



**Australian Government**

**Australian Law Reform Commission**

# Family Violence— Commonwealth Laws

DISCUSSION PAPER

This Discussion Paper reflects the law as at 22<sup>nd</sup> July 2011

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Commission Reference: DP 76

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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# Making a submission

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## Making a Submission to the Inquiry

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

The closing date for submissions to this Discussion Paper is 30 September 2011.

There are a range of ways to make a submission or comment on the proposals and questions posed in the Discussion Paper.

### *Online submission tool*

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

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

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

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## Open inquiry policy

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

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

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

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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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# List of Proposals and Questions

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## 3. Common Interpretative Framework

**Proposal 3–1** The *Social Security Act 1991* (Cth) should be amended to provide that family violence is violent or threatening behaviour, or any other form of behaviour, that coerces and controls a family member, or causes that family member to be fearful. Such behaviour may include, but is not limited to:

- (a) physical violence;
- (b) sexual assault and other sexually abusive behaviour;
- (c) economic abuse;
- (d) emotional or psychological abuse;
- (e) stalking;
- (f) kidnapping or deprivation of liberty;
- (g) damage to property, irrespective of whether the victim owns the property;
- (h) causing injury or death to an animal irrespective of whether the victim owns the animal; and
- (i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.

**Proposal 3–2** The *Child Support (Assessment) Act 1989* (Cth) and the *Child Support (Registration and Collection) Act 1988* (Cth) should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

**Proposal 3–3** A *New Tax System (Family Assistance) Act 1999* (Cth) should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

**Proposal 3–4** A *New Tax System (Family Assistance) (Administration) Act 1999* (Cth) should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

**Proposal 3–5** The *Fair Work Act 2009* (Cth) should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

**Proposal 3–6** The following guidelines and material should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1:

- Department of Education, Employment and Workplace Relations and Job Services Australia Guidelines, Advices and Job Aids;

- Safe Work Australia Codes of Practice and other material
- Fair Work Australia material; and
- other similar material.

**Proposal 3–7** The *Superannuation Industry (Supervision) Regulations 1994* (Cth) and, where appropriate, all Australian Prudential Regulation Authority, Australian Taxation Office and superannuation fund material, should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

**Proposal 3–8** The *Migration Regulations 1994* (Cth) should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

**Proposal 3–9** The Department of Immigration and Citizenship’s *Procedures Advice Manual 3* for decision makers should include examples to illustrate coercive and controlling conduct that may amount to family violence, including but not limited to:

- (a) the threat of removal; and
- (b) violence perpetrated by a family member of the sponsor at the instigation, or through the coercion, of the sponsor.

#### **4. Screening, Information Sharing and Privacy**

**Proposal 4–1** Information about screening for family violence by Child Support Agency and Family Assistance Office staff and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers should be included in the *Child Support Guide*, the *Family Assistance Guide* and the *Guide to Social Security Law*.

**Proposal 4–2** Child Support Agency and Family Assistance Office staff and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers should routinely screen for family violence when commencing the application process with a customer, immediately after that, and at defined intervals and trigger points (as identified in Chapters 5 and 9–11).

**Proposal 4–3** Screening for family violence by Child Support Agency and Family Assistance Office staff and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers should be conducted through different formats including through:

- electronic and paper claim forms and payment booklets;
- in person;
- posters and brochures;
- recorded scripts for call waiting;
- telephone prompts;
- websites; and
- specific publications for customer groups such as *News for Seniors*.

**Proposal 4-4** In conducting screening for family violence, Child Support Agency and Family Assistance Office staff and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers should take into consideration a customer's cultural and linguistic background as well as a person's capacity to understand, such as due to cognitive disability.

**Question 4-1** In addition to the initial point of contact with the customer, at what trigger points should Child Support Agency and Family Assistance Office staff and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers screen for family violence?

**Proposal 4-5** Child Support Agency and Family Assistance Office staff and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers should receive regular and consistent training and support (including resource manuals and information cards) in:

- screening for family violence sensitively; and
- responding appropriately to disclosure of family violence, including by making referrals to Centrelink social workers.

**Proposal 4-6** Training provided to Child Support Agency and Family Assistance Office staff, and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers should include:

- the nature, features and dynamics of family violence, and its impact on victims, in particular those from high risk and vulnerable groups;
- recognition of the impact of family violence on particular customers such as Indigenous peoples; those from culturally and linguistically diverse backgrounds; those from lesbian, gay, bisexual, trans and intersex communities; children and young people; older persons; and people with disability;
- training to ensure customers who disclose family violence, or fear for their safety, know about their rights and possible service responses, such as those listed in Proposal 4-8; and
- training in relation to responding appropriately to and interviewing victims of family violence. In particular, training for Centrelink customer service advisers and social workers should include information about the potential impact of family violence on a job seeker's barriers to employment.

**Proposal 4-7** The Department of Human Services should ensure that monitoring and evaluation of processes for screening for family violence is conducted regularly and the outcomes of such monitoring and evaluation are made public.

**Proposal 4-8** The *Child Support Guide*, the *Family Assistance Guide* and the *Guide to Social Security Law* should provide that Child Support Agency and Family Assistance Office staff and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers should give all customers information about how family violence may be relevant to the child support,

family assistance, social security and Job Services Australia systems. This should include, but is not limited to:

- exemptions;
- entitlements;
- information protection;
- support and services provided by the agencies;
- referrals; and
- income management.

**Proposal 4–9** The Department of Human Services and other relevant departments and agencies should develop a protocol to ensure that disclosure of family violence by a customer prompts the following service responses:

- case management, including provision of information in Proposal 4–8, and additional services and resources where necessary; and
- the treatment of that information as highly confidential with restricted access.

**Proposal 4–10** The *Guide to Family Assistance* and the *Child Support Guide* should provide that where family violence is identified through the screening process, or otherwise, Centrelink, Child Support Agency and Family Assistance Office staff must refer the customer to a Centrelink social worker.

**Proposal 4–11** Where family violence is identified through the screening process or otherwise, a ‘safety concern flag’ should be placed on the customer’s file.

**Proposal 4–12** The ‘safety concern flag’ only (not the customer’s entire file) should be subject to information sharing as discussed in Proposal 4–13.

**Proposal 4–13** If a ‘safety concern flag’ is developed in accordance with Proposal 4–11, the Department of Human Services and other relevant departments and agencies should develop inter-agency protocols for information sharing between agencies in relation to the ‘safety concern flag’. Parties to such protocols should receive regular and consistent training to ensure that the arrangements are effectively implemented.

**Proposal 4–14** The Department of Human Services and other relevant departments and agencies should consider issues, including appropriate privacy safeguards, with respect to the personal information of individual customers who have disclosed family violence in the context of their information-sharing arrangements.

**Proposal 4–15** The Department of Human Services and other relevant departments and agencies should develop policies and statements relating to family violence and child protection, to ensure consistency in service responses. These policies should be published on the agencies’ websites and be included in the information provided to customers in Proposal 4–8.

**5. Social Security—Overview and Overarching Issues**

**Proposal 5–1** The *Guide to Social Security Law* should be amended to include:

- (a) the definition of family violence in Proposal 3–1; and
- (b) the nature, features and dynamics of family violence including: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children.

In addition, the *Guide to Social Security Law* should refer to 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.

**Proposal 5–2** Centrelink customer service advisers, social workers and members of the Social Security Appeals Tribunal and Administrative Appeals Tribunal should receive consistent and regular training on the definition of family violence, including the nature, features and dynamics of family violence, and responding sensitively to victims of family violence.

**Proposal 5–3** The *Guide to Social Security Law* should be amended to provide that the following forms of information to support a claim of family violence may be used, including but not limited to:

- statements including statutory declarations;
- third party statements such as statutory declarations by witnesses, employers or family violence services;
- social worker’s reports;
- documentary records such as diary entries, or records of visits to services, such as health care providers;
- other agency information (such as held by the Child Support Agency);
- protection orders; and
- police reports and statements

**Proposal 5–4** The *Guide to Social Security Law* should be amended to include guidance as to 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.

**Proposal 5–5** Centrelink customer service advisers and social workers should receive consistent and regular training in relation to the types of information that a person may rely on in support of a claim of family violence.



**Proposal 5–6** The *Guide to Social Security Law* should be amended to provide that, where a person claims that they are experiencing family violence by a family member or partner, it is not appropriate to seek verification of family violence from that family member or partner.

**Proposal 5–7** Centrelink customer service advisers and social workers should receive consistent and regular training in relation to circumstances when it is not appropriate to seek verification of family violence from a person’s partner or family member.

**Proposal 5–8** Centrelink customer service advisers and social workers should be required to screen for family violence when negotiating and revising a person’s Employment Pathway Plan.

**Question 5–1** At what other trigger points, if any, should Centrelink customer service advisers and social workers be required to screen for family violence?

**Proposal 5–9** A Centrelink Deny Access Facility restricts access to a customer’s information to a limited number of Centrelink staff. The *Guide to Social Security Law* should be amended to provide that, where a customer discloses family violence, he or she should be referred to a Centrelink social worker to discuss a Deny Access Facility classification.

**Question 5–2** Should Centrelink place a customer who has disclosed family violence on the ‘Deny Access Facility’:

- (a) at the customer’s request; or
- (b) only on the recommendation of a Centrelink social worker?

## **6. Social Security—Relationships**

**Proposal 6–1** The *Guide to Social Security Law* should be amended to reflect the way in which family violence may affect the interpretation and application of the criteria in s 4(3) of the *Social Security Act 1991* (Cth).

**Proposal 6–2** Centrelink customer service advisers and social workers should receive consistent and regular training in relation to the way in which family violence may affect the interpretation and application of the criteria in s 4(3) of the *Social Security Act 1991* (Cth).

**Proposal 6–3** The *Guide to Social Security Law* should be amended expressly to include family violence as a circumstance where a person may be living separately and apart under one roof.

**Proposal 6–4** The *Guide to Social Security Law* should be amended to 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).

**Question 6–1** With respect to the discretion under s 24 of the *Social Security Act 1991* (Cth):

- (a) is the discretion accessible to those experiencing family violence;

- (b) what other ‘reasonable means of support’ would need to be exhausted before a person could access s 24; and
- (c) in what ways, if any, could access to the discretion be improved for those experiencing family violence?

**Proposal 6–5** The *Guide to Social Security Law* should be amended 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)

**Question 6–2** Should the *Social Security Act 1991* (Cth) also be amended expressly to refer to family violence, child abuse and neglect as an example of when it is ‘unreasonable to live at home’?

**Question 6–3** Should ss 1067A(9)(a)(ii) and 1061PL(7)(a)(ii) of the *Social Security Act 1991* (Cth) be amended:

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

**Proposal 6–6** DEEWR and Centrelink should review their policies, practices and training to ensure that, in cases of family violence, Youth Allowance, Disability Support Pension and Pensioner Education Supplement, applicants do not bear sole responsibility for providing specific information about:

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

## 7. Social Security—Proof of Identity, Residence and Activity Tests

**Question 7–1** In practice, is the form, ‘Questions for Persons with Insufficient Proof of Identity’, sufficient to enable victims of family violence to provide an alternate means of proving identity?

**Proposal 7–1** The *Guide to Social Security Law* should be amended expressly to include family violence as a reason for an indefinite exemption from the requirement to provide a partner’s tax file number.

**Question 7–2** Section 192 of the *Social Security (Administration) Act 1999* (Cth) confers certain information-gathering powers on the Secretary of FaHCSIA. In practice, is s 192 of the *Social Security (Administration) Act 1999* (Cth) invoked to require the production of tax file numbers or information for the purposes of proof of identity? If not, should s 192 be invoked in this manner in circumstances where a person fears for his or her safety?

**Question 7–3** When a person does not have a current residential address, what processes are currently in place for processing social security applications?

**Proposal 7–2** Proposal 20–3 proposes that the *Migration Regulations 1994* (Cth) be amended to allow holders of Prospective Marriage (Subclass 300) visas to move onto another temporary visa in circumstances of family violence. If such an amendment is made, the Minister of FaHCSIA should make a Determination including this visa as a ‘specified subclass of visa’ that:

- meets the residence requirements for Special Benefit; and
- is exempted from the Newly Arrived Resident’s Waiting Period for Special Benefit.

**Question 7–4** Should the Minister of FaHCSIA make a Determination including certain temporary visa holders—such as student, tourist and secondary holders of Subclass 457 visas—as a ‘specified subclass of visa’ that:

- meets the residence requirements for Special Benefit?
- is exempted from the Newly Arrived Resident’s Waiting Period for Special Benefit?

**Question 7–5** What alternatives to exemption from the requirement to be an Australian resident could be made to ensure that victims of family violence, who are not Australian residents, have access to income support to protect their safety?

**Question 7–6** In what way, if any, should the *Social Security Act 1991* (Cth) or the *Guide to Social Security Law* be amended to ensure that newly arrived residents with disability, who are victims of family violence, are able to access the Disability Support Pension? For example, should the qualifying residence period for Disability Support Pension be reduced to 104 weeks where a person is a victim of family violence?

**Proposal 7–3** The *Guide to Social Security Law* should be amended expressly to include family violence as an 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.

**Question 7–7** What changes, if any, are needed to improve the safety of victims of family violence who do not meet the Newly Arrived Resident’s Waiting Period for payments other than Special Benefit?

**Proposal 7–4** Centrelink customer service advisers should receive consistent and regular training in the administration of the Job Seeker Classification Instrument including training in relation to:

- 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
- the availability of support services.

**Question 7–8** In practice, to what extent can, or do, recommendations made by ESAt or JCA assessors in relation to activity tests, participation requirements, Employment Pathway Plans and exemptions account for the needs and experiences of job seekers experiencing family violence?

**Question 7–9** In practice, is family violence adequately taken into account by a Centrelink specialist officer in conducting a Comprehensive Compliance Assessment?

**Question 7–10** What changes, if any, to the Employment Pathway Plan and exemption processes could ensure that Centrelink captures and assesses the circumstances of job seekers experiencing family violence?

**Proposal 7–5** The *Guide to Social Security Law* should expressly direct Centrelink customer service advisers to consider family violence when tailoring a job seeker's Employment Pathway Plan.

**Proposal 7–6** Exemptions from activity tests, participation requirements and Employment Pathway Plans are available for a maximum of 13 or 16 weeks. The ALRC has heard concerns that exemption periods granted to victims of family violence do not always reflect the nature of family violence. DEEWR should review exemption periods to ensure a flexible response for victims of family violence—both principal carers and those who are not principal carers.

**Question 7–11** In practice, what degree of flexibility does Centrelink have in its procedures for customers experiencing family violence:

- (a) to engage with Centrelink in negotiating or revising an Employment Pathway Plan; or
- (b) apply for or extending an exemption.

Are these procedures sufficient to ensure the safety of victims of family violence is protected?

**Question 7–12** A 26 week exclusion period applies to a person who moves to an area of lower employment prospects. An exemption applies where the reason for moving is due to an 'extreme circumstance' such as family violence in the 'original place of residence'. What changes, if any, are necessary to ensure that victims of family violence are aware of, and are making use of, the exemption available from the 26 week exclusion period? For example, is the term 'original place of residence' interpreted in a sufficiently broad manner to encapsulate all forms of family violence whether or not they occur within the 'home'?

**Proposal 7–7** 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.

**Question 7–13** Centrelink can end a person's 'Unemployment Non-Payment Period' in defined circumstances. In practice, are these sufficiently accessible to victims of family violence?

**8. Social Security—Payment Types and Methods, and Overpayment**

**Proposal 8–1** The *Social Security Act 1991* (Cth) establishes a seven day claim period for Crisis Payment. FaHCSIA should review the seven day claim period for Crisis Payment to ensure a flexible response for victims of family violence.

**Question 8–1** Crisis Payment is available to social security recipients or to those who have applied, and qualify, for social security payments. However, Special Benefit is available to those who are not receiving, or eligible to receive, social security payments. What reforms, if any, are needed to ensure that Special Benefit is accessible to victims of family violence who are otherwise ineligible for Crisis Payment?

**Proposal 8–2** Crisis Payment for family violence currently turns on either the victim of family violence leaving the home or the person using family violence being removed from, or leaving, the home. The *Social Security Act 1991* (Cth) should be amended to provide Crisis Payment to any person who is ‘subject to’ or ‘experiencing’ family violence.

**Proposal 8–3** 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. As urgent payments may not be made because the family violence was ‘foreseeable’, the *Guide to Social Security Law* should be amended expressly to refer to family violence as a separate category of circumstance when urgent payments may be sought.

**Proposal 8–4** The *Guide to Social Security Law* should be amended to provide that urgent payments and advance payments may be made in circumstances of family violence in addition to Crisis Payment.

**Proposal 8–5** The *Guide to Social Security Law* should be amended to provide that, where a delegate is determining a person’s ‘capability to consent’, the effect of family violence is also considered in relation to the person’s capability.

**Question 8–2** When a person cannot afford to repay a social security debt, the amount of repayment may be negotiated with Centrelink. In what way, if any, should flexible arrangements for repayment of a social security debt for victims of family violence be improved? For example, should victims of family violence be able to suspend payment of their debt for a defined period of time?

**Proposal 8–6** Section 1237AAD of the *Social Security Act 1991* (Cth) provides that the Secretary of FaHCSIA may waive the right to recover a debt where special circumstances exist and the debtor or another person did not ‘knowingly’ make a false statement or ‘knowingly’ omit to comply with the *Social Security Act*. Section 1237AAD should be amended to provide that the Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that ‘the debt did not result wholly or partly from the debtor or another person acting as an agent for the debtor’.

**Proposal 8–7** The *Guide to Social Security Law* should be amended expressly to refer to family violence as a ‘special circumstance’ for the purposes of s 1237AAD of the *Social Security Act 1991* (Cth).

**9. Child Support—Frameworks, Assessment and Collection**

**Proposal 9–1** The *Child Support Guide* should be amended to include:

- (a) the definition of family violence in Proposal 3–1;
- (b) the nature, features and dynamics of family violence including: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children.

In addition, the *Child Support Guide* should refer to 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.

**Proposal 9–2** The *Child Support Guide* should provide that the Child Support Agency should screen for family violence when a payee:

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

**Proposal 9–3** The *Child Support Guide* should provide that Child Support Agency staff refer to Centrelink social workers payees who have disclosed family violence, when the payee:

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

**Proposal 9–4** The *Child Support Guide* should provide that the Child Support Agency should contact a customer to screen for family violence prior to initiating significant action against the other party, including:

- (a) departure determinations;
- (b) court actions to recover child support debt; and
- (c) departure prohibition orders.

**Proposal 9–5** The *Child Support Guide* should provide that, when a customer has disclosed family violence, the Child Support Agency should consult with the customer and consider concerns regarding the risk of family violence, prior to initiating significant action against the other party, including:

- (a) departure determinations;

- (b) court actions to recover child support debt; and
- (c) departure prohibition orders.

**Proposal 9–6** The *Child Support Guide* should provide that the Child Support Agency should screen for family violence prior to requiring a payee to collect privately pursuant to s 38B of the *Child Support (Registration and Collection) Act 1988* (Cth).

#### **10. Child Support—Agreements, Personal Information, Informal Carers**

**Question 10–1** Should the Child Support Agency ensure that notices of assessment pursuant to s 76 of the *Child Support (Assessment) Act 1989* (Cth) do not include parties' names?

**Proposal 10–1** The *Child Support Guide* should provide that Child Support Agency forms or supporting documentation containing offensive material should be referred to a senior officer. The senior officer should determine whether to inform the other party of the offensive material and, where requested, provide it to the other party.

**Proposal 10–2** The *Child Support Guide* should provide that, where a customer discloses family violence, he or she should be referred to a Centrelink social worker to discuss a Restricted Access Customer System classification.

**Question 10–2** Should the Child Support Agency provide a Restricted Access Customer System classification to a customer who has disclosed family violence:

- (a) at the customer's request; or
- (b) only on the recommendation of a Centrelink social worker?

**Proposal 10–3** Where the Child Support Agency receives a threat against a customer's life, health or welfare by another party to the child support case, the *Child Support Guide* should provide that the Child Support Agency will:

- (a) place a safety concern flag on the threatened customer's file; and
- (b) refer the threatened person to a Centrelink social worker.

**Question 10–3** What reforms, if any, are necessary to improve the safety of victims of family violence who are child support payers?

*The next proposals are presented as alternate options: Proposal 10–4 OR Proposals 10–5, 10–6 and Question 10–4*

#### **OPTION ONE: Proposal 10–4**

**Proposal 10–4** 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 limitation on the child support eligibility of carers who are neither parents nor legal guardians in section 7B(2)–(3) of the *Child Support (Assessment) Act 1989* (Cth) should be repealed.

**OPTION TWO: Proposals 10–5, 10–6 and 10–7, and Question 10–4**

**Proposal 10–5** 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).

Section 7B(3)(b) of the *Child Support (Assessment) Act 1989* (Cth) should be amended 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’.

**Proposal 10–6** The *Child Support Guide* should provide that:

- (a) where a person who is not a parent or legal guardian carer applies for child support; and
- (b) a parent or legal guardian advises the Child Support Agency that he or she does not consent to the care arrangement; and
- (c) it is alleged that it is unreasonable for a child to live with the parent or legal guardian concerned.

the following should occur:

- (1) a Centrelink social worker should assess whether it is unreasonable for the child to live with the parent or legal guardian who does not consent, and make a recommendation; and
- (2) a senior Child Support Agency officer should determine if it is unreasonable for the child to live with the parent or legal guardian who does not consent, giving consideration to the Centrelink social worker’s recommendation.

**Proposal 10–7** The *Child Support Guide* should include guidelines for assessment of circumstances in which it may be unreasonable for a child to live with a parent or legal guardian.

**Question 10–4** Should the *Child Support Guide* be amended to specify the Child Support Agency’s response to an application for child support from a carer who is not a parent or legal guardian of the child, where:

- (a) only one of the child’s parents consents to the care arrangements; or
- (b) neither of the child’s parent consents to the care arrangements, and it is unreasonable for the child to live with one parent?



In practice, how does the Child Support Agency respond to an application for child support in these circumstances?

## 11. Child Support and Family Assistance—Intersections and Alignments

**Proposal 11–1** 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. A *New Tax System (Family Assistance) Act 1999* (Cth) should be amended 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’ on specified grounds, including family violence.

**Proposal 11–2** The *Family Assistance Guide* should be amended to provide additional information regarding:

- (a) the duration, and process for determining the duration, of family violence exemptions from the ‘reasonable maintenance action’ requirement; and
- (b) the exemption review process.

**Proposal 11–3** The Centrelink e-Reference includes information and procedure regarding partial exemptions from the ‘reasonable maintenance action’ requirement. The *Family Assistance Guide* should be amended to make clear the availability of these partial exemptions.

## 12. Family Assistance

**Proposal 12–1** The *Family Assistance Guide* should be amended to include:

- (a) the definition of family violence in Proposal 3–1; and
- (b) the nature, features and dynamics of family violence including: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children.

In addition, the *Family Assistance Guide* should refer to 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.

**Proposal 12–2** The *Family Assistance Guide* should be amended expressly to include ‘family violence’ as a reason for an indefinite exemption from the requirement to provide a partner’s tax file number.

**Proposal 12–3** In relation to Child Care Benefit for care provided by an approved child care service, the *Family Assistance Guide* should list family violence as an example of ‘exceptional circumstances’ for the purposes of:

- (a) exceptions from the work/training/study test; and
- (b) circumstances where more than 50 hours of weekly Child Care Benefit is available.

**Proposal 12–4** 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’. A *New Tax System (Family Assistance) Act 1999* (Cth) should be amended 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.

**Proposal 12–5** The *Family Assistance Guide* should be amended to provide definitions of abuse and neglect.

### 13. Income Management—Social Security Law

**Proposal 13–1** The *Social Security (Administration) Act 1999* (Cth) and the *Guide to Social Security Law* should be amended to ensure that a person or persons experiencing family violence are not subject to Compulsory Income Management.

**Question 13–1** Are there particular needs of people experiencing family violence, who receive income management, that have not been identified?

**Proposal 13–2** In order to inform the development of a voluntary income management system, the Australian Government should commission an independent assessment of voluntary income management on people experiencing family violence, including the consideration of the Cape York Welfare Reform model of income management.

**Proposal 13–3** Based on the assessment of the Cape York Welfare Reform model of income management in Proposal 13–2, the Australian Government should amend the *Social Security (Administration) Act 1999* (Cth) and the *Guide to Social Security Law* to create a more flexible Voluntary Income Management model.

**Question 13–2** In what other ways, if any, could Commonwealth social security law and practice be improved to better protect the safety of people experiencing family violence?

**Proposal 13–4** Priority needs, for the purposes of s 123TH of the *Social Security (Administration) Act 1999* (Cth) are goods and services that are not excluded for the welfare recipient to purchase. The definition of ‘priority needs’ in s 123TH and the *Guide to Social Security Law* should be amended to include travel or other crisis needs for people experiencing family violence.

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

**Question 14–1** In addition to removal of the employee records exemption in the *Privacy Act 1988* (Cth), what reforms, if any, are needed to protect the personal information of employees who disclose family violence for the purposes of accessing new entitlements such as those proposed in Chapters 16 and 17?

**Proposal 14–1** 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 should, in consultation with unions and employer organisations:

- (a) develop a model privacy policy which incorporates consideration of family violence-related personal information; and
- (b) develop or revise guidance for employers in relation to their privacy obligations where an employee discloses, or they are aware of, family violence.

**Proposal 14–2** The Australian Government should initiate a national education and awareness campaign about family violence in the employment context.

**Proposal 14–3** Section 653 of the *Fair Work Act 2009* (Cth) should be amended to provide that Fair Work Australia must, in conducting the review and research required under that section, consider family violence-related developments and the effect of family violence on the employment of those experiencing it, in relation to:

- (a) enterprise agreements;
- (b) individual flexibility arrangements; and
- (c) the National Employment Standards.

**Question 14–2** In addition to review and research by Fair Work Australia, what is the most appropriate mechanism to capture and make publicly available information about the inclusion of family violence clauses in enterprise agreements?

**Question 14–3** How should Fair Work Australia collect data in relation to the incidence and frequency with which family violence is raised in unfair dismissal and general protections matters?

**Proposal 14–4** In the course of its 2012 and 2014 reviews of modern awards, Fair Work Australia should consider issues relating to data collection.

## **15. The Pre-Employment Stage**

**Question 15–1** In what ways, if any, should the Australian Government include a requirement in requests for tender and contracts for employment services that JSA and DES providers demonstrate an understanding of, and systems and policies to address, the needs of job seekers experiencing family violence?

**Question 15–2** How is personal information about individual job seekers shared between Centrelink, DEEWR, the Department of Human Services, and JSA, DES and IEP providers?

**Question 15–3** How does, or would, the existence of a Centrelink ‘Deny Access Facility’, or other similar safety measures, such as a ‘safety concern flag’, affect what information about job seekers DEEWR and JSA and DES providers can access?

**Proposal 15–1** Centrelink, DEEWR, JSA, DES and IEP providers, and ESAt and JCA assessors (through the Department of Human Services) 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.

**Proposal 15–2** The current circumstances in which a job seeker can change JSA or DES providers should be extended to circumstances where a job seeker who is experiencing family violence is registered with the same JSA or DES provider as the person using family violence.

**Question 15–4** Should JSA and DES providers routinely screen for family violence? If so:

- what should the focus of screening be;
- how, and in what manner and environment, should such screening be conducted; and
- when should such screening be conducted?

**Question 15–5** Under the *Job Seeker Classification Instrument Guidelines* if a job seeker discloses family violence, the job seeker should immediately be referred to a Centrelink social worker. What reforms, if any, are necessary to ensure this occurs in practice?

**Proposal 15–3** JSA and DES providers should introduce specialist systems and programs for job seekers experiencing family violence—for example, a targeted job placement program.

**Proposal 15–4** As far as possible, or at the request of the job seeker, all Job Seeker Classification Instrument interviews should be conducted in:

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

**Question 15–6** The Job Seeker Classification Instrument includes a number of factors, or categories, including ‘living circumstances’ and ‘personal characteristics’. Should DEEWR amend those categories to ensure the Job Seeker Classification Instrument incorporates consideration of safety or other concerns arising from the job seeker’s experience of family violence?

**Proposal 15–5** DEEWR should amend the Job Seeker Classification Instrument to include ‘family violence’ as a new and separate category of information.

**Question 15–7** A job seeker is referred to an ESAt or JCA where the results of the Job Seeker Classification Instrument indicate ‘significant barriers to work’. Should the disclosure of family violence by a job seeker automatically constitute a ‘significant barrier to work’ and lead to referral for an ESAt or JCA?

**Question 15–8** Where a job seeker has disclosed family violence, should there be streaming of job seekers to ESAt and JCA assessors with specific qualifications or expertise with respect to family violence, where possible?

**Question 15–9** When conducting an ESAt or JCA, how do assessors consider the impact of family violence on a job seeker’s readiness to work? What changes, if any, could ensure that ESAts and JCAs capture and assess the circumstances of job seekers experiencing family violence

**Question 15–10** In practice, to what extent can, or do, recommendations made by ESAt or JCA assessors in relation to stream placement or referral to DES account for the needs and experiences of job seekers experiencing family violence?

**Proposal 15–6** DEEWR and the Department of Human Services should require that all JSA, DES and IEP provider staff and ESAt and JCA assessors receive regular and consistent training in relation to:

- (a) the nature, features and dynamics of family violence, including: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children;
- (b) recognition of the impact of family violence on particular job seekers such as:
  - Indigenous people;
  - those from culturally and linguistically diverse backgrounds;
  - those from lesbian, gay, bisexual, trans and intersex communities;
  - children and young people;
  - older persons; and
  - people with disability
- (c) the potential impact of family violence on a job seeker’s capacity to work and barriers to employment;
- (d) appropriate referral processes; and
- (e) the availability of support services.

**Question 15–11** In what ways, if any, should the Australian Government include a requirement in requests for tender and contracts for employment services that IEP projects and services, or panel providers, demonstrate an understanding of, and systems and policies to address, the needs of Indigenous job seekers experiencing family violence?

**Question 15–12** In what ways, if any, should the JSA, DES, IEP or CDEP systems be reformed to assist Indigenous job seekers who are experiencing family violence?

**Question 15–13** In what ways, if any, should the JSA or DES systems be reformed to assist job seekers from culturally and linguistically diverse communities who are experiencing family violence?

**Question 15–14** In what ways, if any, should the JSA or DES systems be reformed to assist job seekers with disability who are experiencing family violence?

**Question 15–15** In the context of the Australian Government review of new approaches for the delivery of rural and remote employment services, in what ways, if any, could any new approach incorporate measures to protect the safety of job seekers experiencing family violence?

**16. Employment—The *Fair Work Act 2009* (Cth)**

**Question 16–1** How do, or how could, Fair Work Australia’s role, functions or processes protect the safety of applicants experiencing family violence?

**Question 16–2** In making an application to Fair Work Australia, applicants are required to pay an application fee. Under the *Fair Work Regulations 2009* (Cth) an exception applies if an applicant can establish that he or she would suffer ‘serious hardship’ if required to pay the relevant fee. In practice, do people experiencing family violence face difficulty in establishing that they would suffer ‘serious hardship’? If so, how could this be addressed?

**Question 16–3** In applying for waiver of an application fee, referred to in Question 16–2, applicants must complete a ‘Waiver of Application Fee’ form. How could the form be amended to ensure issues of family violence affecting the ability to pay are brought to the attention of Fair Work Australia?

**Question 16–4** In Proposals 14–1, 17–1 and 17–3 the role of the Fair Work Ombudsman is discussed. In what other ways, if any, could the Fair Work Ombudsman’s role, function or processes protect employees experiencing family violence?

**Proposal 16–1** Section 65 of the *Fair Work Act 2009* (Cth) should be amended to provide that an employee who is experiencing family violence, or who is providing care or support to a member of the employee’s immediate family or household 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.

This additional ground should:

- (a) remove the requirement that an employee be employed for 12 months, or be a long-term casual and have a reasonable expectation of continuing employment on a regular and systemic basis, prior to making a request for flexible working arrangements; and
- (b) provide that the employer must give the employee a written response to the request within seven days, stating whether the employer grants or refuses the request.

*The next proposals are presented as alternate options: Proposal 16–2 OR Proposals 16–3 and 16–4*

**OPTION ONE: Proposal 16–2**

**Proposal 16–2** The Australian Government should amend the National Employment Standards under the *Fair Work Act 2009* (Cth) to provide for a new minimum statutory entitlement to 10 days paid family violence leave. An employee should be entitled to access such leave for purposes arising from the employee’s experience of family violence, or to provide care or support to a member of the employee’s immediate family or household who is experiencing family violence.

**OPTION TWO: Proposals 16–3 and 16–4**

**Proposal 16–3** The Australian Government should amend the National Employment Standards under the *Fair Work Act 2009* (Cth) to provide for a minimum statutory entitlement to an additional 10 days paid personal/carer’s leave. An employee should be entitled to access the additional leave solely for purposes arising from the employee’s experience of family violence, or to provide care or support to a member of the employee’s immediate family or household who is experiencing family violence.

**Proposal 16–4** The Australian Government should amend the National Employment Standards under the *Fair Work Act 2009* (Cth) to provide that an employee may access the additional personal/carer’s leave referred to in Proposal 16–3:

- (a) because the employee is not fit for work because of a circumstance arising from the employee’s experience of family violence; or
- (b) to provide care or support to a member of the employee’s immediate family, or a member of the employee’s household, who requires care or support as a result of their experience of family violence.

**17. Employment—The *Fair Work Act 2009* (Cth) Continued**

**Proposal 17–1** The Fair Work Ombudsman should develop a guide to negotiating individual flexibility arrangements to respond to the needs of employees experiencing family violence, in consultation with the Australian Council of Trade Unions and employer organisations.

**Proposal 17–2** The Australian Government should encourage the inclusion of family violence clauses in enterprise agreements. Agreements should, at a minimum:

- (a) recognise that verification of family violence may be required;
- (b) ensure the confidentiality of any personal information disclosed;
- (c) establish lines of communication for employees;
- (d) set out relevant roles and responsibilities;
- (e) provide for flexible working arrangements; and
- (f) provide access to paid leave.

**Proposal 17–3** 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, the Australian Council of Trade Unions and employer organisations.

**Proposal 17–4** In the course of its 2012 review of modern awards, Fair Work Australia should consider the ways in which family violence may be incorporated into awards in keeping with the modern award objectives.

**Proposal 17–5** In the course of its first four-yearly review of modern awards, beginning in 2014, Fair Work Australia should consider the inclusion of a model family violence clause.

**Proposal 17–6** Fair Work Australia members should be provided with training to ensure that the existence of family violence is adequately considered in deciding whether there are ‘exceptional circumstances’ under s 394(3) of the *Fair Work Act 2009* (Cth) that would warrant the granting of a further period within which to make an application for unfair dismissal.

**Question 17–1** Section 352 of the *Fair Work Act 2009* (Cth) prohibits employers from dismissing an employee because they are temporarily absent from work due to illness or injury. Regulation 3.01 of the *Fair Work Regulations 2009* (Cth) prescribes kinds of illness or injury and outlines a range of other requirements. In what ways, if any, could the temporary absence provisions be amended to protect employees experiencing family violence?

## 18. Occupational Health and Safety Law

**Proposal 18–1** Safe Work Australia should include information on family violence as a 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’; and
- (c) any other code that Safe Work Australia may develop in relation to other topics, such as bullying and harassment or family violence.

**Proposal 18–2** Safe Work Australia should develop model safety plans which include measures to minimise the risk posed by family violence in the work context for use by all Australian employers, in consultation with unions, employer organisations, and bodies such as the Australian Domestic and Family Violence Clearinghouse.

**Proposal 18–3** Safe Work Australia should develop and provide education and training in relation to family violence as a work health and safety issue in consultation with unions, employer organisations and state and territory OHS regulators.

**Proposal 18–4** Safe Work Australia should, in developing its Research and Data Strategy:

- (a) identify family violence and work health and safety as a research priority; and



- (b) consider ways to extend and improve data coverage, collection and analysis in relation to family violence as a work health and safety issue.

**Question 18–1** What reforms, if any, are needed to occupational health and safety law to provide better protection for those experiencing family violence? For example, should family violence be included in the National Work Health and Safety Strategy?

## **19. Superannuation Law**

**Question 19–1** The ALRC is not proposing that a trustee should have an express obligation to consider whether an application for superannuation splitting is being made as a result of coercion. Are there any other ways a trustee or another body could consider this issue? If so, what if any steps could they take to limit or ameliorate the effect of that on a victim of family violence?

**Proposal 19–1** In *Family Violence—A National Legal Response* (ALRC Report 114) 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.

**Question 19–2** What changes, if any, are required to ensure that the Australian Tax Office considers family violence in determining appropriate compliance action in relation to trustees of SMSFs who fail to comply with superannuation or taxation law, where that action may affect a trustee who is:

- (a) a victim of family violence; and
- (b) not the subject of compliance action?

**Question 19–3** What changes, if any, to guidance material produced by the Australian Tax Office may assist in protecting people experiencing family violence who are members or trustees of a SMSF?

**Question 19–4** What approaches or mechanisms should be established to provide protection to people experiencing family violence in the context of SMSFs?

**Proposal 19–2** Regulation 6.01(5)(a) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) should be amended 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.

**Question 19–5** Are there any difficulties for a person experiencing family violence in meeting the requirements under reg 6.01(5)(b) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) as part of satisfying the ground of ‘severe financial hardship’? If so, what changes are necessary to respond to such difficulties?

**Question 19–6** Should the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to allow recipients of Austudy, Youth Allowance and CDEP Scheme payments to access early release of superannuation on the basis of ‘severe financial hardship’?

**Question 19–7** Should reg 6.01(5)(a) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to provide that applicants must either be in receipt of Commonwealth income support payments or some other forms of payment—for example, workers’ compensation, transport accident or personal income protection payments because of disabilities?

**Question 19–8** Should APRA Superannuation Circular No I.C.2, *Payment Standards for Regulated Superannuation*, be amended to provide guidance for trustees in relation to:

- (a) what constitutes 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?

**Question 19–9** As an alternative to Question 19–8 above, should APRA work with the Australian Institute of Superannuation Trustees, the Association of Superannuation Funds of Australia and other relevant bodies to develop guidance for trustees in relation to early release of superannuation on the basis of ‘severe financial hardship’, including information in relation to:

- (a) what constitutes 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?

**Question 19–10** In practice, how long do superannuation funds take to process applications for early release of superannuation on the basis of ‘severe financial hardship’? What procedural steps may be taken to facilitate the prompt processing of applications in circumstances involving family violence?

**Question 19–11** In practice, how long does APRA take to process applications for early release of superannuation on compassionate grounds? What procedural steps may be taken to facilitate the prompt processing of applications in circumstances involving family violence?

**Proposal 19–3** APRA should amend the *Guidelines for Early Release of Superannuation Benefits on Compassionate Grounds* to include information about family violence, including 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.

**Question 19–12** Should reg 6.19A of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to provide that a person may apply for early release of superannuation on compassionate grounds where the release is required to pay for expenses associated with the person’s experience of family violence?

**Question 19–13** Should the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to provide for a new ground for early release of superannuation for victims of family violence? If so, how should it operate? For example:

- (a) which body should be responsible for administering the new ground;
- (b) what criteria should apply;
- (c) what evidence should be required;
- (d) if individual funds administer the new ground, should there be common rules for granting early release on the new ground; and
- (e) what appeal mechanisms should be established?

**Question 19–14** What amendments, if any, should be made to application forms for early release of superannuation to provide for disclosure of family violence where it is relevant to the application?

**Question 19–15** What training is provided to superannuation fund staff and APRA staff who are assessing applications for early release of superannuation? Should family violence and its impact on the circumstances of an applicant be included as a specific component of any training?

**Question 19–16** In practice, how do superannuation funds and APRA contact members or those who have made an application for early release of superannuation? Is there, or should there be, some mechanism or process in place in relation to applications involving family violence to deal with safety concerns associated with:

- (a) contacting the member or applicant; or
- (b) the disclosure of information about the application?

**Question 19–17** Should the 90 day period for a superannuation fund to respond to a complaint by a member be reduced to 30 days?

**Question 19–18** Should there be central data collection in relation to applications for early release of superannuation in order to identify:

- (a) the extent to which funds are being accessed early on the basis of any new family violence ground, including numbers of applications and success rates; and
- (b) whether there are multiple claims on the same or different funds?

If so, which body should collect that information, and how?

**Question 19–19** Are there any other ways in which superannuation law could be improved to protect those experiencing family violence?

**20. Migration Law—Overarching Issues**

**Question 20–1** From 1 July 2011 the Migration Review Tribunal will lose the power to waive the review application fee in its totality for review applicants who are suffering severe financial hardship. In practice, will those experiencing family violence face difficulties in accessing merits review if they are required to pay a reduced application fee? If so, how could this be addressed?

**Proposal 20–1** The *Migration Regulations 1994* (Cth) should be amended to provide that the family violence exception applies to all secondary applicants for all onshore permanent visas. The family violence exception should apply:

- (a) as a ‘time of application’ and a ‘time of decision’ criterion for visa subclasses where there is a pathway from temporary to permanent residence; and
- (b) as a ‘time of decision’ criterion, in all other cases.

**Question 20–2** Given that a secondary visa applicant, who has applied for and been refused a protection visa, is barred by s 48A of the *Migration Act 1958* (Cth) from making a further protection visa application onshore:

- (a) In practice, how is the ministerial discretion under s 48B—to waive the s 48A bar to making a further application for a protection visa onshore—working in relation to those who experience family violence?
- (b) Should s 48A of the *Migration Act 1958* (Cth) be amended to allow secondary visa applicants who are experiencing family violence, to make a further protection visa application onshore? If so, how?

**Question 20–3** Section 351 of the *Migration Act 1958* (Cth) allows the Minister for Immigration and Citizenship to substitute a decision for the decision of the Migration Review Tribunal if the Minister thinks that it is in the public interest to do so:

- (a) Should s 351 of the *Migration Act 1958* (Cth) be amended to allow victims of family violence who hold temporary visas to apply for ministerial intervention in circumstances where a decision to refuse a visa application has not been made by the Migration Review Tribunal?
- (b) If temporary visa holders can apply for ministerial intervention under s 351 of the *Migration Act 1958* (Cth), what factors should influence whether or not a victim of family violence should be granted permanent residence?

*The next proposals are presented as alternate options: Proposal 20–2 OR Proposal 20–3*

**OPTION ONE: Proposal 20–2**

**Proposal 20–2** The *Migration Regulations 1994* (Cth) should be amended to allow a former or current Prospective Marriage (Subclass 300) visa holder to access the family violence exception when applying for a temporary partner visa in circumstances where he or she has not married the Australian sponsor.

**OPTION TWO: Proposal 20–3**

**Proposal 20–3** Holders of a Prospective Marriage (Subclass 300) visa who are victims of family violence but who have not married their Australian sponsor, should be allowed to apply for:

- (a) a temporary visa, in order make arrangements to leave Australia; or
- (b) a different class of visa.

**Question 20–4** If Prospective Marriage (Subclass 300) visa holders are granted access to the family violence exception, what amendments, if any, are necessary to the *Migration Regulations 1994* (Cth) to ensure the integrity of the visa system?

**Question 20–5** Should the Prospective Marriage (Subclass 300) visa be abolished, and instead, allow persons who wish to enter Australia to marry an Australian sponsor to do so on a special class of visitor visa, similar to that in place in New Zealand?

**Question 20–6** Should the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth) be amended to provide that sponsorship is a separate and reviewable criterion for the grant of partner visas?

**Proposal 20–4** The Australian Government should ensure consistent and regular education and training in relation to the nature, features and dynamics of family violence, including its impact on victims, for visa decision makers, competent persons and independent experts, in the migration context.

**Proposal 20–5** The Australian Government should ensure that information about legal rights, family violence support services, and the family violence exception are provided to visa applicants prior to and upon arrival in Australia. Such information should be provided in a culturally appropriate and sensitive manner.

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

**Proposal 21–1** The Department of Immigration and Citizenship’s *Procedures Advice Manual 3* should provide that, in considering judicially-determined claims, family violence orders made post-separation can be considered.

**Question 21–1** Where an application for a family violence protection order has been made, should the migration decision-making process be suspended until finalisation of the court process?

**Proposal 21–2** The requirement in reg 1.23 of the *Migration Regulations 1994* (Cth) 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 spouse or de facto partner of the alleged perpetrator should be repealed.

**Question 21–2** If the requirement in reg 1.23 is not repealed, what other measures should be taken to improve the safety of victims of family violence, where the violence occurs after separation?

*The next proposals are presented as alternate options: Proposal 21–3 OR Proposals 21–4 to 21–8*

**OPTION ONE: Proposal 21–3**

**Proposal 21–3** The process for non-judicially determined claims of family violence in reg 1.25 the *Migration Regulations 1994* (Cth) should be replaced with an independent expert panel.

**OPTION TWO: Proposals 21–4 to 21–8**

**Proposal 21–4** The *Migration Regulations 1994* (Cth) should be amended to provide that competent persons should not be required to give an opinion as to who committed the family violence in their statutory declaration evidence.

**Proposal 21–5** The *Migration Regulations 1994* (Cth) should be amended to provide that visa decision makers can seek further information from competent persons to correct minor errors or omissions in statutory declaration evidence.

**Proposal 21–6** The *Migration Regulations 1994* (Cth) should be amended to provide that visa decision makers are required to provide reasons for referral to an independent expert.

**Proposal 21–7** The *Migration Regulations 1994* (Cth) should be amended to require independent experts to give applicants statements of reasons for their decision.

**Proposal 21–8** The *Migration Regulations 1994* (Cth) should be amended to provide for review of independent expert assessments.

**22. Refugee Law**

**Proposal 22–1** The Minister for Immigration and Citizenship should issue a direction under s 499 of the *Migration Act 1958* (Cth) to visa decision makers to have regard to the Department of Immigration and Citizenship’s *Procedures Advice Manual 3* Gender Guidelines when making refugee status assessments.

**Question 22–1** Under s 417 of the *Migration Act 1958* (Cth), the Minister for Immigration and Citizenship may substitute a decision for a decision of the Refugee Review Tribunal, if the Minister considers that it is in the public interest to do so. Does the ministerial intervention power under s 417 of the *Migration Act 1958* (Cth) provide sufficient protection for victims of family violence? If not, what improvements should be made?



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## Part A—Common Threads

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### Chapters

1. Introduction to the Inquiry
2. Conceptual Framework
3. Common Interpretative Framework
4. Screening, Information Sharing and Privacy

### Proposals and Questions in this Part

**Proposal 3–1** The *Social Security Act 1991* (Cth) should be amended to provide that family violence is violent or threatening behaviour, or any other form of behaviour, that coerces and controls a family member, or causes that family member to be fearful. Such behaviour may include, but is not limited to:

- (a) physical violence;
- (b) sexual assault and other sexually abusive behaviour;
- (c) economic abuse;
- (d) emotional or psychological abuse;
- (e) stalking;
- (f) kidnapping or deprivation of liberty;
- (g) damage to property, irrespective of whether the victim owns the property;
- (h) causing injury or death to an animal irrespective of whether the victim owns the animal; and
- (i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.



**Proposal 3–2** The *Child Support (Assessment) Act 1989* (Cth) and the *Child Support (Registration and Collection) Act 1988* (Cth) should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

**Proposal 3–3** A *New Tax System (Family Assistance) Act 1999* (Cth) should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

**Proposal 3–4** A *New Tax System (Family Assistance) (Administration) Act 1999* (Cth) should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

**Proposal 3–5** The *Fair Work Act 2009* (Cth) should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

**Proposal 3–6** The following guidelines and material should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1:

- Department of Education, Employment and Workplace Relations and Job Services Australia Guidelines, Advices and Job Aids;
- Safe Work Australia Codes of Practice and other material
- Fair Work Australia material; and
- other similar material.

**Proposal 3–7** The *Superannuation Industry (Supervision) Regulations 1994* (Cth) and, where appropriate, all Australian Prudential Regulation Authority, Australian Taxation Office and superannuation fund material, should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

**Proposal 3–8** The *Migration Regulations 1994* (Cth) should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

**Proposal 3–9** The Department of Immigration and Citizenship's *Procedures Advice Manual 3* for decision makers should include examples to illustrate coercive and controlling conduct that may amount to family violence, including but not limited to:

- (a) the threat of removal; and
- (b) violence perpetrated by a family member of the sponsor at the instigation, or through the coercion, of the sponsor.

**Proposal 4–1** Information about screening for family violence by Child Support Agency and Family Assistance Office staff and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers should be included in the *Child Support Guide*, the *Family Assistance Guide* and the *Guide to Social Security Law*.

**Proposal 4–2** Child Support Agency and Family Assistance Office staff and Centrelink customer service advisers, social workers, Indigenous Service Officers and

Multicultural Service Officers should routinely screen for family violence when commencing the application process with a customer, immediately after that, and at defined intervals and trigger points (as identified in Chapters 5 and 9–11).

**Proposal 4–3** Screening for family violence by Child Support Agency and Family Assistance Office staff and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers should be conducted through different formats including through:

- electronic and paper claim forms and payment booklets;
- in person;
- posters and brochures;
- recorded scripts for call waiting;
- telephone prompts;
- websites; and
- specific publications for customer groups such as *News for Seniors*.

**Proposal 4–4** In conducting screening for family violence, Child Support Agency and Family Assistance Office staff and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers should take into consideration a customer’s cultural and linguistic background as well as a person’s capacity to understand, such as due to cognitive disability.

**Question 4–1** In addition to the initial point of contact with the customer, at what trigger points should Child Support Agency and Family Assistance Office staff and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers screen for family violence?

**Proposal 4–5** Child Support Agency and Family Assistance Office staff and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers should receive regular and consistent training and support (including resource manuals and information cards) in:

- screening for family violence sensitively; and
- responding appropriately to disclosure of family violence, including by making referrals to Centrelink social workers.

**Proposal 4–6** Training provided to Child Support Agency and Family Assistance Office staff, and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers should include:

- the nature, features and dynamics of family violence, and its impact on victims, in particular those from high risk and vulnerable groups;
- recognition of the impact of family violence on particular customers such as Indigenous peoples; those from culturally and linguistically diverse

backgrounds; those from lesbian, gay, bisexual, trans and intersex communities; children and young people; older persons; and people with disability;

- training to ensure customers who disclose family violence, or fear for their safety, know about their rights and possible service responses, such as those listed in Proposal 4–8; and
- training in relation to responding appropriately to and interviewing victims of family violence. In particular, training for Centrelink customer service advisers and social workers should include information about the potential impact of family violence on a job seeker’s barriers to employment.

**Proposal 4–7** The Department of Human Services should ensure that monitoring and evaluation of processes for screening for family violence is conducted regularly and the outcomes of such monitoring and evaluation are made public.

**Proposal 4–8** The *Child Support Guide*, the *Family Assistance Guide* and the *Guide to Social Security Law* should provide that Child Support Agency and Family Assistance Office staff and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers should give all customers information about how family violence may be relevant to the child support, family assistance, social security and Job Services Australia systems. This should include, but is not limited to:

- exemptions;
- entitlements;
- information protection;
- support and services provided by the agencies;
- referrals; and
- income management.

**Proposal 4–9** The Department of Human Services and other relevant departments and agencies should develop a protocol to ensure that disclosure of family violence by a customer prompts the following service responses:

- case management, including provision of information in Proposal 4–8, and additional services and resources where necessary; and
- the treatment of that information as highly confidential with restricted access.

**Proposal 4–10** The *Guide to Family Assistance* and the *Child Support Guide* should provide that where family violence is identified through the screening process, or otherwise, Centrelink, Child Support Agency and Family Assistance Office staff must refer the customer to a Centrelink social worker.

**Proposal 4–11** Where family violence is identified through the screening process or otherwise, a ‘safety concern flag’ should be placed on the customer’s file.

**Proposal 4–12** The ‘safety concern flag’ only (not the customer’s entire file) should be subject to information sharing as discussed in Proposal 4–13.

**Proposal 4–13** If a ‘safety concern flag’ is developed in accordance with Proposal 4–11, the Department of Human Services and other relevant departments and agencies should develop inter-agency protocols for information sharing between agencies in relation to the ‘safety concern flag’. Parties to such protocols should receive regular and consistent training to ensure that the arrangements are effectively implemented.

**Proposal 4–14** The Department of Human Services and other relevant departments and agencies should consider issues, including appropriate privacy safeguards, with respect to the personal information of individual customers who have disclosed family violence in the context of their information-sharing arrangements.

**Proposal 4–15** The Department of Human Services and other relevant departments and agencies should develop policies and statements relating to family violence and child protection, to ensure consistency in service responses. These policies should be published on the agencies’ websites and be included in the information provided to customers in Proposal 4–8.



# 1. Introduction to the Inquiry

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## Introduction

1.1 On 9 July 2010, the Attorney-General of Australia, the Hon Robert McClelland MP, asked the Australian Law Reform Commission (ALRC) to inquire into and report on the treatment of family violence in Commonwealth laws, including child support and family assistance law, immigration law, employment law, social security law and superannuation law and privacy provisions in relation to those experiencing family violence. The ALRC was requested to consider what, if any, improvements could be made to relevant legal frameworks to protect the safety of those experiencing family violence.<sup>1</sup>

1.2 In undertaking the Inquiry, the ALRC was asked to consider legislative arrangements across the Commonwealth that impact on those experiencing family violence and whether those arrangements impose barriers to providing effective support to those adversely affected by this type of violence. The ALRC was also asked

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1 The full Terms of Reference are set out at the front of this Discussion Paper and are available on the ALRC's website at <[www.alrc.gov.au](http://www.alrc.gov.au)>.

to consider whether the extent of sharing of information across the Commonwealth and with state and territory agencies is appropriate to protect the safety of those experiencing family violence.

1.3 This introductory chapter summarises the background to the Inquiry, its scope, the processes of reform and concludes with an overview of the Discussion Paper.

## Background to the Inquiry

1.4 This Inquiry follows the one concluded by the ALRC in conjunction with the New South Wales Law Reform Commission (the Commissions) in October 2010, and the resulting report, *Family Violence—A National Legal Response* (2010) (ALRC Report 114). In discussing the limits of the Terms of Reference in that inquiry, the Commissions identified that family violence was also relevant—or potentially relevant—to other legislative schemes in the Commonwealth field and suggested that the Australian Government should initiate a further inquiry in regard to such areas.<sup>2</sup> The Terms of Reference in this Inquiry reflect this suggestion.<sup>3</sup>

1.5 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, which was given the role of drafting a national plan to reduce violence against women and their children.<sup>4</sup>

## Time for Action

1.6 The report of the National Council, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (*Time for Action*), released on 29 April 2009, drew attention to the extent of the problem of family violence in Australia. Research undertaken for the National Council reported that an estimated 750,000 Australian women 'will experience and report violence in 2021–22, costing the Australian economy an estimated \$15.6 billion'.<sup>5</sup>

1.7 *Time for Action* estimated that '[a]bout one in three Australian women experience physical violence and almost one in five women experience sexual violence over their lifetime';<sup>6</sup> and stated that while violence 'knows no geographical, socio-

2 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks: Consultation Paper*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), [1.74].

3 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [1.69].

4 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 11.

5 National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 43; KPMG, *The Cost of Violence against Women and their Children* (2009), prepared for the National Council to Reduce Violence Against Women and their Children.

6 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 9.

economic, age, ability, cultural or religious boundaries’,<sup>7</sup> the experience of violence is not evenly spread.

1.8 For example, Indigenous women reported higher levels of physical violence during their lifetime than did non-Indigenous women, and the violence was more likely to include sexual violence.<sup>8</sup> Other groups may also experience violence in a different and/or disproportionate way, for example: women with disability; women who identify themselves as lesbian, bisexual, trans or intersex; and immigrant women.<sup>9</sup> Such experiences were also strongly echoed in submissions to the ALRC and noted in *Family Violence—A National Legal Response*.<sup>10</sup>

1.9 *Time for Action* also pointed to a range of compounding factors in the presentation of violence, especially alcohol, and that of geographical and social isolation—and both were identified as critical issues for Indigenous women and children.<sup>11</sup> Similar concerns were reported in *Family Violence—A National Legal Response*.<sup>12</sup>

1.10 Not only are there compounding factors causing family violence, there are also compounding consequences, such as: financial difficulty flowing from economic dependence on a violent partner; homelessness, where women are seeking to escape violence at home; and health issues associated with treating the effects of violence on the victim.<sup>13</sup> As commented by the Department of Premier and Cabinet Tasmania and quoted in *Family Violence—A National Legal Response*, ‘the causes of violence are various, and can manifest differently, but can “drag in” every aspect of the people’s lives’.<sup>14</sup>

## Immediate Government Actions

1.11 In response to *Time for Action*, the Australian Government announced a package of immediate actions,<sup>15</sup> including investments in a new national domestic violence and sexual assault telephone and online crisis service; in primary prevention activities

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7 National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council’s Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 16.

8 Ibid, 17.

9 Ibid, 18.

10 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [1.9].

11 National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council’s Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 29, 30–35.

12 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [1.11]–[1.15].

13 National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council’s Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 42–45.

14 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [1.15].

15 Australian Government, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (2009).



towards building respectful relationships; and to support research on perpetrator treatment.

1.12 The Government also committed to working with the states and territories through the Standing Committee of Attorneys-General (SCAG) to: establish a national scheme for the registration of domestic and family violence orders; improve the uptake of relevant coronial recommendations; and identify the most effective methods to investigate and prosecute sexual assault cases.

1.13 Further immediate actions included: the development of a multi-disciplinary training package for lawyers, judicial officers, counsellors and other professionals working in the family law system, to improve consistency in the handling of family violence cases; the establishment of the Violence Against Women Advisory Group to advise on the National Plan to Reduce Violence against Women; and asking the ALRC to work with state and territory law reform commissions to examine the inter-relationship of federal and state and territory laws that relate to the safety of women and their children. In the list of ‘priority actions’ the Australian Government agreed to the inquiry that led to the report, *Family Violence—A National Legal Response*.

### **The National Plan**

1.14 *Time for Action* identified six core areas for improvement together with strategies and actions to achieve them.<sup>16</sup> The first ‘three-year Action Plan’ of the *National Plan to Reduce Violence against Women and their Children* (the *National Plan*) was released in February 2011,<sup>17</sup> providing the ‘framework for action’ by all Australian governments to reduce violence against women and children.<sup>18</sup> The six ‘national outcomes’ are:

- National Outcome 1—Communities are safe and free from violence;
- National Outcome 2—Relationships are respectful;
- National Outcome 3—Indigenous communities are strengthened;
- National Outcome 4—Services meet the needs of women and their children experiencing violence;
- National Outcome 5—Justice responses are effective; and
- National Outcome 6—Perpetrators stop their violence and are held to account.

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16 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 16–20. The six ‘outcome areas’ listed are that: communities are safe and free from violence; relationships are respectful; services meet the needs of women and their children; responses are just; perpetrators stop their violence; and systems work together effectively. The plan identified 25 outcomes with 117 strategies.

17 Department of Families, Housing, Community Services and Indigenous Affairs, *National Plan to Reduce Violence Against Women and Their Children—Including the First Three-year Action Plan* (2011). The Government plans four three year plans overall, the first running from 2010 to 2013, 12.

18 Australian Government, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (2009), 12.

1.15 National Outcome 5 included as one of its three strategies that ‘justice systems work better together and with other systems’. ‘Immediate national initiatives’ pursuant to this strategy included that the Commonwealth, states and territories should ‘consider the recommendations’ in *Family Violence—A National Legal Response*; and that the current Inquiry be established.<sup>19</sup>

1.16 A number of the broader outcomes and strategies in the *National Plan* are of key relevance in this Inquiry. They are considered in the summary of the framing principles and themes discussed in Chapter 2.

### ***Family Violence—A National Legal Response***

1.17 *Family Violence—A National Legal Response* contained 187 recommendations for reform. The overarching, or predominant principle reflected in the recommendations was that of seamlessness, and to achieve this, both a systems perspective and a participant perspective must be connected, to the greatest extent possible, within the constitutional and practical constraints of a federal system. This seamlessness was expressed in recommendations focused on improving legal frameworks and improving practice.

1.18 The Commissions considered that the improvement of legal frameworks as a result of the implementation of the recommendations will be achieved through:

- a common interpretative framework, core guiding principles and objects, and a better and shared understanding of the meaning, nature and dynamics of family violence that may permeate through the various laws involved when issues of family violence arise;
- corresponding jurisdictions, so that those who experience family violence may obtain a reasonably full set of responses, at least on an interim basis, at whatever point in the system they enter, within the constraints of the division of power under the *Australian Constitution*;
- improved quality and use of evidence; and
- better interpretation or application of sexual assault laws.

1.19 Similarly, the improvement of practice will be achieved through:

- specialisation—bringing together, as far as possible, a wide set of jurisdictions to deal with most issues relating to family violence in one place, by specialised magistrates supported by a range of specialised legal and other services;
- education and training;
- the development of a national family violence bench book;
- the development of more integrated responses;

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19 Ibid, Strategy 5.3.

- information sharing and better coordination overall, so that the practice in responding to family violence will become less fragmented; and
- the establishment of a national register of relevant court orders and other information.

1.20 The Report identified a number of particular issues that are of continuing relevance in this Inquiry and which are discussed throughout this Discussion Paper. One continuing theme is the under-reporting of family violence and the range of concerns that may impede disclosure. For example, Part G concerned sexual assault, and in Chapter 24 the range of reasons for not reporting sexual violence were noted as including because: the victim may not have identified the act as sexual violence, let alone a criminal offence; victims may not consider the incident serious enough to warrant reporting; they are ashamed, fearful of the perpetrator, do not think that they will be believed, fear how they will be treated by the criminal justice system, and many consider that they can handle it themselves. Non-disclosure may also be a ‘survival strategy’.<sup>20</sup> While the discussion in Part G was focused on under-reporting in the context of sexual violence in the criminal justice system, it was noted that the problem of under-reporting is exacerbated in the family violence context and therefore that responses needed to focus on measures to promote reporting.<sup>21</sup>

1.21 Associated with under-reporting were factors that hinder disclosure or act as barriers to reporting, such as those faced by victims from CALD backgrounds, including communication and language difficulties, and cultural barriers such as beliefs about traditional gender roles and the importance of the family.<sup>22</sup> Similarly the Commissions heard about the particular barriers to disclosure of family violence for Indigenous women and women with disability.<sup>23</sup>

## Scope of the Inquiry

### Terms of Reference

1.22 Under the Terms of Reference, the ALRC is required to consider ‘what, if any, improvements could be made to relevant legal frameworks to protect the safety of those experiencing family/domestic violence’. The range of legal frameworks focuses on particular Commonwealth laws: 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.

1.23 In undertaking this reference, the ALRC was asked to consider legislative arrangements across the Commonwealth that have an impact on those experiencing family violence and sexual assault and whether those arrangements impose barriers to effectively supporting those adversely affected by these types of violence; and whether

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20 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [24.17]–[24.18].

21 Ibid, [24.21].

22 For example, Ibid, [7.44], [26.37].

23 For example, Ibid, [21.65], [24.48], [25.71], [26.36].

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.

1.24 In undertaking this Inquiry, the ALRC was directed to be careful not to duplicate:

- (a) the work undertaken in *Family Violence—A National Legal Response*;
- (b) the other actions being progressed as part of the *National Plan* and the Immediate Government Actions announced by former Prime Minister, the Hon Kevin Rudd MP, 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.

1.25 The 'lens' established in the Terms of Reference is one of safety. The reform principles and themes, discussed in Chapter 2, and all proposals for reform, are considered in the light of it.

### **Matters outside the Inquiry**

1.26 While the scope of the problem of family violence is extensive, the brief in this Inquiry is necessarily constrained both by the Terms of Reference and by the role and function of a law reform commission.

1.27 The ALRC acknowledges, as it did in *Family Violence—A National Legal Response*, that the Inquiry concerns only a narrow slice of the vast range of issues raised by the prevalence of family violence—when victims of such violence encounter the legal system in its various manifestations. As noted in that Report, a comment made by the Family Law Council in its advice to the Australian Government Attorney-General in 2009, is equally apt as a comment with respect to the problems of family violence in a much wider sense. The Council, noting that it was only focusing on family violence 'when it becomes visible in the Family Law system in Australia', stated that: 'this 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>24</sup>

1.28 In *Family Violence—A National Legal Response*, the ALRC noted widespread concern about the link between alcohol and family violence, and recognised that any serious attempt to develop preventative measures in the area of family violence must tackle the problem of alcohol abuse in Australian society. This issue is, however, beyond the scope of the Terms of Reference for that inquiry and the current one.

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24 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.

1.29 The limits of law, both in terms of services but also in terms of its application, was expressed succinctly in a remark by Penny Taylor, a solicitor with the Top End Women’s Legal Service, that ‘you can have the perfect law, but ...’;<sup>25</sup> and the Commissioner for Victims’ Rights, South Australia, stated that:

Law alone is not a satisfactory response to family violence. The law must be augmented by consistent, comprehensive and co-operative agencies, organisations and individuals. Existing law and range of approaches to family violence serve as a baseline from which people concerned about that violence and its effects can reach out to establish better laws and approaches reflecting victims’ needs and respecting their fundamental rights.<sup>26</sup>

1.30 The ALRC notes that the *National Plan* identifies many other strategies in areas beyond legal frameworks to achieve outcomes such as relationships that are respectful, and services that meet the needs of women and children.<sup>27</sup>

1.31 As noted above, the lens for this Inquiry is safety. So, while the ALRC has heard concerns about matters that can be described as ‘systemic’ concerns, to address them would require solutions beyond those that can be described as improvements to protect the safety of those experiencing family violence. For example, concerns about the calculation of child support payments may be described as relating to a systemic issue. If proposals were to go to the child support system as a whole, while prompted by family violence issues, this may be seen to go beyond the brief as defined by the Terms of Reference. In such cases, where concerns of a systemic kind have been expressed to the ALRC, they are noted in the relevant context, although no proposals are developed in response. A treatment of this kind at least provides a public forum through which to note concerns in the context of a more specific inquiry, as constrained by the Terms of Reference.

1.32 The ALRC also focuses on the specific areas of Commonwealth law listed in the Terms of Reference, including: child support and family assistance law, immigration law, employment law, social security law and superannuation law and privacy provisions in relation to those experiencing family violence. Although the list was an ‘inclusive’ one, not exclusive, the ALRC is not considering family violence issues in the *Family Law Act 1975* (Cth), on the basis that:

- the earlier report, *Family Violence—A National Legal Response*, gave extensive consideration to a range of *Family Law Act* matters within the Terms of Reference for that inquiry;

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25 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [1.67].

26 Ibid, [1.67].

27 Department of Families, Housing, Community Services and Indigenous Affairs, *National Plan to Reduce Violence Against Women and Their Children—Including the First Three-year Action Plan* (2011); Australian Government, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (2009); National Council to Reduce Violence Against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), Outcomes 2, 3.

- the Terms of Reference for this Inquiry direct the ALRC not to duplicate, amongst other things, the work undertaken in that report;
- the ALRC recommended that the Australian Government should initiate an inquiry into how family violence should be dealt with in property proceedings under the *Family Law Act* and suggested that the Family Law Council might be the appropriate body to deal with the issue, following their 2001 Letter of Advice on violence and property proceedings;<sup>28</sup> and
- given the scope of such a potential additional matter, the ALRC considers that it is beyond what may be captured by an inclusive definition, and would require to be listed expressly in the Terms of Reference.

## Processes of reform

### Consultation processes

1.33 A major aspect of building the evidence base to support the formulation of ALRC recommendations for reform is community consultation, acknowledging that widespread community consultation is a hallmark of best practice law reform.<sup>29</sup> Under the provisions of the *Australian Law Reform Commission Act 1996* (Cth), the ALRC ‘may inform itself in any way it thinks fit’ for the purposes of reviewing or considering anything that is the subject of an inquiry.<sup>30</sup> For each inquiry the ALRC determines a consultation strategy in response to its particular subject matter and likely stakeholder interest groups. The nature and extent of this engagement is normally determined by the subject matter of the reference—and the timeframe in which the inquiry must be completed under the Terms of Reference.

1.34 The Terms of Reference for this Inquiry direct the ALRC to work closely with 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. Of particular relevance in this Inquiry are the following Australian Government departments: the Attorney-General’s Department; the Department of Immigration and Citizenship; the Department of Employment, Education and Workplace Relations; the Department of Families, Housing, Community Services and Indigenous Affairs; and the Department of Human Services. Within the latter Department, the ALRC has consulted Centrelink, the Child Support Agency, the Family Assistance Office and Commonwealth Rehabilitation Service Australia. Other relevant Commonwealth bodies include: the Office of the Australian Information Commissioner; the Australian Taxation Office, the Australian Prudential Regulation Authority, the Australian Securities and Investments Commission, the Treasury, Safe

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28 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), Rec 17–2.

29 B Opeskin, ‘Measuring Success’ in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005), 202.

30 *Australian Law Reform Commission Act 1996* (Cth) s 38.

Work Australia, Fair Work Australia, the Superannuation Tribunal and the Fair Work Ombudsman.

### **Community consultation and participation**

1.35 A multi-pronged strategy of seeking community comments is being used during the Inquiry. First, internet communication tools—an e-newsletter and an online forum—are being used to provide information and obtain comment; secondly, the four Issues Papers were released; and thirdly, a national round of stakeholder consultation meetings, forums and roundtables are being conducted. In addition, the ALRC is developing consultation strategies for engaging with Indigenous peoples, those from CALD backgrounds, people with disability and people who identify themselves as lesbian, gay, bisexual, trans or intersex.

#### ***Online tools***

1.36 ***E-newsletter:*** Regular Commonwealth Family Violence Inquiry e-newsletters provide a way to keep stakeholders informed about the Inquiry progress, with a calendar of stakeholder consultations or other upcoming events, and a summary of consultations and other work to date.

1.37 The comments received in response to the Issues in Focus provided an important additional means of input into the Inquiry. At the date of release of this Discussion Paper, six e-newsletters had been published.

1.38 ***Online submission:*** After a successful pilot of integrating an online submission facility for *Family Violence—A National Legal Response*, this Inquiry is also using online submission, to enable people to respond in a focused way, addressing the individual questions set out in the Issues Papers. Each question was followed by an area to enter a response, with the option to upload a pre-prepared submission or supporting document. As with other methods of submission, online submissions can be marked ‘confidential’.

#### ***Consultations***

1.39 During this Inquiry to date, the ALRC has conducted 55 consultations, as listed in Appendix 2 of this Discussion Paper. Consultations were undertaken with individuals, academics, legal services and support agencies, advocacy groups, community legal services, research centres, government agencies and departments, and non-government organisations.

### **Appointed experts**

1.40 In addition to the contribution of expertise by way of consultations and submissions, specific expertise is also obtained in ALRC inquiries through the establishment of its Advisory Committees and Panels and the appointment by the Attorney-General of part-time Commissioners.

#### ***Advisory Panels***

1.41 A key aspect of ALRC procedures is to establish an expert Advisory Committee or ‘reference group’ to assist with the development of its inquiries. Because of the

complex nature of this Inquiry the ALRC has established Advisory Panels of experts in each of the key areas explored in the Discussion Paper, each of which is listed at the front of this publication.

1.42 While the ultimate responsibility in each inquiry remains with the Commissioners of the ALRC, the establishment of a panel of experts as an Advisory Committee or Panel, appropriate to the Terms of Reference, is an invaluable aspect of ALRC inquiries—assisting in the identification of key issues, providing quality assurance in the research and consultation effort, and assisting with the development of reform proposals.

### ***Part-time Commissioners***

1.43 In addition to the Advisory Panels, the ALRC was also able to call upon the expertise and experience of its two standing part-time Commissioners, both judges of the Federal Court: the Hon Justice Susan Kenny and the Hon Justice Berna Collier.

## **Consultation documents**

### ***Issues Papers***

1.44 To facilitate consultation in the Inquiry the ALRC released a series of four Issues Papers covering the treatment of family violence in:

- employment and superannuation law;<sup>31</sup>
- immigration law;<sup>32</sup>
- child support and family assistance law;<sup>33</sup> and
- social security law.<sup>34</sup>

1.45 Producing four Issues Papers enabled streamlined consultation with the range of stakeholders interested in the differing and specific areas under consideration in the Terms of Reference. Their aim was to encourage informed community participation in the Inquiry by providing some background information and highlighting the issues then identified by the ALRC as relevant to the Inquiry. Like all other ALRC consultation documents, they could be downloaded free of charge from the ALRC's website, <[www.alrc.gov.au](http://www.alrc.gov.au)>.

### ***Submissions***

1.46 The ALRC received 82 submissions in response to the Issues Papers, a full list of which is included in Appendix 1. Submissions were received from a wide range of

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31 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011).

32 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Immigration Law*, ALRC Issues Paper 37 (2011).

33 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance*, ALRC Issues Paper 38 (2011).

34 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011).



people and agencies, including: individuals; academics; lawyers; unions; employer organisations; community legal centres; law societies; women's centres and legal services; single parents groups; social workers; Indigenous legal and other services; government agencies; peak bodies; tribunals; the Office of the Australian Information Commissioner; the Commonwealth Ombudsman and the Australian Human Rights Commission.

1.47 The ALRC acknowledges the considerable amount of work involved in preparing submissions and the impact, particularly in organisations with limited funding, of committing staff resources to this task. It is the invaluable work of participants that enriches the whole consultative process of ALRC inquiries and the ALRC records its deep appreciation to all participants.

### ***Discussion Paper***

1.48 This Discussion Paper brings together all the matters considered so far in the Inquiry. It contains a more detailed treatment of the issues outlined in each of the Issues Papers, and indicates the ALRC's current thinking in the form of specific proposals for reform as well as seeking further input in response to particular questions. The ALRC is now seeking further submissions and will undertake a further round of national consultations in relation to the proposals contained in this Discussion Paper.

## **Overview of the Discussion Paper**

### **Definitions and terminology**

1.49 This section sets out some of the terminology that will be used in this Discussion Paper in referring to specific concepts in the family violence sphere.

#### ***Culturally and linguistically diverse***

1.50 The phrase 'culturally and linguistically diverse'—and the abbreviation 'CALD'—are commonly used in referring to people of diverse backgrounds. The ALRC recognises that the discussion in this publication may apply to people who are 'culturally *or* linguistically diverse' as well as those who are 'culturally *and* linguistically diverse'. The phrase is used for convenience to embrace both kinds of diversity.

#### ***Family***

1.51 The definition of 'family' or 'domestic' relationship varies across the Australian jurisdictions and legislation. In this Discussion Paper the particular definitions of 'family' are considered in the context of the specific legislation under consideration.

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

1.52 The terminology that should be adopted to describe violence within families and intimate relationships has been, and continues to be, the subject of controversy and

debate.<sup>35</sup> Invariably there will be difficulties in attaching any one label to describe a complex phenomenon varying in degrees of severity and reflecting the differing experiences of persons from diverse cultural, socio-economic, geographical groups, and those in same-sex relationships or in family structures that do not replicate the nuclear family structure.

1.53 As noted in *Family Violence—A National Legal Response*, state, territory and Commonwealth legislation that refers to violence within families and intimate relationships uses various descriptions—‘family violence’, ‘domestic violence’ and ‘domestic abuse’.<sup>36</sup> The term ‘domestic’ has been criticised on the basis that it ‘qualifies and arguably reduces the term “violence”’.<sup>37</sup> The Macquarie Dictionary notes the colloquial use of the term ‘domestic’ as ‘an argument with one’s spouse or another member of the household’. Thus, from a cultural perspective, the term ‘domestic’ can trivialise the impact of the violence on the victim. However the phrase ‘family violence’ has also been criticised:

The problem with the term ‘family violence’ is not even in its gendered neutrality, but the picture that it paints that violence in the family is something in which all members are complicit, and which is just to do with difficulties in relationships between family members and problems in handling conflict in non ‘violent’ ways. ... The term is even less acceptable than the more commonly used ‘domestic violence’. ‘Domestic’ with all its implications of ‘just a domestic’, at least cannot be taken to qualify the violence by reference to the ungended perpetrator, as ‘family’ can.<sup>38</sup>

1.54 Reports and writing in this area have adopted varying terminology. Some have referred to both ‘family and domestic violence’, or vice versa;<sup>39</sup> others to ‘family violence’;<sup>40</sup> and some to ‘domestic violence’.<sup>41</sup> Fehlberg and Behrens adopt the terminology of ‘violence and abuse in families’.<sup>42</sup> In each case, the differing terminology—in the Australian context—attempts to refer to the same type of conduct, although the boundaries of such conduct have expanded over the years.

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35 See, eg, Domestic Violence and Incest Resource Centre, *What’s In a Name? Definitions and Domestic Violence: Domestic Violence? Family Violence? Violence Against Women?*, Discussion Paper No 1 (1998).

36 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [1.105].

37 B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008), 178.

38 J Behrens, ‘Ending the Silence, But ... Family Violence under the Family Law Reform Act 1995’ (1996) 10 *Australian Journal of Family Law* 35, 38.

39 See, eg, National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009); Australian Bureau of Statistics, *Conceptual Framework for Family and Domestic Violence* (2009); Government of Western Australia, *Family and Domestic Violence Action Plan (2007–2008)*.

40 See, eg, Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006); Queensland Centre for Domestic and Family Violence Research, *Indigenous Family Violence Prevention Forum 2009: Report* (2009).

41 See, eg, Australian Government Solicitor, *The Giving of Evidence by Victims of Sexual Assault* (2008); M Pyke, *South Australian Domestic Violence Laws: Discussion and Options for Reform* (2007); Australian Law Reform Commission, *Domestic Violence*, Report 30 (1986).

42 B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008), 178.

1.55 In this Inquiry the ALRC will refer to ‘family violence’, rather than ‘domestic violence’ or ‘domestic abuse’, unless specifically quoting from sources including legislation which use alternative terminology.

### ***Indigenous peoples***

1.56 In this Discussion Paper, the ALRC may use the terms ‘Aboriginal and Torres Strait Islander peoples’ or ‘Indigenous communities’ or ‘Indigenous peoples’, which are consistent with the terminology adopted by various organisations, including the Aboriginal and Torres Strait Islander Social Justice Commissioner in his reports:

Aborigines and Torres Strait Islanders are referred to as ‘peoples’. This recognises that Aborigines and Torres Strait Islanders have a collective, rather than purely individual, dimension to their livelihoods. ... The use of the term ‘Indigenous’ has evolved through international law.<sup>43</sup>

1.57 This is affirmed under international law principles and by the *United Nations Declaration on the Rights of Indigenous Peoples*.<sup>44</sup> ‘Indigenous women’ and ‘Indigenous children’ also reflect this terminology.

### ***People with disability***

1.58 A contemporary view of disability acknowledges a person has an impairment or medical condition but that it is disabling barriers within society—negative attitudes, inaccessible buildings and environments, inaccessible communications and information—that prevent people with disability from being treated equally and from fully participating in all aspects of community life.<sup>45</sup>

1.59 The ALRC uses the term ‘people with disability’ throughout this Discussion Paper, to reflect each person’s value, individuality, dignity and capabilities. ‘People with disability’ is used rather than ‘people with a disability’, acknowledging that a person may have more than one disability.

### ***LGBTI***

1.60 At the outset the ALRC acknowledges the significance of terminology and that terminology is often contested. While the ALRC understands there are other possible abbreviations, the term ‘LGBTI’ is used in this Discussion Paper as it is a broadly understood abbreviation that describes people who identify as lesbian, gay, bisexual, trans or intersex.<sup>46</sup>

1.61 The ALRC is aware that the LGBTI community is not a homogenous group, but rather consists of individuals with differing sexual orientation and gender identity. In

<sup>43</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report* (2009), vi.

<sup>44</sup> *Declaration on the Rights of Indigenous Peoples*, 13 September 2007, GA Res 61/295, UN Doc A/RES/47/1.

<sup>45</sup> See, *People With Disability, A Guide to Reporting On Disability*.

<sup>46</sup> The ALRC notes that this is also the term adopted by the Australian Human Rights Commission following their research and consultation on protection from discrimination on the basis of sexual orientation and/or sex and gender identity. See: <[http://www.hreoc.gov.au/human\\_rights/lgbti/lgbticonsult/index.html](http://www.hreoc.gov.au/human_rights/lgbti/lgbticonsult/index.html)> at 11 August 2011.

particular, the ALRC understands that people who identify as trans and intersex often have perspectives, issues and needs that are different from those of the people who identify as gay, lesbian or bisexual, and as a result should be separately consulted.

### ***Protection orders***

1.62 Protection orders under family violence legislation are variously described as: apprehended violence orders, family violence intervention orders, violence restraining orders, family violence orders, domestic violence orders, and domestic violence restraining orders. For the purposes of this Discussion Paper the ALRC uses the generic term of ‘protection order’, unless specifically quoting from legislation or case law which uses the particular terminology adopted by a particular state or territory.

## **Structure of the Discussion Paper**

1.63 This Discussion Paper comprises 22 chapters divided into seven parts.

1.64 **Part A—Common Threads**, contains four chapters that cover common ideas and themes relevant to the whole Discussion Paper.

1.65 This chapter provides an outline of the background to the Inquiry and an analysis of the scope of the Inquiry as defined by the Terms of Reference. It also describes the development of the evidence base to support the law reform response as reflected in the proposals and questions included throughout the Discussion Paper.

1.66 Chapter 2, ‘Conceptual Framework’ considers the backdrop of international instruments that affect the range of issues in focus in this Inquiry, followed by an analysis of the broad policy themes relevant to the objective, as set out in the Terms of Reference, of protecting the safety of those experience family violence.

1.67 Chapter 3, ‘Common Interpretative Framework’, focuses on the definition of family violence in the legislative areas identified in the Terms of Reference: employment, superannuation, migration, child support, family assistance and social security. As a key aspect of establishing a common interpretative framework, the ALRC proposes including in those laws the same core definition of family violence that describes the context in which behaviour takes place, as well as a shared common understanding of the types of conduct—both physical and non-physical—that may fall within the definition of family violence.

1.68 The ALRC considers that systemic benefits would flow from the adoption of a common interpretative framework across different legislative schemes, promoting seamlessness and effectiveness in proceedings involving family violence for both victims and decision makers.

1.69 Chapter 4, ‘Screening, Information Sharing and Privacy’, examines how family violence is disclosed to Commonwealth agencies—namely Centrelink, the Child Support Agency (CSA) and the Family Assistance Office (FAO)—and how that information is treated by those agencies. As these issues primarily concern service provision by agencies within the Human Services portfolio, this chapter also provides an overview of the structure of, and recent changes to the portfolio.

1.70 The chapter explores ways in which barriers can be minimised to encourage disclosure of family violence in a safe environment, and to ensure that upon disclosure, an appropriate case management and privacy response is triggered. This chapter focuses on screening and risk assessment processes, information sharing and privacy, and family violence policies, to ensure that victims of family violence are appropriately identified, and their needs are responded to accordingly.

1.71 The ALRC identifies a number of personal and institutional barriers to the disclosure of family violence and proposes a multifaceted approach of screening and risk assessment processes, information sharing and privacy, and family violence policies, to ensure that victims of family violence are appropriately identified, and their needs are responded to accordingly. In particular, the ALRC proposes that Centrelink, the CSA and the FAO should ‘screen’ all customers for family violence, not through direct questions, but by giving them a short statement and other information about family violence and its relevance to a person’s social security, child support and family assistance case.

1.72 However, the ALRC recognises that screening alone is not sufficient and considers that an appropriate case-management and privacy response should be triggered, including referral to a Centrelink social worker. To assist with this, and to ensure consistency across the relevant departments and agencies, the ALRC proposes that a ‘safety concern’ flag should be placed on a customer’s file where family violence and fears for safety have been disclosed. This flag should be subject to information-sharing protocols between relevant departments and agencies, subject to informed consent and privacy safeguards. Finally, to enhance consistency across the different departments and agencies, the ALRC proposes that a family violence and child protection policy be developed for each department or agency.

1.73 **Part B—Social Security**, contains four chapters, Chapters 5–8. Chapter 5, ‘Social Security—Overview and Overarching Issues’, together with Chapters 6–8, provides an overview of Commonwealth social security law and examines options for reform of the social security legislative framework to improve the safety of people who have experienced, or are experiencing, family violence.

1.74 Chapter 5 examines the social security frameworks relevant to this Inquiry—the legal framework and the agencies that administer it; the policy framework, including underlying principles; and the relevance of family violence in the social security system. The chapter proposes reforms in the key areas of interpretative frameworks around family violence, screening, and collecting information about family violence.

1.75 In order to enhance the common interpretative framework, the ALRC proposes that the definition of family violence, and its natures, features and dynamics, be included in the *Guide to Social Security Law* supported by training for relevant Centrelink staff. The ALRC also considers that, 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 makes proposals as to the types of information a person may use to support the claim and proposes that guidance

as to the weight placed on each type of information should be included in the *Guide to Social Security Law*. The ALRC also makes proposals to ensure the safety of victims of family violence is protected when Centrelink is seeking information to support a claim of family violence and that this information is protected through Centrelink's Deny Access Facility.

1.76 Chapter 6, 'Social Security—Relationships' considers how family violence may have implications in relation to how relationships are defined in the social security context—for example, whether a person is considered to be a 'member of a couple' or 'independent'. The way in which a decision about a person's relationship status is made in the social security context, and the relevance of family violence in making that decision, is considered. The ALRC considers that relationships are inherently difficult to define, but recognises that the effect of family violence is not always considered in relationship decisions in the social security context. The ALRC therefore makes a number of proposals to ensure that the impacts of family violence are expressly considered in relationship decisions in social security law through amendment to the *Guide to Social Security Law*.

1.77 Chapter 7, 'Social Security—Proof of Identity, Residence and Activity Tests' discusses the relevance of family violence to various qualification and payability requirements—such as proof of identity, residence, and activity and participation requirements attached to certain social security payments. This chapter considers how these qualification and payability requirements could be improved to protect the safety of victims of family violence while also maintaining the integrity of the social security system.

1.78 The ALRC makes proposals in relation to residence requirements—ensuring that where appropriate, certain subclasses of visas are able to access Special Benefit. The ALRC seeks guidance from stakeholders as to what other reforms may be necessary to residence requirements to maintain this balance. The ALRC also makes proposals to ensure that a person's experience of family violence is adequately considered in the negotiation and revision of a person's requirements for activity-tested social security payments; and the granting of exemptions from such requirements.

1.79 Chapter 8, 'Social Security—Payment Types and Methods, and Overpayment', considers mechanisms that are built into social security law and practice to assist victims of family violence, and others, including: special or supplementary payments; the way in which a person receives their regular social security payment, such as weekly or urgent payments; and nominee arrangements.

1.80 Chapter 8 discusses ways in which these payments and payment arrangements may be able to better protect the safety of victims of family violence. In particular, the ALRC considers a number of barriers for victims of family violence in accessing Crisis Payment, weekly and urgent payments and makes proposals to overcome these barriers. The ALRC also considers ways 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.

1.81 **Part C—Child Support and Family Assistance**, contains four chapters, Chapters 9–12. Chapter 9, ‘Child Support—Frameworks, Assessment and Collection’, provides an overview of the child support frameworks relevant to this Inquiry: the legal framework and the agencies that administer it; and the policy framework—including the objectives that underpin the child support scheme. The chapter then outlines the relevance of family violence in the child support system, and proposes reforms to the key areas of interpretative frameworks around family violence, child support assessment, and the collection and enforcement of child support.

1.82 The reforms proposed in Chapter 9 would facilitate appropriate management of child support cases by the Child Support Agency, where a customer is at risk of family violence. The proposed reforms complement the proposals in Chapter 4, and relate primarily to screening and referrals at certain key points in a child support case. In particular, the ALRC proposes that the Child Support Agency should screen for family violence, and consult with customers who have disclosed family violence, prior to initiating significant action against the other party.

1.83 Chapter 10, ‘Child Support—Agreements, Personal Information, Informal Carers’ includes discussion of two alternatives to Child Support Agency assessments: child support agreements; and self-administration of child support. The chapter then addresses the treatment of personal information, including protection and exchange of information, and reporting threats of family violence. Finally, the chapter discusses the child support eligibility of carers who are neither parents nor legal guardians (‘informal carers’).

1.84 The proposed reforms in Chapter 10 are in two main sets. The first set focuses on information management by the Child Support Agency. It includes proposed processes for dealing with offensive material on Child Support Agency forms, and providing higher levels of protection for the personal information of victims of family violence. The second set of proposed reforms aims to remove barriers to child support faced by informal carers. The ALRC has proposed these reforms as children may be in informal care—often provided by grandparents—as a result of family violence.

1.85 Chapter 11, ‘Child Support and Family Assistance—Intersections and Alignments’ focuses on the points of intersection and alignment between child support and family assistance frameworks—in particular, Family Tax Benefit. The first point of intersection is the ‘reasonable maintenance action’ requirement in family assistance legislation. In accordance with this requirement, eligible parents must be in receipt of child support to receive more than the minimum rate of Family Tax Benefit. Family assistance policy recognises that this requirement may affect victims of family violence, and provides for exemptions from the requirement to take reasonable maintenance action. The second intersection point is an alignment in family assistance and child support legislation and policy in relation to determinations of percentages of care. This is a component of both child support and family assistance calculations, and affects the amount or distribution of entitlements.

1.86 Chapter 11 focuses on exemptions from the reasonable maintenance action requirement, as family violence exemptions are the key protective strategy for victims

in both child support and family assistance contexts. A strong focus is the accessibility of exemptions for victims who require them. The proposed reforms seek to achieve this by providing information in the *Family Assistance Guide*—in particular, information about the availability of partial exemptions, the duration of exemptions, and the review process. The ALRC also proposes that exemption policy should be included in family assistance legislation. The chapter concludes with an examination of the legislative and policy bases of percentage determinations, and how the rules underpinning such determinations affect victims of family violence.

1.87 Chapter 12, ‘Family Assistance’, discusses the family assistance framework and the ways in which it addresses, and in some instances fails to address, family violence. This discussion focuses on the two primary family assistance payments—Family Tax Benefit and Child Care Benefit (CCB). This chapter proposes reforms specifically targeted at family assistance law and policy, where needed, particularly in relation to CCB. Family assistance legislation provides for increased CCB in certain circumstances. The proposed reforms seek to improve accessibility to increased CCB in cases of family violence. The ALRC proposes that this be achieved by amending the *Family Assistance Guide* to explicitly recognise family violence as exceptional circumstances that may qualify for increased CCB, and by amending family assistance legislation to lower the eligibility threshold for increased rates of CCB where children are at risk of abuse or neglect.

1.88 **Part D—Income Management**, comprises one chapter, Chapter 13. ‘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. Chapter 13 discusses the relevance of family violence to income management measures and the treatment of family violence in the income management of welfare payments under the *Social Security (Administration) Act*. The chapter briefly explains the nature and the history of the income management regime and how income management may be improved to work to protect the safety of people experiencing family violence. By way of comparison, the income management model in the *Family Responsibilities Commission Act 2008* (Qld) is discussed.

1.89 In particular, Chapter 13 examines the implications of family violence for how individuals may become subject to, or obtain exemptions from, the application of income management; and the consequences of income management for people experiencing family violence. The ALRC concludes that the complexity of family violence, and the intertwining of family violence in a number of the ‘vulnerability indicators’ that trigger the imposition of compulsory income management, leads to serious questions about whether it is an appropriate response. The ALRC proposes that there should be a flexible and voluntary form of income management offered to people experiencing family violence to ensure that the complex needs of the victims are provided for and their safety protected.

1.90 In Chapter 13 the ALRC also proposes a review of the voluntary income management measures and streams to provide welfare recipients experiencing family violence with a flexible opt-in and opt-out measure.



1.91 **Part E—Employment**, comprises five chapters, Chapters 14–18. Chapter 14, ‘Employment Law—Overarching Issues and a National Approach’, together with Chapters 15–17, examines possible options for reform to employment-related legislative, regulatory and administrative frameworks to improve the safety of people experiencing family violence. The chapter examines the relevance of family violence to the employment law system; issues associated with disclosure of family violence—including verification of family violence and privacy issues; the need for national initiatives which address family violence in the context of employment; and associated reforms to data collection.

1.92 The ALRC’s key proposal in Chapter 14 is that the Australian Government should initiate a national education and awareness campaign around family violence in the employment context. The ALRC also proposes that the Office of the Australian Information Commissioner should develop a model privacy policy and guidance material in relation to family violence-related personal information. With respect to data collection, the ALRC considers the possible roles Fair Work Australia should play in considering the effect of family violence on the employment of those experiencing family violence in relation to the National Employment Standards, enterprise agreements and individual flexibility arrangements.

1.93 Chapter 15, ‘The Pre-Employment Stage’, deals with ways in which the framework underpinning the pre-employment stage of the employment law spectrum, with a particular focus on employment services provided by contractors to the Australian Government, could be improved to protect the safety of victims of family violence. The chapter examines ways in which Job Services Australia (JSA)—the national employment services system—Disability Employment Services (DES) and Indigenous Employment Program (IEP) systems do, or could, respond to the needs of job seekers experiencing family violence.

1.94 In particular, the chapter addresses:

- JSA—including tender arrangements, information sharing processes and protocols and screening for family violence;
- JSA and DES provider responses to disclosure of family violence by job seekers;
- the Job Seeker Classification Instrument (JSCI)—conduct and content of JSICs;
- Employment Services Assessment (ESA) and Job Capacity Assessment (JCA)—referral to, and conduct of, ESAs and JCAs and the impact of family violence;
- education and training; and
- employment services for specific groups of job seekers, including Indigenous peoples, job seekers from culturally and linguistically diverse (CALD) backgrounds, job seekers with disability and those in rural and remote areas.

1.95 In particular, the ALRC proposes in Chapter 15 that those who wish to tender to become job service providers must demonstrate an understanding of family violence

and its impact on job seekers. The ALRC also proposes that the JSCI should include a new category of information in relation to family violence. With the enhanced disclosure of family violence that might result, the ALRC also considers what information-sharing processes and protocols, as well as privacy safeguards, are appropriate. Other proposals in this chapter concern JSA and DES provider responses to the disclosure of family violence, the conduct of ESAs and JCAs, and education and training for a range of people involved in the pre-employment stage.

1.96 Chapters 16 and 17 focus on the *Fair Work Act 2009* (Cth). Chapter 16, ‘Employment—The *Fair Work Act 2009* (Cth)’ provides an overview of the *Fair Work Act* and examines possible options for reform to the Act, and the institutions created under the Act, to address the needs—and ultimately the safety—of employees experiencing family violence. The chapter examines the background, constitutional basis, coverage and objects of the *Fair Work Act*, as well as the role and processes of Fair Work Australia (FWA) and the Fair Work Ombudsman (FWO). The ALRC suggests ways in which those institutions or their processes do, or could, function to protect the safety of those experiencing family violence.

1.97 The key focus of Chapter 16 is on the National Employment Standards. The ALRC makes two key proposals—first, that family violence be included as a circumstance in which an employee should have a right to request flexible working arrangements and, secondly, that family violence-related leave be included as a minimum statutory entitlement under the National Employment Standards.

1.98 Chapter 17, ‘Employment—The *Fair Work Act 2009* (Cth) Continued’, complements Chapter 16 and considers enterprise agreements—specifically the inclusion of family violence clauses and the role of individual flexibility arrangements; modern awards; unfair dismissal; and the general protections provisions under the *Fair Work Act*. The ALRC concludes that the Australian Government should encourage the inclusion of family violence clauses, that such clauses should include a range of minimum requirements and proposes that the Fair Work Ombudsman should develop a guide to negotiating such clauses in agreements. The ALRC also considers the appropriateness of individual flexibility arrangements (IFAs) in circumstances where an employee is experiencing family violence and proposes that the Fair Work Ombudsman should develop a guide to negotiating IFAs in such circumstances.

1.99 With respect to modern awards, the ALRC considers ways in which modern awards might incorporate family violence-related provisions and suggests this should be considered in the course of Fair Work Australia’s reviews in 2012 and 2014. In relation to unfair dismissal, the ALRC acknowledges the broad formulation of ‘harsh, unjust and unreasonable’ and suggests consideration of family violence in determining whether ‘exceptional circumstances exist’ for the purposes of granting an extension of time in which to make an application. Finally the ALRC considers the general protections provisions under the *Fair Work Act* and suggests that discrimination on family-violence related grounds under those provisions could be considered in the context of the post-implementation review and by the Australian Human Rights Commission.

1.100 Chapter 18, ‘Occupational Health and Safety Law’, examines ways in which the Commonwealth occupational health and safety (OHS) system, in the context of moves to harmonise OHS law across Australia, might be improved to protect employees experiencing family violence. In particular it examines: legislative duties—specifically, duties of care and the duty to report notifiable incidents; the nature and role of regulatory guidance; the importance of education, training and measures to raise awareness about family violence as a work health and safety issue; and issues associated with data collection.

1.101 The central premise underlying Chapter 18 is that, where family violence becomes an OHS issue for employees, they should be given the highest level of protection reasonably practicable, and employers should introduce measures to address family violence in such circumstances. This reflects one of the principles underlying the Model Work Health and Safety Bill developed by Safe Work Australia.

1.102 The ALRC concludes that legislative or regulatory obligations may not be the most appropriate means by which to address family violence in the OHS context. The ALRC considers that significant amendments to the OHS system, due to come into effect on 1 January 2012, existing legislative and regulatory duties appear to be sufficiently broad to encompass family violence. Rather, it is lack of awareness or consideration of family violence as an OHS issue that should be the focus of reforms. Accordingly, the ALRC makes a range of proposals in Chapter 18 focused on: increasing awareness of family violence as a 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.

1.103 **Part F—Superannuation**, comprises one chapter, Chapter 19, which examines ways in which the Australian superannuation system does, or could, respond to protect the safety of people experiencing family violence. While the intersection between family violence and superannuation is not one that has received much attention in the past, other than to a limited extent within the family law arena, there are a range of areas of superannuation in which family violence has a particular impact on or consequence for the economic security and independence of victims of family violence.

1.104 The chapter consist of two main parts. The first part deals with circumstances in which a victim of family violence may have been coerced into taking action in respect of their superannuation. It considers superannuation agreements, spousal contributions and self-managed superannuation funds (SMSFs). The ALRC concludes that the treatment of superannuation should be considered in the context of an inquiry into how family violence should be dealt with in respect of property proceedings under the *Family Law Act 1975* (Cth) and considers changes to the regulation of, and guidance material with respect to, SMSFs.

1.105 The second part of Chapter 19 examines circumstances in which a victim of family violence may wish to seek early access to superannuation benefits for the

purposes of, for example, leaving a violent relationship. In considering early release on the basis of severe financial hardship, the ALRC proposes amendments to the eligibility requirements for making an application and to guidance material for decision makers in granting early release. The ALRC also considers whether compassionate grounds could be amended to account for family violence, or whether a new ground of early release on the basis of family violence should be introduced. The ALRC also outlines a range of other issues relevant to early release, including in relation to application forms, training, applicant safety measures, time limits and data collection and systems integrity measures

1.106 **Part G—Migration**, comprises three chapters, Chapters 20–22. Chapter 20, ‘Migration Law—Overarching Issues’, considers a number of broad issues surrounding the family violence exception contained in the *Migration Regulations 1994* (Cth). The exception—which is invoked mainly in partner visa cases—provides for the grant of permanent residence to victims of family violence, notwithstanding the breakdown of the spousal or de facto relationship on which their migration status depends. A major focus of this chapter concerns whether the family violence exception should be expanded to apply to a broader range of onshore permanent and temporary visa categories, including the Prospective Marriage (Subclass 300) visa.

1.107 The ALRC considers that the family violence exception should be made available to all *secondary visa applicants* for onshore permanent visas. Similarly, the ALRC proposes in Chapter 20 that the family violence exception should be made available to holders of a Prospective Marriage (Subclass 300) visa who have experienced family violence, but who have not married their Australian sponsor. Beyond these cases, the ALRC acknowledges that those on other temporary visas may also experience family violence. However, in light of the need to ensure the integrity of the visa system the ALRC does not propose that the family violence exception be extended to apply to temporary visa holders.

1.108 The ALRC considers that the proposals in Chapter 20 need to be complemented by adequate education, training and information dissemination to all those within the system. Accordingly, the ALRC proposes that the Australian Government should ensure consistent and regular education and training in relation to the nature, features and dynamics of family violence, including its impact on victims, for visa decision makers, competent persons and independent experts, in the migration context. The ALRC also proposes that information about legal rights, family violence support services, and the family violence exception should be provided to visa applicants prior to and upon arrival in Australia, and that such information should be provided in a culturally appropriate and sensitive manner.

1.109 Chapter 21 ‘The Family Violence Exception—Evidentiary Requirements’, builds on Chapter 20 and focuses on the evidentiary requirements for making a family violence exception claim under the *Migration Regulations 1994* (Cth). In order to meet the family violence exception, applicants must make a claim based on judicially or non-judicially determined evidence of family violence. The chapter begins by giving an overview of the evidentiary requirements in the Australian context, including its legislative history. This is followed by an examination of stakeholder concerns in

relation to judicially and non-judicially determined claims of family violence. Chapter 21 then considers equivalent family violence provisions in other jurisdictions including: the United States, Canada, New Zealand and the United Kingdom, before examining a number of options for reform.

1.110 Chapter 22, ‘Refugee Law’, considers the position of asylum seekers who seek protection in Australia on the basis of having experienced family violence. The first part of the chapter includes an analysis of refugee case law in Australia in relation to family violence, and considers whether legislative changes to the *Migration Act 1958* (Cth) are necessary to improve the safety of victims of family violence. The ALRC concludes that family violence claims can fall under the definition of a refugee contained in the United Nations *Convention Relating to the Status of Refugees* (the Refugee Convention), as incorporated into Australian law by the *Migration Act*. However, the ALRC considers that this is a complex area of the law which is prone to inconsistent decision-making. Assessments of family violence claims require a visa decision maker to have an in-depth understanding of the intersection between family violence and refugee law, and the relevant country information. Accordingly, in order to improve consistency in decision-making, the ALRC proposes that the Minister for Immigration and Citizenship should issue a direction under s 499 of the *Migration Act* to require visa decision makers to have regard to the *Procedures Advice Manual 3* Gender Guidelines when making refugee status assessments.

1.111 The second part of Chapter 22 considers whether other amendments, such as those proposed in the Complementary Protection Bill 2011 (Cth) are necessary to protect victims of family violence whose claims may fall outside the Refugee Convention, but who may need international protection. The ALRC considers that the measures proposed by the Bill provide limited scope for protection of victims of family violence. For the Bill to provide meaningful protection to victims of family violence, substantial amendments would need to be made to the exclusions criteria, which would significantly alter the nature of complementary protection affecting all persons who may need complementary protection, beyond those who are victims of family violence.

### **How to make a submission**

1.112 With the release of this Discussion Paper, the ALRC invites individuals and organisations to make submissions in response to the specific proposals and questions, or to any of the background material and analysis provided, to help advance the reform process in this Inquiry.

1.113 There is no specified format for submissions and they may be marked ‘confidential’ if preferred. The ALRC prefers electronic communications and submissions, and strongly encourages stakeholders to make use of the online submission form available on the ALRC website. However, the ALRC will gratefully accept anything from handwritten notes to detailed commentary and scholarly analyses

on relevant laws and practices. Even simple dot-points are welcome. Submissions will be published on the ALRC website, unless they are marked confidential.<sup>47</sup>

1.114 The ALRC appreciates that tight deadlines for making submissions places considerable pressure upon those who wish to participate in ALRC inquiries. Given the deadline for delivering the final report to the Attorney-General at the end of November 2011, and the need to consider fully the submissions received in response to this Discussion Paper, all submissions must be submitted on time—by **Friday 30 September 2011**.

1.115 It is the invaluable work of participants that enriches the whole consultative process of ALRC inquiries. The quality of the outcomes is assisted greatly by the understanding of contributors in needing to meet the deadline imposed by the reporting process itself. This Inquiry is no exception.

In order to ensure consideration for use in the final report, submissions addressing the questions and proposals in this Discussion Paper must reach the ALRC by **Friday 30 September 2011**.

The ALRC encourages stakeholders to use the online submission form available at <<http://www.alrc.gov.au/inquiries/family-violence-and-commonwealth-laws/respond-discussion-paper>>.

Submissions not marked confidential will be published on the ALRC website.

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47 Submissions provided only in hard copy may not be published on the website.



## 2. Conceptual Framework

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### Summary

2.1 This chapter considers the backdrop of international instruments that affect the range of issues in focus in this Inquiry. This is followed by an analysis of the broad policy themes relevant to the objective, as set out in the Terms of Reference, of protecting the safety of those experience family violence.

2.2 Family violence is an issue that arises for consideration in a diverse number of laws. In *Family Violence—A National Legal Response*,<sup>1</sup> the ALRC tackled a range of problems that arise in the interactive space between Commonwealth and state and territory laws. In doing so, that inquiry had to navigate the complex federal–state constitutional divide, particularly in relation to family law matters. As the present Inquiry concerns only Commonwealth laws, this particular layer of difficulty does not present itself in the same way. For both inquiries, various international instruments provide a backdrop for a consideration of legal reform responses to family violence issues and safety concerns.

2.3 In *Family Violence—A National Legal Response* the ALRC identified a number of policy aims to provide the conceptual framework for the recommendations for reform in that Report.<sup>2</sup> They are of continuing relevance as themes in this Inquiry. In addition, there are specific themes that have emerged in relation to the areas under consideration in the present review.

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1 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010).

2 Ibid, Ch 3.



## International setting

2.4 Under its constituting legislation, the ALRC is directed to have regard to ‘all of Australia’s international obligations that are relevant to the matter’.<sup>3</sup> A number of international conventions are relevant to the legal framework in relation to violence in the family. In particular, these reflect the acknowledgment that violence against women and children is a violation of human rights.

2.5 Such international instruments do not become part of Australian law until incorporated into domestic law by statute.<sup>4</sup> However, as Professors Bryan Horrigan and Brian Fitzgerald commented, ‘[i]nternational and transnational sources of law increasingly affect the development of Australian constitutional, statutory, and case law, and also governmental policy-making’.<sup>5</sup> Where not expressly incorporated into domestic law,

international law can be influential (or indirectly included) by forming a part of the context through which the exercise of judicial and governmental power is scrutinised.<sup>6</sup>

2.6 For example, as noted by the High Court in *Minister for Immigration and Ethnic Affairs v Teoh*, a convention can assist with the interpretation of domestic law:

The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law.<sup>7</sup>

2.7 The particular instruments of relevance to this Inquiry, summarised below in chronological order of introduction, are the:

- *Universal Declaration of Human Rights*;
- *International Covenant on Civil and Political Rights*;
- *Convention on the Elimination of Discrimination Against Women*;
- *Declaration on the Elimination of Violence against Women*;
- *Convention on the Rights of the Child*; and
- *Declaration on the Rights of Indigenous Peoples*.

## Universal Declaration of Human Rights

2.8 The Universal Declaration of Human Rights (UDHR) was adopted in the wake of the Second World War and proclaimed by the General Assembly of the United Nations on 10 December 1948. It was the first international expression of rights to

<sup>3</sup> *Australian Law Reform Commission Act 1996* (Cth) s 24(2).

<sup>4</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–8, 315.

<sup>5</sup> B Horrigan and B Fitzgerald, ‘International and Transnational Influences on Law and Policy Affecting Government’ in B Horrigan (ed), *Government Law and Policy: Commercial Aspects* (1998) 2, 2.

<sup>6</sup> *Ibid*, 4.

<sup>7</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288. The Court added a caution: ‘But the courts should act in this fashion with due circumspection when the Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law’.

which all human beings are entitled.<sup>8</sup> Comprising 30 articles, it is the basis of a number of later instruments which embody and expand upon its provisions. The ones of particular relevance to this Inquiry include: art 10 (the right to a fair and public hearing); art 12 (protection of privacy, family and home); and art 16 (concerning marriage and the family). In addition to these particular rights, which are considered below as incorporated in later instruments, of particular note is art 22, which provides that:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

### International Covenant on Civil and Political Rights

2.9 The *International Covenant on Civil and Political Rights* (ICCPR), described as ‘one of the most important human rights conventions of the United Nations era’,<sup>9</sup> was adopted by the United Nations General Assembly on 16 December 1966 and ratified by the Australian Government in 1980. In making any proposals or recommendations for reform, the ALRC is directed to ensure that they are consistent, ‘as far as practicable’, with the ICCPR.<sup>10</sup>

2.10 A number of articles of the ICCPR are of particular relevance in the context of a consideration of family violence and possible improvements to legal frameworks to protect the safety of those who experience it. Article 23 provides that ‘[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State’.<sup>11</sup> It also stipulates that, with respect to marriage, ‘no marriage shall be entered into without the free and full consent of the intending spouses’<sup>12</sup> and that signatory countries will take appropriate steps ‘to ensure equality of rights and responsibility of spouses as to marriage, during marriage and at its dissolution’.<sup>13</sup>

2.11 Article 17 includes protection for the family that includes a specific recognition of privacy within such protection, in stipulating that:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.<sup>14</sup>

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8 *Universal Declaration of Human Rights*, 10 December 1948, (entered into force on 10 December 1948).

9 B Opeskin and D Rothwell (eds), *International Law and Australian Federalism* (1997), 16.

10 *Australian Law Reform Commission Act 1996* (Cth) s 24(1)(b).

11 Reflecting art 16 of the UDHR.

12 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23 (entered into force on 23 March 1976), art 23(3).

13 *Ibid*, art 23(4).

14 *Ibid*, art 17(1). This article reflects art 12 of the UDHR.

2.12 With respect to children, there are two particular articles of note. Article 23 refers to the position of children after the dissolution of marriage, stating that provision shall be made for their ‘necessary protection’.<sup>15</sup> Article 24 focuses particularly on children in their own right:

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2.13 In 1990 a convention concerning children’s rights was adopted by the United Nations, the *Convention on the Rights of the Child*,<sup>16</sup> which is considered specifically below.

2.14 Other key rights of a more general nature in the ICCPR are the right to a ‘fair and public hearing’ in art 14, with minimum procedural guarantees in the case of criminal charges;<sup>17</sup> and the affirmation in art 26 that ‘all persons are equal before the law and are entitled without any discrimination to the equal protection of the law’.

2.15 There are also provisions that concern discrimination. First, art 2 provides a positive assertion of the responsibility of signatories to ensure equal treatment:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2.16 Secondly, art 26 provides a specific proscription of discrimination:

the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2.17 In the context of family violence, there are evident tensions in the way that these articles—and the expectations they engender—might operate. A person accused of violence that may be a criminal offence, for example, is entitled to a fair hearing (art 14); the family itself, as a fundamental unit of society, is entitled to protection (art 23); and the child is entitled to the expectation of protection by his or her family and the state (art 24). When, for example, a child is the subject of abuse by a family member, each of these articles, and their inherent expectations, may be in apparent conflict. Similarly, where a woman or man is the subject of family violence, the protection of the family requires the family to be open to some public scrutiny—notwithstanding the right to privacy and the protection of the home (art 17).

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15 Ibid, art 23(4).

16 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4 (entered into force on 2 September 1990).

17 This article reflects art 10 of the UDHR.

### Convention on the Elimination of Discrimination Against Women

2.18 While discrimination against *all persons* is proscribed under art 26 of the ICCPR, this provision is supplemented by the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW),<sup>18</sup> which came into force for Australia on 27 August 1983.<sup>19</sup> CEDAW defines discrimination as any distinction, exclusion or restriction that prevents the equal exercise or enjoyment by women of human rights and fundamental freedoms ‘in the political, economic, social, cultural, civil or any other field’.<sup>20</sup> In doing so, it ‘moves beyond the concept of discrimination used in other human rights treaties’<sup>21</sup> to define the concept of discrimination ‘more broadly than earlier international treaties on women’.<sup>22</sup> Elizabeth Evatt, a member of the UN Committee on the Elimination of Discrimination from 1984 to 1992, described CEDAW as ‘an international bill of rights for women’<sup>23</sup> and as representing ‘a commitment by the international community to equality in the enjoyment of human rights’.<sup>24</sup>

2.19 In an inquiry in the 1990s as part of the Australian Government’s ‘New National Agenda for Women’, the ALRC noted in particular that, as a party to CEDAW, Australia has undertaken to pursue ‘by all appropriate means and without delay a policy of eliminating discrimination against women’.<sup>25</sup> While observing that, as a party to the ICCPR, ‘Australia must guarantee the equal protection of human rights to men and women without discrimination and equality before the law’,<sup>26</sup> the ALRC concluded that a significant aspect of gender inequality—and therefore of discrimination in contravention of CEDAW—was ‘women’s experience and fear of violence’.<sup>27</sup>

2.20 The two ALRC reports produced from this inquiry<sup>28</sup> raised general public and government awareness of the issues and ‘act[ed] as a mouthpiece for the views of

18 *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, [1983] ATS 9 (entered into force on 3 September 1981).

19 Ibid. In March 2009 Australia became a party to the CEDAW Optional Protocol, which allows individuals to bring a complaint directly to the UN CEDAW Committee, after all domestic remedies have been exhausted.

20 Ibid, arts 1–3.

21 S Cusack, ‘Discrimination Against Women: Combating Its Compounded and Systemic Forms’ (2009) 34(2) *Alternative Law Journal* 86, 86.

22 H Charlesworth and S Charlesworth, ‘The Sex Discrimination Act and International Law’ (2004) 27 *University of New South Wales Law Journal* 858, 858, referring to, eg, the 1953 UN *Convention on the Political Rights of Women*.

23 E Evatt, ‘Eliminating Discrimination Against Women: The Impact of the UN Convention’ (1991) 18 *Melbourne University Law Review* 435, 435.

24 Ibid, 437.

25 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), [1.2].

26 Ibid.

27 Ibid, [2.30].

28 Ibid; Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 2)*, Report 69 (1994).

women across Australia'.<sup>29</sup> The ALRC also highlighted the impact that violence has on women's access to the legal system:

Violence directly impedes women in enforcing their legal rights through its destructive impact on their personal confidence and because they may fear retaliation.<sup>30</sup>

2.21 Although CEDAW does not expressly mention violence as a form of discrimination, parties are asked to report on the protection of women against the incidence of all kinds of violence, 'including sexual violence, abuses in the family, sexual harassment at the work place, etc'.<sup>31</sup> So, for example, where art 16 calls for the elimination of discrimination in marriage and the family, family violence 'is clearly a form of discrimination which denies women equality'.<sup>32</sup>

### **Declaration on the Elimination of Violence against Women**

2.22 At the time that the ALRC was conducting its work on the *Equality Before the Law* inquiry, the Declaration on the Elimination of Violence against Women was adopted by the General Assembly of the United Nations on 20 December 1993, to complement and strengthen CEDAW. The commencing articles of the declaration define violence against women in the following terms:

#### **Article 1**

For the purposes of this Declaration, the term 'violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

#### **Article 2**

Violence against women shall be understood to encompass, but not be limited to, the following:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

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<sup>29</sup> L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [16.2].

<sup>30</sup> Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), [9.6].

<sup>31</sup> E Evatt, 'Eliminating Discrimination Against Women: The Impact of the UN Convention' (1991) 18 *Melbourne University Law Review* 435, 438, n 21 citing Rec 12, 8th session 1989.

<sup>32</sup> *Ibid*, 441.

2.23 In 1999, the General Assembly designated 25 November as the International Day for the Elimination of Violence against Women.

### Convention on the Rights of the Child

2.24 The United Nations *Convention on the Rights of the Child* (CROC)<sup>33</sup> has been described as ‘the most comprehensive statement of children’s rights ever drawn up at the international level’,<sup>34</sup> and as providing ‘a universally accepted rights-based framework for addressing the treatment of children’.<sup>35</sup> Following ratification by Australia on 17 December 1990, CROC proved of significance in ‘shaping the first wave of reforms to Pt VII of the *Family Law Act 1975* (Cth) effected under the *Family Law Reform Act 1995* (Cth)’.<sup>36</sup>

2.25 CROC sets out the full range of human rights—civil, cultural, economic, political and social rights—pertaining to children under 18 years of age.<sup>37</sup> CROC spells out that children everywhere have the right to:

- survival;<sup>38</sup>
- develop to the fullest;<sup>39</sup>
- protection from harmful influences, abuse and exploitation;<sup>40</sup> and
- participate fully in family, cultural and social life.<sup>41</sup>

2.26 The four core principles of the Convention are non-discrimination; devotion to the best interests of the child; the right to life, survival and development; and respect for the views of the child. In a joint 1997 report, the ALRC and the Human Rights and Equal Opportunity Commission stated that:

CROC recognises that children, as members of the human family, have certain inalienable, fundamental human rights. It emphatically endorses the proposition that the family is the fundamental environment for the growth and well-being of children and states that, for the well-being of society, the family should be afforded protection and assistance so as to fully assume its responsibilities. At the same time, it recognises that children need special safeguards and care where the family does not or cannot assume these roles.<sup>42</sup>

33 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4 (entered into force on 2 September 1990).

34 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [7.3].

35 National Children’s and Youth Law Centre, *Submission CFV 64*, 3 May 2011.

36 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [7.5].

37 UNICEF, *Convention on the Rights of the Child: Introduction* <[www.unicef.org/crc/index\\_30160.html](http://www.unicef.org/crc/index_30160.html)> at 18 January 2010.

38 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4 (entered into force on 2 September 1990), art 6.

39 *Ibid*, art 6.

40 *Ibid*, art 19.

41 *Ibid*, arts 9, 16, 17, 27, 28.

42 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), [3.15].

2.27 A number of the provisions of CROC were particularly relevant to *Family Violence—A National Legal Response* and continue to be an important part of the international setting for this Inquiry. First, ‘the best interests of the child’ is a central principle, as set out in art 2:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.<sup>43</sup>

2.28 Secondly, the maintenance of contact between a child and his or her parents is affirmed, subject to the ‘best interests’ principle, in art 12:

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.<sup>44</sup>

2.29 Of particular note is the rider in the above provision—that separation of a child from a parent may be in the child’s best interests where the child is subject to abuse or neglect by a parent. However, notwithstanding this qualification, it is also stated that:

States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.<sup>45</sup>

2.30 The risk of violence and abuse to a child is given specific attention in art 19, which requires States Parties to

take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.<sup>46</sup>

2.31 CROC includes articles concerning protection from sexual exploitation and sexual abuse;<sup>47</sup> and promoting physical and psychological recovery from, amongst other things, any form of neglect, exploitation or abuse.<sup>48</sup> The child’s right to be heard in proceedings involving him or her is also addressed:

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43 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4 (entered into force on 2 September 1990), art 3(1).

44 *Ibid*, art 9(1).

45 *Ibid*, art 9(3).

46 *Ibid*, art 19(1). ‘Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement’: art 19(2).

47 *Ibid*, art 34.

48 *Ibid*, art 39.

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.<sup>49</sup>

2.32 The right to express his or her own views may be satisfied by being given an opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of applicable national law.<sup>50</sup>

2.33 In *B and B: Family Law Reform Act 1995*, the Full Court of the Family Court expressed the view that CROC

must be given special significance because it is an almost universally accepted human rights instrument and thus has much greater significance for the purposes of domestic law than does an ordinary bilateral or multilateral treaty not directed at such ends.<sup>51</sup>

2.34 The relationship between CROC and the *Family Law Act* has been considered by the High Court in the context of the mandatory detention of children in immigration detention centres when proceedings for the release of two boys were brought under pt VII of the *Family Law Act*.<sup>52</sup> The High Court held that the welfare power was constrained by the constitutional head of power under which it was enacted and, accordingly, that the Family Court had no jurisdiction either to order the release of the children from detention or to make general orders concerning the welfare of detained children.

### **Declaration on the Rights of Indigenous Peoples**

2.35 The Declaration on the Rights of Indigenous Peoples was adopted by the United Nations General Assembly on 13 September 2007.<sup>53</sup> It has been described as ‘the greatest development on indigenous rights’ in the decade up to 2009.<sup>54</sup> Australia, Canada, New Zealand and the United States, originally voted against the Declaration, but on 3 April 2009 the Australian Government reversed this position. At the time, the Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon Jenny Macklin MP, remarked that the Declaration was supported ‘in the spirit of re-setting the relationship between Indigenous and non-Indigenous Australians and building trust’.<sup>55</sup>

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49 Ibid, art 12(1).

50 Ibid, art 12(2).

51 *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676, [10.19].

52 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365.

53 *Declaration on the Rights of Indigenous Peoples*, 13 September 2007, GA Res 61/295, UN Doc A/RES/47/1.

54 A Xanthaki, ‘Indigenous Rights in International Law Over the Last 10 Years and Future Developments’ (2009) 10 *Melbourne Journal of International Law* 27, 29.

55 J Macklin, ‘Federal Government Formally Endorses the Declaration on the Rights of Indigenous Peoples’ (2009) 7(11) *Indigenous Law Bulletin* 6, 6.



2.36 The Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, drew attention to the significance of the Declaration:

As an international instrument, the Declaration provides a blueprint for Indigenous peoples and governments around the world, based on the principles of self-determination and participation, to respect the rights and roles of Indigenous peoples within society. It is the instrument that contains the minimum standards for the survival, dignity and well-being of Indigenous peoples all over the world.<sup>56</sup>

2.37 The Declaration contains 46 articles. As affirmed in art 43, the rights recognised in the Declaration ‘constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world’. The emphasis is ‘collectivist or peoples oriented’, in contrast to that, for example, of the UDHR and the ICCPR, which emphasise ‘human dignity and the worth of every individual person’.<sup>57</sup>

2.38 A number of articles, however, combine both approaches. As Emeritus Professor Theo van Boven commented:

In many ways, the Declaration ... brings together peoples’ rights and individual rights in a spectrum of mutual relationship and reach. A good illustration of this is Article 7, which, echoing Article 3 UDHR, provides that ‘indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person’, while at the same time making it clear, in language similar to the UN Declaration on the Right of Peoples to Peace (1984), that ‘indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples’.<sup>58</sup>

2.39 Of particular relevance in this Inquiry are the articles that focus on the rights of Indigenous peoples as individuals. Article 1 provides that:

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

2.40 Article 2 then affirms the right of Indigenous peoples and individuals to be free from any kind of discrimination, in particular that based on their Indigenous origin or identity.

2.41 Article 22 focuses upon particular forms of discrimination and protection from violence:

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

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56 M Gooda, *Community Guide to the UN Declaration on the Rights of Indigenous Peoples* <[www.hreoc.gov.au/declaration\\_indigenous/index.html](http://www.hreoc.gov.au/declaration_indigenous/index.html)> at 12 July 2011.

57 T van Boven, ‘Categories of Rights’ in D Moeckli, S Shah and S Sivakumaran (eds), *International Human Rights Law* (2010) 173, 176; and see A Xanthaki, ‘Indigenous Rights in International Law Over the Last 10 Years and Future Developments’ (2009) 10 *Melbourne Journal of International Law* 27, 29.

58 T van Boven, ‘Categories of Rights’ in D Moeckli, S Shah and S Sivakumaran (eds), *International Human Rights Law* (2010) 173, 177.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

2.42 The *Community Guide to the UN Declaration on the Rights of Indigenous Peoples*, produced by the Australian Human Rights Commission in 2010, explains in relation to art 22 that:

Violence against our women and children is an issue of concern to Aboriginal and Torres Strait Islander communities.

Governments have obligations to take actions to prevent and protect our women and children from violence and discrimination.

Laws and policies developed to protect women and children should not at the same time discriminate against Aboriginal and Torres Strait Islander peoples. That is why governments must work with us in meeting these obligations.<sup>59</sup>

2.43 The rights affirmed in the Declaration provide an additional lens through which to consider a range of the issues in this Inquiry. While many of the articles focus on community and cultural issues that are unique to Indigenous communities, the affirmation of rights of individuals within those communities is an additional layer of commitment to the rights spelled out in the other international instruments considered above. The Declaration provides a contemporary framework for Governments and agencies to ensure ‘the ongoing development of universally relevant standards’ in policy and law to address ‘constructive arrangements’ for the promotion and protection of fundamental human rights.<sup>60</sup>

## Conceptual framework

### Overarching objective

2.44 The Australian Government has identified a clear goal ‘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’.<sup>61</sup> The overarching objective of this Inquiry therefore reflects the Government’s objective—through proposals for reform of legal frameworks to protect the safety of those experiencing family/domestic 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. The overall touchstone throughout the chapters and proposals, however, is one of improving safety.

59 Australian Human Rights Commission, *Community Guide to the UN Declaration on the Rights of Indigenous Peoples* (2010), 43.

60 M Martinez, *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations Reported to the UN for the Working Group on Indigenous Peoples* (1997).

61 Department of Families, Housing, Community Services and Indigenous Affairs, *National Plan to Reduce Violence Against Women and Their Children—Including the First Three-year Action Plan* (2011), 2.

## **Inquiry themes**

2.45 The following section provides a brief snapshot of some of the key themes and policy tensions that have emerged so far, leaving a fuller consideration to the chapters on each particular legislative area including an analysis of the rationale or purposes of the relevant Commonwealth laws under review. The objectives of such laws are commonly signalled either expressly in objects clauses or, for example, in Explanatory Memorandums, which can provide the basis for the assessment of the application of the Inquiry themes in each case.

2.46 In *Family Violence—A National Legal Response*, four specific principles were singled out as those that should be expressed by relevant legal frameworks in that inquiry: seamlessness, accessibility, fairness and effectiveness. These have also been evident as distinct themes in this Inquiry, to which have been added the themes of: self-agency or autonomy, privacy and system integrity.

### ***Principles from Family Violence—A National Legal Response***

#### ***Seamlessness***

2.47 In *Family Violence—A National Legal Response*, ‘seamlessness’ was identified as a foundational policy principle driving the recommendations for reform contained in the Report.

*Seamlessness*—to ensure that the legal framework is as seamless as possible from the point of view of those who engage with it.<sup>62</sup>

2.48 Seamlessness was expressed as a goal of ensuring that, from the point of view of those engaging with the legal frameworks in which issues of family violence and child abuse arise, the key focus must be upon the experience of those participants—to see the system through their eyes. In the context of the Terms of Reference for that inquiry, which required the Commissions to look at a wide range of laws and their interactions across the Commonwealth and state and territory spheres, the idea of seamlessness was a particularly potent one.

2.49 In the context of the current Inquiry, seamlessness remains an important theme, particularly in relation to matters such as the consistency of definitions across the various Commonwealth laws under review. Consistency then informs training and awareness in service delivery areas; and facilitates better coordination of responses to family violence, through appropriate information sharing and the improvement of pathways between agencies.<sup>63</sup> For example, as remarked by the Commonwealth Ombudsman, in the context of child support:

Having a single consistently applied definition would potentially minimise the need for a person to retell their story and obtain different types of evidence for agencies they will commonly need to approach when experiencing or fleeing family violence,

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62 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [3.10]. See also [3.11]–[3.14].

63 For example: ADFVC, *Submission CFV 71*, 11 May 2011.

such as Centrelink and the [Child Support Agency]. Hopefully, it would lead to alignment of policies across relevant agencies, and reduce the likelihood of an anomalous situation where the same set of factual circumstances leads to recognition of violence by one agency, but not another.<sup>64</sup>

### ***Fairness***

2.50 In *Family Violence—A National Legal Response*, fairness was a key framing principle:

***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.<sup>65</sup>

2.51 *Time for Action* identified as one key ‘outcome’ area, that ‘responses are just’.<sup>66</sup> Fairness also reflects human rights principles—in particular, Australia’s obligations under international instruments considered above.

2.52 In this Inquiry, fairness can be expressed in a number of distinct aims, to ensure that:

- concerns about safety are properly heard, understood and responded to;
- issues of family violence or safety concerns do not give rise to inappropriate advantages or disadvantages in the context of the particular legislative regimes under consideration—what may be called ‘system perversities’;<sup>67</sup>
- safety concerns are not exacerbated by the applicable system requirements in relevant contexts;<sup>68</sup>
- procedural fairness is accorded where issues of allegations of family violence *by* someone are relevant, as distinct from an individual’s expression of fears for safety.<sup>69</sup>

2.53 Fairness is also considered in relation to one of the additional themes in this Inquiry—system integrity, considered below.

2.54 A further aspect of fairness may be expressed as a need to ensure that Australia’s resources are fairly distributed, including, for example, a fair distribution of social security benefits, and eligibility for citizenship via immigration. In the context of

<sup>64</sup> Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

<sup>65</sup> Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [3.10]. See also [3.16]–[3.17].

<sup>66</sup> National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), Outcome 4.

<sup>67</sup> For example: concern about the ‘financial incentive for perpetrators’ was expressed in National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011.

<sup>68</sup> For example, in the context of child support: ADFVC, *Submission CFV 53*, 27 April 2011; Sole Parents’ Union, *Submission CFV 52*, 27 April 2011.

<sup>69</sup> Concern about the role of allegations of family violence was noted, eg, in Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011; Non-Custodial Parents Party (Equal Parenting), *Submission CFV 50*, 25 April 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 43*, 21 April 2011.

employment, fairness also requires consideration of what are appropriately considered to be ‘workplace’ issues and the responsibility of employers, rather than private matters for employees. As remarked by the Australian Chamber of Commerce and Industry:

All too often policy makers do not sufficiently take into account these issues when they make wide sweeping recommendations which would either create new obligations, increase red-tape on a business and/or introduce new costs (most times, achieving a triple whammy). This is despite other arms of government extolling their policy objectives in reducing the administrative burden on business.<sup>70</sup>

### **Accessibility**

2.55 Given that the driving focus of this Inquiry is on improving safety responses for those experiencing family violence, a key aim is clearly to ensure that appropriate recognition is given of the experience and the connection of sufferers to appropriate services.

2.56 In *Family Violence—A National Legal Response*, accessibility was identified as one of the framing principles for reform: ‘to facilitate access to legal and other responses to family violence’.<sup>71</sup> Using ‘accessibility’ as a principle in this way built upon the report of the Access to Justice Taskforce of the Australian Government Attorney-General’s Department, which included accessibility as a key principle: ‘Justice initiatives should reduce the net complexity of the justice system’.<sup>72</sup>

2.57 Systems that are complicated, in which definitions are inconsistent, where concerns of form over substance impede a response to safety concerns, and where there are complex pathways to obtain answers, work against the principle of accessibility. This theme has been expressed strongly in this Inquiry—particularly in the context of immigration law.<sup>73</sup>

2.58 An aim of accessibility that complements the other principles is the avoidance of victims having to retell the circumstances of the violence, thereby ‘re-traumatising’ victims of family violence. This was a persistent theme in the earlier family violence inquiry and repeated in this Inquiry.<sup>74</sup> The consequential under-reporting of family violence and fears for safety for this and other reasons were also identified.<sup>75</sup>

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<sup>70</sup> ACCI, *Submission CFV 19*, 8 April 2011.

<sup>71</sup> Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [3.10], [3.15].

<sup>72</sup> Australian Government Attorney-General’s Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 8.

<sup>73</sup> For example: Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011. In the context of social security, see, eg, Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

<sup>74</sup> For example: Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

<sup>75</sup> For example: Law Institute of Victoria, *Submission CFV 74*, 17 May 2011; Sole Parents’ Union, *Submission CFV 63*, 27 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; Queensland Law Society, *Submission CFV 21*, 6 April 2011; National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011; Women’s Health Victoria, *Submission CFV 11*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

### **Effectiveness**

2.59 The principle of ‘effectiveness’—to facilitate effective interventions and support in circumstances of family violence—also builds on the work of the Access to Justice Taskforce, referred to in *Family Violence—A National Legal Response*.<sup>76</sup> Similarly, the *National Plan* stressed that ‘[a]ll systems need to work together to make a major difference to the prevalence and impact of violence against women’.<sup>77</sup> This theme is also reflected in the idea of ‘seamlessness’.

2.60 With respect to improving legal frameworks to protect safety, a key issue is to ensure that concerns about safety are properly heard, understood and responded to<sup>78</sup>—also an aspect of fairness.

2.61 A particular challenge in the context of family violence is the issue of disclosure of safety concerns, as the ability to provide effective responses may depend on if, how and when such disclosures are made. A continuing theme is that many people do not wish to disclose concerns about safety in the context of family violence. Difficulties in disclosing family violence were remarked upon in submissions to this Inquiry.<sup>79</sup> The limited extent to which information about safety concerns was sought, or information provided, in some situations, was also noted.<sup>80</sup>

### **Additional themes in this Inquiry**

#### **Self-agency or autonomy**

2.62 In the course of this Inquiry one theme that has emerged can be described as one of ‘self-agency’ or ‘autonomy’, concerning an individual’s right to make decisions about matters affecting him or her. Respect for autonomy is ‘the idea that every rational person should be able to decide matters for him or herself’.<sup>81</sup> An example in

76 Australian Government Attorney-General’s Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), referred to in Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [3.18].

77 Department of Families, Housing, Community Services and Indigenous Affairs, *National Plan to Reduce Violence Against Women and Their Children—Including the First Three-year Action Plan* (2011), 14 and 32 (Strategy 5.3).

78 This reflects a theme that recurred throughout the review conducted by Professor Richard Chisholm in relation to family violence in family courts: ‘that family violence must be disclosed, understood, and acted upon’. R Chisholm, *Family Courts Violence Review* (2009), 5. As Chisholm commented, each component of the family law system ‘needs to encourage and facilitate the disclosure of family violence, ensure that it is understood, and act effectively upon that understanding’: 5.

79 For example: Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011; Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; .

80 For example: WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

81 J Devereux and M Parker, ‘Competency Issues for Young Persons and Older Persons’ in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54, 54. The idea of autonomy is a predominant one in liberal political philosophy, developing from Enlightenment thinking and expressed, for example, in the writing of John Stuart Mill in his classical treatise ‘On Liberty’ (1859), especially ch 3: ‘Of individuality, as one of the elements of well-being’. For a discussion of the development of autonomy, see, eg, J Christman, ‘Autonomy in Moral and Political Philosophy’ in E Zalta (ed), *The Stanford Encyclopedia of Philosophy* (2011) .

the context of this Inquiry may be called the ‘right to choose’ to disclose safety concerns,<sup>82</sup> or not, and the consequences that might flow from such choice, within each particular legislative regime under consideration.

2.63 The role of agency is a significant theme in broader jurisprudential analysis and is often seen in debates in the health law context, particularly in relation to questions of competency and principles of informed consent.<sup>83</sup> As Professor Terry Carney has pointed out:

An influential school of jurisprudence conceives the legitimate role (and limits) of law to be that of protecting people against unwarranted interference with their freedom of choice/action and in providing the resources (or the ‘level playing field’) to enable people to enjoy and obtain personal fulfilment from the exercise of those rights.<sup>84</sup>

2.64 Autonomy can be juxtaposed to ‘paternalism’, which ‘provides a justification for interference with a person’s own conception of their interests in order to secure their welfare’.<sup>85</sup>

Autonomy is the aspect of persons that undue paternalism offends against. Paternalistic interventions can be both interpersonal (informal) and legal. Such interventions are identified not by the kind of acts they involve but by the justification given for them, so that paternalism involves interference with a person’s actions or knowledge against that person’s will for the purpose of advancing that person’s good. Respect for autonomy is meant to prohibit such interventions because they involve a judgment that the person is not able to decide for herself how best to pursue her own good. Autonomy is the ability to so decide, so paternalism involves a lack of respect for autonomy.<sup>86</sup>

2.65 There is a clear tension in some areas about wanting to ensure that safety concerns are identified through appropriate screening and to respond accordingly, and an individual’s wish for certain matters to remain ‘private’ and the consequences therefore to remain within their own control or self-agency.

2.66 One particular legislative area that illustrates a response that is driven by policy concerns as to the safety of children, but operates with a constrained place for an idea of individual agency, is that of the compulsory income management regime discussed in Chapter 13, overriding autonomy by a concern to protect vulnerable people. Such areas reveal a tension between ideas of individual freedom, and self-agency, and what may be described as protective paternalism. For example, the Australian Domestic and Family Violence Clearinghouse considers compulsory income management:

to be a disempowering approach to people who have already been significantly disempowered by the abuse (e.g. having no involvement with household finances, having to give over their money to abusive partners, experiencing emotional and

82 For example: ADFVC, *Submission CFV 26*, 11 April 2011.

83 See, eg, J Devereux and M Parker, ‘Competency Issues for Young Persons and Older Persons’ in I Freckelton and K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 54.

84 T Carney, ‘The Limits and the Social Legacy of Guardianship in Australia’ (1989) 18 *Federal Law Review* 231, 237.

85 Ibid, 238.

86 J Christman, ‘Autonomy in Moral and Political Philosophy’ in E Zalta (ed), *The Stanford Encyclopedia of Philosophy* (2011) , [2.2].

psychological abuse). It is effectively blaming victims of violence for their financial situation rather than acknowledging that their hardship is more likely to be a product of the abuse.<sup>87</sup>

2.67 Another area where the issue of agency is of particular concern is in relation to child support and family assistance, considered particularly in Part C, where law reform proposals are discussed that contribute to self-agency, by empowering and enabling victims of family violence to make informed choices about participation in the child support scheme, and to contribute to decisions that affect their safety.

### **Privacy**

2.68 A related theme to autonomy is privacy, that sensitive information concerning fears for safety is obtained and handled in an appropriate way. For example, the Office of the Privacy Commissioner recognised

the sensitivity of personal information related to family violence matters and the potential for an individual to be stigmatised, embarrassed or discriminated against as a result of the disclosure or inappropriate sharing of this information. The challenge is to ensure that initiatives contain appropriate privacy safeguards regarding the handling of an individual's personal information, while providing strong protection against harm from family violence.<sup>88</sup>

2.69 The theme of privacy is particularly relevant in terms of the linking of service responses—an aspect of accessibility. What information is obtained and how it is used is also relevant in terms of concerns about allegations of violence—an aspect of fairness. The extent to which privacy is accorded when a person chooses to disclose safety concerns may affect the decision to disclose.<sup>89</sup>

### **System integrity**

2.70 A number of the legislative regimes under consideration provide pathways to particular results of a broadly 'beneficial' kind. For example, to immigration, to social security payments and entitlements, to the receipt of child support, to family assistance and to fair workplace conditions. Issues of family violence may be a relevant factor that leads to a modification of the particular pathway or to a different mode of calculation of benefit. A main issue in such contexts is the kind and standard of proof required where an issue of family violence is raised.

2.71 The ALRC has identified a policy tension between ensuring that appropriate acknowledgment is given to the safety concerns of a person who is experiencing family violence and what may be broadly described as 'system integrity' issues, where appropriate checks and balances are included so as not to 'incentivise' the raising of family violence simply to achieve a benefit of some kind—or 'playing the family

87 ADFVC, *Submission CFV 71*, 11 May 2011. See also, eg, Erskine Rodan and Associates, *Submission CFV 80*, 17 June 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011.

88 Office of the Australian Information Commissioner, *Submission CFV 68*, 6 May 2011; Office of the Australian Information Commissioner, *Submission CFV 61*, 4 May 2011; Office of the Australian Information Commissioner, *Submission CFV 30*, 12 April 2011.

89 For example: Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011



violence card' as it has been crudely described. Another kind of system integrity issue is to ensure that a person who causes another to fear for their safety in a family context is not advantaged in some way by that action.

### 3. Common Interpretative Framework

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#### Summary

3.1 The Terms of Reference require the Australian Law Reform Commission (ALRC) to consider what, if any, improvements can be made to relevant legal frameworks to protect the safety of those experiencing family violence. The definitions, and understanding, of family violence are key starting points in this respect.

3.2 This chapter focuses on the definition of family violence in the legislative areas identified in the Terms of Reference: employment, superannuation, migration, child support, family assistance and social security. As a key aspect of establishing a common interpretative framework the ALRC proposes including in those laws the same core definition of family violence that describes the context in which behaviour takes place, as well as a shared common understanding of the types of conduct—both physical and non-physical—that may fall within the definition of family violence. The ALRC considers that systemic benefits would flow from the adoption of a common interpretative framework across different legislative schemes, promoting seamlessness

and effectiveness in proceedings involving family violence for both victims and decision makers.

## Common interpretative framework

### Concepts of family violence

3.3 There is no single nationally or internationally agreed definition of family violence. As noted in Chapter 2, the United Nations *Declaration on the Elimination of Violence against Women* defines violence against women as

any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.<sup>1</sup>

3.4 As the Australian Bureau of Statistics has noted, definitions of what constitutes family violence are inherently likely to differ across the legal sector, researchers and service providers. These definitions do not always necessarily align with community understandings, or victim and offender perspectives, of what constitutes family violence.<sup>2</sup>

3.5 In *Family Violence—A National Legal Response*, ALRC 114 (2010), the ALRC and New South Wales Law Reform Commission (the Commissions) undertook a detailed review of the various definitions of family violence—or ‘domestic violence’ or ‘domestic abuse’ as it is referred to in some jurisdictions—as a first step in the consideration of the interaction issues across and within jurisdictions that was required by the Terms of Reference for that inquiry. The Commissions identified the wide variations in definitions of family violence in Australia in: family violence legislation, the *Family Law Act 1975* (Cth), the criminal law, and other types of legislation such as victims’ compensation legislation and migration regulations.<sup>3</sup>

3.6 A key plank of the recommendations in *Family Violence—A National Legal Response* was the adoption of a common interpretative framework across the legislation under review. The recommendations included establishing a shared understanding of what constitutes family violence across these legislative schemes—and of the nature, features and dynamics of family violence. In relation to state and territory family violence legislation, the recommendations also involved the adoption of core guiding principles based on a human rights framework, the adoption of core purposes, and striving for equality of treatment of family violence victims by establishing common grounds for obtaining protection orders and a core set of persons to be protected.

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1 *Declaration on the Elimination of Violence against Women* 20 December 1993, UN GAOR, A/RES/48/104 (entered into force on 23 February 1994), art 1.

2 Australian Bureau of Statistics, *Conceptual Framework for Family and Domestic Violence* (2009).

3 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), Chs 5 and 6.

### Towards a common definition

3.7 In developing a definition of family violence in *Family Violence—A National Legal Response*, the Commissions noted that, whatever form family violence takes, a central feature is that it involves a person exercising control and power over the victim by inducing fear, for example by using threatening behaviour.<sup>4</sup> Definitions of family violence usually recognise that violence can constitute more than single ‘incidents’. It can involve ‘a continuum of controlling behaviour and violence, which can occur over a number of years’.<sup>5</sup>

3.8 The Commissions considered that the critical assessment of definitional issues was relevant to the important question of when it is appropriate for the law to intervene to provide protection or other forms of redress to victims. On the one hand, excessively narrow definitions of family violence might cause gaps in protection to victims. On the other, excessively broad definitions may detract from the significance of family violence or devalue the experience of its victims or facilitate the abuse of the protection order system.<sup>6</sup>

3.9 The common interpretative framework recommended in *Family Violence—A National Legal Response* is based on the same core definition of family violence, describing the context in which behaviour takes place, as well as a shared common understanding of the types of conduct that may fall within the definition of family violence in the following legislation:

- state and territory family violence legislation;
- the *Family Law Act*; and
- the criminal law—in the limited circumstances where ‘family violence’ is defined in the context of defences to homicide.

3.10 The Commissions recommended that each legislative regime should provide that family violence is violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful. Such behaviour may include but is not limited to:

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

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4 See, eg, National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 13–14. See discussion in Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), Ch 5.

5 Access Economics, *The Cost of Domestic Violence to the Australian Economy, Part I* (2004), 3.

6 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [5.11].

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

3.11 The Commissions considered that adopting consistent definitions of family violence across different legislative schemes allows the courts to send clear messages about what constitutes family violence.

### **Nature, features and dynamics of family violence**

3.12 The Commissions also recommended that the common definition be complemented in family violence legislation by a provision that explains the nature, features and dynamics of family violence, including: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children. In addition, the Commissions recommended that family violence legislation should refer to the particular impact of family violence on: Indigenous peoples; those from a culturally and linguistically diverse (CALD) background; those from the gay, lesbian, bisexual, trans and intersex communities; older persons; and people with disability. The Commissions recommended the adoption of a similar provision in the *Family Law Act*.<sup>7</sup>

3.13 The Commissions did not recommend that all types of conduct that constitute family violence should be criminalised, nor that family violence should be given the same treatment in the various legal frameworks considered in the report. In each case, the severity and context of particular family violence may carry varying weight in different legal proceedings, depending on the reasons for advancing evidence of family violence and the purposes of the respective legal frameworks, which were also considered.<sup>8</sup> The Commissions further considered that the adoption of a shared understanding of what constitutes family violence would not compromise the objects and purposes of the legislative schemes reviewed. What was considered crucial, however, is that common definitions of family violence reflect a consistent and shared understanding of the concepts that underlie the legislative schemes, reinforced by appropriate and regular training.

3.14 The Commissions considered that significant systemic benefits would flow from the adoption of a common interpretative framework, across different legislative schemes, promoting the foundational policy principles of seamlessness and

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7 Ibid, Ch 7.

8 Ibid, Ch 4.

effectiveness underlying the approach to reform advocated in the report. The Commissions considered that embracing a common understanding of family violence is also likely to have a positive flow-on effect in the gathering of evidence of family violence for use in more than one set of proceedings. Another significant benefit of adopting a commonly shared understanding of family violence is that it will facilitate the registration and enforcement of family violence protection orders under the proposed national registration of protection orders scheme, also considered in the report,<sup>9</sup> and provide more useful and comparable data upon which policies to address family violence can be based.

## Social Security

### Current definitions

3.15 The *Social Security Act 1991* (Cth) refers to ‘domestic violence’ or ‘domestic or family violence’ in a range of contexts. Neither the *Social Security Act* nor the *Social Security (Administration) Act 1999* (Cth) contains a definition of domestic or family violence. The *Guide to Social Security Law* refers to a definition that has now been repealed—s 60D(1) of the *Family Law Reform Act 1995* (Cth)—in stating that:

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

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

Domestic violence can include violence to someone who is not a family member, for example co-tenants and people in shared housing situations.<sup>10</sup>

3.16 The *Guide to Social Security Law* provides, further, in relation to Crisis Payment, that ‘domestic and family violence’ includes: child abuse; maltreatment; exploitation; verbal abuse; partner abuse; elder abuse; neglect; sexual assault; emotional abuse; economic abuse; assault; financial coercion; domestic violence; psychological abuse, or social abuse.<sup>11</sup>

3.17 While the current definition contained in the *Guide to Social Security Law* is already broad, it may be beneficial to have a definition that is consistent with the definition of family violence in other Commonwealth laws. This would ensure that victims of family violence have some degree of clarity and certainty that the violence

9 Ibid, Ch 30.

10 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.1.D.235] (Domestic and/or Family Violence (CrP)).

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

that they are experiencing will be recognised and treated similarly across all Commonwealth laws—a common interpretive framework as suggested in *Family Violence—A National Legal Response*.

3.18 The Commissions also noted that provisions which affect the lives and safety of particularly vulnerable groups in society may be more appropriately placed in primary legislation.<sup>12</sup> Placing the definition of family violence in the *Social Security Act* may afford a measure of stability and visibility to the definition.

3.19 ‘Family member’ is defined in s 23(14) of the *Social Security Act* to include, in relation to a person (the *relevant person*):

- (a) the partner or a parent of the relevant person;
- (b) a sister, brother or child of the relevant person; or
- (c) any other person who, in the opinion of the Secretary, should be treated for the purposes of this definition as one of the relevant person’s relations described in paragraph (a) or (b).

3.20 The *Guide to Social Security Law* states that ‘the discretion in s 23(14)(c) should be used only in respect of a family relationship that is similar to that of a partner, mother, father, brother, sister or child of the relevant person and is also such that it should be treated as such a relationship’.

3.21 Currently, references to ‘domestic and/or family violence’ in the *Social Security Act* are referred to without reference to who is using the family violence<sup>13</sup> except in reference to Crisis Payment. However, ‘family member’ is also used in the proposed definition of family violence and therefore it is important to understand how the proposed definition of family violence will be interpreted in the social security context. In particular, for Indigenous communities, where the meaning of ‘family member’ has a immutable connection to custom and practice through Aboriginal law, or revitalised customs and practice through a reconnection to ‘country’ and family membership.

### Using the common definition

3.22 In *Family Violence and Commonwealth Laws—Social Security Law* (ALRC Issues Paper 39, 2011), the ALRC asked whether the *Social Security Act* and/or the *Social Security (Administration) Act* should be amended to insert a definition of ‘family violence’ consistent with that recommended by the ALRC/NSWLRC in *Family Violence—A National Legal Response* (ALRC Report 114).<sup>14</sup>

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12 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), Ch 6.

13 See, for example, *Social Security Act* ss 602B, 1061JHA.

14 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 1.

**Submissions and consultations**

3.23 There was strong support amongst stakeholders for consistency of definitions across Commonwealth laws, including in the area of social security.<sup>15</sup> The importance of consistency across the ‘family law system’ and the adoption of a national ‘best practice’ definition, including within all states and territories, were identified as key goals.<sup>16</sup> Consistent definitions were seen as providing the foundation for consistent decision making.<sup>17</sup> For example, the National Council for Single Mothers and Their Children said that ‘legislation is a foundation from which policy, practices, processes and culture are formed and implemented’.<sup>18</sup> Similarly, the Commonwealth Ombudsman supported the definition ‘being consistently applied across the policies and procedures of Commonwealth agencies, wherever possible’:

Having a single consistently applied definition would potentially minimise the need for a person to retell their story and obtain different types of evidence for agencies they will commonly need to approach when experiencing or fleeing family violence, such as Centrelink and the CSA. The definition recommended by the ALRC and NSW Law Reform Commission would seem to encompass the full range of behaviours that amount to ‘violence’ within the term ‘family violence’.

3.24 The Homeless Persons’ Legal Service drew attention to the ‘strong nexus’ between experiences of family violence and homelessness, and the need, therefore, for people at risk of homelessness to be able to access income support, social security and child support. In this context the service stressed the importance for homeless people to have certainty that their experiences of family violence are treated in the same way under different Commonwealth legislative frameworks.<sup>19</sup>

3.25 The Commonwealth Ombudsman queried whether there also needed to be an amendment to the definition of ‘family member’ to acknowledge ‘that “family violence” may involve violence affecting parents and children, and other members of their former and current family units that are living separately and, indeed, may have never lived together’.<sup>20</sup>

15 North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011; ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; National Children’s and Youth Law Centre, *Submission CFV 64*, 3 May 2011; Sole Parents’ Union, *Submission CFV 63*, 27 April 2011; Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011; Multicultural Disability Advocacy Association, *Submission CFV 60*, 28 April 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; M Winter, *Submission CFV 51*, 27 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011; P Eastal and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

16 Sole Parents’ Union, *Submission CFV 63*, 27 April 2011 and Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011, respectively.

17 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

18 National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011.

19 Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

20 Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.



3.26 The Sole Parents' Union recommended that the definition of family violence be amended to reflect behaviour by the person using family violence that causes a child to be exposed to the behaviour or exposed to the effects of the behaviour in (a)–(h) above.<sup>21</sup>

### ***ALRC's views***

3.27 As with the other areas under consideration in this chapter, the ALRC confirms its views expressed in *Family Violence—A National Legal Response* that systemic benefits would flow from the adoption of a common interpretative framework, across different legislative schemes, promoting seamlessness and effectiveness in proceedings involving family violence for both victims and decision makers.

3.28 Consistency of definitions across the areas under consideration in this Inquiry promotes the seamlessness identified as a key framing principle. Such consistency can then underpin training and awareness in service delivery areas, and also facilitate better coordination of responses to family violence, through appropriate information sharing and the improvement of pathways between agencies. The ALRC does not propose to extend or alter the definition of family violence as proposed in the *Family Violence—A National Legal Response* and considers that the particular nature, features and dynamics of family violence can be expanded upon in the *Guide to Social Security Law*.<sup>22</sup>

3.29 As discussed in Chapter 13, the indicators of vulnerability for compulsory income management are financial hardship; financial exploitation; failure to undertake reasonable self-care; or homelessness or risk of homelessness.<sup>23</sup> In that chapter, the ALRC notes concerns with introducing family violence as an indicator of vulnerability; and for any unintended use and application in broadening the definition of family violence that may affect vulnerable groups as a trigger for income management. However, the ALRC also recognises that the current indicators of vulnerability encapsulate the experiences of many people who are experiencing family violence. For example, the *Guide to Social Security Law* states that 'financial exploitation' may occur when 'a person is subject to undue pressure, harassment, violence, abuse, deception or exploitation for resources by another person or people, including other family and community members'.<sup>24</sup>

3.30 With respect to social security the ALRC considers that the *Social Security Act* should be amended to include the common definition. As the primary legislation, the *Social Security Act* contains the definition section. The ALRC considers therefore that references to family violence in the *Social Security (Administration) Act* should cross reference to this definition.

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21 Sole Parents' Union, *Submission CFV 63*, 27 April 2011.

22 See Proposal 5–1.

23 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [11.4.2.20] (Indicators of Vulnerability).

24 *Ibid.*, [11.4.2.20] (Indicators of Vulnerability). The *Guide* also recognises that family violence may lead to homelessness, in circumstances where the victim is forced to leave his or her home.

**Proposal 3–1** The *Social Security Act 1991* (Cth) should be amended to provide that family violence is violent or threatening behaviour, or any other form of behaviour, that coerces and controls a family member, or causes that family member to be fearful. Such behaviour may include, but is not limited to:

- (a) physical violence;
- (b) sexual assault and other sexually abusive behaviour;
- (c) economic abuse;
- (d) emotional or psychological abuse;
- (e) stalking;
- (f) kidnapping or deprivation of liberty;
- (g) damage to property, irrespective of whether the victim owns the property;
- (h) causing injury or death to an animal irrespective of whether the victim owns the animal; and
- (i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.

## Child support

### Current definitions

3.31 Family violence is not defined in either the *Child Support (Assessment) Act 1989* (Cth), or the *Child Support (Registration and Collection) Act 1988* (Cth). The *Child Support Guide* contains a broad definition of family violence:

Family violence covers a broad range of controlling behaviours. They are commonly of a physical, sexual, and/or psychological nature, and typically involve fear, harm, intimidation and emotional deprivation. It occurs within a variety of close interpersonal relationships, such as between spouses, partners, parents and children, siblings, and in other relationships where significant others are not part of the physical household but are part of the family and/or are fulfilling the function of family.<sup>25</sup>

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

- physical abuse;
- sexual abuse;
- emotional abuse;

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<sup>25</sup> Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [6.10.1].

- verbal abuse;
- social abuse;
- economic abuse; and
- spiritual abuse.<sup>26</sup>

3.33 As noted in *Family Violence—A National Legal Response*, provisions that affect the lives and safety of particularly vulnerable groups of society may be more appropriately placed in primary legislation.<sup>27</sup> Therefore, it may be desirable for the definition of family violence to be provided in the *Child Support (Assessment) Act* and the *Child Support (Registration and Collection) Act*, rather than solely in the *Child Support Guide*. Placing the definition of family violence in child support legislation may give the definition increased stability, visibility and authority.

3.34 It may also be desirable to include the common definition in other relevant Commonwealth laws that are within the reference—including family assistance legislation and social security legislation, discussed below. As noted above, consistent legislative definitions of family violence may foster a shared understanding across jurisdictions, courts and tribunals, and across agencies such as the Child Support Agency and Centrelink. Further, consistent definitions provide victims with clarity and the certainty that family violence will be recognised and treated similarly across Commonwealth laws.

### Using the common definition

3.35 In *Family Violence and Commonwealth Laws—Child Support and Family Assistance*, ALRC Issues Paper 38, 2011, the ALRC asked whether the *Child Support (Assessment) Act 1989* (Cth) and the *Child Support (Registration and Collection) Act 1988* (Cth) should be amended to insert a definition of family violence consistent with that recommended by the Australian Law Reform Commission and NSW Law Reform Commission in *Family Violence—A National Legal Response*.<sup>28</sup>

### Submissions and consultations

3.36 Stakeholders who responded to this question were overwhelmingly in favour of a consistent definition across the laws under consideration.<sup>29</sup> National Legal Aid, for example, commented that:

<sup>26</sup> Ibid, [6.10.1].

<sup>27</sup> Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), Ch 6.

<sup>28</sup> Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 1.

<sup>29</sup> National Legal Aid, *Submission CFV 81*, 24 June 2011; Law Council of Australia Family Law Section, *Submission CFV 67*, 5 May 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 59*, 27 April 2011; Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011; ADFVC, *Submission CFV 53*, 27 April 2011; Sole Parents' Union, *Submission CFV 52*, 27 April 2011; Confidential, *Confidential CFV 49*, 21 April 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011; Bundaberg Family Relationship Centre, *Submission CFV 04*, 16 March 2011.

The proposed definition reflects the broad range of behaviours that family violence encompasses. Definition/s of family violence should be consistent across jurisdictions. This will help to ensure as far as possible that people receive consistent responses and outcomes in relation to their interactions with the systems involved in family violence issues. Consistency in legislative definitions would also facilitate consistency in education/training methods in relation to family violence.<sup>30</sup>

3.37 Including the proposed definition in the relevant legislation would ‘elevate and emphasise the importance of family violence considerations and resultant risk factors in child support matters’.<sup>31</sup> The clear articulation of the definition in legislation would ‘provide clarity and transparency’ and create the ‘foundation from which policy, practices, processes and culture are formed and implemented’.<sup>32</sup> A joint submission by Domestic Violence Victoria and others argued that:

building common understandings about the nature and dynamics of family violence across all organisations dealing with child support and family assistance issues is an essential first step. The development of consistent definitions, policies, screening tools, risk management guidelines and practice directions will enhance the safety of women and children experiencing family violence.<sup>33</sup>

3.38 A consistent definition in the *Child Support (Assessment) Act* and the *Child Support (Registration and Collection) Act* and the *Child Support Guide* would assist those experiencing family violence when engaging with different government agencies, particularly if it is available, as advocated by the National Council of Single Mothers and their Children, ‘on all modes of communication including the Child Support Agency website and that it is then consistently used for all government agencies’.<sup>34</sup> The Acting Commonwealth Ombudsman also submitted that:

Having a single consistently applied definition would potentially minimise the need for a person to retell their story and obtain different types of evidence for agencies they will commonly need to approach when experiencing or fleeing family violence, such as Centrelink and the CSA. Hopefully, it would lead to alignment of policies across relevant agencies, and reduce the likelihood of an anomalous situation where the same set of factual circumstances leads to recognition of violence by one agency, but not another.<sup>35</sup>

3.39 The role of the definition with respect to drawing attention to the impact of family violence on children was also highlighted.<sup>36</sup> Generating a more consistent and thorough understanding of the impact of family violence and fears for safety would improve the response of staff making decisions affecting victims. For example, the Council of Single Mothers and their Children (CSMC) said that women contacting the

30 National Legal Aid, *Submission CFV 81*, 24 June 2011.

31 Ibid.

32 Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011. See, similarly, ADFVC, *Submission CFV 53*, 27 April 2011.

33 Joint submission from Domestic Violence Victoria and others, *Submission CFV 59*, 27 April 2011.

34 National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011.

35 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

36 ADFVC, *Submission CFV 53*, 27 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

Council regularly describe a ‘lack of understanding of the impact on children of being exposed to family violence’:

All too often however CSMC has heard from women that the officers whose role is to assess exemptions etc from particular requirements are unaware of these provisions, or lacking a sympathetic response to disclosures of family violence. This compounds the situation where women decide not to pursue child support entitlements due to fear that this will further jeopardise their safety and that of their children.

It is imperative that information and definitions of family violence are clearly articulated in legislation and guides that decision makers refer to.<sup>37</sup>

3.40 One stakeholder, however, was strongly against the inclusion of the definition in the child support context. The Non-Custodial Parents Party (Equal Parenting) did not support what it said was an ‘unreasonable broadening of the definition of family violence’, arguing that ‘unfounded allegations of family violence’ should not be ‘an acceptance criterion to establish a relationship between child support and family violence’.<sup>38</sup>

3.41 While the ALRC asked about amending the *Child Support (Assessment) Act* and the *Child Support (Registration and Collection) Act* by the insertion of a definition consistent with that recommended in *Family Violence—A National Legal Response*, some stakeholders suggested a different location for the definition or changes to the proposed definition. The Law Council of Australia agreed that there should be a single definition, but submitted that it should be located in the *Family Law Act 1975* (Cth), with ‘all other Commonwealth Acts pointing to that definition as necessary’:

This would mean that if a change to the definition is ever required, there is only one Act which needs to be amended. Similarly, having one definition ensures that different definitions of the same concept are not inadvertently created if one Act is changed and the other is overlooked.<sup>39</sup>

3.42 With respect to the definition itself, National Legal Aid, for example, submitted that a small amendment should be added, namely:

the inclusion of a further subparagraph (j) **threats** to carry out the behaviours referred to in (a) – (h) above or to commit suicide or self harm. The wording of the proposed section does not include threats to an animal, but rather requires that the animal have been injured or killed for the definition of family violence to be met. In our family violence casework and advice experience ‘threats to harm’ to pets are common and have been effectively used to exercise control over victims.<sup>40</sup>

3.43 The Commonwealth Ombudsman also commented with respect to the definition of family in the child support context:

any definition of family violence in the child support, family assistance and social security legislation would need to be broad enough to include violence involving persons connected by a variety of current and former ‘family’ relationships. To this

37 Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

38 Non-Custodial Parents Party (Equal Parenting), *Submission CFV 50*, 25 April 2011.

39 Law Council of Australia Family Law Section, *Submission CFV 67*, 5 May 2011.

40 National Legal Aid, *Submission CFV 81*, 24 June 2011.

end, we consider that the definition should acknowledge that ‘family violence’ may involve violence affecting parents and children, and other members of their former and current family units that are living separately and, indeed, may have never lived together. It may be necessary to separately define the term ‘family’, within the policy setting and context of the specific legislation.<sup>41</sup>

### ***ALRC’s views***

3.44 The ALRC confirms its views expressed in *Family Violence—A National Legal Response*, that systemic benefits would flow from the adoption of a common interpretative framework, across different legislative schemes, promoting seamlessness and effectiveness in proceedings involving family violence for both victims and decision makers.

3.45 Consistency of definitions across the areas under consideration in this Inquiry promotes the seamlessness identified as a key framing principle. Such consistency can then underpin training and awareness in service delivery areas; and facilitate better coordination of responses to family violence, through appropriate information sharing and the improvement of pathways between agencies.

3.46 In the context of child support, the ALRC considers that the proposed common definition should be included in both the *Child Support (Assessment) Act 1989* (Cth) and the *Child Support (Registration and Collection) Act 1988* (Cth). Similarly, the *Child Support Guide* should also include the common definition. This is considered in Chapter 9.

3.47 While the ALRC considers that the suggestion by the Law Council for the definition to be included in the *Family Law Act* and that this be used as the reference point for other legislation has practical appeal in terms of ensuring that only one piece of legislation requires amendment, there is an educative function in having the definition in the relevant primary legislation for each area that may then inform policy documents, such as the guides, that are the principal tool for officers who have the task of implementing or working with the legislation, and associated training especially in service delivery areas.

3.48 In the context of the interactions under consideration in *Family Violence—A National Legal Response*, where over 26 legislative regimes were considered across civil and criminal law areas, this argument was perhaps stronger than in the Commonwealth arena. The ALRC also considers that achieving consistency is the principal aim, and that this can be achieved either by the approach of specific amendment to the relevant primary legislation or by amendment to one, with cross-references in the other. The *Family Law Act* is the central piece of legislation in the ‘family law system’ and child support may be considered to be part of that system. In this particular context, therefore—although not necessarily with respect to the other areas under consideration in this Inquiry—it is clearly one possible direction for reform. There are practical issues that remain, however, where cross-referencing itself

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41 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

becomes out of date, and explanations in policy material are no longer relevant.<sup>42</sup> There is also the distinct educative role and value of placing the definition in the relevant primary legislation. This is the approach the ALRC favours in the proposals being advanced in this Discussion Paper.

3.49 In relation to the form of the definition, the ALRC considers it unnecessary to include a further category to the definition of family violence regarding threats to carry out the conduct listed as illustrations of family violence. Such threats are provided for in the category of emotional abuse contained in the proposed definition.

3.50 The ALRC also considers it unnecessary for the terms ‘family’ or ‘family relationships’ to be defined in the child support legislation. Defining relationships in which family violence can occur is an important component of state and territory family violence legislation. The defined relationships provide for, and restrict, eligibility for family violence protection orders. Only persons in certain categories of relationships may obtain such orders.

3.51 By contrast, and as discussed in Chapter 9, family violence in the child support framework does not, in and of itself, prompt an outcome which determines rights between parties. There is therefore not the same imperative to define the context in which family violence may occur. Indeed, defining family or family relationships may unnecessarily limit the application of a case-management response to family violence that promotes customer safety.

**Proposal 3–2** The *Child Support (Assessment) Act 1989* (Cth) and the *Child Support (Registration and Collection) Act 1988* (Cth) should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

## Family assistance

### Current definitions

3.52 The current framework for family assistance is contained in two statutes: *A New Tax System (Family Assistance) Act 1999* (Cth) and *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth)—referred to as the *Family Assistance Act* and the *Family Assistance (Administration) Act* respectively. Neither of these Acts, nor the *Family Assistance Guide* provides a definition of ‘family violence’.<sup>43</sup>

3.53 As noted in the context of the discussion on child support, it may be desirable for definitions of family violence to be included in primary legislation. In *Family Violence—A National Legal Response*, the Commissions recommended a consistent

<sup>42</sup> For example, the *Guide to Social Security Law*, noted below, refers to a definition that has now been repealed—s 60D(1) of the *Family Law Reform Act 1995* (Cth).

<sup>43</sup> The *Guide to Social Security Law*, which is also hosted on the FAHCSIA website, does contain a definition of family violence. Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.1.D.235].

definition of family violence in state and territory family violence and criminal legislation, and the *Family Law Act*. As discussed above, including this definition in relevant Commonwealth laws, such as family assistance legislation, may increase clarity and certainty for victims of family violence, by ensuring that the violence they have experienced will be recognised and treated similarly across all Commonwealth laws.

### Using the common definition

3.54 In *Family Violence and Commonwealth Laws—Child Support and Family Assistance*, ALRC Issues Paper 38, the ALRC asked whether family assistance legislation should be amended to insert a definition of family violence consistent with that recommended by the Australian Law Reform Commission and NSW Law Reform Commission in *Family Violence—A National Legal Response*.<sup>44</sup>

### Submissions and consultations

3.55 The response of stakeholders was very similar to that in response to the question in relation to child support, summarised above. The response of the Non-Custodial Parents Party, for example, was identical, and strongly against the proposal.<sup>45</sup> All other stakeholders who responded to this question, however, were strongly in support.<sup>46</sup>

3.56 For example, the Welfare Rights Centre (NSW) commented that:

It is crucial that family violence be given the broadest possible definition and that that definition is used consistently across all government departments and agencies. This is particularly the case given the higher levels of vulnerability (economic and otherwise) of parents receiving family assistance and social security payments.<sup>47</sup>

3.57 The ADFVC advocated that:

insertion of the definition into the legislation will give the issue prominence and clarify the scope of the issue for those interpreting the legislation. It will also offer consistency in definitions across legislation and policies.<sup>48</sup>

### ALRC's views

3.58 The ALRC confirms its views expressed in *Family Violence—A National Legal Response* that systemic benefits would flow from the adoption of a common

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44 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 30.

45 Non-Custodial Parents Party (Equal Parenting), *Submission CFV 50*, 25 April 2011.

46 National Legal Aid, *Submission CFV 81*, 24 June 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Law Council of Australia Family Law Section, *Submission CFV 67*, 5 May 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 59*, 27 April 2011; Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011; ADFVC, *Submission CFV 53*, 27 April 2011; Sole Parents' Union, *Submission CFV 52*, 27 April 2011; Confidential, *Confidential CFV 49*, 21 April 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 43*, 21 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011; Bundaberg Family Relationship Centre, *Submission CFV 04*, 16 March 2011.

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

48 ADFVC, *Submission CFV 53*, 27 April 2011.



interpretative framework, across different legislative schemes, promoting seamlessness and effectiveness in proceedings involving family violence for both victims and decision makers.

3.59 Consistency of definitions across the areas under consideration in this Inquiry promotes the seamlessness identified as a key framing principle. Such consistency can then underpin training and awareness in service delivery areas; and facilitate better coordination of responses to family violence, through appropriate information sharing and the improvement of pathways between agencies.

3.60 The ALRC notes again the comments of the Law Council, expressed in relation both to child support and family assistance, with respect to placing the definition in the *Family Law Act* but, as noted above, considers that the primary legislation in each area should be amended.

**Proposal 3–3** *A New Tax System (Family Assistance) Act 1999* (Cth) should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

**Proposal 3–4** *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

## Employment and Superannuation

### Current definitions

3.61 With respect to employment law, neither the *Fair Work Act 2009* (Cth) nor the *Fair Work Regulations 2009* (Cth) have specific provisions dealing with family violence or the manifestation of family violence in the workplace.

3.62 Similarly, in the other areas of law considered by the ALRC in the Issues Paper, *Family Violence—Employment and Superannuation Law*, ALRC IP 36 (2010) (Employment and Superannuation Law Issues Paper), there is no definition. This includes the following areas.

3.63 In the pre-employment context, the term domestic violence is included in publications such as the Job Seeker Classification Instrument Guidelines, other material utilised by Job Services Australia, Disability Employment Services and Indigenous Employment Program providers as well as in relation to Job Capacity Assessments and Employment Services Assessments. However, there does not appear to be any relevant definition of domestic violence.

3.64 With respect to occupational health and safety:

- *Occupational Health and Safety Act 1991* (Cth) (OHS Act);
- *Safe Work Australia Act 2008* (Cth) (SWA Act);

- *Occupational Health and Safety (Safety Arrangements) Regulations 1991* (Cth) (OHS Regulations 1991);
- *Occupational Health and Safety (Safety Standards) Regulations 1994* (Cth) (OHS Regulations 1994);
- *Occupational Health and Safety Code of Practice 2008* (Cth) (OHS Code); and
- Codes of Practice developed by Safe Work Australia.

3.65 With respect to superannuation:

- *Superannuation Act 1976* (Cth)—specifically, the provisions with respect to early access to superannuation;
- *Superannuation (Resolution of Complaints) Act 1993* (Cth)—which establishes the Superannuation Complaints Tribunal;
- *Superannuation Industry (Supervision) Act 1993* (Cth)—which makes provision for the prudent management of certain superannuation funds and supervision by Australian Prudential Regulatory Authority (APRA), the Australian Securities & Investments Commission (ASIC) and the Commissioner of Taxation; and
- *Superannuation Industry (Supervision) Regulations 1994* (Cth)—which articulate the grounds for early access to superannuation.

3.66 In the superannuation context, there is also no relevant definition of family violence.

### Using the common definition

3.67 In the Employment and Superannuation Law Issues Paper, the ALRC did not ask a specific question with respect to the definition of family violence across the various legislative areas under consideration. Nonetheless it is consistent with the approach in *Family Violence—A National Legal Response*, and the other Issues Papers in this Inquiry to consider its inclusion with respect to the areas covered within the areas of employment and superannuation law. It was also the subject of comment by many stakeholders in this Inquiry.

### Submissions and consultations

3.68 For example, in a joint submission, Domestic Violence Victoria and others submitted that:

The definition of family violence would need to be consistent with definitions adopted by other jurisdictions (we refer to recommendations 5–1 and 5–3 of the ALRCs *Family Violence: A National Legal Response Final Report* (2010)).<sup>49</sup>

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49 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

3.69 Two stakeholders commented about including a definition of family violence for the purposes of accessing flexible working arrangements under s 65 of the *Fair Work Act*. The Australian Domestic and Family Violence Clearinghouse suggested that:

‘domestic or family violence’ includes physical, sexual, mental, verbal or emotional abuse by a member of the employee’s immediate family or a member of the employee’s household.<sup>50</sup>

3.70 Women’s Health Victoria added that, if family violence is included under s 65 of the *Fair Work Act*, they would recommend, ‘accompanying materials be produced for both employers and employees explaining the reason for its inclusion, legal definitions of what constitutes family violence’.<sup>51</sup>

3.71 The Queensland Law Society supported the approach of a consistent definition of family violence ‘throughout the various Commonwealth and State Acts’—‘in order to avoid confusion’.<sup>52</sup>

### **ALRC’s views**

3.72 The ALRC considers that consistency of definitions across the areas under consideration in this Inquiry promotes the seamlessness identified as a key framing principle. Such consistency can then underpin training and awareness in service delivery areas; and facilitate better coordination of responses to family violence, through appropriate information sharing and the improvement of pathways between agencies. The ALRC therefore proposes that the *Fair Work Act 2009* (Cth) and that relevant guidelines and material be amended to reflect it. The ALRC also proposes that the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to include the proposed common definition.

**Proposal 3–5** The *Fair Work Act 2009* (Cth) should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

**Proposal 3–6** The following guidelines and material should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1:

- Department of Education, Employment and Workplace Relations and Job Services Australia Guidelines, Advices and Job Aids;
- Safe Work Australia Codes of Practice and other material
- Fair Work Australia material; and
- other similar material.

<sup>50</sup> ADFVC, *Submission CFV 26*, 11 April 2011.

<sup>51</sup> Women’s Health Victoria, *Submission CFV 11*, 5 April 2011.

<sup>52</sup> Queensland Law Society, *Submission CFV 21*, 6 April 2011.

**Proposal 3–7** The *Superannuation Industry (Supervision) Regulations 1994* (Cth) and, where appropriate, all Australian Prudential Regulation Authority, Australian Taxation Office and superannuation fund material, should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

## Migration

### Current definitions

3.73 The *Migration Regulations 1994* (Cth) define the term ‘relevant family violence’ to mean a reference to conduct, whether actual or threatened, towards:

- (a) the alleged victim; or
  - (b) a member of the family unit of the alleged victim; or
  - (c) a member of the family unit of the alleged perpetrator; or
  - (d) the property of the alleged victim; or
  - (e) the property of a member of the family unit of the alleged victim; or
  - (f) the property of a member of the family unit of the alleged perpetrator;
- that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.<sup>53</sup>

3.74 This definition takes a similar approach to the definition of family violence in the *Family Law Act 1975* (Cth), as at the time of writing this Discussion Paper,<sup>54</sup> in giving focus to the effect of the conduct on the victim, rather than categorising types of conduct.<sup>55</sup>

### Judicial consideration of the term ‘violence’

3.75 The term ‘violence’ is not defined by the *Migration Regulations*, but it has been the subject of some judicial consideration. Early authorities on this issue took a broad view that violence was ‘not meant to exclude instances where the damage suffered by the applicant was not wholly physical’.<sup>56</sup> However, in *Cakmak v Minister for Immigration and Citizenship*, the Full Federal Court commented that the term ‘violence’ was restricted to physical violence, and that things like belittling, lowering

<sup>53</sup> *Migration Regulations 1994* (Cth) reg 1.21(1).

<sup>54</sup> At the time of writing, a proposal to amend the definition in the *Family Law Act 1975* (Cth) was under consideration: Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011.

<sup>55</sup> *Migration Amendment Regulations (No 13) 2007* (Cth) reg 3 amended the definition and replaced the term ‘domestic violence’ with ‘family violence’. The definition of ‘relevant family violence’ applies to all visa applications made on or after 15 October 2007.

<sup>56</sup> See *Malik v Minister for Immigration and Multicultural Affairs* (2000) 98 FCR 291. This approach was also adopted in *Ibrahim v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1279; *Meroka v Minister for Immigration and Multicultural Affairs* (2002) 117 FCR 251.

self esteem, ‘emotional violence’ or ‘psychological violence’ broadened the scope of the *Migration Regulations* beyond their words.<sup>57</sup>

3.76 In *Sok v Minister for Immigration and Citizenship* the Full Federal Court, disapproved of these comments, holding that violence is not restricted to actual or threatened physical violence.<sup>58</sup> The court considered that ‘domestic violence’ is a term of art in contemporary Australia and, in the modern day context, is generally understood to encompass emotional abuse or economic deprivation.<sup>59</sup> A critical part of the courts’ reasoning was that reg 1.23(2)(b) of the *Migration Regulations* refers to violence that causes the victim to fear for his or her ‘personal well-being or safety’, and that personal well-being is generally considered to encompass psychological health.<sup>60</sup>

### ***ALRC consideration of the term ‘relevant family violence’***

3.77 In *Family Violence: Improving Legal Frameworks*, ALRC CP 1 (2010) the Commissions foreshadowed these issues and asked how the definition of ‘relevant family violence’ in the *Migration Regulations* was working in practice.<sup>61</sup> The Commissions flagged that the responses received would be used in this Inquiry.

3.78 Stakeholders in that inquiry suggested that the current definition of ‘relevant family violence’:

- is too narrow and should be broadened to reflect current understandings of family violence, including having the reasonableness test removed;<sup>62</sup>
- should reflect the broader definition used in the Victorian family violence legislation, or align more generally with the definition in the *Family Law Act* and all state and territory definitions of family violence;<sup>63</sup>
- is problematic in its inclusion of the term ‘relevant’, as this is out of step with other state, territory and federal definitions of family violence, and appears to suggest that relevance of violence is determined according to culture.<sup>64</sup>

### **Using the common definition**

3.79 In the Issues Paper, *Family Violence and Commonwealth Laws—Immigration*, (ALRC IP 37, 2011) (the Migration Issues Paper), the ALRC asked what issues arise in the use of the ‘relevant family violence exception’, and whether the *Migration*

<sup>57</sup> *Cakmak v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 135 FCR 183, [62].

<sup>58</sup> *Sok v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 144 FCR 170.

<sup>59</sup> *Ibid.*, [24].

<sup>60</sup> *Ibid.*

<sup>61</sup> Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks: Consultation Paper*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Question 4–6.

<sup>62</sup> Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), 288.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

*Regulations* should be amended to insert a definition of family violence consistent with that recommended in *Family Violence—A National Legal Response*.<sup>65</sup>

### ***Submissions and consultations***

3.80 A majority of stakeholders supported amending the *Migration Regulations* to include a definition of family violence consistent with that recommended in *Family Violence—A National Legal Response*.<sup>66</sup> In doing so, several strong themes emerged from the submissions with respect to the current definition of ‘relevant family violence’.

### ***‘Relevant’ family violence***

3.81 First, submissions highlighted as problematic the use of the term ‘relevant’ as confusing and unnecessary.<sup>67</sup> For example, the Australian Association of Social Workers (Qld Branch) submitted that:

The concept of ‘relevant’ as it is included in the current legislation is questionable and the AASW strongly argues that all forms of violence need to be assessed and recognised as relevant to decision makers.<sup>68</sup>

3.82 The Refugee and Immigration Legal Service submitted that ‘relevant’ can be interpreted to mean ‘cultural’ relevance, rather than taking into account all dimensions of domestic and family violence.<sup>69</sup>

### ***The reasonableness requirement***

3.83 Stakeholders also questioned the utility of requiring a decision maker to make an assessment as to the state of mind of the victim, and whether the violence caused the victim to be reasonably apprehensive about his or her safety or well-being. For example, the Law Institute of Victoria argued that:

The focus on the victim, rather than the perpetrator, is inappropriate because it allows myths and stereotypes to persist about the nature and dynamics of family violence, including who is a victim, what constitutes violence and what is a reasonable response by the victim.<sup>70</sup>

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<sup>65</sup> Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Immigration Law*, ALRC Issues Paper 37 (2011), Question 1.

<sup>66</sup> ANU College of Law, *Submission CFV 79*, 7 June 2011; Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011; National Legal Aid, *Submission CFV 75*, 20 May 2011; Law Institute of Victoria, *Submission CFV 74*, 17 May 2011; Good Shepherd Australia New Zealand, *Submission CFV 41*, 15 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011; Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011; Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

<sup>67</sup> Good Shepherd Australia New Zealand, *Submission CFV 41*, 15 April 2011; Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011.

<sup>68</sup> Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011.

<sup>69</sup> Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011.

<sup>70</sup> Law Institute of Victoria, *Submission CFV 74*, 17 May 2011.

3.84 As an example of this concern, National Legal Aid submitted that:

It is not uncommon for victims of family violence to return to the family home several times before making the final decision that they can no longer continue to live with their partner ... However, returns home and assertive behaviour can be misinterpreted as evidence that the victim is not reasonably fearful/apprehensive and so the victim fails to meet the definition of ‘relevant family violence’.

The emphasis on fear also places an onus on the victim to not only provide evidence of the family violence but also of their mental state at the relevant time. There can be practical implications given the length of time which is sometimes involved in assessing applications and claims. A woman who is now enjoying better health because she is no longer in fear could be potentially disadvantaged as to her credibility.<sup>71</sup>

3.85 On the other hand, Visa Lawyers Australia—while supporting the ALRC’s definition—emphasised that, in their experience, ‘the current definition of family violence contained in the *Migration Regulations* works well enough in practice’ and argued that:

the definition was developed for the purposes of determining the victim’s right to a visa despite the breakdown of intimate relationships on which the visa application was based, rather than to establish all the details of the perpetrator’s behaviour per se.

The ALRC’s proposed definition shifts the focus from the victim’s personal experience of family violence to an itemised list of perpetrator behaviour, which has the potential to place undue emphasis on evidence of the perpetrator’s behaviour which may be difficult for the victim to provide. If changes to the definition of family violence are introduced then we respectfully submit that consideration needs to be given to whether the new definition will place onerous evidentiary burden on the applicant.<sup>72</sup>

***Violence perpetrated by someone other than sponsor***

3.86 Stakeholders also commented that the definition of ‘relevant family violence’—when read together with visa criteria in *Migration Regulations* sch 2, stating who can be the ‘alleged perpetrator’ and ‘alleged victim’—does not account for instances where violence is used by someone other than the sponsor, such as a family member of the sponsor. For example, Domestic Violence Victoria and others in a joint submission submitted that:

In Touch Multicultural Centre Against Family Violence can cite multiple cases in which their clients are subjected to violence from family members of the sponsor (brothers, fathers-in-law, mothers-in-law, uncles-nephews etc). In such cases, the victim will not be able to utilise the Family Violence provisions resulting in a significant inequity in the access the equity of the provisions.<sup>73</sup>

71 National Legal Aid, *Submission CFV 75*, 20 May 2011.

72 Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011.

73 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

3.87 Similarly, the Refugee and Immigration Legal Service (RAILS) argued that, in its experience:

We are aware that of situations where the sponsoring spouse has not directly perpetrated the violence, but neither have they acted to protect their partner against this violence. We suggest that the legislation be amended to reflect this scenario, or where the sponsoring spouse does nothing to intervene to protect their partner, their apparent condoning of the violence can be regarded as coming within the provisions of the existing legislation.<sup>74</sup>

3.88 The ANU College of Law submitted that the assumption that limiting the family violence exception only to instances where the perpetrator is the sponsoring partner ‘does not correspond to the reality and complexity of family violence contexts’.<sup>75</sup>

3.89 In Chapter 20, the ALRC considers whether the family violence exception should extend to cases where the person using the violence is someone other than the sponsor. However, for the purposes of the definition of family violence, the ALRC acknowledges stakeholder concerns that, in the migration context, family violence may be committed by someone other than the sponsor.

***The threat of withdrawal of sponsorship and removal***

3.90 Another theme that emerged was that the two year probationary period for partner visas—discussed in Chapter 20—allowed sponsors to use the threat of removal from Australia to coerce and control victims of family violence, many of whom lack an understanding of their legal rights, or who may be totally dependent on the sponsor. Stakeholders suggested that the threat to withdraw sponsorship, with the consequences of removal, is routinely used to perpetuate power imbalances in relationships.<sup>76</sup> For example, the ANU College of Law submitted that:

It is our experience when dealing with victims of family violence that the threat to withdraw sponsorship is one of the most common forms of devices used to ensure compliance with the perpetrator’s wishes ... As it stands the current definition does not capture coercion to this level. The failure to accept the repercussions of threats at this level have meant that the victim is often required to argue their case with decisions makers on the grounds of personal danger should they return home instead of the climate of threats they lived under during the relationship.<sup>77</sup>

3.91 The threat of removal was also raised as an issue by stakeholders in relation to Prospective Marriage (Subclass 300) visas, where a sponsor threatens to withhold marriage from the applicant.<sup>78</sup> Similar concerns were also raised in relation to secondary visa applicants on visas where there is a pathway to permanent residence, and the primary visa applicant uses the threat of not including the secondary visa applicant in the application for a permanent visa as means of perpetuating family

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<sup>74</sup> Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011.

<sup>75</sup> ANU College of Law, *Submission CFV 79*, 7 June 2011.

<sup>76</sup> ANU College of Law, *Submission CFV 79*; Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

<sup>77</sup> ANU College of Law, *Submission CFV 79*, 7 June 2011.

<sup>78</sup> Confidential, *Submission CFV 36*, 12 April 2011; Confidential, *Submission CFV 35*, 12 April 2011.



violence dynamics.<sup>79</sup> The concerns in these two particular contexts are discussed in Chapter 20.

### **ALRC's views**

3.92 The ALRC confirms its views expressed in *Family Violence—A National Legal Response* that systemic benefits would flow from the adoption of a common interpretative framework, across different legislative schemes, promoting seamlessness and effectiveness in proceedings involving family violence for both victims and decision makers.

3.93 The ALRC considers that the use of the term ‘relevant’, and the ‘reasonableness’ requirement that focuses on state of mind of the victim in the current definition of ‘relevant family violence’ are problematic. In the ALRC’s view, all forms of family violence should be considered by the decision-maker, with an understanding of the controlling and coercive conduct that causes the victim to fear for his or her safety or well-being. As the Commissions argued in *Family Violence—A National Legal Response*:

Emphasising the coercive, controlling nature of family violence and how it engenders fear serves an important educative function, as well as a dual pragmatic function ... it allows new behaviours—including seemingly ‘minor events’ which may have a particular significance to victims—to be included, provided that they meet this definition.<sup>80</sup>

3.94 The ALRC acknowledges that, in the migration context, family violence may be committed by members of the family unit of a sponsor. The ALRC considers that a definition that focuses on ‘controlling and coercive conduct’ can adequately cover instances where the visa applicant is subjected to family violence committed by family members of the sponsor, at the instigation or coercion of the sponsor. In addition, the ALRC considers that the definition can also capture a range of other conduct, including where a sponsor threatens to withdraw sponsorship and have the visa holder removed from Australia.

3.95 Thus, the ALRC considers that the *Migration Regulations 1994* (Cth) should be amended to insert a definition of family violence consistent with that recommended in *Family Violence—A National Legal Response*. The ALRC considers that the definition accounts better for the nature, features and dynamics of family violence and will help to improve the safety of those experiencing it.

3.96 The ALRC also considers it important that guidance be given to decision makers in the Department of Immigration and Citizenship’s *Procedures Advice Manual 3* (PAM 3) guidelines as to what controlling and coercive conduct may include for the purposes of the definition. At present, PAM 3 has no examples as to what conduct may

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79 ANU College of Law, *Submission CFV 79*, 7 June 2011; National Legal Aid, *Submission CFV 75*, 20 May 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

80 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), 235.

constitute family violence, nor any specific guidance concerning the definition. Rather officers are instructed that the definition is ‘apt to be re-interpreted by the courts, which could have implications for the types of ‘actions’ captured by the definition’, and advice should be sought as to the current judicial interpretation.<sup>81</sup>

**Proposal 3–8** The *Migration Regulations 1994* (Cth) should be amended to provide for a consistent definition of family violence as proposed in Proposal 3–1.

**Proposal 3–9** The Department of Immigration and Citizenship’s *Procedures Advice Manual 3* for decision makers should include examples to illustrate coercive and controlling conduct that may amount to family violence, including but not limited to:

- (a) the threat of removal; and
- (b) violence perpetrated by a family member of the sponsor at the instigation, or through the coercion, of the sponsor.

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81 Department of Immigration and Citizenship, *Procedures Advice Manual 3* (2010), s 13.3.



## 4. Screening, Information Sharing and Privacy

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### Summary

4.1 The Terms of Reference for this Inquiry require the ALRC to consider, among other things, the legislative arrangements of Commonwealth social security, child support and family assistance systems. The ALRC is also required to consider whether the extent of information sharing across the Commonwealth, and with state and territory agencies, is appropriate to protect the safety of those experiencing family

violence.<sup>1</sup> This chapter examines how family violence is disclosed to Commonwealth agencies, and how that information is treated by those agencies.

4.2 Centrelink, the Child Support Agency (CSA) and the Family Assistance Office (FAO) are responsible for the administration of the social security, child support and family assistance systems, respectively. As service delivery agencies, and due to the integration of these agencies as part of the Human Services portfolio, this chapter discusses the disclosure of family violence to, and treatment of, information about family violence by, these agencies. Details of other Commonwealth agencies referred to in this Inquiry are considered in their respective chapters. As these issues primarily concern service provision by Department of Human Services (DHS) agencies, this chapter also provides an overview of the structure of DHS, and recent changes to the Human Services portfolio.

4.3 As discussed in Chapters 5–13, family violence is relevant to social security, child support and family assistance in a number of ways, including qualification for social security payments, income management and exemptions from the requirement to obtain child support (‘reasonable maintenance action’). It is therefore important that the agencies that administer these systems are able to identify people who have experienced, or are experiencing, family violence so that they can inform them about relevant exemptions or entitlements which, in turn, may enhance their safety.

4.4 The ALRC has identified a number of personal and institutional barriers to the disclosure of family violence to these agencies and proposes a multifaceted approach of screening and risk assessment processes, information sharing and privacy, and family violence policies, to ensure that victims of family violence are appropriately identified, and their needs are responded to accordingly.

4.5 In particular, the ALRC proposes that Centrelink, the CSA and FAO should ‘screen’ all customers for family violence, not through direct questions, but by giving them a short statement and other information about family violence and its relevance to a person’s social security, child support and family assistance case. The ALRC considers that these reforms will enable customers to decide whether or not to disclose family violence—reflecting the theme of self-agency, detailed in Chapter 2.

4.6 However, the ALRC recognises that screening alone is not sufficient and considers that an appropriate case-management and privacy response should be triggered, including referral to a Centrelink social worker. To assist with this, and to ensure consistency across the relevant departments and agencies, the ALRC proposes that a ‘safety concern’ flag should be placed on a customer’s file where family violence and fears for safety have been disclosed. This flag should be subject to information-sharing protocols between relevant departments and agencies, subject to informed consent and privacy safeguards.

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1 The full Terms of Reference are set out at the front of this Discussion Paper and are available on the ALRC’s website at <[www.alrc.gov.au](http://www.alrc.gov.au)>.

4.7 Finally, to enhance consistency across the different departments and agencies, the ALRC proposes that a family violence and child protection policy be developed for each department or agency.

### **Service Delivery Reform**

4.8 DHS is responsible for the development of service delivery policy and provides access to social, health and other payments and services. It was created on 26 October 2004, as part of the Finance and Administration portfolio.<sup>2</sup>

4.9 In December 2009, the Australian Government announced a Service Delivery Reform initiative aimed to ‘improve the efficiency and effectiveness of service delivery to the Australian people’.<sup>3</sup> As part of this initiative, the Human Services portfolio agencies (namely, the DHS—including the CSA, FAO and CRS Australia—Centrelink, and Medicare Australia) have been integrating back-office support services, customer contact areas and co-locating some shopfronts.<sup>4</sup>

4.10 One of the key goals of the integration is to provide seamlessness for customers and stakeholders who access services delivered by the Human Services portfolio.<sup>5</sup> In addition, it is envisaged that the integration will allow a ‘tell us once’ approach for customers, and make it easier for customers to update details once, across the portfolio, should they choose to have their information shared.<sup>6</sup>

### **ICT support services**

4.11 As part of the integration process, the DHS will integrate the disparate information and communication technology (ICT) systems that support Medicare, Centrelink and the CSA,<sup>7</sup> and move to a single shared gateway, with a single security management system for payment systems across the three agencies.

### **Customer contact areas and co-located shop fronts**

4.12 As a result of the Service Delivery Reforms, as of 1 July 2011, Centrelink no longer operates as a statutory agency and its functions have been integrated into the DHS. As such, Centrelink and CSA now sit under a single portfolio website and phone number. As at 14 February 2011, 34 sites were providing Centrelink and Medicare services from ‘one-stop-shops’, which will be progressively rolled out to more places across Australia.

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2 T Plibersek, *The Human Services Portfolio* <[http://www.mhs.gov.au/the\\_human\\_services\\_portfolio.php](http://www.mhs.gov.au/the_human_services_portfolio.php)> at 22 July 2011.

3 Revised Explanatory Memorandum Human Services Legislation Amendment Bill 2010 (Cth).

4 Ibid.

5 Department of Human Services, *Additional Submission to the Senate Community Affairs Committee Inquiry of the Human Services Legislation Amendment Bill 2010* (2011).

6 Ibid.

7 Department of Human Services, *Budget 2011-12: Increased Support for People Needing Assistance* (2011).

4.13 The Minister for Human Services explained that '[t]his initiative will reduce the need for people to navigate their way around different agencies, making it easier to connect with the services and information people require'.<sup>8</sup>

### **Case Coordination**

4.14 As part of the 2010–11 Budget, the Human Services Portfolio announced the trial of a new service delivery approach to provide increased support for people needing assistance—called 'Case Coordination'.<sup>9</sup>

4.15 The Case Coordination approach aims to enable people, processes and systems 'to work in an integrated way and consistently identify customers with complex needs who will benefit from targeted or specialised services'.<sup>10</sup> Nineteen sites are planned for 2011–12, with a total of 44 sites by 2013–14. Those who have been identified as 'facing significant disadvantage or complex challenges' include people who are homeless, long-term unemployed, living with a disability or literacy difficulties, or facing barriers like drug or alcohol dependency.<sup>11</sup>

4.16 The type of support and assistance that will be offered through Case Coordination will vary depending on customers' needs. However, it may include 'simple referrals to services like training programs; information about other services; intensive support for multiple coordinated appointments with non-government and local community services to help people facing issues like homelessness or gambling dependency'.<sup>12</sup>

### **Centrelink, CSA and FAO**

4.17 Centrelink customer service advisers are often the first point of contact for a person wishing to claim a social security payment or entitlement. Claims for social security payments must generally be made in writing by completing the relevant Centrelink form either online or in hardcopy. In some circumstances, claims may be made by telephone or in person.

4.18 While Centrelink administers family assistance payments on behalf of the FAO,<sup>13</sup> the FAO provides a range of 'first-point-of-contact services', including:

- operating an FAO call centre;
- assisting with family assistance enquiries;
- providing information about payment options;
- receiving claim forms; and

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8 C Bowen (Minister for Human Services), 'Reform to Deliver Service That Works For You' (Press Release, 16 December 2009).

9 Department of Human Services, *Budget 2011-12: Increased Support for People Needing Assistance* (2011).

10 Ibid.

11 Ibid.

12 Ibid.

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

- ‘making appointments with other FAO staff for complex enquiries and interviews’.<sup>14</sup>

4.19 The CSA assesses child support amounts, and collects child support where requested by payees. Centrelink also has a role in the administration of the child support system, in particular, where it intersects with the family assistance system. Centrelink administers the ‘reasonable maintenance action’ test, discussed in further detail in Chapters 9 and 11. Briefly, the reasonable maintenance action test requires a person who is eligible for child support, and receives more than the base rate of Family Tax Benefit (FTB), to obtain child support.

## Barriers to disclosure of family violence

4.20 In *Family Violence—A National Legal Response*, the ALRC and the NSW Law Reform Commission (the Commissions) identified a range of reasons for non-disclosure of family violence:

A victim of family violence may hide the abuse due to feelings of shame, low self esteem or a sense that he or she, as the victim, is responsible for the violence. A victim may feel that he or she will not be believed. A victim may hope that the violence will stop, or might believe that violence is a normal part of relationships. Because of the family violence, a victim may feel powerless and unable to trust others, or fear further violence if caught disclosing it.<sup>15</sup>

4.21 Further, the Commissions noted that ‘there may be a lack of understanding by ... service providers and the community of what constitutes family violence. This may mean that, even if family violence is disclosed, it may not be recognised, or acted on, as family violence’.<sup>16</sup>

4.22 In *Family Violence and Commonwealth Laws—Social Security* (Social Security Issues Paper) and *Family Violence and Commonwealth Laws—Child Support and Family Assistance* (Child Support and Family Assistance Issues Paper), the ALRC asked several questions about how family violence is disclosed or identified by CSA and Centrelink staff,<sup>17</sup> including barriers faced by victims of family violence in disclosing family violence.<sup>18</sup>

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14 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.3].

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

16 Ibid, [18.5].

17 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011) Question 2, 3; Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Questions 10, 11, 12, 19, 20.

18 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), 8.



### Submissions and consultations

4.23 Stakeholders identified a number of barriers to self-disclosure of family violence to the CSA and Centrelink, including:

- lack of confidence to classify what they are experiencing as family violence,<sup>19</sup> such as financial or economic abuse<sup>20</sup>—in particular, those from Non-English Speaking Background with disability ‘may not interpret threats of abandonment, withdrawal of services or tampering with aids as family violence, even though such acts are designed to threaten and control the person’;<sup>21</sup>
- lack of knowledge—both of what constitutes family violence legally, and of the significance of family violence in obtaining entitlements;<sup>22</sup>
- shame,<sup>23</sup> or fear of other stigmas associated with family violence;<sup>24</sup>
- learned practices such as staying silent about victimisation as a result of being taught that ‘speaking out against victimisers or revealing victimisation (even unintentionally) had negative consequences and was often pointless’;<sup>25</sup>
- the person using family violence supervises all contact with the service agency;<sup>26</sup>
- fear of adverse consequences such as being ‘punished’ by not receiving payments or more stringent work requirements;<sup>27</sup>
- having to repeat an account of family violence multiple times;<sup>28</sup>
- lack of privacy at Centrelink offices—being ‘mortified’ by being expected to discuss family violence in public, at the front counter;<sup>29</sup>
- concerns that disclosure of family violence will not be believed or their experiences trivialised;<sup>30</sup> and
- fear of retribution.<sup>31</sup>

19 National Children’s and Youth Law Centre, *Submission CFV 64*, 3 May 2011.

20 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011.

21 Multicultural Disability Advocacy Association, *Submission CFV 60*, 28 April 2011.

22 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

23 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; Multicultural Disability Advocacy Association, *Submission CFV 60*, 28 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

24 Multicultural Disability Advocacy Association, *Submission CFV 60*, 28 April 2011.

25 Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

26 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

27 Sole Parents’ Union, *Submission CFV 63*, 27 April 2011.

28 Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

29 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

30 National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011.

31 Confidential, *Submission CFV 06*, 27 March 2011.

## 4.24 As one stakeholder stated:

I don't get child support for one of my children (and haven't done since she was born 4 yrs ago) because my ... ex told me he would take my children away and kill them if I did claim it.<sup>32</sup>

**ALRC's views**

4.25 The ALRC recognises that victims of family violence may be reluctant to disclose family violence for a number of reasons, or may not consider themselves to be a victim due to, for example, traditional notions of 'domestic violence'. Further, victims may fail to disclose family violence as they may not be aware that such information is relevant to their social security, child support or family assistance entitlements.

4.26 In light of these various concerns, the ALRC considers that multiple responses are required by service delivery agencies to ensure the needs of victims of family violence are adequately responded to by Centrelink, the CSA and FAO. One mechanism will not be sufficient. The ALRC suggests a multifaceted approach of screening, information provision and information-sharing protocols. These are considered in detail below.

**Screening for family violence**

4.27 Screening is the first step in a risk assessment process. Screening is 'the systemic application of a test or enquiry (a series of questions) to identify individuals at sufficient risk of violence to benefit from further investigation or direct preventative action'.<sup>33</sup> Screening is therefore a safety precaution and not only helps identify those at risk but may also enable early intervention through immediate identification of supportive resources and referrals.<sup>34</sup> Screening is not seeking evidence or truth in relation to the existence of family violence; it is seeking to elicit a victim's fear or disclosure of violence, or to elicit whether there is a risk of violence in the future to a customer or their children.<sup>35</sup>

4.28 Importantly, to be beneficial, screening must be followed by a positive and appropriate response—generally, risk assessment and risk management. These concepts are discussed later in this chapter.

**Strengths and limitations of screening**

4.29 Screening for family violence can have a positive effect on the victim, on service providers, and the wider community. Screening can improve the identification of people experiencing violence, increase the rate of disclosure, promote help-seeking by victims of violence, and thereby enable better advice and referrals for the victim. For service provision agencies, it can improve the knowledge base and practice of

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32 Ibid.

33 Australian Institute of Social Relations, *Screening, Risk Assessment and Safety Planning* (2010).

34 Ibid.

35 Ibid.

professionals about family violence, foster interagency collaboration and may, in turn, educate the community about the seriousness and prevalence of family violence.<sup>36</sup>

4.30 However, there are also commonly identified limitations of screening, including that it is a relatively new practice requiring more evaluation and research in order to inform good practice. Screening tools themselves suffer limitations, tending to rely on very few questions which, in turn, does not produce a very sophisticated diagnostic assessment.<sup>37</sup> Further, screening may emphasise physical and sexual violence, and may not identify other forms of family violence.<sup>38</sup> Currently, there is no accepted effective tool for screening for family violence, nor is there an established best-practice length of time to devote to screening.<sup>39</sup>

4.31 There are also problems surrounding the implementation of any screening tool, including the use of staff time and increased workloads, lack of sustainable training regimes, lack of privacy to conduct screening, and problems when partners are present.<sup>40</sup>

4.32 A related concern is that the mere application of a screening tool does nothing to protect the victim—rather, disclosure during the screening process should act as a trigger for an effective response.

4.33 Despite these limitations, as noted by Elly Robinson and Professor Lawrie Moloney, the ‘detection of, and responses to family violence cannot wait until the gold standard research has been completed’.<sup>41</sup>

### **Screening for family violence by Centrelink, CSA and the FAO**

4.34 Centrelink, the CSA and the FAO rely on self-disclosure of family violence and do not screen routinely for family violence.

4.35 Application and information forms for various social security payments do not appear to include specific information about family violence, such as how family violence may form the basis for an exemption from participation, activity or Employment Pathway Plan requirements, or from providing original proof of identity or tax file numbers.

4.36 The CSA’s Change of Assessment form asks whether the person has a restraining, intervention or other order involving the other parent. However, the ALRC also understands that the CSA asks for this information to assist it with deciding how

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36 R Braaf and C Sneddon, *Family Law Act Reform: The Potential for Screening and Risk Assessment for Family Violence* (2006). It is beyond the scope of the Terms of Reference for this Inquiry for the ALRC to conduct an extensive literature review on the strengths and limitations of screening processes.

37 Ibid.

38 Ibid.

39 E Robinson and L Moloney, *Family Violence: Towards a Holistic Approach to Screening and Risk Assessment in Family Support Services* (2010), 6.

40 R Braaf and C Sneddon, *Family Law Act Reform: The Potential for Screening and Risk Assessment for Family Violence* (2006), 14.

41 E Robinson and L Moloney, *Family Violence: Towards a Holistic Approach to Screening and Risk Assessment in Family Support Services* (2010), 15.

best to arrange the parents' separate conferences with the decision maker, rather than for any other broader purpose.<sup>42</sup>

4.37 The ALRC understands that the Attorney-General's Department is developing a screening and risk assessment tool, recently releasing a tender for its development.<sup>43</sup>

### Submissions and consultations

4.38 In the Social Security Issues Paper and the Child Support and Family Assistance Issues Paper, the ALRC asked in what circumstances, if any, should Centrelink and CSA staff be required to enquire about the existence of family violence and whether Centrelink and CSA application forms—including electronic forms, correspondence and telephone prompts—should directly seek information about family violence.<sup>44</sup>

4.39 Stakeholders who responded to these questions recognised that 'family violence is seriously underreported'<sup>45</sup> and that there was a need for improvement in the way in which family violence is disclosed. The Ombudsman submitted that service delivery agencies such as Centrelink

have an obligation to, wherever possible, actively seek information from customers about any circumstances which might affect their capacity to actively engage with government, or which might affect the type, rate or conditions of payments or services they are, or may be eligible for.<sup>46</sup>

4.40 Similarly, the Council of Single Mothers and their Children (CSMC) considered that agencies such as Centrelink 'need to acknowledge that they have a responsibility to ensure that they act in a manner that protects vulnerable people from harm to the extent they are able'.<sup>47</sup> The Homeless Persons Legal Service considered that 'Centrelink staff should employ a principle of trauma-informed care ... which takes as its starting point the likely presence and long-term effects of family violence'.<sup>48</sup>

4.41 Most stakeholders recommended that Centrelink<sup>49</sup> and the CSA<sup>50</sup> should: screen for family violence or safety concerns as this would increase the chances of disclosure;<sup>51</sup> ensure customers are aware that specific provisions exist in relation to

42 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

43 National Legal Aid, *Submission CFV 81*, 24 June 2011.

44 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Questions 2, 3; Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 10.

45 Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

46 Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.

47 Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

48 Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

49 Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 59*, 27 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; M Winter, *Submission CFV 51*, 27 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

50 Joint submission from Domestic Violence Victoria and others, *Submission CFV 59*, 27 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

51 Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

family violence;<sup>52</sup> and indicate that these agencies are willing to discuss and deal with these matters.<sup>53</sup> The Australian Domestic and Family Violence Clearinghouse (ADFVC) considered that screening was particularly important due to the relevance of family violence to the administration of child support (in terms of the collection of payments, privacy of personal information and applicants' knowledge of and decisions to utilise the exemption),<sup>54</sup> and better identify and refer customers affected by family violence to appropriate services.<sup>55</sup>

4.42 However, some stakeholders did not consider screening by Centrelink and the CSA appropriate.<sup>56</sup> The Welfare Rights Centre Inc Queensland submitted that '[r]outine screening is neither appropriate nor practicable',<sup>57</sup> and Centrelink and CSA staff should not inquire about family violence directly',<sup>58</sup> while the Australian Association of Social Workers Queensland Branch (AASW) considered that 'Centrelink staff should not inquire about family violence directly unless the customer reports behaviour that is consistent with domestic and family violence at which time the Centrelink staff member would refer the person to social workers'.<sup>59</sup>

#### ***How should screening occur?***

4.43 Most stakeholders agreed that Centrelink and CSA application forms, correspondence and telephone prompts should directly seek information about family violence<sup>60</sup> as this would 'facilitate victims of family violence overcoming their reluctance to disclose'.<sup>61</sup>

4.44 However, stakeholders were divided as to how screening should occur. On the one hand, some stakeholders recommended that agency staff should provide information about the relevance of family violence to social security, child support and

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52 Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

53 Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

54 ADFVC, *Submission CFV 53*, 27 April 2011.

55 ADFVC, *Submission CFV 71*, 11 May 2011.

56 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 43*, 21 April 2011.

57 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

58 Welfare Rights Centre Inc Queensland, *Submission CFV 43*, 21 April 2011.

59 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

60 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; Multicultural Disability Advocacy Association, *Submission CFV 60*, 28 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011; Sole Parents' Union, *Submission CFV 52*, 27 April 2011; M Winter, *Submission CFV 51*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011; Confidential, *Submission CFV 13*, 5 April 2011; P Easteal and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

61 Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

family assistance to allow for self-disclosure,<sup>62</sup> while others considered that a question, or series of questions, about family violence was the best way to screen for family violence.<sup>63</sup>

#### ***Direct questioning***

4.45 The ADFVC submitted that standard screening questions should be used and that '[d]irect questioning is known to be more effective in eliciting disclosures than more oblique invitations to self identify'.<sup>64</sup> Similarly, the National Council for Single Mothers and their Children (NCSMC) and Women Everywhere Advocating Violence Elimination (WEAVE) recommended 'a routinized question about whether the person has any current concerns for their own safety or the safety of members of their household'.<sup>65</sup>

4.46 Some stakeholders added that including questions about family violence on forms may not be regarded as enough for screening since many will answer 'no'<sup>66</sup> due to the inability of a victim of family violence to be able to complete a form or contact a service agency via telephone in private.<sup>67</sup>

Control is a central element in family violence. Clients have spoken about the perpetrator supervising all contact with Centrelink, ensuring the victim reported to Centrelink exactly as instructed.<sup>68</sup>

4.47 The North Australian Aboriginal Justice Agency (NAAJA) raised concerns 'about a positive duty on Centrelink workers to inquire about the presence of family violence, especially given that a customer is likely to be going through the application process in a Centrelink office (or in a remote community on a phone in a public space or with a remote service team in a public space)'.<sup>69</sup>

4.48 Accordingly, the Welfare Rights Centre Inc Queensland submitted that, if questions about family violence were to be included on forms, the 'absence of an affirmative answer' should not 'be taken as an indication that family violence is not occurring'.<sup>70</sup>

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62 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 43*, 21 April 2011.

63 WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; ADFVC, *Submission CFV 53*, 27 April 2011.

64 ADFVC, *Submission CFV 53*, 27 April 2011.

65 WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011.

66 P Eastale and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

67 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

68 Ibid.

69 North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011.

70 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

4.49 An alternative, proposed by Welfare Rights Centre Inc Queensland, was for a short statement on claim forms about family violence and the assistance available from Centrelink, such as:

Centrelink recognises that domestic and family violence is a significant issue in our society and has specialist staff that offer help in a discrete and confidential setting. You can ask for an appointment to our social workers by ...<sup>71</sup>

4.50 NAAJA made a similar recommendation and submitted that such a statement ‘has the double benefit of informing customers of what’s available and allowing people to maintain their privacy’.<sup>72</sup>

4.51 The AASW recommended that enquiries about family violence should only be made if staff ‘suspect or detect violence during the relaying of the circumstances by the victim’.<sup>73</sup>

4.52 Other stakeholders recommended that information about family violence should be included on CSA and Centrelink forms—either in addition to, or as an alternative to, direct questioning.<sup>74</sup>

4.53 The AASW and the Welfare Rights Centre Inc Queensland did not support routine screening, both considered it more preferable that agency staff ‘provide information about how domestic and family violence is defined by the department and inquire about whether the person would like a referral to a social worker to discuss the options available’,<sup>75</sup> and about the provisions and services available, so that a person can make a decision to disclose or not.<sup>76</sup> The AASW recommended that such information also be included in application forms and other forms.<sup>77</sup>

4.54 The ADFVC also considered that information provided to customers should include

a definition of family violence and common types of abuse, information about disclosure of family violence and why it is important in the context of applying for Centrelink entitlements (e.g. around eligibility for certain payments and exemptions, access to social workers); a package of information about family violence victim’s rights and entitlements to Centrelink services; contact details for local family violence services.<sup>78</sup>

4.55 The CSMC recommended that information about family violence should be displayed in offices; contained in printed material; readily accessible on the website; and on recorded messages—as well as available in all community languages and in a

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71 Ibid.

72 North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011.

73 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

74 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011.

75 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

76 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 43*, 21 April 2011.

77 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

78 ADFVC, *Submission CFV 71*, 11 May 2011.

culturally appropriate means to reflect the diversity of customers.<sup>79</sup> The Welfare Rights Centre NSW added that information to customers that they can obtain help, support or financial assistance or referral if they are affected by family violence should be included on ‘all forms of communication (claim forms and payment booklets; face-to-face interviews; posters and brochures in Centrelink offices; recorded ‘scripts’ for call waiting; specific publications for client groups (eg *News For Seniors*, *The Journey*; *Pulse*: website)’.<sup>80</sup>

### ***Two-stage approach***

4.56 The Commonwealth Ombudsman proposed a two-stage process. First, information should be included on letters and forms to explain how family violence might be relevant, for example, to a person’s obligation to apply for and collect child support. The information should be designed to encourage the person to contact the CSA to discuss what measures the CSA can take to reduce the risk that seeking child support would precipitate violence.<sup>81</sup>

4.57 Secondly, where a person identifies that they have a fear of violence, a more detailed screening should be conducted by asking questions about the general indicators of violence (for example, controlling behaviour regarding finances).<sup>82</sup>

4.58 The Ombudsman considered that it should be up to the person experiencing the family violence to decide how he or she wants to declare themselves to Commonwealth agencies and any information sought about family violence should be voluntary. The Ombudsman submitted that forms, letters and other publications should all provide clear and consistent information to enhance customers’ understanding that family violence is relevant to their case, it may be in their interests to disclose, where relevant, so staff may provide them with information about their choices.<sup>83</sup>

### ***What to screen for***

4.59 The ADFVC strongly recommended that standard screening questions be used, while the Multicultural Disability Advocacy Association (MDAA) considered that forms should have multiple questions regarding behaviour, rather than a single question about family violence.<sup>84</sup>

4.60 Stakeholders generally considered that screening should enquire about: the presence of violence;<sup>85</sup> the safety of both the individual and any children involved;<sup>86</sup> about non-physical as well as physical abuse;<sup>87</sup> the general indicators of violence (for example, controlling behaviour regarding finances); and a number of vulnerability

79 Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

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

81 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

82 Ibid.

83 Ibid.

84 Multicultural Disability Advocacy Association, *Submission CFV 60*, 28 April 2011.

85 Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Sole Parents’ Union, *Submission CFV 63*, 27 April 2011.

86 Sole Parents’ Union, *Submission CFV 63*, 27 April 2011.

87 ADFVC, *Submission CFV 71*, 11 May 2011.



indicators—including homelessness, disability, illiteracy and mental illness—because often these indicators occur in combination,<sup>88</sup> and be developed in close consultation with workers and organisations that support victims of family violence.<sup>89</sup>

### ***When should screening occur?***

4.61 Those stakeholders who considered that Centrelink and the CSA should screen for family violence indicated that screening should occur on first contact<sup>90</sup> or initial assessment,<sup>91</sup> routinely,<sup>92</sup> or in all circumstances.<sup>93</sup> Chapters 5, and Chapters 9–11 discuss specific trigger points for screening within the social security system and child support and family assistance systems.

4.62 On the other hand, the AASW submitted that ‘[r]outinely screening for domestic and family violence is problematic ... and should not be conducted in a situation where there is no expert support immediately available’. The AASW questioned the value of routine screening for domestic violence as screening questions are not

able to encapsulate the broader definitions of violence and therefore have the potential to screen out people who are subject to coercively controlling tactics whose experience do not match the screening tool domains. Research using tools to discriminate violence from non-violence use detailed questionnaires that often include some 35 questions. This type of process in practice is not workable, cumbersome and of little value if the person has not self identified. It is our view that people need the opportunity to see examples of the coercive controlling tactics that make up the broader definition of violence to then be able to make an informed decision about where their experience fits or not. It is our experience that this process for some takes time. Many domestic violence services define violence and then under each heading provide brief examples of what these might mean. This has been an effective strategy for women’s domestic violence services for over 30 years.<sup>94</sup>

### ***Manner and environment***

4.63 The manner and environment in which family violence is screened for was also considered by stakeholders to be important.

4.64 The Homeless Person’s Legal Service recommended that Centrelink staff enquire with appropriate sensitivity,<sup>95</sup> and in a non-judgemental manner,<sup>96</sup> about the existence of family violence. The ADFVC considered that, where the information is

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88 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

89 Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

90 Sole Parents’ Union, *Submission CFV 52*, 27 April 2011; M Winter, *Submission CFV 51*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011.

91 Joint submission from Domestic Violence Victoria and others, *Submission CFV 59*, 27 April 2011.

92 ADFVC, *Submission CFV 71*, 11 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

93 P Eastale and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

94 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

95 National Children’s and Youth Law Centre, *Submission CFV 64*, 3 May 2011; ADFVC, *Submission CFV 53*, 27 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

96 ADFVC, *Submission CFV 53*, 27 April 2011.

included in forms, online, over the phone or in person, there needs to be an explanation as to why this information is sought, that it is routine, how information will be used and what protections might be offered if family violence is disclosed—such as privacy of personal information. Stakeholders also recommended appropriate training and supervision for staff about family violence screening techniques,<sup>97</sup> in order not to re-traumatise affected customers.<sup>98</sup> The AASW noted that ‘training and support have been shown to reduce the risk of vicarious traumatisation and burn-out in staff populations who work with trauma’.<sup>99</sup>

4.65 The Welfare Rights Centre NSW considered it essential that ‘Centrelink provide an environment where clients are encouraged and feel comfortable to raise such personal and sensitive issues’.<sup>100</sup> The ADFVC also recommended ‘conducting screening in a private space, without partners present’.<sup>101</sup>

### **ALRC’s views**

#### ***Should the CSA, FAO and Centrelink screen for family violence?***

4.66 Stakeholders identified that customers were often not aware of how family violence would affect their social security, child support or family assistance eligibility and entitlements. Most stakeholders recommended that some form of screening for family violence by the agencies was necessary—either by providing relevant information or through direct questioning.

4.67 The ALRC acknowledges the difficulties of screening by service delivery agencies such as Centrelink, CSA and the FAO. The first point of contact a customer has is often with front staff who are not currently trained to screen for family violence. They also have a number of other roles.

4.68 However, the ALRC understands that Centrelink customer service advisers are currently able to place a vulnerability indicator on a customer’s file if they suspect, among other things, a customer has recently experienced a relationship breakdown. CSA staff may also place a ‘sensitive issue indicator’ on a customer’s file.<sup>102</sup> These indicators are discussed in further detail below. Arguably, therefore, a level of screening is occurring by Centrelink and CSA staff.

#### ***How should screening occur?***

4.69 Stakeholders were divided as to whether screening for family violence should take the form of direct questioning or through the provision of information to all customers. While direct questioning may encourage disclosure of family violence, the ALRC recognises that there are a number of concerns with such an approach, for example:

97 Ibid; Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

98 ADFVC, *Submission CFV 53*, 27 April 2011.

99 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

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

101 ADFVC, *Submission CFV 53*, 27 April 2011.

102 Department of Human Services, *Common Module—Family Violence*, 7 June 2011.

- one or two questions about family violence or safety may not elicit a response;
- it may lead to an assumption that every person is subject to family violence;
- customer service staff do not have the time to ask numerous questions to ensure thorough screening for family violence; and
- there is a lack of privacy at Centrelink, CSA and FAO offices.

4.70 In light of such concerns, the ALRC does not consider that direct questioning about family violence would be the most effective response. Yet the barriers to disclosure of family violence need to be addressed. One such barrier is lack of knowledge on the part of the customer—both of what constitutes family violence and how family violence is relevant to a person’s entitlements.

4.71 In the ALRC’s view, agency staff should make a short statement which recognises that family violence is a significant issue in society and may be relevant to the customer’s entitlements and indicates the availability of Centrelink social worker. This addresses a number of stakeholder concerns:

- it allows for individual choice by the customer as to whether to disclose family violence or not;
- it does not assume that everyone is a victim of family violence; and
- it is less labour-intensive on front staff.

***When should screening occur?***

4.72 In the ALRC’s view, screening for family violence should occur on first contact with the service agency. This addresses the overarching concerns of a lack of awareness about family violence and its relevance to a person’s entitlements. However, as a person may not always be experiencing family violence at the time of first contact, routine screening for family violence is also necessary at identified trigger points. These additional trigger points are considered in Chapter 5 for social security and Chapters 9–11 for child support and family assistance.

***Training***

4.73 The ALRC considers that Centrelink, CSA and FAO staff should be provided with training on the impact of family violence on a customer’s social security, child support and family assistance arrangements and to ensure referrals to Centrelink social workers who can discuss a customer’s circumstances in more detail.

***Monitoring and evaluation***

4.74 In light of the limitations of screening identified earlier, and as screening for family violence by Centrelink, CSA and the FAO will be a new process, it is important that the impacts of screening arrangements are monitored and evaluated. The ALRC considers that monitoring and evaluation should be built into the process to ensure that screening is increasing the disclosure of family violence, and positively assisting victims of family violence and not causing further harm. Monitoring and evaluation should also be conducted routinely, and the outcomes made publicly available.

**Information pack**

4.75 To address the concern that persons who experience family violence do not always identify that they are experiencing family violence, or how it might be relevant to their social security, child support or family assistance case, an information pack should be provided to all customers that contain this information. This information pack would provide detail about family violence, including examples of its nature, features and dynamics, and how family violence is relevant to social security, child support and family assistance. In particular, such information would include how family violence is relevant to:

- exemptions;
- entitlements;
- information protection;
- support and services provided by the agencies;
- referrals; and
- income management.

4.76 In order to ensure that all customers receive this information, it should be provided, where possible, orally—either in person or by telephone, and in writing and online. The information should be tailored to each individual customer, in particular recognising the impact of family violence on particular customers such as Indigenous peoples; those from culturally and linguistically diverse backgrounds; lesbian, gay, bisexual, trans and intersex; children and young people; older persons; and people with disability.

4.77 This information should be provided to all customers upon, or directly following, an application for child support or social security and routinely at periodic intervals and specified trigger points.

4.78 Child Support Agency and Family Assistance Office staff, Centrelink customer service staff, social workers, Indigenous Service Officers (ISOs) and Multicultural Service Officers (MSOs) should receive regular and consistent training in relation to how family violence is relevant to a customer's circumstances and the requirement to provide all customers with such information.

4.79 Providing such information to customers in this way will allow customers to make their own decisions as to whether to disclose family violence, which ties in with the theme of self-agency discussed in Chapter 2.

**Proposal 4-1** Information about screening for family violence by Child Support Agency and Family Assistance Office staff and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers should be included in the *Child Support Guide*, the *Family Assistance Guide* and the *Guide to Social Security Law*.

**Proposal 4–2** Child Support Agency and Family Assistance Office staff and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers should routinely screen for family violence when commencing the application process with a customer, immediately after that, and at defined intervals and trigger points (as identified in Chapters 5 and 9–11).

**Proposal 4–3** Screening for family violence by Child Support Agency and Family Assistance Office staff and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers should be conducted through different formats including through:

- electronic and paper claim forms and payment booklets;
- in person;
- posters and brochures;
- recorded scripts for call waiting;
- telephone prompts;
- websites; and
- specific publications for customer groups such as *News for Seniors*.

**Proposal 4–4** In conducting screening for family violence, Child Support Agency and Family Assistance Office staff and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers should take into consideration a customer’s cultural and linguistic background as well as a person’s capacity to understand, such as due to cognitive disability.

**Question 4–1** In addition to the initial point of contact with the customer, at what trigger points should Child Support Agency and Family Assistance Office staff and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers screen for family violence?

**Proposal 4–5** Child Support Agency and Family Assistance Office staff and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers should receive regular and consistent training and support (including resource manuals and information cards) in:

- screening for family violence sensitively; and
- responding appropriately to disclosure of family violence, including by making referrals to Centrelink social workers.

**Proposal 4–6** Training provided to Child Support Agency and Family Assistance Office staff, and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers should include:

- the nature, features and dynamics of family violence, and its impact on victims, in particular those from high risk and vulnerable groups;
- recognition of the impact of family violence on particular customers such as Indigenous peoples; those from culturally and linguistically diverse backgrounds; those from lesbian, gay, bisexual, trans and intersex communities; children and young people; older persons; and people with disability;
- training to ensure customers who disclose family violence, or fear for their safety, know about their rights and possible service responses, such as those listed in Proposal 4–8; and
- training in relation to responding appropriately to and interviewing victims of family violence. In particular, training for Centrelink customer service advisers and social workers should include information about the potential impact of family violence on a job seeker's barriers to employment.

**Proposal 4–7** The Department of Human Services should ensure that monitoring and evaluation of processes for screening for family violence is conducted regularly and the outcomes of such monitoring and evaluation are made public.

**Proposal 4–8** The *Child Support Guide*, the *Family Assistance Guide* and the *Guide to Social Security Law* should provide that Child Support Agency and Family Assistance Office staff and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers should give all customers information about how family violence may be relevant to the child support, family assistance, social security and Job Services Australia systems. This should include, but is not limited to:

- exemptions;
- entitlements;
- information protection;
- support and services provided by the agencies;
- referrals; and
- income management.

## Risk assessment and management

4.80 ‘Risk assessment’ refers to ‘ongoing efforts to assess the degree of harm or injury likely to occur as a result of past, present or future family violence’,<sup>103</sup> while ‘risk management’ aims to promote safety, accountability and healing for victims through referral to a range of services such as emergency and support services, counselling and support, accommodation and culturally specific services.

4.81 It is important that the person conducting the risk assessment has experience and expertise in interviewing victims of family violence; considerable knowledge of the dynamics of family violence; and uses risk assessment guidelines or tools accepted in the scientific and professional communities.<sup>104</sup> Given the nature of risk assessment, often screening and assessment are conducted by different individuals. However, there are concerns with separating the screening and risk assessment processes, including:<sup>105</sup>

- establishing trust—‘[r]evelations, even at the screening phase, are made by a client within the context of some level of trust in the competence and integrity of the individual conducting the screening’ which ‘will not always repeat itself with another individual’;<sup>106</sup>
- dangers of screening in isolation from empathic engagement;<sup>107</sup> and
- further traumatising the victim if screening is insensitively or incompetently handled.<sup>108</sup>

4.82 Robinson and Moloney describe these problems as problems of ‘triage’ and that, arguably,

the person at the beginning of the triage process bears the greatest responsibility because a failure to detect violence or associated issues at this stage can reverberate through the service delivery system. At the same time, such an individual usually cannot take on the full burden of the case.<sup>109</sup>

4.83 It is therefore acknowledged that ‘services still grapple with the most effective ways of identifying family violence issues with which clients present and, just as importantly, of taking appropriate actions once family violence has been accurately identified’.<sup>110</sup>

4.84 Currently, referral to Centrelink social workers where family violence is disclosed is already provided for in the *Guide to Social Security Law*, Job Seeker Classification Instrument (JSCI) Guidelines and related Department of Education, Employment and Workplace Relations (DEEWR) advices where family violence is

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103 E Robinson and L Moloney, *Family Violence: Towards a Holistic Approach to Screening and Risk Assessment in Family Support Services* (2010).

104 Ibid, 5.

105 Ibid.

106 Ibid, 4.

107 Ibid, 5.

108 Ibid, 5.

109 Ibid, 5.

110 Ibid.

self-disclosed. However, it is not consistently provided for in the *Child Support Guide* and *Family Assistance Guide*.

4.85 However, the CSA's 'Common Module—Family Violence' (an internal CSA electronic resource) states that, where a parent or non-parent carer indicates that they are experiencing, or are at risk of family violence, referral to service support services should be made, including warm referrals<sup>111</sup> to the Parent Support Service where the customer is significantly emotionally distressed or, warm transfer to the Family Relationships Advice Line or the family violence support web page.<sup>112</sup>

4.86 In the Commonwealth Ombudsman's report—*Falling Through the Cracks*—the Ombudsman recommended that Centrelink implement processes to collect information from customers who identify as having a disability (mental or physical) about the impact that disability has on their capacity to engage effectively with the social security system' and that 'Centrelink should consider implementing a standard process for recording any special needs or limitations associated with mental illness on a customer's electronic file, as well as any instructions/strategies for accommodating those needs'.<sup>113</sup> A variation of this is currently used by both Centrelink and the CSA—referred to as 'vulnerability indicators' and 'sensitive issue indicators', respectively.

### **Vulnerability indicators**

4.87 In the social security system, a 'vulnerability indicator' may be placed on a customer's record (accessible by Centrelink, DEEWR and the job seeker's job services provider) in certain circumstances. The ALRC understands that these currently include recent psychiatric problem or mental illness, drug or alcohol dependence, homelessness and recent traumatic relationship breakdown (including relocation as a result of a recent family violence situation). Centrelink customer service advisers are required to consider at their initial engagement with a job seeker, and at subsequent engagements, whether a 'vulnerability indicator' should be placed on the customer's record.<sup>114</sup> The flag indicates to job service providers and Centrelink that a job seeker may have difficulty meeting their requirements for receiving social security payments or entitlements (such as activity test or participation requirements) due to vulnerability and to ensure that the vulnerabilities are taken into account when setting participation requirements for the job seeker and responding to failures to comply.

4.88 A 'warm referral' involves contacting another service on the customer's behalf and may also involve writing a report or case history on the customer for the legal service and/or attending the service with the customer. This may be effective for

111 A 'warm referral' involves contacting another service on the client's behalf and may also involve writing a report or case history on the client for the legal service and/or attending the service with the client. This may be effective for clients who are hesitant to contact other services or who may not have the means—such as a telephone—to contact the other agency. See S Clarke and S Forell, *Pathways to Justice: The Role of Non-Legal Services* (2007), prepared for the Law and Justice Foundation of NSW.

112 Department of Human Services, *Common Module—Family Violence*, 7 June 2011.

113 Commonwealth Ombudsman, *Falling Through the Cracks—Centrelink, DEEWR and FaHCSIA: Engaging with Customers with a Mental Illness in the Social Security System* (2010) Recs 9 and 10.

114 J Disney, A Buduls and P Grant, *Impacts of the new Job Seeker Compliance Framework: Report of the Independent Review* (2010).



customers who are hesitant to contact other services or who may not have the means—such as a telephone—to contact the other agency.

4.89 The Commonwealth Ombudsman has previously noted that ‘Centrelink staff struggle with the challenge of properly identifying these customers so that services can be appropriately tailored to their needs’.<sup>115</sup>

### **Sensitive issue indicator**

4.90 A similar mechanism exists in the child support system. The CSA’s *Family Violence—Common Module* states that where a customer advises that there is a risk of family violence, regardless of whether there is an Apprehended Violence Order (AVO) or Domestic Violence Order (DVO) in place, a ‘sensitive issue indicator’ should be placed on the customer’s file. The Module expressly states that the customer is not to be advised of the existence of the ‘sensitive issue indicator’ and that it is an internal customer management tool only.<sup>116</sup> Conversations regarding family violence are also required to be documented in the CSA database.<sup>117</sup>

### **Submissions and consultations**

4.91 Stakeholders recommended a number of responses that should occur when family violence is disclosed, including the provision of information; referral to social workers and other support services such as Legal Aid, case or issues management, and mechanisms for the protection of personal information. Some stakeholders also recommended the establishment of a specialised team or case worker to coordinate these responses. These concepts are discussed below.

### **Provision of information**

4.92 The Sole Parents’ Union submitted that it had received feedback that,

while many Centrelink staff are excellent, providing all information necessary and ensuring applicants are aware of their entitlements, others are not so diligent, sympathetic or even believing. Nor do they generally provide information about child support eligibility and requirements, often merely advising the victim to contact the Child Support Agency for all information.<sup>118</sup>

4.93 In particular, the ADFVC recommended that customers who disclose family violence should be provided with information about their rights and entitlements.<sup>119</sup> The National Children’s and Youth Law Centre emphasised the importance of this for young people experiencing family violence if ‘they are not aware that they are able to

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115 Commonwealth Ombudsman, *Falling Through the Cracks—Centrelink, DEEWR and FaHCSIA: Engaging with Customers with a Mental Illness in the Social Security System* (2010); Commonwealth Ombudsman, *Submission to the House Standing Committee on Education and Employment Inquiry into the Social Security Legislation Amendment (Job Seeker Compliance) Bill 2011* (2011).

116 Department of Human Services, *Common Module—Family Violence*, 7 June 2011.

117 Ibid.

118 Sole Parents’ Union, *Submission CFV 63*, 27 April 2011.

119 ADFVC, *Submission CFV 71*, 11 May 2011; ADFVC, *Submission CFV 53*, 27 April 2011.

financially support themselves then young people may be forced to stay in the violent home, or become homeless'.<sup>120</sup>

#### 4.94 The CSMC stated

At a time when they are often at their most vulnerable, and needing additional financial resources, [victims] have to negotiate the complex, interacting systems that involve Child Support, Centrelink and family law. Family violence often commences or worsens during separation, and the main concern for women at this time is the safety of themselves and their children. To achieve this they often decide not to pursue child support, despite the financial impact. In our experience they are often not fully informed by the CSA or Centrelink of their rights and entitlements; nor do they have an advocate or support to assist them negotiate these complex systems.<sup>121</sup>

#### *Referral to support services*

4.95 A number of stakeholders recommended that a person who discloses family violence should be referred to a social worker.<sup>122</sup> The ADFVC considered that any person who discloses family violence should be referred to support available—‘whether that be to the national domestic violence helpline, Centrelink social workers or a domestic violence service’.<sup>123</sup> Stakeholders considered that social workers were best placed to provide further assistance with a person’s claims and entitlements.<sup>124</sup>

4.96 Stakeholders also recognised the need for additional training for social workers to ‘undertake any necessary assessment’,<sup>125</sup> and to ensure that policies and practices support required referral to social workers where family violence is identified.<sup>126</sup>

#### *Specialist family violence team*

4.97 Several stakeholders considered that a specialist family violence unit or team should be established.<sup>127</sup> Stakeholders submitted that such a team would overcome a ‘range of structural, cultural and systemic issues’ such as:

- inconsistent responses to family violence, including differing information from CSA and Centrelink;
- the need to ask the ‘right’ questions in order to get the desired information;
- a lack of expertise in responding to family violence;

120 National Children’s and Youth Law Centre, *Submission CFV 64*, 3 May 2011.

121 Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

122 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 59*, 27 April 2011; ADFVC, *Submission CFV 53*, 27 April 2011.

123 ADFVC, *Submission CFV 53*, 27 April 2011.

124 ADFVC, *Submission CFV 71*, 11 May 2011.

125 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

126 Joint submission from Domestic Violence Victoria and others, *Submission CFV 59*, 27 April 2011.

127 ADFVC, *Submission CFV 53*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

- the personal and intrusive nature of seeking an exemption for child support purposes;
- support and trust of agency staff;
- limited information provided to victims of family violence;
- barriers created by frequent reassessments;<sup>128</sup> and
- the need to repeat a story to numerous workers in different agencies.<sup>129</sup>

4.98 The CSMC submitted that a specialist family violence unit could work across both the CSA and Centrelink,<sup>130</sup> staffed with highly skilled workers with extensive experience of family violence<sup>131</sup> who utilise a sensitive case management approach.<sup>132</sup> This team would be a specialist team with best practice screening tools and have a professional background and expertise in ‘domestic violence’. The team would have a complaint mechanism and processes of review consistent with current government agencies.<sup>133</sup> Some stakeholders suggested that a member of the specialist team should be appointed to each person who discloses family violence.<sup>134</sup>

4.99 Stakeholders suggested that this team could assume a range of responsibilities that could include, but are not limited to, the following:

- act as the first point of contact for victims of family violence;<sup>135</sup>
- coordinate the provision of information and referral to support services;<sup>136</sup>
- act as a conduit between the victim and government agencies;<sup>137</sup>
- critically discuss the various options available to them, and support them in their decisions and their negotiation through the system;<sup>138</sup> and
- organise exemptions and reviews.<sup>139</sup>

4.100 The ADFVC provided an example of best practice from New Zealand:

New Zealand’s Department of Work and Income ... provides financial assistance and employment services. It offers a single point of contact for New Zealanders needing job search support, financial assistance and in-work support. In 2005, Work and

128 National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011.

129 Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

130 Ibid.

131 Ibid.

132 Ibid.

133 National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011.

134 ADFVC, *Submission CFV 53*, 27 April 2011.

135 National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011.

136 ADFVC, *Submission CFV 53*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

137 National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

138 Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

139 National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011.

Income piloted the Family Violence Intervention Programme that was rolled out nationally. Through the program, Family Violence Response Co-ordinators are appointed in each region to provide support to case managers and liaise with local support services. Co-ordinators provide training and support to enable case managers in screening clients for family violence and providing referrals to services.<sup>140</sup>

#### ***‘Safety concern’ flag***

4.101 The AASW considered that ‘measures be undertaken to minimize the number of times a person has to provide detail of the domestic and family violence experienced’.<sup>141</sup>

4.102 The Welfare Rights Centre Inc Queensland referred to Centrelink’s ‘vulnerability indicators’ for homelessness and potential homelessness which leads to an ‘appropriate service delivery to the customer; tailored responses as well as internal and external referrals for addressing the needs and dealing with homelessness’. It recommended a ‘similar “flag” system be set up to better effect service delivery for customers with family violence, or risk of family violence concerns’.<sup>142</sup>

4.103 Similarly, the Commonwealth Ombudsman considered that there would be ‘merit in expanding the use of vulnerability indicators (or some other visible “flag” on the customer’s record) to highlight the customer’s vulnerability to all staff handling their file’.<sup>143</sup>

#### **ALRC’s views**

4.104 The ALRC recognises the need for an appropriate response by Centrelink, the CSA and the FAO, when family violence is disclosed. Such a response should be coordinated, informative and ultimately increase the safety of victims of family violence. The ALRC considers that there is merit in ensuring that, within an agency—and possibly across agencies—there is a signalling mechanism that family violence has been raised which prompts a privacy and a case-management response which includes risk assessment and risk management. Such a response could be facilitated through either referral to a Centrelink social worker or a specialist family violence team.

4.105 The ALRC understands that DHS is currently considering a portfolio-wide response and an alignment of CSA and Centrelink responses to family violence, as part of DHS integration and Service Delivery Reform. Such a portfolio-wide response may assist in ensuring a coordinated response from the Human Services portfolio agencies.

#### ***Provision of information***

4.106 The ALRC notes with concern that when a person discloses family violence to a service agency, the person may not receive all the information relevant to their circumstances. The disclosure of family violence should act as a trigger for the provision of information discussed in Proposal 4–8 above. This will ensure that

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140 ADFVC, *Submission CFV 53*, 27 April 2011.

141 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

142 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

143 Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.

customers who disclose family violence are aware of how family violence may be relevant to their social security, child support, and family assistance case, and of the support networks that are available to them.

### ***Confidentiality***

4.107 The information about family violence is only a claim of family violence and does not go to evidence of its truth. To preserve procedural fairness and prevent the spread of unfounded allegations of family violence, information about family violence should be treated confidentially, including prohibiting disclosure of such information to individuals outside the relevant agency other than the customer without the express permission of the customer. The focus should be on managing safety issues and not to cause unintended consequences.<sup>144</sup>

### ***Referral to a Centrelink social worker***

4.108 There are concerns about splitting the roles of screening and risk assessment. However, in light of the nature of the role of customer service staff and the agency environment, the ALRC considers that customer service staff should not conduct risk assessment, but that persons who disclose family violence be referred to a Centrelink social worker to perform this role. The ALRC notes in this regard that the *Guide to Social Security Law*, JSCI Guidelines and related DEEWR material already provide this. However, the ALRC considers that the *Child Support Guide* and the *Family Assistance Guide* should be amended to reflect this.

### ***Specialist family violence team***

4.109 Some stakeholders suggested the development of a specialist family violence team that would screen, support and address issues of exemptions and other family violence matters. The team would be the one point of contact for victims. Other stakeholders have recommended a specialist case manager to fulfil much the same role. The ALRC understands that, to some extent, Centrelink social workers currently fulfil this role.

4.110 In the ALRC's view, the establishment of a specialist family violence team could potentially solve a number of problems related to multiple points of engagement within and across agencies. It would also constitute a shift from issues management to case management for family violence cases. The ALRC notes that if a specialist family violence team or case manager is established, many of the proposals in this Discussion Paper that refer to social workers will refer instead to the specialist family violence team or case manager.

### ***Safety concern flag***

4.111 The operation of a flag, similar to the 'vulnerability indicator' and 'sensitive issue indicator' currently used by Centrelink and the CSA, respectively, would assist in

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144 Both the social security system and the child support system have restricted access facilities available—the Deny Access Facility and Restricted Access Classification system, respectively. These facilities are discussed in further detail in Chs 5 and 10.

addressing the barrier of repeating information to numerous agency officers. The ALRC considers that the flag should be placed on a customer's file when safety concerns are raised, to provide the relevant agency staff member an indication that the person may be eligible for different entitlements or exemptions.

4.112 The ALRC notes, however, that there would be some concerns as to how to keep the 'safety concern flag' current, to ensure that the flag is not used for some collateral purpose and to ensure procedural fairness is afforded to others who may be connected to the person's file. There may also be concerns about who could access the 'safety concern flag'. These concerns should be taken into consideration in developing the 'safety concern flag'. The existing infrastructure must also be sufficient to host a 'safety concern flag' without allowing unintended access by various government departments and agencies.

4.113 Currently, the interface between the agencies—Centrelink, the CSA, and the FAO—and their customers may be best described as 'issues management'. This is distinct from case management, which is 'generally held to involve the handling of a customer by a dedicated case officer over an extended, if not indefinite, period of time'.<sup>145</sup> While the ALRC acknowledges this distinction, the Discussion Paper refers to the agency-customer interface as case management, for simplicity.

**Proposal 4–9** The Department of Human Services and other relevant departments and agencies should develop a protocol to ensure that disclosure of family violence by a customer prompts the following service responses:

- case management, including provision of information in Proposal 4–8, and additional services and resources where necessary; and
- the treatment of that information as highly confidential with restricted access.

**Proposal 4–10** The *Guide to Family Assistance* and the *Child Support Guide* should provide that where family violence is identified through the screening process, or otherwise, Centrelink, Child Support Agency and Family Assistance Office staff must refer the customer to a Centrelink social worker.

**Proposal 4–11** Where family violence is identified through the screening process or otherwise, a 'safety concern flag' should be placed on the customer's file.

**Proposal 4–12** The 'safety concern flag' only (not the customer's entire file) should be subject to information sharing as discussed in Proposal 4–13.

145 D Richmond, *Delivering Quality Outcomes—Report of the Review of Decision Making and Quality Assurance Processes of the Child Support Program* (2010), [4.3.6].

## Information sharing

4.114 Family violence is relevant in different ways for child support, family assistance and social security. As child support is inter-partes, a past history of family violence may always be relevant to a case. Similarly, historical family violence may be of continuing relevance in a family assistance context, where parties share care of children. More recent family violence is relevant to social security as it may affect a person's qualification for, or payability of, social security payments and entitlements.

4.115 As discussed earlier, as part of the government's Service Delivery Reform, some ICT systems in the Human Services portfolio are being integrated. The former Minister for Human Services, the Hon Chris Bowen MP, explained that 'apart from the limited data that is already shared between agencies like Medicare and Centrelink, no more information will be shared, unless the individual concerned asks us to share the information for their convenience'<sup>146</sup> and the individual databases of each agency will not be merged.

4.116 The *Privacy Act 1988* (Cth) regulates the handling of personal information by the Australian Government—to which 11 Information Privacy Principles apply.<sup>147</sup> In line with the Information Privacy Principles, the DHS has stated that it will 'not use customer information collected for the purposes of one program for another program, unless the use of information in this way is authorised by law and already occurs or, alternatively, the customer gives informed consent to the additional use',<sup>148</sup> explaining that the idea is to bring information technology platforms together, not information.<sup>149</sup>

4.117 In addition, the DHS has stated that it has conducted preliminary Privacy Impact Assessments and, to ensure that information is appropriately managed and shared, a consent model is being put in place to enable 'the sharing of customer information across programs' and emphasise 'adequate levels of notice, control and choice for individuals'.<sup>150</sup>

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146 C Bowen (Minister for Human Services), 'Reform to Deliver Service That Works For You' (Press Release, 16 December 2009).

147 However, in June 2010, the Government released an exposure draft of legislation intended to unify the Information Privacy Principles and the National Privacy Principles in a single set of 13 Australian Privacy Principles, as recommended by the ALRC in *For Your Information: Australian Privacy Law and Practice* (ALRC Report 108, 2008). The Senate Standing Committee on Finance and Public Administration is currently considering the exposure draft. The Government has indicated that it will consider the exemptions under the *Privacy Act*.

148 Department of Human Services, *Submission to the Senate Community Affairs Committee for the Inquiry of the Human Services Legislation Amendment Bill 2010* (2011).

149 C Bowen (Minister for Human Services), 'Reform to Deliver Service That Works For You' (Press Release, 16 December 2009).

150 Department of Human Services, *Submission to the Senate Community Affairs Committee for the Inquiry of the Human Services Legislation Amendment Bill 2010* (2011).

### Submissions and consultations

4.118 In the Social Security Issues Paper and the Child Support and Family Assistance Issues Paper, the ALRC asked whether information about family violence should be shared between government agencies, such as Centrelink and the CSA.<sup>151</sup>

4.119 Some stakeholders recommended that information sharing could be improved both between agency officers themselves and between different service agencies, so that victims of family violence would only have to tell their story to one officer in one agency, and to allow both agencies to have the same information.<sup>152</sup>

4.120 The ADFVC raised concerns that ‘[w]omen could not understand the reason for having to retell their story as they expected that the information would already be on file, accessible to the officer they were meeting with’.

Every time I go in there I end up crying, especially if they’re in any way abrupt. You don’t want to go around telling your story all the time. It’s not a story that you really... I didn’t live it for thirty-two years to go and tell people.<sup>153</sup>

4.121 The ADFVC considered it appropriate that some assurances be given to a victim of family violence that once a person disclosed family violence to either Centrelink or the CSA, they would not have to repeat their story when that information is already on their file. The ADFVC considered that the assignment of a case worker, discussed above, to the applicant would ensure greater sensitivity in dealing with these issues.<sup>154</sup>

4.122 The Commonwealth Ombudsman raised concerns that

many people assume that Commonwealth agencies share more information about their circumstances than is actually the case. In particular, people who are customers of Centrelink and the Child Support Agency often assume that those agencies automatically share information about their circumstances. In some cases, people have relied to their detriment on that assumption, and have failed to disclose the same information to other agencies, believing that their contact with one agency will suffice.<sup>155</sup>

4.123 The Ombudsman considered that the integration of the various agencies within the Human Services portfolio ‘will further encourage people to assume that relevant information will be shared between Centrelink and the Child Support Agency’.<sup>156</sup>

4.124 The Ombudsman considered that both Centrelink and the CSA ‘should also be careful to explain to these customers that information about their family violence

151 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 5; Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 14.

152 ADFVC, *Submission CFV 71*, 11 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; ADFVC, *Submission CFV 53*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

153 ADFVC, *Submission CFV 71*, 11 May 2011.

154 ADFVC, *Submission CFV 53*, 27 April 2011.

155 Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.

156 Ibid.



situation is not automatically shared, and that they should consider contacting the other agency directly to discuss how this might affect the payments or services they receive'.<sup>157</sup>

4.125 Most stakeholders who responded to these questions considered that any sharing of information between government agencies such as Centrelink and the CSA should only be done with the express consent of the person concerned,<sup>158</sup> to enable individuals to 'exercise choice and control over the way their information is handled'.<sup>159</sup>

4.126 The Welfare Rights Centre Inc Queensland added that, even where informed consent has been given, 'policy and practice needs to allow for the understanding that vulnerable people may give consent without real knowledge of the possible negative consequences of such an act'.<sup>160</sup>

4.127 Some stakeholders considered that information should also be able to be shared in circumstances where there are genuine concerns about risk to children.<sup>161</sup> In cases where there are concerns about risks to children, the Welfare Rights Centre Inc Queensland submitted that where the staff member genuinely believes that there are risks to the children, a report to the local child protection agency should be made.<sup>162</sup>

### **Privacy protocols**

4.128 In considering information sharing between agencies, stakeholders submitted that there should be 'information sharing protocols to ensure information about family violence and risk can be shared ethically and legally to improve safety of victims'.<sup>163</sup> In particular, stakeholders considered it was important that:

- protections were developed to ensure that this information, or any other, is not further relayed to the perpetrator;<sup>164</sup> and
- any information sharing should be in line with the *Privacy Act 1988* (Cth) and the *National Privacy Principles*.<sup>165</sup>

4.129 On the other hand, the Sole Parents' Union submitted that protecting children at risk of harm should override other privacy considerations and therefore, where there

<sup>157</sup> Ibid.

<sup>158</sup> Law Council of Australia Family Law Section, *Submission CFV 67*, 5 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 43*, 21 April 2011.

<sup>159</sup> Office of the Australian Information Commissioner, *Submission CFV 61*, 4 May 2011.

<sup>160</sup> Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

<sup>161</sup> Sole Parents' Union, *Submission CFV 52*, 27 April 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 43*, 21 April 2011.

<sup>162</sup> Welfare Rights Centre Inc Queensland, *Submission CFV 43*, 21 April 2011.

<sup>163</sup> Joint submission from Domestic Violence Victoria and others, *Submission CFV 59*, 27 April 2011.

<sup>164</sup> National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

<sup>165</sup> Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

are concerns about violence or child protection, this information should be shared across agencies.<sup>166</sup>

### **ALRC's views**

4.130 The ALRC understands that, in many cases, Centrelink may be the first point of contact a person has with the social welfare system. A person eligible for child support, for example, may contact Centrelink before being referred to the CSA. In addition, people may not differentiate between various government agencies and assume that once they have informed one agency about family violence—such as Centrelink—there is no need to inform another. As a result, victims of family violence may not be informed about all their rights and entitlements across the Human Services portfolio. The ALRC acknowledges that this confusion may increase in the future due to the government's move to 'one-stop-shops' and a single portal for a customer's access to Centrelink and the CSA.

4.131 The ALRC considers that if a 'safety concern flag' is developed (Proposal 4–11), and placed on a customer's file, the existence of this flag could be shared between agencies, with the informed consent of the customer. This could ensure that victims of family violence do not have to repeat their story to different agencies.

4.132 In order to ensure that privacy concerns are addressed with such a proposal, the ALRC considers that customers who have disclosed family violence should be notified that a 'safety concern flag' will be placed on their file. This is in contrast to the 'sensitive issue indicator' and 'vulnerability indicator', in which the ALRC understands that customers are not informed about its existence. This safety concern flag is only to identify that family violence or safety concerns have been raised, not the truth of such a claim.

4.133 Customers should be informed of the effect of the 'safety concern flag'—in particular, that neither the 'safety concern flag', nor the customer's disclosure of family violence, will automatically be shared with other agencies such as Centrelink, the CSA and the FAO, however, that they have the option to provide informed consent to the sharing of the 'safety concern flag' with other agency staff. There must also be procedures in place for the revocation of consent. Provision for informed consent should take into consideration an individual customer's cultural background and ability to understand and make informed decisions.

### **Privacy**

4.134 The ALRC considers that, in sharing information between agencies there is a need to ensure the confidentiality of that information and adherence to obligations under the *Privacy Act*.

4.135 The ALRC understands that different government agencies and departments may be able to access the database of other government agencies. For example, where Centrelink receives information about family violence from DEEWR (whether from

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166 Sole Parents' Union, *Submission CFV 52*, 27 April 2011.

DEEWR itself, through DEEWR from Job Services Australia providers, or from CRS Australia) or DEEWR holds such information, there is a need to ensure that information is not subsequently shared with the CSA and the FAO.

4.136 The ALRC considers that the current access arrangements between these agencies and departments needs to be taken into consideration in the sharing of any ‘safety concern flag’ to ensure that any information-sharing arrangement is in accordance with the *Privacy Act* and the *Information Privacy Principles*. The ALRC considers, therefore, that a Privacy Impact Assessment may be necessary.

**Proposal 4–13** If a ‘safety concern flag’ is developed in accordance with Proposal 4–11, the Department of Human Services and other relevant departments and agencies should develop inter-agency protocols for information sharing between agencies in relation to the ‘safety concern flag’. Parties to such protocols should receive regular and consistent training to ensure that the arrangements are effectively implemented.

**Proposal 4–14** The Department of Human Services and other relevant departments and agencies should consider issues, including appropriate privacy safeguards, with respect to the personal information of individual customers who have disclosed family violence in the context of their information-sharing arrangements.

## Family violence policy

4.137 It is recognised that ‘[g]ood individual practice cannot be sustained unless it is supported by organisational cultures and legitimated formally ... by being enshrined in policy’.<sup>167</sup>

### Submissions and consultations

4.138 The ADFVC recommended the development of a family violence policy—including procedures for screening and dealing with disclosures information provided to customers, training for staff, appointment of a case worker to those who disclose and restricting access to their personal information. The ADFVC considered that such a policy may provide greater clarity to staff and greater consistency in practice.<sup>168</sup>

4.139 In a joint submission, the Domestic Violence Victoria and the Domestic Violence Resource Centre Victoria submitted that ‘building common understandings about the nature and dynamics of family violence across all organisations dealing with child support and family assistance is an essential first step. The development of consistent definitions, policies, screening tools, risk management guidelines and

<sup>167</sup> Australian Institute of Social Relations, *Screening, Risk Assessment and Safety Planning* (2010).

<sup>168</sup> ADFVC, *Submission CFV 53*, 27 April 2011.

practice directions will enhance the safety of women and children experiencing family violence'.<sup>169</sup>

### **ALRC's views**

4.140 The ALRC's view is that a family violence policy across agencies would help to ensure a consistent response to family violence from service agencies such as Centrelink, CSA and the FAO. In addition, a family violence policy would perform an educative function across the three agencies.

**Proposal 4–15** The Department of Human Services and other relevant departments and agencies should develop policies and statements relating to family violence and child protection, to ensure consistency in service responses. These policies should be published on the departments' and agencies' websites and be included in the information provided to customers in Proposal 4–8.

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<sup>169</sup> Joint submission from Domestic Violence Victoria and others, *Submission CFV 59*, 27 April 2011.



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## Part B—Social Security

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### Chapters

- 5. Social Security—Overview and Overarching Issues
- 6. Social Security—Relationships
- 7. Social Security—Proof of Identity, Residence and Activity Tests
- 8. Social Security—Payment Types and Methods, and Overpayment

### Proposals and Questions in this Part

**Proposal 5–1** The *Guide to Social Security Law* should be amended to include:

- (a) the definition of family violence in Proposal 3–1; and
- (b) the nature, features and dynamics of family violence including: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children.

In addition, the *Guide to Social Security Law* should refer to 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.

**Proposal 5–2** Centrelink customer service advisers, social workers and members of the Social Security Appeals Tribunal and Administrative Appeals Tribunal should receive consistent and regular training on the definition of family violence, including the nature, features and dynamics of family violence, and responding sensitively to victims of family violence.

**Proposal 5–3** The *Guide to Social Security Law* should be amended to provide that the following forms of information to support a claim of family violence may be used, including but not limited to:

- statements including statutory declarations;
- third party statements such as statutory declarations by witnesses, employers or family violence services;
- social worker’s reports;
- documentary records such as diary entries, or records of visits to services, such as health care providers;
- other agency information (such as held by the Child Support Agency);
- protection orders; and
- police reports and statements.

**Proposal 5–4** The *Guide to Social Security Law* should be amended to include guidance as to 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.

**Proposal 5–5** Centrelink customer service advisers and social workers should receive consistent and regular training in relation to the types of information that a person may rely on in support of a claim of family violence.

**Proposal 5–6** The *Guide to Social Security Law* should be amended to provide that, where a person claims that they are experiencing family violence by a family member or partner, it is not appropriate to seek verification of family violence from that family member or partner.

**Proposal 5–7** Centrelink customer service advisers and social workers should receive consistent and regular training in relation to circumstances when it is not appropriate to seek verification of family violence from a person’s partner or family member.

**Proposal 5–8** Centrelink customer service advisers and social workers should be required to screen for family violence when negotiating and revising a person’s Employment Pathway Plan.

**Question 5–1** At what other trigger points, if any, should Centrelink customer service advisers and social workers be required to screen for family violence?

**Proposal 5–9** A Centrelink Deny Access Facility restricts access to a customer’s information to a limited number of Centrelink staff. The *Guide to Social Security Law* should be amended to provide that, where a customer discloses family violence, he or she should be referred to a Centrelink social worker to discuss a Deny Access Facility classification.

**Question 5–2** Should Centrelink place a customer who has disclosed family violence on the ‘Deny Access Facility’:

- (a) at the customer’s request; or
- (b) only on the recommendation of a Centrelink social worker?

**Proposal 6–1** The *Guide to Social Security Law* should be amended to reflect the way in which family violence may affect the interpretation and application of the criteria in s 4(3) of the *Social Security Act 1991* (Cth).

**Proposal 6–2** Centrelink customer service advisers and social workers should receive consistent and regular training in relation to the way in which family violence may affect the interpretation and application of the criteria in s 4(3) of the *Social Security Act 1991* (Cth).

**Proposal 6–3** The *Guide to Social Security Law* should be amended expressly to include family violence as a circumstance where a person may be living separately and apart under one roof.

**Proposal 6–4** The *Guide to Social Security Law* should be amended to 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).

**Question 6–1** With respect to the discretion under s 24 of the *Social Security Act 1991* (Cth):

- (a) is the discretion accessible to those experiencing family violence;
- (b) what other ‘reasonable means of support’ would need to be exhausted before a person could access s 24; and
- (c) in what ways, if any, could access to the discretion be improved for those experiencing family violence?

**Proposal 6–5** The *Guide to Social Security Law* should be amended 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).

**Question 6–2** Should the *Social Security Act 1991* (Cth) also be amended expressly to refer to family violence, child abuse and neglect as an example of when it is ‘unreasonable to live at home’?

**Question 6–3** Should ss 1067A(9)(a)(ii) and 1061PL(7)(a)(ii) of the *Social Security Act 1991* (Cth) be amended:

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



**Proposal 6–6** DEEWR and Centrelink should review their policies, practices and training to ensure that, in cases of family violence, Youth Allowance, Disability Support Pension and Pensioner Education Supplement, applicants do not bear sole responsibility for providing specific information about:

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

**Question 7–1** In practice, is the form, ‘Questions for Persons with Insufficient Proof of Identity’, sufficient to enable victims of family violence to provide an alternate means of proving identity?

**Proposal 7–1** The *Guide to Social Security Law* should be amended expressly to include family violence as a reason for an indefinite exemption from the requirement to provide a partner’s tax file number.

**Question 7–2** Section 192 of the *Social Security (Administration) Act 1999* (Cth) confers certain information-gathering powers on the Secretary of FaHCSIA. In practice, is s 192 of the *Social Security (Administration) Act 1999* (Cth) invoked to require the production of tax file numbers or information for the purposes of proof of identity? If not, should s 192 be invoked in this manner in circumstances where a person fears for his or her safety?

**Question 7–3** When a person does not have a current residential address, what processes are currently in place for processing social security applications?

**Proposal 7–2** Proposal 20–3 proposes that the *Migration Regulations 1994* (Cth) be amended to allow holders of Prospective Marriage (Subclass 300) visas to move onto another temporary visa in circumstances of family violence. If such an amendment is made, the Minister of FaHCSIA should make a Determination including this visa as a ‘specified subclass of visa’ that:

- meets the residence requirements for Special Benefit; and
- is exempted from the Newly Arrived Resident’s Waiting Period for Special Benefit.

**Question 7–4** Should the Minister of FaHCSIA make a Determination including certain temporary visa holders—such as student, tourist and secondary holders of Subclass 457 visas—as a ‘specified subclass of visa’ that:

- meets the residence requirements for Special Benefit?
- is exempted from the Newly Arrived Resident’s Waiting Period for Special Benefit?

**Question 7–5** What alternatives to exemption from the requirement to be an Australian resident could be made to ensure that victims of family violence, who are not Australian residents, have access to income support to protect their safety?

**Question 7–6** In what way, if any, should the *Social Security Act 1991* (Cth) or the *Guide to Social Security Law* be amended to ensure that newly arrived residents

with disability, who are victims of family violence, are able to access the Disability Support Pension? For example, should the qualifying residence period for Disability Support Pension be reduced to 104 weeks where a person is a victim of family violence?

**Proposal 7–3** The *Guide to Social Security Law* should be amended expressly to include family violence as an 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.

**Question 7–7** What changes, if any, are needed to improve the safety of victims of family violence who do not meet the Newly Arrived Resident’s Waiting Period for payments other than Special Benefit?

**Proposal 7–4** Centrelink customer service advisers should receive consistent and regular training in the administration of the Job Seeker Classification Instrument including training in relation to:

- 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
- the availability of support services.

**Question 7–8** In practice, to what extent can, or do, recommendations made by ESA or JCA assessors in relation to activity tests, participation requirements, Employment Pathway Plans and exemptions account for the needs and experiences of job seekers experiencing family violence?

**Question 7–9** In practice, is family violence adequately taken into account by a Centrelink specialist officer in conducting a Comprehensive Compliance Assessment?

**Question 7–10** What changes, if any, to the Employment Pathway Plan and exemption processes could ensure that Centrelink captures and assesses the circumstances of job seekers experiencing family violence?

**Proposal 7–5** The *Guide to Social Security Law* should expressly direct Centrelink customer service advisers to consider family violence when tailoring a job seeker’s Employment Pathway Plan.

**Proposal 7–6** Exemptions from activity tests, participation requirements and Employment Pathway Plans are available for a maximum of 13 or 16 weeks. The ALRC has heard concerns that exemption periods granted to victims of family violence do not always reflect the nature of family violence. DEEWR should review exemption periods to ensure a flexible response for victims of family violence—both principal carers and those who are not principal carers.

**Question 7–11** In practice, what degree of flexibility does Centrelink have in its procedures for customers experiencing family violence:

- (a) to engage with Centrelink in negotiating or revising an Employment Pathway Plan; or

(b) apply for or extending an exemption.

Are these procedures sufficient to ensure the safety of victims of family violence is protected?

**Question 7–12** A 26 week exclusion period applies to a person who moves to an area of lower employment prospects. An exemption applies where the reason for moving is due to an ‘extreme circumstance’ such as family violence in the ‘original place of residence’. What changes, if any, are necessary to ensure that victims of family violence are aware of, and are making use of, the exemption available from the 26 week exclusion period? For example, is the term ‘original place of residence’ interpreted in a sufficiently broad manner to encapsulate all forms of family violence whether or not they occur within the ‘home’?

**Proposal 7–7** 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.

**Question 7–13** Centrelink can end a person’s ‘Unemployment Non-Payment Period’ in defined circumstances. In practice, are these sufficiently accessible to victims of family violence?

**Proposal 8–1** The *Social Security Act 1991* (Cth) establishes a seven day claim period for Crisis Payment. FaHCSIA should review the seven day claim period for Crisis Payment to ensure a flexible response for victims of family violence.

**Question 8–1** Crisis Payment is available to social security recipients or to those who have applied, and qualify, for social security payments. However, Special Benefit is available to those who are not receiving, or eligible to receive, social security payments. What reforms, if any, are needed to ensure that Special Benefit is accessible to victims of family violence who are otherwise ineligible for Crisis Payment?

**Proposal 8–2** Crisis Payment for family violence currently turns on either the victim of family violence leaving the home or the person using family violence being removed from, or leaving, the home. The *Social Security Act 1991* (Cth) should be amended to provide Crisis Payment to any person who is ‘subject to’ or ‘experiencing’ family violence.

**Proposal 8–3** 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. As urgent payments may not be made because the family violence was ‘foreseeable’, the *Guide to Social Security Law* should be amended expressly to refer to family violence as a separate category of circumstance when urgent payments may be sought.

**Proposal 8–4** The *Guide to Social Security Law* should be amended to provide that urgent payments and advance payments may be made in circumstances of family violence in addition to Crisis Payment.

**Proposal 8–5** The *Guide to Social Security Law* should be amended to provide that, where a delegate is determining a person’s ‘capability to consent’, the effect of family violence is also considered in relation to the person’s capability.

**Question 8–2** When a person cannot afford to repay a social security debt, the amount of repayment may be negotiated with Centrelink. In what way, if any, should flexible arrangements for repayment of a social security debt for victims of family violence be improved? For example, should victims of family violence be able to suspend payment of their debt for a defined period of time?

**Proposal 8–6** Section 1237AAD of the *Social Security Act 1991* (Cth) provides that the Secretary of FaHCSIA may waive the right to recover a debt where special circumstances exist and the debtor or another person did not ‘knowingly’ make a false statement or ‘knowingly’ omit to comply with the *Social Security Act*. Section 1237AAD should be amended to provide that the Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that ‘the debt did not result wholly or partly from the debtor or another person acting as an agent for the debtor’.

**Proposal 8–7** The *Guide to Social Security Law* should be amended expressly to refer to family violence as a ‘special circumstance’ for the purposes of s 1237AAD of the *Social Security Act 1991* (Cth).



## 5. Social Security—Overview and Overarching Issues

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### Summary

5.1 Together with Chapters 6–8, this chapter provides an overview of Commonwealth social security law and examines options for reform of the social

security legislative framework to improve the safety of people who have experienced, or are experiencing, family violence.

5.2 This chapter examines the social security frameworks relevant to this Inquiry—the legal framework and the agencies that administer it; the policy framework, including underlying principles; and the relevance of family violence in the social security system. The chapter proposes reforms in the key areas of interpretative frameworks around family violence, screening, and collecting information about family violence.

5.3 In order to enhance the common interpretative framework, the ALRC proposes that the definition of family violence, and its natures, features and dynamics, be included in the *Guide to Social Security Law* supported by training for relevant Centrelink staff.

5.4 The ALRC also considers that, 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 makes proposals as to the types of information a person may use to support the claim and proposes that guidance as to the weight placed on each type of information should be included in the *Guide to Social Security Law*. The ALRC also makes proposals to ensure the safety of victims of family violence is protected when Centrelink is seeking information to support a claim of family violence and that this information is protected through Centrelink's Deny Access Facility.

## Background

5.5 Social security in Australia is funded from general taxation revenue and provides flat-rate, means-tested income support payments to those not expected to work (retired people, lone parents and carers), unable to work (people with disabilities and the sick), or unable to find work (the unemployed).<sup>1</sup> Supplementary payments are also available in certain circumstances, such as Rent Assistance.

## Legislative framework

5.6 The legislative basis of the social security system is the *Social Security Act 1991* (Cth) and the *Social Security (Administration) Act 1999* (Cth).

5.7 The *Social Security Act* governs all social security payments, while the *Social Security (Administration) Act* determines how all social security payments are administered—for example, how payments can be claimed, how and what information can be collected by Centrelink, and the operation of the review process. The *Social Security (International Agreements) Act 1999* (Cth) governs agreements relating to social security between Australia and other countries.

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1 P Whiteford and G Angenent, *The Australian System of Social Protection: An Overview* (2002), prepared for the Department of Family and Community Services.

5.8 The *Social Security Act* is ‘beneficial’ legislation—that is, it provides benefits to people. As such, ‘if there is an ambiguity in a piece of legislation which is beneficial in character, then the ambiguity should be resolved in a way that is most favourable to the people the Act is intended to benefit’.<sup>2</sup>

5.9 In some circumstances, the Ministers of the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) and the Department of Education, Employment and Workplace Relations (DEEWR) have the power to make determinations—either in writing or by legislative instrument—which, in effect, have the same legal force as if they were in social security legislation itself.<sup>3</sup> The head of FaHCSIA and DEEWR (the Secretary, in each case) are occasionally given similar powers to make directions by social security legislation.<sup>4</sup>

### Policy framework

5.10 While legislation governs and sets out the decision-making framework, the *Guide to Social Security Law* provides the lens through which the legislation is to be implemented by providing guidance to decision makers.

5.11 The *Guide to Social Security Law* is updated monthly to reflect changes in government policy and legislative interpretation and is publicly available online.<sup>5</sup> Although not binding in law, it is a relevant consideration for the decision maker<sup>6</sup> and, as such, is a significant aspect of the ‘legal frameworks’ being considered in this Inquiry.

5.12 A further element of the policy framework is the electronic guidelines referred to as the ‘e-reference’ used by Centrelink. The ‘e-reference’ is not, however, generally available to the public.

### Administrative arrangements

5.13 Social security law is administered by the Department of Human Services (DHS) through Centrelink. Policy responsibility is spread between DEEWR, which carries responsibility for work age payments, such as Newstart Allowance and Youth Allowance, and FaHCSIA, which carries responsibility for all other payments, such as Disability Support Pension and Age Pension.

5.14 Centrelink customer service advisers are usually the first point of contact for people visiting a Centrelink office. Certain customers are referred to a Centrelink social worker in specific situations, including:

- young people aged under 18 who are unable to live at home because of severe family breakdown, abuse or other exceptional circumstances;

2 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.3.1] (Beneficial Administration of the Act).

3 See, for example, *Social Security Act 1991* (Cth) s 25.

4 Ibid s 3A.

5 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011.

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



- customers who are experiencing, or are at risk of, family or domestic violence; and
- customers who are claiming a payment in respect of a child who is considered to be ‘at risk of harm’.<sup>7</sup>

5.15 Centrelink social workers can make an assessment about a person’s personal circumstances to assist with determinations for qualification and payability of social security payments. Centrelink social workers also exercise delegations for the Youth Allowance—Unreasonable to Live At Home payment<sup>8</sup> and have specific requirements for Parenting Payment, Carer Payment and Special Benefit.<sup>9</sup>

### **Review of decisions**

5.16 The review process within the social security system consists of the following steps:

- review either by the original decision maker or by a Centrelink Authorised Review Officer (ARO);<sup>10</sup>
- application to the Social Security Appeals Tribunal (SSAT) after review by an ARO;<sup>11</sup>
- appeal to the Administrative Appeals Tribunal (AAT).

5.17 In considering what improvements can be made to the social security legislative framework to protect the safety of those experiencing family violence, consideration of systemic reforms to the role or powers of the SSAT and AAT are beyond the scope of the Terms of Reference for this Inquiry.

### **Underlying principles of social security law**

5.18 The social security system forms part of a wider structure that presumes a strong commitment by government to high levels of employment and includes social protections provided outside the social security system—such as a mandatory system of private superannuation, worker’s compensation, a national health care system, paid sick leave and other cash and in-kind welfare benefits and services such as personal tax concessions.<sup>12</sup>

5.19 Several principles underpin the social security framework in Australia. First, the Australian social security system is based on the recognition of government and

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7 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [8.1.7.10] (Guidelines for Social Worker Involvement).

8 Ibid, [8.1.7.10] (Guidelines for Social Worker Involvement).

9 Ibid, [8.1.7.20] (Social Worker Involvement—Specific Payments).

10 *Social Security (Administration) Act 1999* (Cth) s 126.

11 Ibid s 142(1)(a).

12 A Herscovitch and D Stanton, ‘History of Social Security in Australia’ (2008) 80 *Family Matters* 51; P Whiteford and G Angenent, *The Australian System of Social Protection: An Overview* (2002), prepared for the Department of Family and Community Services.

community responsibility to assist those in need. Accordingly, an entitlement to social security is viewed as a right based on need, rather than as something to be ‘bought’ by paying a financial contribution akin to social insurance (which is the model in many other countries).<sup>13</sup> Need is measured by reference to the income and assets of the applicant through income and assets tests. In this way, social security acts primarily as a safety net.

5.20 Secondly, the concept of ‘mutual obligations’ refers to the general principle that 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.<sup>14</sup> This concept builds upon the notion that unemployed people have an obligation to seek work in return for social security payments—an enduring aspect of the Australian social security system.<sup>15</sup>

5.21 Thirdly, despite welfare reform that has focused on ‘mutual obligations’ of the individual, ‘it remains the bedrock of Australian social security law that a client’s relationship status determines eligibility and rates of payment’.<sup>16</sup> This is reflected, for example, in the concept of ‘member of a couple’. The rationale behind this principle was provided by the Minister of Social Security in 1974:

The reason for granting a higher rate of pension to a single person is that a married couple can share the costs of day-to-day living whereas a single person needs a relatively higher rate in order to enjoy the same living standard.<sup>17</sup>

5.22 Finally, because payments are not contributory, coverage of the system is universal, subject to a range of residence requirements. Some scholars have suggested that these requirements are considered necessary to preserve scarce social security resources for those ‘settled’ within the Australian community,<sup>18</sup> reflecting the theme of ‘fairness’ identified in Chapter 2.

### Qualification and payability

5.23 Section 37 of the *Social Security (Administration) Act* provides that a claim for a social security payment must be granted if the person is qualified and the payment is payable, creating a two stage process—qualification and payability.

13 A Herscovitch and D Stanton, ‘History of Social Security in Australia’ (2008) 80 *Family Matters* 51.

14 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.1.M.160] (Mutual obligation).

15 T Carney and P Hanks, *Social Security in Australia* (1994).

16 L Sleep, K Tranter and J Stannard, ‘Cohabitation Rule in Social Security Law: The More Things Change the More They Stay the Same’ (2006) 13 *Australian Journal of Administrative Law* 135.

17 *Debates*, House of Representatives, 20 March 1974, 668 (Bill Hayden—Minister for Social Security).

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

5.24 A person is qualified to receive a payment where they meet all the qualification criteria set out in the *Social Security Act*.<sup>19</sup> Qualification criteria may include age and residence requirements and practical issues such as whether a person has made a claim.

5.25 Once a decision is made that a person qualifies for a payment, then there is the separate issue of whether it is payable, and if so, the rate at which it is payable. Payability may be affected by a number of factors including income and assets tests, waiting periods, or whether a person is receiving another social security payment.

## Social security and family violence

5.26 This Inquiry is limited by its Terms of Reference to consider whether the social security legislative framework imposes barriers to effectively supporting those adversely affected by family violence and to consider what, if any improvements could be made to protect the safety of those experiencing family violence.<sup>20</sup> This aligns with the administrative principles of social security that include having regard to ‘the special needs of disadvantaged groups in the community’.<sup>21</sup> The ALRC’s proposed reforms are directed towards enhancing the capacity of social security law and policy to achieve this aim for victims of family violence.

## Safety

5.27 In considering safety, in the context of social security, the ALRC refers both to actual safety from harm but also to financial security and independence through social security payments and entitlements.

5.28 The importance of financial security and independence was noted by participants in a study conducted by the Australian Domestic and Family Violence Clearinghouse (ADFVC), which culminated in a report entitled *Seeking Security: Promoting Women’s Economic Wellbeing Following Domestic Violence (Seeking Security)*:

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>22</sup>

5.29 Family violence can affect a person’s financial security both directly and indirectly, contributing to ‘poverty, financial risk and financial insecurity ... sometimes long after they have left the relationship’.<sup>23</sup>

5.30 A lack of independent financial resources for victims of family violence can mean ‘feeling imprisoned by financial need’, keeping many victims trapped in an

19 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.1.Q.10] (Qualification).

20 The Terms of Reference are set out at the front of this Discussion Paper and can be found on the ALRC’s website <[www.alrc.gov.au](http://www.alrc.gov.au)>.

21 *Social Security (Administration) Act 1999* (Cth) s 8.

22 R Braaf and I Meyering, *Seeking Security: Promoting Women’s Economic Wellbeing Following Domestic Violence* (2011).

23 *Ibid*, 5.

abusive relationship.<sup>24</sup> This can also have compounding impacts, including homelessness.<sup>25</sup> In particular,

Economic abuse erodes financial resources and undermines employment and education, resulting in longer term financial insecurity and thereby increases the risk of returning to abusive partners and to a cycle of violence.<sup>26</sup>

5.31 Social security payments and entitlements can be a source of financial security and thereby facilitate the safety of those experiencing family violence. There are existing responses to family violence in the social security system—such as exemptions from activity tests and participation requirements; the availability of special payments such as Crisis Payment; and the option of different payment arrangements, such as weekly payments. Having independent financial resources can enable victims of family violence to leave a violent relationship<sup>27</sup> and seek alternate accommodation.

### Barriers

5.32 Acknowledging the importance of social security payments and entitlements to enhance the financial independence of victims of family violence, there are a number of ‘barriers’ within the social security system that may prevent victims of family violence accessing the financial assistance they need to be safe. Consequently, the ALRC considers reforms to enhance accessibility of the social security system.

5.33 A number of these are administrative barriers—such as knowledge and awareness of entitlements and exemptions for victims of family violence. These are discussed in Chapter 4. Knowledge of the type of information required by Centrelink to verify a claim of family violence where it is relevant to a person’s social security payments and entitlements is also important.

5.34 Access to income support for victims of family violence is affected by qualification requirements. Inflexible requirements to qualify, or to remain qualified, for payments can mean that victims of family violence are unable to access social security payments or are cut off from existing payments. This includes requirements relating to residence, proof of identity, activity tests and participation requirements.

5.35 In addition, specific payments—such as Crisis Payment—have certain qualification requirements, such as claiming periods, which may exclude some victims of family violence.

5.36 Victims of family violence may also face payability barriers, such as how relationships are defined. For example, whether a person is considered to be a ‘member of a couple’, or ‘independent’, can affect the amount of financial assistance a victim of

24 Ibid.

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

26 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011.

27 R Braaf and I Meyering, *Seeking Security: Promoting Women’s Economic Wellbeing Following Domestic Violence* (2011), 5.

family violence is able to access. This can also create a barrier to qualification for certain payments.

5.37 Another matter of concern in terms of income support for victims of family violence, is the inadequacy of the quantum of social security payments to meet the needs of victims of family violence.

5.38 While the amount of social security payments received by victims of family violence may be relevant to protecting their safety, this aspect of social security—and its budgetary and financial implications—is not a focus of this Inquiry. Reforms to address these issues would be systemic, affecting calculations for different social security payments and, as a result, have an impact on a much broader range of Centrelink customers than only victims of family violence. Such matters are larger than those defined by the Terms of Reference for this Inquiry.

## Interpretative framework

### Definition of family violence

5.39 As discussed in Chapter 3, the *Social Security Act* refers to ‘domestic violence’ or ‘domestic or family violence’ in a range of contexts. Neither the *Social Security Act* nor the *Social Security (Administration) Act* contains a definition of domestic or family violence. The *Guide to Social Security Law* refers to a definition that has now been repealed—s 60D(1) of the *Family Law Reform Act 1995* (Cth)—in stating that:

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

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

Domestic violence can include violence to someone who is not a family member, for example co-tenants and people in shared housing situations.<sup>28</sup>

5.40 The *Guide to Social Security Law* provides further, in relation to Crisis Payment, that ‘domestic and family violence’ includes: child abuse; maltreatment; exploitation; verbal abuse; partner abuse; elder abuse; neglect; sexual assault; emotional abuse; economic abuse; assault; financial coercion; domestic violence; psychological abuse, or social abuse.<sup>29</sup>

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28 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.1.D.235] (Domestic and/or Family Violence (CrP)).

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

5.41 In Chapter 3, the ALRC proposes that the following definition of family violence be included in the *Social Security Act* and the *Social Security (Administration) Act*, in addition to other Commonwealth legislation:

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

- (a) physical violence;
- (b) sexual assault and other sexually abusive behaviour;
- (c) economic abuse;
- (d) emotional or psychological abuse;
- (e) stalking;
- (f) kidnapping or deprivation of liberty;
- (g) damage to property, irrespective of whether the victim owns the property;
- (h) causing injury or death to an animal irrespective of whether the victim owns the animal; and
- (i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.<sup>30</sup>

### Nature, features and dynamics

5.42 As noted in Chapter 3, in *Family Violence—A National Legal Response* (ALRC 114, 2010),<sup>31</sup> the ALRC and the New South Wales Law Reform Commission (the Commissions) considered the particular nature, features and dynamics of family violence—including its gendered nature, detrimental impact on children, and the fact that it can involve exploitation of power imbalances, and occur in all sectors of society.<sup>32</sup>

5.43 The Commissions recommended that state and territory family violence legislation should contain a provision that explains the nature, features and dynamics of family violence.<sup>33</sup> The Commissions considered that this would ‘provide a contextual framework for judicial decision making’, serve an important educative function and complement the training and education of judicial officers, lawyers and the police as part of a package of recommendations to ‘facilitate a common understanding of family violence across the community, victims of family violence and the legal sector’.<sup>34</sup>

5.44 In addition, in 2009, the Family Law Council recommended that the Attorney-General facilitate the establishment of an expert panel and reference group to develop, maintain and promote a family violence common knowledge base for those involved in

<sup>30</sup> Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), Recs 5–1, 6–1, 6–4.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid, [7.26].

<sup>33</sup> Ibid, Rec 7–2.

<sup>34</sup> Ibid, [7.38].

the family relationship and family law system. This included that professional and peak bodies utilise the family violence common knowledge base to guide good practice and underpin training.<sup>35</sup>

### Submissions and consultations

5.45 As discussed in Chapter 3, stakeholders who responded to the *Family Violence and Commonwealth Laws Issues Paper—Social Security Law*, ALRC Issues Paper 39 (2011) (Social Security Issues Paper) supported including the definition of family violence recommended in the *Family Violence—A National Legal Response* in the *Social Security Act*.<sup>36</sup> Stakeholders supported such an amendment on the grounds that it would facilitate consistent decision making and would ‘potentially minimise the need for a person to retell their story and obtain different types of evidence for agencies they will commonly need to approach when experiencing or fleeing family violence, such as Centrelink and the CSA’.<sup>37</sup>

5.46 Stakeholders also considered that it would allow the decision maker to take into account the impact of family violence and abuse on the person’s social security eligibility,<sup>38</sup> and would provide clarity and transparency.<sup>39</sup>

5.47 The Multicultural Disability Advocacy Association added that the definition should capture the fact that forms of violence can be culturally specific and not apparent to others and recommended that specific examples of family violence experienced by different sectors of society be included within the definition.<sup>40</sup>

5.48 In addition to supporting the proposed definition, the Council of Single Mothers and their Children (CSMC) recommended that:

Centrelink staff at all levels [should] receive comprehensive training on family violence, including the types of behaviours, impacts, and working sensitively with women who have experienced violence.<sup>41</sup>

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35 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).

36 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; National Children’s and Youth Law Centre, *Submission CFV 64*, 3 May 2011; Sole Parents’ Union, *Submission CFV 63*, 27 April 2011; Multicultural Disability Advocacy Association, *Submission CFV 60*, 28 April 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; M Winter, *Submission CFV 51*, 27 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011; P Eastal and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

37 Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

38 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

39 National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011.

40 Multicultural Disability Advocacy Association, *Submission CFV 60*, 28 April 2011.

41 Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

**ALRC's views*****Aiming proposals: legislation, policy and procedure***

5.49 The ALRC considers that there is a need for transparency, consistency and accountability in the way Centrelink deals with cases involving family violence. Consequently, where changes to Centrelink procedures are considered, proposed reforms are aimed at the *Guide to Social Security Law* rather than Centrelink's e-reference, described above, which is not publicly available.

5.50 The ALRC considers that including procedural information in the *Guide to Social Security Law* may promote awareness regarding the ways family violence is relevant to the management of social security, and the purpose for family violence screening and Centrelink identification of customers who may be at risk.

***Nature, features and dynamics of family violence***

5.51 Chapter 3 considers placing a definition of family violence in the *Social Security Act* and the *Social Security (Administration) Act*. In the ALRC's preliminary view, the definition of family violence in the *Guide to Social Security Law* should be amended to reflect this definition, to enhance consistency across the policy and legislative base of the system. Such a reform would also provide victims with clarity, and the certainty that family violence will be recognised and treated similarly across Commonwealth laws. It would provide increased certainty for staff—particularly those who work across legislative regimes, such as Centrelink social workers—and provide a consistent basis for training. Further, a consistent definition across legislations and guidelines may foster a shared understanding across agencies, jurisdictions, courts and tribunals, reflecting the theme of 'seamlessness' referred to in Chapter 2.

5.52 While some stakeholders recommended specific examples of family violence be included in the definition of family violence, the ALRC considers that it is more appropriate that such examples be included in the *Guide to Social Security Law*. As a policy document, the *Guide to Social Security Law* is a more flexible instrument enabling examples of family violence specific to different sectors of society to be included. In addition, the ALRC has proposed that the definition of family violence in Chapter 3 be applied across a number of Commonwealth laws. To retain consistency, the ALRC does not propose the amendment of the definition of family violence, but rather proposes placing specific examples in interpretative policy instruments—such as the *Guide to Social Security Law*.

5.53 The ALRC also considers that training should be provided to all decision makers to ensure consistent application and understanding of the nature, features and dynamics of family violence.



**Proposal 5–1** The *Guide to Social Security Law* should be amended to include:

- (a) the definition of family violence in Proposal 3–1; and
- (b) the nature, features and dynamics of family violence including: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children.

In addition, the *Guide to Social Security Law* should refer to 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.

**Proposal 5–2** Centrelink customer service advisers, social workers and members of the Social Security Appeals Tribunal and Administrative Appeals Tribunal should receive consistent and regular training on the definition of family violence, including the nature, features and dynamics of family violence, and responding sensitively to victims of family violence.

## Verifying family violence

5.54 As discussed above, social security law is ‘beneficial’ legislation. Social security payments are provided to people on the basis of ‘need’. While ensuring that the claims of people who are experiencing family violence are genuinely met, there is also a need to ensure that unintended outcomes or ‘system perversities’ are not created—a theme of this Inquiry discussed in Chapter 2. Likewise, there is a need for checks and balances to ensure that genuine claims are met and that a claim of family violence is not seen as an easy way to gain a social security entitlement or benefit, thereby creating an incentive for a false or manipulated claim of family violence.

5.55 To ensure the integrity of the social security system, it is necessary, in certain circumstances, for Centrelink to verify claims of family violence where it is relevant to a person’s social security payments and entitlements. Consequently, it is necessary for Centrelink to collect information about family violence when it has been disclosed and where it is relevant to a person’s social security payments and entitlements.

5.56 Guidance is provided in the *Guide to Social Security Law* as to the types of information relevant to different qualification and payability criteria and how it is collected. However, often little or no guidance is provided in relation to the actual collection of information about family violence or safety concerns in different contexts. For example, in relation to exemptions from activity tests and participation requirements on the basis of special family circumstances, the only guidance provided

is that exemptions are to be based on a Centrelink social worker's report.<sup>42</sup> In other areas, more specific guidance is provided.

### **When family violence is relevant**

5.57 Circumstances of family violence may be relevant to a number of social security outcomes—for example, a breakdown of the relationship between a couple so that they may no longer be assessed, in social security terms, on the basis of that status. Family violence may also lead to safety concerns so that a person can no longer live at home or cause distress that may have other social security consequences.

5.58 In determining whether a person is a member of a couple, the *Guide to Social Security Law* states that important indicators to consider in relation to the nature of the commitment to each other include evidence of domestic violence, such as 'court documentation, that may indicate the absence of commitment and/or emotional support'.<sup>43</sup>

5.59 Reference to 'domestic violence' is made in two areas in relation to collecting information to determine separation under one roof. First, when deciding to interview a partner for additional information, discretion must be exercised to ensure that contact is appropriate. 'Domestic violence' is provided as an example of when it is not appropriate to interview a partner at all.<sup>44</sup> Secondly, while independent referees may be called upon to verify the basis of the claim, in circumstances where an independent referee is unable to verify a situation, a departmental social worker's report may be required—such as in a situation of 'domestic violence' where separation is not public knowledge.<sup>45</sup>

5.60 The assessment of whether a person is independent on the ground of 'Unreasonable To Live At Home—Extreme Family Breakdown', is generally conducted by a Centrelink social worker.<sup>46</sup> Assessment includes personal contact with the claimant, parental contact, third party verification and—for youth protocol cases—contact with state or territory child protection agencies.<sup>47</sup> It is mandatory to contact the parents of a young person, unless the young person refuses permission or if contact with the parent presents a 'severe risk' to the young person or others.<sup>48</sup>

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42 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011 [3.2.11.70] (Activity Test for NSA/YA Job Seekers—Exemptions—Principal Carer Parents with Special Family Circumstances—Case-by-Case Exemptions); [3.5.1.280] (Participation Requirement Exemptions in Special Family Circumstances—Case-by-Case (PP)).

43 Ibid, [2.2.5.10] (Determining a De Facto Relationship).

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

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

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

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

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

5.61 Factors to consider as to whether ‘special circumstances’ exist to waive a debt, include the person’s physical and emotional state and decision-making capacity and financial circumstances.<sup>49</sup> However, the *Guide to Social Security Law* does not expressly direct the decision maker to consider family violence in determining whether circumstances are ‘special’.

5.62 In relation to ‘Crisis Payment—Remaining in the Home after Removal of Family Member due to Domestic or Family Violence’, the *Guide to Social Security Law* provides that, in most cases, there is likely to be an apprehended violence order (AVO) with an exclusion provision. However, in cases where the abusive family member leaves without police involvement, verification is to be sought from a third party, such as: doctors; domestic violence services; legal services; crisis workers; other household members; community agencies; schools; and/or child care services.<sup>50</sup>

5.63 In a submission to the 2005 Senate Employment, Workplace Relations and Education References Committee Inquiry into student income support (the student income support inquiry), the University of Queensland Union expressed concerns about reliance on third party verification for victims of family violence:

The psychological dynamics of any kind of violence or abuse in the home routinely involve an element of secrecy, and often have been difficult for the young person to express. It happens frequently that students who have left home because of unreasonable circumstances have only recently begun to talk about their experiences of violence. Because of this fact, there is rarely anyone who fits the description of ‘independent third party’ in the picture. In the case of non-physical forms of violence, the dynamics may be very hard to see for outside the family dynamic.

### **Submissions and consultations**

5.64 In the Social Security Issues Paper, the ALRC asked a number of questions about the way in which Centrelink collects information about a claim of family violence where it is relevant to a person’s social security payment or entitlement. The ALRC also asked on what information should a claim of family violence be assessed, in particular when contact with a partner or parent is not appropriate.<sup>51</sup>

5.65 Stakeholders identified a number of barriers to disclosing family violence that may affect a person’s social security payment or entitlement. Barriers to disclosure are discussed further in Chapter 4. Stakeholders made a number of suggestions about the types of information that should be able to be relied upon for a claim of family violence. However, some stakeholders noted concerns about the use of certain types of information and issues concerning the appropriate weight to be placed on different types of information.

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49 Ibid, [6.7.3.40] (Waiver of Debt on the Basis of Special Circumstances).

50 Ibid, [3.7.4.25] (Qualification for CrP—Remaining in the Home after Removal of Family Member due to Domestic or Family Violence).

51 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011) Questions 15, 21, 28, 33.

5.66 In addition, WEAVE submitted that it was important to provide ‘clear information to clients about the types of verification needed to support claims of family and domestic violence’.<sup>52</sup>

### ***Type of information***

5.67 Some stakeholders considered that the victim’s account of family violence should be sufficient to verify a claim of family violence,<sup>53</sup>—in particular, where no independent verification is available<sup>54</sup>—and that the victim should be given the benefit of the doubt.<sup>55</sup> One stakeholder submitted that ‘it is better to pay ten people incorrectly than to let one genuine claim go by unpaid’.<sup>56</sup> This position was also suggested as being appropriate for Crisis Payment.<sup>57</sup>

5.68 The Commonwealth Ombudsman highlighted the need for autonomy, recommending that persons experiencing family violence ‘should be able to choose how they want to declare themselves to others’.<sup>58</sup> Likewise, the Welfare Rights Centre Queensland submitted that there needed to be ‘a choice of assessment methods, to enable the victim to provide the information’.<sup>59</sup>

5.69 Similarly, the ADFVC supported the use of a ‘wide range of evidence to support a claim of experiencing family violence’, including:

a statutory declaration by the victim; documentary records, such as diary entries; records of visits to services, such as health care providers; other agency information (such as that held by the Child Support Agency); third party statements, such as statutory declarations by witnesses, employers or domestic violence services; protection orders; or reports to police.<sup>60</sup>

5.70 Some stakeholders supported the use of third party verification,<sup>61</sup> but with the qualification that ‘[i]f no independent expert is available or in situations of urgency, a Centrelink social worker professional assessment should be regarded as sufficient to verify the circumstances’.<sup>62</sup>

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52 WEAVE, *Submission CFV 58*, 27 April 2011.

53 Ibid; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011.

54 Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011.

55 Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011.

56 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

57 Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011.

58 Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.

59 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

60 ADFVC, *Submission CFV 71*, 11 May 2011.

61 Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011.

62 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011.

### Concerns

5.71 Concerns were highlighted by some stakeholders in relation to the reliance on certain types of information for verification of family violence.

5.72 WEAVE noted concerns about the reliance on third party statements:

Police, health and social work professionals who work with the victim rely on the victim for information about what has happened so engaging with a third party serves only to (1) provide another source to repeat what the victim has said (2) disempower the victim as a potential liar who is not an adequate source of information about what has happened to them.<sup>63</sup>

5.73 The Welfare Rights Centre NSW also noted that reliance on third parties—such as police reports or community agencies—to inform an assessment is ‘problematic and can lead to unfair treatment of abused women and can place them at risk’. This is demonstrated by the following case study.<sup>64</sup>

#### Case Study

Ajmand came to Australia as a refugee with her son. Her first husband had passed away before her arrival in Australia. As a single mother, Ajmand received pressure from her community to re-marry. An arranged marriage took place in 1999. On the wedding night Ajmand’s husband became drunk and violently assaulted her, abusing her for not being a virgin. His family and he stayed at her flat for around one week then left. Ajmand told community members that he could not be her husband and told religious leaders it was not safe for her son to have her new husband living with her.

After separation which occurred around one week after the wedding, Ajmand’s husband returned a number of times later to violently assault her and leave, often vomiting from intoxication then ordering her to clean it up, and never staying at the flat. These sexual assaults resulted in the birth, after separation, of two further children. Ajmand did not tell Centrelink about the wedding or separation, believing that she was entitled to receive payments as a widow with a son.

In 2006 Ajmand’s Parenting Payments were cancelled on the basis that she was a member of a couple from the date of her wedding in 1999. Debts of Parenting Payment and Family Assistance from 1999 until 2006 were raised, totalling \$121,000.

[Welfare Rights Centre] assisted Ajmand in obtaining her hospital and police records, documenting extensive physical violence and the psychological impact on Ajmand.

In relation to at least four documented incidents of Ajmand’s husband attending Ajmand’s home intoxicated and violent, the review officer commented:

‘Although she alleges physical and sexual abuse during the period of her relationship with her ex-husband, she does not allege that he coerced her actions in relation to Centrelink payments. She only claims that he did not contribute to her or her children’s support’

<sup>63</sup> WEAVE, *Submission CFV 58*, 27 April 2011.

<sup>64</sup> Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011.

‘She had a clear responsibility to advise of her change of marital status. Both becoming partnered and separation are notifiable events. In the case of Family Tax Benefit, combined income affects both the rate of payment and the income test exemptions. The fact that her partner was the father of the younger children also raises issues for maintenance action’.

There is only the customer’s testimony to support claims of special circumstances during the period that the customer was considered to be a member of a couple. Medical reports and police reports provided only cover the period after the date Centrelink accepted as the date of separation. While the absence of earlier reports does not mean that there was not a pattern of domestic violence or abuse, the character of the reports that were provided suggests the customer was not the only victim.

In any case, in regard to waiver, the legislation requires that the debt not arise because the debtor or another person knowingly contravened the Act. I am not satisfied that the criteria for waiver is fully met.”

Ajmand appealed the decision to the Social Security Appeals Tribunal, who accepted that the relationship ceased one week after the wedding day. They accepted that she did not knowingly fail to comply with the legislation and waived the remaining week’s debt in view of the special circumstances of her case, which included her exclusion from her national community and the impact of the violence on her mental health.

5.74 WEAVE also noted concerns about relying on police reports, submitting that ‘only 36% of women who experienced physical assault by a male perpetrator reported it to the police in 2005’. This indicated that reliance on police reports ‘is likely to exclude two-thirds of victims from being believed by Centrelink’.<sup>65</sup>

5.75 One stakeholder also noted concerns about overreliance on police reports due to instances ‘where Centrelink has denied crisis payments to victims of family violence on the basis that there was no police involvement’.<sup>66</sup>

5.76 In a submission to the *Family Violence and Commonwealth Laws—Employment and Superannuation Law Issues Paper*, ALRC Issues Paper 36 (2011),<sup>67</sup> WEAVE raised concerns about accessing information from a person’s former employer to establish that they have not voluntarily left their job or caused their dismissal.<sup>68</sup>

### ***Weight of information***

5.77 The Commonwealth Ombudsman submitted that, in obtaining information about family violence from third parties, ‘emphasis should be placed on obtaining information from independent and/or professional people or organisations who may have observed the violence or its effects’ and to

65 WEAVE, *Submission CFV 58*, 27 April 2011.

66 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011.

67 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011).

68 WEAVE, *Submission CFV 14*, 5 April 2011.

provide guidance to staff that this sort of evidence should generally be preferred over other types of evidence, including statements from people who have a personal relationship with either the victim or the perpetrator.<sup>69</sup>

## **ALRC's views**

### ***Fairness***

5.78 The ALRC considers that there is a need for transparency in the type of information Centrelink relies on in determining claims of family violence, to ensure fairness in the administration of the social security system. While promoting transparency by making the e-Reference publicly available may address this, such a proposal would be outside the ALRC's Terms of Reference as it would be broader than just a proposal about family violence. Alternatively, if only the sections of the e-reference that were relevant to family violence were made accessible, this would create a two-tier system of the kind foreshadowed earlier.

5.79 The ALRC proposes that any amendments to the type of information relied on by Centrelink be included in the *Guide to Social Security Law* as it is the publicly accessible policy guide. This would ensure that victims of family violence and their advocates know what types of information they need to provide to Centrelink for different payments and claims.

5.80 The ALRC also considers that this information should be included in the proposals in Chapter 4 regarding information provision (Proposal 4–8) to increase accessibility and transparency—and therefore fairness—of the decision-making process. Including information about the type of information Centrelink relies upon in verifying a claim of family violence may also reduce the need for a victim of family violence to visit a Centrelink office repeatedly and enable him or her to bring all the required information on the first visit.

### ***System integrity***

5.81 The ALRC recognises that verification of family violence is needed in order to maintain the integrity of the system and to ensure a fair distribution of social security according to genuine need. However, not all circumstances should require the same level of verification.

5.82 In this respect, the ALRC considers that the level of verification of family violence should be proportionate to the 'entitlement' gained. For example, for Crisis Payment, due to the nature of the payment, the victim's account should be sufficient whereas, for 'member of a couple' determinations and exercise of the 'special reason' discretion, the level of verification should be higher. This is because a decision that a person is or is not a 'member of a couple' has broader consequences than a decision that a person should receive a one-off Crisis Payment.

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69 Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.

**Type of information**

5.83 In light of the theme of ‘autonomy’ discussed in Chapter 2, it is important that the social security system does not presume a ‘one-size-fits-all’ response. Recognising the individual circumstances of the customer, not every customer will be able to rely on the same type of information. A person who is experiencing family violence should be able to provide a range of information, to be given different weighting. However, it is also important that such an approach does not lead to a ‘tick the box’ approach, nor create administrative barriers to providing information about family violence.

**Administrative responses**

5.84 The ALRC is also concerned about stakeholders’ comments regarding Centrelink staff responses to information about family violence. It is important that a person who is experiencing family violence be able to access the services and support needed to ensure his or her safety. The ALRC therefore proposes that Centrelink customer service advisers and social workers should be trained on the types of information that a customer can rely on for claims of family violence.

**Proposal 5–3** The *Guide to Social Security Law* should be amended to provide that the following forms of information to support a claim of family violence may be used, including but not limited to:

- statements including statutory declarations;
- third party statements such as statutory declarations by witnesses, employers or family violence services;
- social worker’s reports;
- documentary records such as diary entries, or records of visits to services, such as health care providers;
- other agency information (such as held by the Child Support Agency);
- protection orders; and
- police reports and statements.

**Proposal 5–4** The *Guide to Social Security Law* should be amended to include guidance as to 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.

**Proposal 5–5** Centrelink customer service advisers and social workers should receive consistent and regular training in relation to the types of information that a person may rely on in support of a claim of family violence.



### Collecting information from parents, partners and third parties

5.85 Several references in the *Guide to Social Security Law* are made to collecting information from a person's partner or parent for the purposes of social security payments or entitlements. In some circumstances, the *Guide to Social Security Law* states that it may not be appropriate to contact a person's partner or parent in circumstances of family violence,<sup>70</sup> or, in relation to 'Independent—Unreasonable To Live At Home', where contact with the parent presents a 'severe risk' to the young person or others.<sup>71</sup>

5.86 In the student income support inquiry, the University of Queensland Union submitted that

young people often decide to give permission [to contact a parent] despite the fact that it doesn't feel appropriate or safe to do so. The requirement that a perpetrator of abuse not be contacted is not helpful here if the definition of abuse is not fully in line with sector standards.

### Submissions and consultations

5.87 In the Social Security Issues Paper, the ALRC asked whether Centrelink staff considered the possibility of family violence before deciding to interview a partner or a parent.<sup>72</sup> The ALRC also asked whether Centrelink customers are aware that Centrelink may decide not to contact a person's partner or parent if the customer is a victim of family violence.<sup>73</sup>

5.88 Some stakeholders found that family violence was not consistently considered by Centrelink before a partner or parent was interviewed.<sup>74</sup> Most stakeholders indicated that improvement is needed to ensure that Centrelink customers are aware that Centrelink has discretion not to contact partners or parents if the customer is a victim of family violence.<sup>75</sup> Specifically, the Welfare Rights Centre NSW stated that, if customers are not aware of such discretion, it could 'act to deter people who have experienced violence from raising the issue with authorities because they fear retribution'.<sup>76</sup>

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70 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.2.5.30] (Determining Separation Under One Roof).

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

72 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011) Question 8.

73 Ibid, Question 10.

74 WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; M Winter, *Submission CFV 51*, 27 April 2011; P Eastal and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

75 Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; M Winter, *Submission CFV 51*, 27 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

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

5.89 The Commonwealth Ombudsman was

supportive of arrangements that protect vulnerable customers and enable them to access entitlements without fear of recrimination balanced with the need for procedural fairness in situations where disclosures of family violence may have a flow-on effect for the entitlements of the alleged perpetrator.<sup>77</sup>

5.90 Stakeholders also considered it important that customers be made aware that ‘Centrelink has the discretion not to contact partners or parents if the customer is a victim of family violence’.<sup>78</sup>

**ALRC’s views**

5.91 A partner or parent may be one of the best sources to verify certain information relevant to a person’s social security payment or entitlement. However, in circumstances involving family violence, contact with a parent or partner, or indeed another family member, may not be appropriate. Contacting a family member may, in some circumstances, jeopardise the safety of a victim of family violence. In such circumstances, other sources of verification should be used.

5.92 Victims of family violence need to be aware that a partner, parent or other family member may not be contacted in circumstances of family violence; otherwise the person experiencing family violence may be deterred from disclosing family violence for fear of retribution.

5.93 The ALRC holds an additional concern that, for ‘Independent—Unreasonable To Live At Home’, the *Guide to Social Security Law* refers to a ‘severe risk’ to the young person. The ALRC considers that the reference to ‘severe’ might create too high a threshold and should refer to ‘risk’ without the qualification of ‘severe’.

5.94 In this regard, the ALRC makes proposals in relation to:

- ensuring consistency throughout the *Guide to Social Security Law* in relation to when it is not appropriate to contact a family member (including a parent or partner) in circumstances of family violence;
- consistent, regular and ongoing training of Centrelink customer service advisers and social workers about the discretion not to contact a parent or partner where family violence has been raised as a concern; and
- information provided to Centrelink customers about the discretion of Centrelink staff not to contact a partner or parent in circumstances of family violence (Proposal 4–8).

5.95 In implementing these proposals, care will need to be taken to ensure procedural fairness is afforded to any person who is alleged to have used family violence. For example, to ensure that where the person alleged to have used family violence is also a

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77 Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.

78 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

recipient of social security payments or entitlements, this allegation does not adversely affect their entitlements without the opportunity to present their case.

**Proposal 5–6** The *Guide to Social Security Law* should be amended to provide that, where a person claims that they are experiencing family violence by a family member or partner, it is not appropriate to seek verification of family violence from that family member or partner.

**Proposal 5–7** Centrelink customer service advisers and social workers should receive consistent and regular training in relation to circumstances when it is not appropriate to seek verification of family violence from a person's partner or family member.

### Access to the National Register

5.96 In the *Family Violence—A National Legal Response*, the Commissions considered that the capacity for family violence protection orders to be enforced across jurisdictions was essential to the safety of victims of family violence. To facilitate this, the Commissions supported the development of a national register of protection orders, family law orders and *Family Law Act* injunctions (the National Register),<sup>79</sup> on the basis that this would allow victims of family violence to move seamlessly from one jurisdiction to another without the need to take action to register a family violence order in the second jurisdiction and would also ensure that police in the second jurisdiction are aware of the existence of the order.<sup>80</sup>

5.97 The Commissions recommended that the National Register be available to federal, state and territory police, federal family courts, state and territory courts that hear matters related to family violence and child protection, and child protection agencies.<sup>81</sup>

### Submissions and consultations

5.98 In the Social Security Issues Paper, the ALRC asked whether Centrelink staff and social workers should be able to access the National Register recommended in *Family Violence—A National Legal Response*.<sup>82</sup>

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

80 Ibid.

81 Ibid, Rec 30–18.

82 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 7.

5.99 Some stakeholders supported Centrelink staff having access to the National Register,<sup>83</sup> subject to certain conditions such as: consent;<sup>84</sup> training and security measures;<sup>85</sup> and access being conditional on the person having first disclosed family violence.<sup>86</sup>

5.100 Welfare Rights Centre Queensland noted that ‘such access could be helpful for some victims, if they had lost the relevant documents’.<sup>87</sup> Others noted that it could be a suitable source of information<sup>88</sup> and provide supporting evidence of the existence of family violence.<sup>89</sup>

5.101 However, a number of concerns were raised about providing access to the National Register, including that:

- there may difficulties in ensuring privacy of a customer’s information<sup>90</sup> and it may be misused;<sup>91</sup>
- not all Centrelink customers who experience family violence would obtain a protection order or similar court order against the person using family violence<sup>92</sup> for various reasons including issues preventing a victim from reporting family violence such as the ‘dominance of the perpetrator over the victim; the severity, or perceived severity of such an act on a partner; the lack of knowledge or acceptance that a victim’s situation is as serious as it is and the willingness of most victims to hide or excuse behaviour’;<sup>93</sup>
- it may lead to an assumption that if there is nothing on the National Register, there is no violence<sup>94</sup> and ‘[a] number of assumptions may be made by a staff member when a check of the national register reveals that a protection order has been obtained’;<sup>95</sup> and

83 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; Sole Parents’ Union, *Submission CFV 63*, 27 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011; P Eastal and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

84 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

85 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011.

86 Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

87 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

88 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011.

89 Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

90 Office of the Australian Information Commissioner, *Submission CFV 68*, 6 May 2011.

91 M Winter, *Submission CFV 51*, 27 April 2011.

92 Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.

93 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

94 Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.

95 Ibid.

- the National Register may not be current to enable verification of family violence ‘which may create further complexities if a person refers to a recent order that is not on the register’.<sup>96</sup>

### **ALRC’s views**

5.102 While the ALRC considers that it may be useful for Centrelink customer service advisers and social workers to have access to the National Register, there are a number of reasons why access to the register should not be extended in this way.

5.103 First, as stakeholders have argued, there are a number of concerns in relation to ensuring that the National Register is used appropriately within an agency like Centrelink. These concerns related to privacy, possible misuse and the making of inaccurate assumptions by Centrelink staff.

5.104 Secondly, the ALRC recommended that the National Register be used primarily by the police and the courts to enforce protection orders across jurisdictional boundaries. In other words, the purpose of the National Register is to assist in enforcement, rather than to enable information to be provided to a service provider about family violence. While access to the National Register would assist victims of family violence who have lost, or cannot access their protection order, in most other circumstances, a victim of family violence would be able to produce the protection order itself, or obtain a copy of it from a court. If a National Register is implemented along the lines suggested, this would help applicants who have moved jurisdictions to be able to obtain a copy of the family violence protection order.

5.105 The ALRC considers that better information dissemination to victims of family violence about how to obtain a copy of a family violence protection order from a court is a more measured approach to ensuring that victims of family violence are able to present information on which to base a claim of family violence.

### **Screening for family violence**

5.106 Screening for family violence by Centrelink is discussed in detail in Chapter 4. As discussed in that chapter, Centrelink relies on self-disclosure of family violence and does not appear to screen routinely for family violence.

### **Submissions and consultations**

5.107 In the Social Security Issues Paper, the ALRC asked in what circumstances Centrelink staff should be required to inquire about the existence of family violence and whether application forms, correspondence and telephone prompts should directly seek information about family violence.<sup>97</sup> Chapter 4 examines screening and information sharing generally. An issue of particular relevance to social security is when additional trigger points for screening should occur.

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<sup>96</sup> Ibid.

<sup>97</sup> Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Questions 2, 3.

5.108 As discussed in Chapter 4, most stakeholders who responded to these questions supported the idea that Centrelink should screen for family violence.<sup>98</sup> Those in support of screening recommended that screening should occur when commencing the application process,<sup>99</sup> routinely,<sup>100</sup> or in ‘all circumstances’.<sup>101</sup> The CSMC also recommended that screening should occur ‘at other points in the system, such as when discussing Employment Pathways Plans’.<sup>102</sup>

5.109 However, the Welfare Rights Centre Queensland submitted that ‘Routine screening is neither appropriate nor practicable’.<sup>103</sup>

### ALRC’s views

5.110 In addition to the proposals made in Chapter 4 for screening by Centrelink, the ALRC is interested in comment about what trigger points exist in the social security process for Centrelink to screen for family violence. The negotiation and revision of a person’s Employment Pathway Plan may be one such trigger point.

**Proposal 5–8** Centrelink customer service advisers and social workers should be required to screen for family violence when negotiating and revising a person’s Employment Pathway Plan.

**Question 5–1** At what other trigger points, if any, should Centrelink customer service advisers and social workers be required to screen for family violence?

### Deny Access Facility

5.111 Centrelink has a ‘Deny Access Facility’ (DAF), which provides additional security to the records of customers who have genuine fears for their safety. Only designated Centrelink officers are able to access DAF records which thereby limits the potential for the computer records of DAF clients to be accessed inappropriately by Centrelink staff, either inadvertently or by reason of a deliberate breach. Customers

98 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; National Children’s and Youth Law Centre, *Submission CFV 64*, 3 May 2011; Sole Parents’ Union, *Submission CFV 63*, 27 April 2011; Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; M Winter, *Submission CFV 51*, 27 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011; P Eastale and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

99 National Children’s and Youth Law Centre, *Submission CFV 64*, 3 May 2011; M Winter, *Submission CFV 51*, 27 April 2011.

100 ADFVC, *Submission CFV 71*, 11 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011.

101 P Eastale and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

102 Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

103 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

who may be eligible to have their personal information on the DAF include customers who are escaping domestic or physical violence.

***ALRC's views***

5.112 The ALRC is interested in comment about whether a person should be placed on the DAF upon the request of a person who has disclosed safety concerns. This reform may have resource implications, as the number of Centrelink staff with DAF access, while necessarily limited, may need to increase to deal with a corresponding increase in people whose information is on the DAF. If this proposed reform would cause a significant resource issue, or undermine the integrity of the process—given the necessarily restricted staff members who may access DAF files—it may be more appropriate for a DAF to be granted upon a Centrelink social worker's recommendation.

5.113 These alternative proposals would be complemented by the proposals made in Chapter 4, in particular proposals about providing information, screening, safety concern flags, information sharing, and referrals to Centrelink social workers when customers disclose family violence.

**Proposal 5–9** A Centrelink Deny Access Facility restricts access to a customer's information to a limited number of Centrelink staff. The *Guide to Social Security Law* should be amended to provide that, where a customer discloses family violence, he or she should be referred to a Centrelink social worker to discuss a Deny Access Facility classification.

**Question 5–2** Should Centrelink place a customer who has disclosed family violence on the 'Deny Access Facility':

- (a) at the customer's request; or
- (b) only on the recommendation of a Centrelink social worker?

## 6. Social Security—Relationships

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### Summary

6.1 The ALRC has identified a number of issues relevant to the safety of victims of family violence in Commonwealth social security law and practice. This chapter considers how family violence may have implications in relation to how relationships are defined—for example, whether a person is considered to be a ‘member of a couple’ or ‘independent’.

6.2 As discussed in Chapter 5, a social security payment can only be made if the person is qualified and the payment is payable. Further, that a higher rate of payment is provided to singles than to a person who is a ‘member of a couple’ assumes that costs are shared between members of a couple and therefore it costs more for a person who is single. This principle forms part of the ‘bedrock’ of social security law in Australia.

6.3 Whether a person is a ‘member of a couple’ or ‘independent’ can affect a person’s qualification for a social security payment—for example, as an actual condition for qualification for Parenting Payment (Single) and Widow Allowance<sup>1</sup>—and the rate of a social security payment.<sup>2</sup> Generally, being regarded as ‘single’ or ‘independent’ attracts a higher rate of payment in recognition that living costs are higher for a person living alone. A decision that a person is a ‘member of a couple’ may result in the refusal, cancellation or reduction of his or her social security payments. It may also lead to a debt being raised against a person which may be pursued through court proceedings.

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1 *Social Security Act 1991* (Cth) s 408BA (Widow Allowance), s 500 (Parenting Payment).

2 Commonwealth Ombudsman, *Marriage-Like Relationships: Policy Guidelines for Assessment Under Social Security Law* (2007).



6.4 Family violence may be of particular relevance in determining whether a person is a ‘member of a couple’, ‘living separately and apart under one roof’, or ‘independent’. The way in which a decision about a person’s relationship status is made in the social security context, and the relevance of family violence in making that decision, is discussed below. The issue of family violence and debt is considered in Chapter 8.

6.5 The ALRC considers that relationships are inherently difficult to define, but recognises that the effect of family violence is not always considered in relationship decisions in the social security context. The ALRC therefore makes a number of proposals to ensure that the impacts of family violence are expressly considered in relationship decisions in social security law through amendment to the *Guide to Social Security Law*.

## Member of a couple

### Section 4 criteria

6.6 Section 4(2) of the *Social Security Act 1991* (Cth) defines ‘member of a couple’ to include persons formally married and persons of the opposite sex who are, in the opinion of the Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), in a ‘de facto relationship’—previously, a ‘marriage-like relationship’.<sup>3</sup> There are exceptions. Section 4(2)(a) excludes people who are ‘living separately and apart’; and s 24 allows persons who otherwise would be treated as a ‘member of a couple’ to be considered ‘single’ for a ‘special reason’<sup>4</sup>—these are discussed separately below.

6.7 Section 4(3) of the *Social Security Act* provides that, in deciding whether a person is a ‘member of a couple’, consideration is to be given to ‘all the relevant circumstances of the relationship’. In particular, regard must be had to a detailed range of criteria which include:

- the financial aspects of the relationship;<sup>5</sup>
- the nature of the household;<sup>6</sup>
- the social aspects of the relationship (including whether the persons hold themselves out as married to each other);<sup>7</sup>
- any sexual relationship between the persons;<sup>8</sup> and

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3 The reference to ‘de facto relationship’ replaced a ‘marriage-like relationship’ in November 2008. The test under s 4 remained the same. See *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform Act) 2008* (Cth).

4 See also, *Social Security Act 1991* (Cth) s 4(6); L Sleep, K Tranter and J Stannard, ‘Cohabitation Rule in Social Security Law: The More Things Change the More They Stay the Same’ (2006) 13 *Australian Journal of Administrative Law* 135.

5 *Social Security Act 1991* (Cth) s 4(3)(a).

6 *Ibid* s 4(3)(b).

7 *Ibid* s 4(3)(c).

8 *Ibid* s 4(3)(d).

- the nature of the commitment to each other.<sup>9</sup>

6.8 These criteria are points for the decision maker to consider and give weight to.<sup>10</sup> They are not a checklist of circumstances that must be met in all cases,<sup>11</sup> nor a balance test where a relationship has to satisfy the majority of criteria.<sup>12</sup> They provide a core of what needs to be investigated, but do not close off the circumstances of a relationship from investigation.

It is possible a decision-maker might decide that the individual is a member of the couple even though she does not satisfy all or even the majority of the criteria. Conversely, many of the indicia ... might be present yet the circumstances as a whole might justify the conclusion that the couple live separately and apart.<sup>13</sup>

6.9 Detail is provided in the *Guide to Social Security Law* as to what type of information may be relevant to each criterion in s 4(3). Relevantly, in relation to the criterion of the ‘nature of the commitment to each other’, the *Guide to Social Security Law* provides that information about ‘domestic violence’, such as ‘court documentation ... may indicate the absence of commitment and/or emotional support’.<sup>14</sup>

6.10 Some interpretative guidance is also provided by case law. In a case considering whether the Administrative Appeals Tribunal (AAT) failed to have regard to extensive violence when considering whether a person was ‘living separately and apart’ under s 4(3) of the *Social Security Act*, Riethmuller FM stated that:

Family violence must be a significant consideration when determining whether parties are members of a couple: it strikes at the very heart of the concept of ‘companionship and emotional support’ to each other. It is difficult to conceive of a case involving significant family violence, that would not require such violence to be carefully considered in the context of determining the nature of the parties’ commitment to each other, and in particular the nature of their emotional support.<sup>15</sup>

6.11 As discussed in Chapter 5, the *Guide to Social Security Law* is updated regularly to reflect changes in government policy and legislative interpretation. However, the decision in *Kozarova* is yet to be incorporated.

6.12 Some scholars have noted that the criteria in s 4(3) and its interpretation by decision makers can lead to a ‘nebulous account of a de facto relationship’ due to the broad criteria and their flexible application.<sup>16</sup> The Commonwealth Ombudsman has also noted that it is not unusual for a decision maker’s own experiences and values to

<sup>9</sup> Ibid s 4(3)(e).

<sup>10</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides\_acts/> at 22 July 2011, [2.2.5.10] (Determining a De Facto Relationship); *Re Secretary, Department of Family & Community Services and Bell* [2000] AATA 252.

<sup>11</sup> *Re Pill and Secretary, Department of Family and Community Services* (2005) 81 ALD 266, 272.

<sup>12</sup> *Stauton-Smith v Secretary, Department of Social Security* (1991) 25 ALD 27.

<sup>13</sup> *Re Cahill and Secretary, Department of Family and Community Services* [2005] AATA 1147 at [22].

<sup>14</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <www.fahcsia.gov.au/guides\_acts/> at 22 July 2011, [2.2.5.10] (Determining a De Facto Relationship).

<sup>15</sup> *Kozarova v Secretary, Department of Education, Employment and Workplace Relations* [2009] 888 888.

<sup>16</sup> L Sleep, K Tranter and J Stannard, ‘Cohabitation Rule in Social Security Law: The More Things Change the More They Stay the Same’ (2006) 13 *Australian Journal of Administrative Law* 135.

weigh into the decision-making process.<sup>17</sup> As stated by French J in *Pelka v Department of Family and Community Services*:

The judgment to be made is difficult and, once out of the range of obvious cases falling within the core concept of ‘marriage-like’, will be attended by a degree of uncertainty. Indeed, it may be that different decision-makers on the same facts could quite reasonably come up with different answers.<sup>18</sup>

### **Submissions and consultations**

6.13 In the *Family Violence and Commonwealth Laws Issues Paper—Social Security Law*, Issues Paper 39 (2011) (Social Security Issues Paper), the ALRC noted concerns that had been expressed about possible underlying assumptions of a decision maker that may disregard family violence and its potential impact on a victim’s decisions, such as:

- economic abuse may obviate consent to the ‘significant pooling of financial resources’;
- patterns of violence and lack of alternative accommodation may mean that a person has no choice but to remain in the same house;
- secrecy associated with family violence may mean that a person continues to hold themselves out as a member of a couple;
- violence in a relationship may negate consent for ‘any sexual relationship between the people’; and
- there may be a correlation between the length of the relationship and the degree of violence.<sup>19</sup>

6.14 The ALRC asked whether the criteria in s 4(3) of the *Social Security Act* for determining whether a person is a ‘member of a couple’ should be amended to take into account the existence and effect of family violence.

6.15 Most stakeholders supported amending the criteria in s 4(3) of the *Social Security Act* to take account of the existence and effect of family violence.<sup>20</sup> In doing so, stakeholders expressed a range of concerns with the current criteria in s 4(3) and their application by decision makers.

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17 Commonwealth Ombudsman, *Marriage-Like Relationships: Policy Guidelines for Assessment Under Social Security Law* (2007).

18 *Re Pelka and Secretary, Department of Family and Community Services* [2006] FCA 735.

19 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011); P Eastal and D Emerson-Elliott, ‘Domestic Violence and Marriage-Like Relationships’ (2009) 34(3) *Alternative Law Journal* 173; T Carney, ‘Women and Social Security/Transfer Payments Law’ in P Eastal (ed), *Women and the Law in Australia* (2010) 424.

20 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011; P Eastal and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

**Concerns with s 4 criteria**

6.16 An overarching concern raised by the North Australian Aboriginal Justice Agency (NAAJA) related to the principle that different rates of payment are available for couples and singles.<sup>21</sup>

6.17 Other concerns specific to the s 4(3) criteria included concerns in relation to the ‘pooling of financial resources’. One stakeholder considered that due to the ‘high incidence of economic abuse in family violence’, the ‘automatic treatment of financial resources in a couple as pooled should not occur’, but rather the assumption should be ‘reversed in instances of family violence’.<sup>22</sup>

6.18 Further concerns were expressed in relation to the criteria concerning the ‘nature of the commitment to each other’. The Council of Single Mothers and their Children (CSMC) and the Homeless Persons Legal Service submitted that the current reference in the *Guide to Social Security Law* to consider evidence of domestic violence as an indication of the absence of commitment and/or emotional support, ‘does not give adequate weight to the existence of family violence in determining whether a person is a member of a couple’.<sup>23</sup>

6.19 The Welfare Rights Centre NSW and NAAJA also raised concerns that information about family violence—such as police reports—have been used to demonstrate the existence of a couple relationship, rather than finding that one did not exist.<sup>24</sup> The following case study demonstrates this concern:

**Case Study**

Jessica had four children to her ex-partner Trevor. They had never lived together, and her relationship with Trevor was one marred by violence and fear. She was afraid of him because he had been violent and because he was a regular drug user who she did not trust alone around her children. For this reason she usually went to Trevor’s house herself with the children when he wanted to see them.

In March 2010 Jessica’s Parenting Payments were cancelled on the basis that she and Trevor were members of a couple from November 2000. Debts were raised of Parenting Payment and Family payments totalling \$127,000. She appealed the decision about her membership of a couple to an Authorised Review Officer.

The Authorised Review Officer’s decision listed a number of aspects of the relationship that indicated that Jessica and Trevor were not members of a couple, including their own statements, Department of Housing information, employer information with no reference to one another, and loan applications and financial documents indicating separate finances. The decision then listed other aspects of the relationship which indicated that Jessica and Trevor were members of a couple, including:

21 North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011.

22 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011.

23 Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

24 North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011.

- ‘the descriptions by the attending officers of your relationship with Trevor provided in the police reports during the period 2000 to 2009 which describe you as being in a long term de facto relationship.
- the information you and Trevor provided to the police in relation to the incidents which resulted in the police reports being made.’
- Jessica appealed the decision to the Social Security Appeals Tribunal, who examined the nature of the disagreements as referred to in the police reports which suggested that they were living together, for example:
- ‘the POI [person of interest] returned intoxicated. The POI began to argue with the victim as she had called him twice while he was at the pub to remind him to pick up milk.’
- ‘the victim told police arguments were about small and petty things for example her spending too much time in the bathroom.’

The SSAT found that on the total picture of the relationship, Jessica and Trevor were living as members of a couple from 2000 onwards. The Tribunal referred to the extensive police reports documenting the couple’s relationship as being one of six factors that persuaded them as to the existence of a relationship.<sup>25</sup>

### ***Legislative amendment***

6.20 In a joint submission, Professor Patricia Easteal and Professor Derek Emerson-Elliott considered that the *Social Security Act* should be amended to require the decision maker to be ‘satisfied that both members have a reasonable equality of power in the partnership, or that if it is a dominant/submissive partnership the submissive member retains the capacity to validly consent to the partnership’.<sup>26</sup>

6.21 On the other hand, the Welfare Rights Centre Inc Queensland considered it more appropriate and effective to amend s 24 of the *Social Security Act* in relation to the discretion to decide that a person is not a ‘member of a couple’. The Welfare Rights Centre Inc Queensland argued that, while ‘section 4 provides a definition of what a member of a couple is, section 24 allows for a decision maker to state what a member of a couple is not’.<sup>27</sup> However, as discussed below, Easteal and Emerson-Elliott considered that any amendment to s 24 would only be a ‘band-aid solution’.<sup>28</sup>

6.22 An alternative submitted by one stakeholder was that research be conducted to ‘investigate and document the ways in which economic/financial abuse interact with income security, in particular in the Australian context’.<sup>29</sup>

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

26 P Easteal and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

27 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

28 P Easteal and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

29 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011.

***Amendment to the Guide to Social Security Law***

6.23 Most stakeholders who responded to this question also agreed that further guidance should be provided in the *Guide to Social Security Law* about how the existence of family violence may affect each of the criteria in s 4(3).<sup>30</sup>

6.24 In particular, the Welfare Rights Centre NSW submitted that such guidance ‘may be supported by reference to the principles enounced in *Kosarova*’ and should provide that the decision maker ‘consider the impact of extreme violence on the nature of the household (s 4(3)(b)) and the nature of the parties’ commitment to each other (s 4(3)(e))’.<sup>31</sup>

***ALRC’s views******Underlying premise***

6.25 In the ALRC’s report, *Equality Before the Law: Justice for Women* (ALRC Report 69), the ALRC considered that the assumption that couple relationships will provide equal financial support for the people in that relationship is inaccurate and that there is a need to address entitlement to income independently.<sup>32</sup>

6.26 While concerns have been raised as to the underlying premise of ‘member of a couple’, it is beyond the ALRC’s Terms of Reference to consider this at large. The underlying notion of financial interdependence, and that singles require more money to enjoy the same living standard as couples, is systemic across the social security system. To reverse this assumption for victims of family violence and not for others would result in a two-tiered structure within the social security system.

***Flexibility versus consistency***

6.27 In any decision-making process, the ALRC considers that it is important that there is flexibility—to ensure that law and policy is responsive to individual circumstances (the theme of self-agency and autonomy described in Chapter 2)—but also consistency, to provide a level of certainty that like circumstances will be considered in a like manner.

6.28 It is inherently difficult to define, in precise terms, what constitutes a relationship. Some relationships, while unpleasant, do not necessarily involve family violence.

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30 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; P Eastal and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

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

32 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 2)*, Report 69 (1994), [12.17].

6.29 The criteria contained in s 4AA of the *Family Law Act 1975* (Cth) and s 22C of the *Acts Interpretation Act 1901* (Cth) for defining a ‘de facto relationship’ are similar to those in s 4(3) of the *Social Security Act*, thereby providing a level of consistency in the interpretation of ‘de facto relationships’ across Commonwealth laws.

6.30 While the current criteria in s 4 for determining a couple relationship can lead to ‘nebulous’ results, it also allows flexibility in decision-making by providing a non-exhaustive list of criteria, with no fixed determination as to the weight to be placed on each criteria, and the circumstances of the whole relationship still to be considered.

6.31 The current criteria do not preclude consideration of family violence, but rather it is a question of practice and guidance provided to decision makers in applying s 4(3) to a particular set of circumstances. Yet, despite this flexibility, the ALRC agrees with stakeholders that the criteria in s 4(3) need to reflect more accurately the nature and effect of family violence on the criteria used to determine couple relationships. The ALRC is concerned that decision makers are not expressly directed as to how family violence may be relevant to the criteria in s 4(3) of the *Social Security Act*, which may, in turn, lead to decisions that do not reflect the true nature of the relationship. This is of particular concern in circumstances of economic abuse where the victim of family violence is prevented from accessing shared finances yet cannot access the higher ‘single’ rate of payment, which may enable the victim to leave a violent relationship.

#### ***System integrity***

6.32 A tension also exists between reflecting the true nature of a relationship and ensuring unintended consequences do not flow from changing the criteria on which a couple relationship is determined—the theme of ‘fairness’, discussed in Chapter 2. The ALRC envisages that amending the criteria in s 4(3) may lead to unintended consequences for both the victim of family violence and the social security system.

6.33 For example, for victims of family violence, a determination that a person is not a member of a couple in social security law may arguably be used in other areas of law such as child support, under Commonwealth law and intestacy, under state and territory law.

6.34 Amending the s 4(3) criteria may also create an incentive for false or manipulated claims of family violence, thereby detracting from the overall purpose of social security law—to provide for those in genuine need. In other words, if claiming family violence is seen as a way of claiming a ‘single’ rate of payment, some may seek to falsify a claim of family violence. Accordingly, the ALRC considers that the level of verification of family violence in ‘member of a couple’ decisions should be appropriately high—as discussed in Chapter 5.

6.35 The ALRC therefore does not propose to amend the criteria contained in s 4(3) of the *Social Security Act*. To do so may lead to unintended consequences, diminish flexibility in decision-making and create inconsistencies with other Commonwealth laws. Rather, the ALRC’s preliminary consideration is that it is more appropriate to provide additional guidance to decision makers through further information about the effect of family violence on ‘member of a couple’ decisions in the *Guide to Social*

*Security Law*. By directing decision makers to consider how family violence affects a victim's decisions, actions and inactions, will improve the way in which family violence is considered in 'member of a couple' decisions. The ALRC makes further proposals in relation to s 24 of the *Social Security Act*, considered below.

**Proposal 6–1** The *Guide to Social Security Law* should be amended to reflect the way in which family violence may affect the interpretation and application of the criteria in s 4(3) of the *Social Security Act 1991* (Cth).

**Proposal 6–2** Centrelink customer service advisers and social workers should receive consistent and regular training in relation to the way in which family violence may affect the interpretation and application of the criteria in s 4(3) of the *Social Security Act 1991* (Cth).

### Separation under one roof

6.36 A person is considered not to be a 'member of a couple' where 'living separately and apart' from the other person on a permanent or indefinite basis.<sup>33</sup> Where a person is assessed as 'living separately and apart', a person is deemed to be single and paid a single rate of income support.<sup>34</sup>

6.37 Generally, a physical separation as well as an emotional separation of the couple is required.<sup>35</sup> They must establish that: they are living apart either permanently or indefinitely, and there has been an 'estrangement or breakdown in their relationship'.<sup>36</sup> The *Guide to Social Security Law* recognises that there may be instances where a person is 'living separately and apart under one roof',<sup>37</sup> but one or both parties must 'form the intention to sever or not to resume that relationship and act on that intention'.<sup>38</sup>

6.38 Neither the *Social Security Act* nor the *Guide to Social Security Law* provides family violence as an example of where people may be 'living separately and apart under one roof'. Rather, a decision maker is directed to consider the five criteria in s 4(3) of the *Social Security Act* to determine whether a person is in a couple relationship or separated under one roof.<sup>39</sup>

6.39 The *Guide to Social Security Law* provides, however, that the consideration of the criterion of 'the nature of the commitment to each other' and the degree they have

33 *Social Security Act 1991* (Cth) ss 4(3), 4(3A); Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.2.5.20] (Determining Living Separately & Apart).

34 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.2.5.20] (Determining Living Separately & Apart).

35 Ibid, [2.2.5.20] (Determining Living Separately & Apart).

36 Ibid, [2.2.5.20] (Determining Living Separately & Apart).

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

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

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



made to distance themselves physically and emotionally, includes whether there has been a withdrawal of intimacy, companionship and support to the other party.<sup>40</sup>

6.40 The *Guide to Social Security Law* also indicates that in circumstances of ‘domestic violence’, different ‘evidentiary’ requirements may apply.<sup>41</sup> This is discussed further in Chapter 5.

### ***Submissions and consultations***

6.41 In the Social Security Issues Paper, the ALRC asked whether, in practice, family violence is adequately considered in determining separation under one roof and, if not, how family violence should be taken into consideration.<sup>42</sup>

6.42 Most stakeholders who responded to this question indicated that determination of separation under one roof was not made consistently.<sup>43</sup> Stakeholders provided examples of difficulties faced by victims of family violence in proving separation under one roof such as:

- where a person has obtained an Apprehended Violence Order (AVO) and the person using family violence breaches the AVO and returns to the home;<sup>44</sup>
- lack of refuge accommodation and the desire to give children some stability can mean it is hard to leave and the fear that if they leave the relationship, and do not have stable accommodation, they may lose custody of their children to the person using family violence;<sup>45</sup> and
- dependency by people with disability on their partner for physical and financial assistance may lead to a finding that they are still in a relationship.<sup>46</sup>

6.43 In addition, the Sole Parents’ Union submitted that victims of family violence were not always aware that a person could be separated under one roof and that it can be difficult to prove, ‘particularly given the element of control by the perpetrator’:

Every time I tried to leave he’d threaten that he’d take the kids away from me. He told me that no court would award me custody if I didn’t have somewhere to live and there was no way he was going to leave the house. I didn’t even know you could be separated if you were still living together.<sup>47</sup>

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

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

42 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 14.

43 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; Sole Parents’ Union, *Submission CFV 63*, 27 April 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; P Eastale and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

44 Sole Parents’ Union, *Submission CFV 63*, 27 April 2011.

45 Ibid.

46 ADFVC, *Submission CFV 71*, 11 May 2011.

47 Sole Parents’ Union, *Submission CFV 63*, 27 April 2011.

6.44 Consequently, most stakeholders submitted that family violence should be considered when determining separation under one roof,<sup>48</sup> and in particular:

the impacts of family violence on victims, including financial abuse, and other environmental and social factors that may prevent a victim from leaving, such as the extreme public housing shortage in some locations and the high cost of private rental.<sup>49</sup>

#### ***ALRC's views***

6.45 As discussed above, the criteria in s 4(3) of the *Social Security Act* are reflected in other Commonwealth laws, enable flexibility in decision-making and, if amended, may lead to unintended consequences. For the reasons stated above, the ALRC does not propose to amend the criteria in s 4(3). However, because of difficulties faced by victims of family violence in proving separation under one roof, the ALRC considers that decision makers need more guidance on how family violence may affect determinations that a person is living separately and apart under one roof.

6.46 At the time of writing, s 4(3A) of the *Social Security Act* does not provide any examples of when a person is living separately and apart. This detail is provided in the *Guide to Social Security Law*. Again, this provides flexibility in decision-making and—on its face—does not preclude a decision maker from considering family violence. If s 4(3A) included family violence as an example, other examples would also need to be included. It may also lead to inflexible decision making and create an incentive to claim family violence in order to access a higher ‘single’ rate of payment.

6.47 Accordingly, the ALRC proposes that further guidance be provided to decision makers in the *Guide to Social Security Law* to ensure that family violence is adequately considered in determining whether a person is living separately and apart under one roof. As discussed previously, such an amendment would provide direction to decision makers as to how family violence affects a victim’s decision to stay or leave a violent relationship such as financial abuse and other social and economic factors that may prevent a victim from leaving a violent relationship.

6.48 The ALRC is also concerned that some victims of family violence may be unaware of the ability to claim ‘living separately and apart under one roof’. As such, the ALRC considers that information about this should be included in Proposal 4–8.

**Proposal 6–3** The *Guide to Social Security Law* should be amended expressly to include family violence as a circumstance where a person may be living separately and apart under one roof.

<sup>48</sup> ADFVC, *Submission CFV 71*, 11 May 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

<sup>49</sup> ADFVC, *Submission CFV 71*, 11 May 2011.

### ‘Special reason’

6.49 The Secretary of FaHCSIA has a discretion, under s 24 of the *Social Security Act*, to rule that, for a ‘special reason’ in the particular case, a person should not be treated as a ‘member of a couple’. The *Guide to Social Security Law* states that s 24 is intended to be an ‘option of last resort and should only be applied when all other reasonable means of support have been explored and exhausted’.<sup>50</sup> When the discretion under s 24 is applied and a person is determined not to be a member of a couple, the person is: treated as a ‘single’ person for all purposes of the *Social Security Act*; paid the single rate of payment; and ‘only their individual income and assets are included in the assessment of the rate of their payment’.<sup>51</sup>

### *Unusual, uncommon or exceptional*

6.50 The *Guide to Social Security Law* states that the ‘special reason’ must be ‘unusual, uncommon or exceptional’—that is, there must be something unusual or different to take the matter the subject of the discretion out of the ordinary course.<sup>52</sup> The discretionary power must also be exercised for the purpose for which it was conferred—that is, to make provision for those who are in genuine need.<sup>53</sup>

6.51 The *Guide to Social Security Law* directs the decision maker to consider three questions while also looking at the full circumstances of the case:

- Is there a special reason to be considered in this couple’s circumstances?
- Is there a lack of being able to pool resources for the couple as a result of the circumstances?
- Is there financial difficulty as a result of the couple’s circumstances?

6.52 While the *Guide to Social Security Law* considers some common scenarios,<sup>54</sup> it does not provide family violence as an example of where the discretion might be exercised. However, a number of cases demonstrate how family violence has been considered by decision makers in exercising the discretion under s 24.

6.53 In *Perry and Department of Family and Community Services*, the AAT found that a longstanding history of family violence did not amount to a ‘special reason’ under s 24, as the applicant was not prevented by some external force from separating from the person using family violence.<sup>55</sup>

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50 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011 [2.2.5.50] (Discretion to Treat a Person as Not Being a Member of a Couple for a Special Reason).

51 Ibid, [2.2.5.50] (Discretion to Treat a Person as Not Being a Member of a Couple for a Special Reason).

52 *Boscolo v Secretary, Department of Social Security* [1999] FCA 106.

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

54 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.2.5.50] (Discretion to Treat a Person as Not Being a Member of a Couple for a Special Reason).

55 *Perry and Department of Family and Community Services* [2001] AATA 282 (9 April 2001).

6.54 Similarly, in *Lynwood and Secretary, Department of Education, Employment and Workplace Relations*, the applicant was seen to have suffered from family violence over a long period from her husband. While her husband did not help in any way with the raising of 11 children, this was not seen as ‘something unusual or different to take the matter the subject of the discretion out of the ordinary course’.<sup>56</sup> Other cases have been determined in a similar manner.<sup>57</sup>

6.55 On the other hand, in *Rolton v Department of Education, Employment and Workplace Relations*, the AAT found that, while the person was a member of a couple under s 4 of the *Social Security Act*, her circumstances, ‘namely, her being in an abusive and controlling relationship, and the nature and severity of her mental condition, amount[ed] to a special reason within the meaning of section 24(2)’.<sup>58</sup>

### **Submissions and consultations**

6.56 In the Social Security Issues Paper, the ALRC asked whether family violence was adequately taken into consideration in the exercise of the discretion under s 24 of the *Social Security Act* not to treat a person as a member of a couple. The ALRC asked further whether the s 24 discretion should be amended expressly to require the existence and effect of family violence to be taken into account.<sup>59</sup>

### **Concerns**

6.57 Some stakeholders indicated that family violence was not adequately taken into consideration by the decision maker in exercising the discretion in s 24.<sup>60</sup> The Commonwealth Ombudsman noted anecdotal instances where Centrelink has determined that a customer is a member of a couple, even where it appears the ‘relationship’ may have only continued as a result of duress or financial abuse.

It is unclear whether this has resulted from decision makers believing that the criteria in s 4 of the *Social Security Act 1991* do not allow them to find the customer was not a member of a couple, or whether the facts of the individual cases were not sufficiently strong to overcome those criteria which did point to the existence of a relationship.<sup>61</sup>

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56 *Lynwood and Secretary, Department of Education, Employment and Workplace Relations* [2011] AATA 213 (30 March 2011).

57 *Bruce and Secretary, Department of Social Security* [1995] ATA 341 (22 November 1995); *Williams and Secretary, Department of Social Security* [1997] AATA 228 (2 July 1997); *Scheibel and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2011] AATA 282 (21 January 2011).

58 *Rolton v Department of Education, Employment and Workplace Relations* AAT No 2008/3542.

59 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Questions 16, 17.

60 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; P Eastale and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

61 Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.

6.58 The Welfare Rights Centre NSW submitted that the discretion under s 24 not to treat a person as a member of a couple is rarely used for victims of family violence and that people who may benefit from its use are not made aware of it as an option.<sup>62</sup>

### **Reform options**

6.59 Stakeholders recommended that family violence should be taken into account expressly in considering the special reason discretion in s 24 of the *Social Security Act*,<sup>63</sup> in particular to ‘require recognition by the decision maker of the disempowering effects of family violence and “battered women’s syndrome”’.<sup>64</sup>

6.60 Easta and Emerson-Elliott identified that the ‘real problem arises from the fact that women living with, or having lived with, serious family violence are unable to consent to a marriage-like relationship in the first place’ likening such relationships to ‘master/slave relationships, where the battered woman does not consent to what is happening but has no power—in fact no will—to change or even challenge the circumstances in which she finds herself’.<sup>65</sup>

6.61 Similarly, the CSMC noted that, due to abuse experienced by victims of family violence and threats made against them if they leave, victims may have no choice but to remain in a violent situation. ‘In these circumstances they are not part of a ‘couple’ by any usual definition—there is no equality or sharing in that situation’.<sup>66</sup>

6.62 Easta and Emerson-Elliott submitted that, as a result of the decision in *Rolton*, ‘consideration is being given to amending section 24 of the Act to specifically recognise circumstances such as those in *Rolton*’.<sup>67</sup> However, they also submitted that while liberalising the discretion in s 24 of the Act would be welcome ‘it would only be a band-aid solution to the problem’.<sup>68</sup>

6.63 The Welfare Rights Centre Inc Queensland recommended the addition of a new subsection to s 24 to provide that a victim of family violence should not be treated as a member of a couple. The Welfare Rights Centre Inc Queensland raised concerns about the potential for such a provision to be abused, but considered that the definitions surrounding duress at both common law and in statute would, to some extent, guard against such abuse.

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

63 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; P Easta and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

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

65 P Easta and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

66 Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

67 P Easta and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

68 Ibid.

6.64 The Welfare Rights Centre NSW considered that the *Guide to Social Security Law* should direct a decision maker expressly to consider family violence in the exercise of the s 24 discretion and any previous decisions should be backdated, where appropriate.<sup>69</sup>

6.65 The Welfare Rights Centre Inc Queensland raised an additional concern about the use of modifying words, like ‘extreme’, ‘special’ or ‘exceptional’ and submitted that they have

dealt with many cases where a decision maker has agreed that a circumstance prevents a victim from living in their place of residence, however due to this situation being quite normal in the victim’s life, the requirement is not met.<sup>70</sup>

### ***ALRC’s views***

6.66 Section 24 of the *Social Security Act* is a discretionary area of law. As discussed above, a number of cases indicate that decision makers may not place sufficient weight on the existence of family violence. However, as noted by the Commonwealth Ombudsman, it is unclear whether this has resulted from decision makers believing that the criteria in s 4 of the *Social Security Act* do not allow them to find the customer was not a member of a couple, or whether the facts of the individual cases were not sufficiently strong to overcome those criteria which did point to the existence of a relationship.

6.67 Section 24 does not preclude family violence from being taken into consideration by a decision maker. In fact, as the cases outlined above demonstrate, family violence has been taken into consideration. However the ALRC is concerned that there may be insufficient guidance and training for decision makers about how family violence can affect a person’s decisions. The ALRC considers that further guidance as to how family violence may constitute a ‘special reason’ should be included in the *Guide to Social Security Law*.

6.68 While the Welfare Rights Centre Inc Queensland expressed concern that the reference to ‘special’ in ‘special reason’ was unsuitable, the ALRC notes that this terminology is repeated throughout the *Social Security Act*, for example in relation to waiver of debt in ‘special circumstances’ (considered in Chapter 7). The ALRC therefore considers that to remove the word ‘special’ from the ‘special reason’ discretion, would be beyond the scope of the ALRC’s Terms of Reference for this Inquiry, as it would also affect other customers—not only those experiencing family violence.

### ***Verification of family violence***

6.69 There are also concerns about maintaining the integrity of the system—to ensure that the addition of family violence as a consideration for ‘special reason’ is not abused by people claiming family violence when they are not in fact experiencing it. The ALRC’s preliminary consideration is that this potential for abuse could be minimised

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

70 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

by requiring the level of verification of family violence to be rigorous for the exercise of the discretion. Verification of family violence in relation to social security payments and entitlements is considered in detail in Chapter 5.

#### ***Access to the s 24 discretion***

6.70 The ALRC notes further that if reliance is to be placed on the discretion in s 24 for persons experiencing family violence, it needs to be adequately accessible. In particular, the ALRC queries whether its use as an ‘option of last resort’ presents a barrier to those experiencing family violence from accessing the discretion.

6.71 Stakeholders mentioned that s 24 was rarely used for family violence and victims were unaware that they could raise this discretion. One reason for its misuse may be accessibility and knowledge of the discretion itself. The ALRC therefore proposes that information about the discretion be included in Proposal 4–8.

**Proposal 6–4** The *Guide to Social Security Law* should be amended to 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).

**Question 6–1** With respect to the discretion under s 24 of the *Social Security Act 1991* (Cth):

- (a) is the discretion accessible to those experiencing family violence;
- (b) what other ‘reasonable means of support’ would need to be exhausted before a person could access s 24; and
- (c) in what ways, if any, could access to the discretion be improved for those experiencing family violence?

## **Independent**

6.72 Whether a person is ‘independent’ can affect his or her qualification for, or rate of payment of, Youth Allowance, Disability Support Pension, Special Benefit and Pensioner Education Supplement.<sup>71</sup> It can also affect whether a person is paid a social security payment directly or through a parent.<sup>72</sup>

6.73 These payments may be assessed on the basis that the person is independent of, or dependent on, his or her parents. If a person is assessed as dependent, the parents’ income and assets are considered in determining eligibility. This is based on the

71 *Social Security Act 1991* (Cth) s 94 (Disability Support Pension), s 540 (Youth Allowance), s 739 (Special Benefit homeless person), s 1061PA (Pensioner Education Supplement).

72 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011 [3.2.3.20] (Payability of YA).

presumption that parents with sufficient resources will provide financial and material support to their children.<sup>73</sup>

6.74 There are a number of circumstances in which a person may be considered ‘independent’. Of most relevance to victims of family violence is the provision for independence where it is ‘unreasonable to live at home’. To be considered independent in these circumstances, it must be unreasonable for the person to live at home and the person must not be receiving ‘continuous support’. These two criteria are discussed separately below.

### **Unreasonable to live at home**

6.75 The *Social Security Act* provides that a person is regarded as ‘independent’ if he or she:

- (a) 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 [exceptional or unreasonable] circumstances.<sup>74</sup>

6.76 In addition, for Youth Allowance, Disability Support Pension and Special Benefit, a person is considered ‘independent’ if the person cannot live at the home of his or her parents:

- (iii) because the parent or parents are unable to provide the person with a suitable home owing to a lack of stable accommodation.<sup>75</sup>

6.77 These three circumstances are considered separately below.

### ***Extreme family breakdown***

6.78 The *Guide to Social Security Law* states that family breakdown must be ‘extreme’, and the existence of ongoing conflict alone is insufficient grounds to consider a person independent under this criteria. Factors that may indicate extreme family breakdown are said to include evidence that the emotional or physical wellbeing of the person or another family member would be jeopardised if the person were to live at home.<sup>76</sup>

6.79 Examples of other ‘similar exceptional circumstances’ include ‘severe neglect’, ‘criminal activity or substance abuse by the parents’, ‘extreme and abnormal demands’ on the young person, and refusal to permit the young person to work or study.<sup>77</sup> The

73 Employment Workplace Relations and Education Reference committee, Student Income Support Inquiry.

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

75 *Ibid* s 1067A(9).

76 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.2.5.40] (Assessment of Extreme Family Breakdown & Other Similar Exceptional Circumstances).

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



*Guide to Social Security Law* also provides that where ‘parents refuse to allow the young person to live at home, this does not constitute “extreme family breakdown” unless there is evidence of extreme and enduring family conflict’.<sup>78</sup>

### ***Serious risk to physical or mental well-being***

6.80 The *Guide to Social Security Law* provides that indicators of ‘serious risk’ to a young person’s physical or mental wellbeing include ‘sexual, physical or psychological abuse’. The Guide recognises that the claimant need not be the direct victim of abuse and that it would usually be accepted as unreasonable to expect the claimant to live in a home where other household members have been or are being subject to such abuse.<sup>79</sup>

6.81 In a submission to the 2005 Senate Employment, Workplace Relations and Education References Committee Inquiry into Student Income Support, the University of Queensland Union submitted that ‘it is left up to policy and, in practice, subjective judgement, to define violence’ and that ‘despite the fact that policy makes reference to risk to mental wellbeing, including psychological abuse, in our experience, assessing officers/social workers can be reluctant to consider violence that is not overt and visible as serious enough to warrant qualification for independent YA [Youth Allowance]’. The University of Queensland Union raised further concerns that ‘Centrelink policy in this regard is endorsing an acceptance of “conflict” which is normal in our communities, and that this extends to conflict relating to sexual, political and religious choice. At the same time as accepting a level of conflict as “normal”’.<sup>80</sup>

### ***Parents unable to provide a home***

6.82 The *Guide to Social Security Law* does not refer to family violence as a circumstance where it may be considered that a person’s parents are unable to provide a home. Rather, the *Guide to Social Security Law* states that a person may be considered independent where a parent is unable to provide a suitable home because the parent lacks stable accommodation.<sup>81</sup>

### **Continuous support**

6.83 In addition, to be considered ‘independent’, the person must not be in receipt of ‘continuous support’ from a parent, guardian or income support (other than a social security benefit) from the Commonwealth, or a state or territory.<sup>82</sup> Continuous support is defined in the *Guide to Social Security Law* as ‘regular and ongoing assistance to the

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

79 Ibid, [3.2.5.50] (Assessment of Serious Risk).

80 University of Queensland Union, *Submission to the Senate Employment, Workplace Relations and Education References Committee Inquiry into Student Income Support* (2004).

81 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.2.5.60] (Parents Unable to Provide a Home (YA & DSP)).

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

young person's upkeep'.<sup>83</sup> The onus is on the applicant to provide relevant supporting information.

6.84 The Social Security Issues Paper referred to a case reviewed by the Commonwealth Ombudsman in which a young person—who had left her home due to family violence—was not found to be independent because she was receiving continuous support from her father, who resided interstate. Her Youth Allowance payment was later cancelled because she was unable to provide details of her father's income or assets. Consequently, she was left without income support for over two months.<sup>84</sup>

6.85 The Ombudsman, in this case, found it unreasonable for Centrelink to put the onus solely on a young person to obtain income and asset details from a parent the young person is not residing with, or with whom the young person might have had minimal contact.<sup>85</sup>

### Submissions and consultations

6.86 In the Social Security Issues Paper, the ALRC asked whether the criteria for a person to be considered 'independent' adequately took into account the existence of family violence. The ALRC also asked in what ways, if any, the *Guide to Social Security Law* should be amended in relation to the 'continuous support' criteria to improve the safety of victims of family violence.<sup>86</sup>

#### *Unreasonable to live at home*

6.87 Most stakeholders who responded to these questions suggested that family violence needs to be recognised expressly as a circumstance when it may be unreasonable for a person to live at home.<sup>87</sup> In doing so, stakeholders expressed the need to ensure that the decision maker takes into account other less visible forms of family violence, such as economic abuse.<sup>88</sup> Women Everywhere Advocating Violence

83 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.1.C.350] (Continuous support (YA, DSP)).

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

85 Ibid.

86 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Questions 19, 22.

87 North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011; ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011; P Eastal and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

88 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

Elimination (WEAVE) and NCSMC considered that child abuse should be expressly considered.<sup>89</sup> For example, the Homeless Person's Legal Service considered that:

Unless express reference is made to family violence there is a risk that some of these elements of family violence [economic abuse, emotional abuse, stalking, deprivation of liberty, damage to property and causing a child to be exposed to violent or abusive behaviour] will not be considered by decision-makers as sufficiently extreme to be considered in the determination of whether a person is independent.<sup>90</sup>

6.88 The Welfare Rights Centre NSW recommended that family violence should be a stand-alone criterion upon which independence may be established:

the existence of family violence should be an express criterion upon which independence may be established.<sup>91</sup>

6.89 Similarly, the Welfare Rights Centre Inc Queensland noted that, while legislation currently refers to violence, sexual abuse, or other similar [exceptional or unreasonable] circumstances, family violence has specific connotations and therefore should be expressly referred to in this context.<sup>92</sup>

6.90 In addition, the National Children's and Youth Law Centre submitted that the 'test of independence in extreme family breakdown should be reviewed to accommodate situations where the child's parents refuse to allow the child to live at home' and that the test in relation to 'extreme family breakdown' should not be of such a high threshold'.<sup>93</sup>

6.91 WEAVE submitted that the response by Centrelink staff is 'highly variable depending on whether the staff member carries a belief that young people make up family conflict to rot the system or a belief that young people can be victims of violent parents'.<sup>94</sup>

### ***Continuous support***

6.92 In relation to the 'continuous support' requirement, stakeholders raised concerns that the bulk of the burden for establishing independence was placed on the young person<sup>95</sup> and that the 'continuous support' criterion does not look to the adequacy of support.<sup>96</sup>

89 WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011.

90 Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

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

92 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

93 National Children's and Youth Law Centre, *Submission CFV 64*, 3 May 2011.

94 WEAVE, *Submission CFV 58*, 27 April 2011.

95 Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; National Children's and Youth Law Centre, *Submission CFV 64*, 3 May 2011; Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

96 Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011.

6.93 The Welfare Rights Centre Inc Queensland submitted that the continuous support requirement can potentially act as a tool for further control of a victim where a legal guardian claims to be providing support, however according to the client, no such support exists.<sup>97</sup>

6.94 Similarly, the Welfare Rights Centre NSW and the National Children's and Youth Law Centre submitted that a family breakdown may mean that a young person is unable to 'obtain information of parental income and assets to determine eligibility for a claim'<sup>98</sup> and that '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'.<sup>99</sup>

6.95 Accordingly, stakeholders who responded to this question agreed that the onus should not be placed on a young person to obtain details of a parent's income or assets in circumstances of family violence.<sup>100</sup> As a possible solution, stakeholders recommended that the onus of 'continuous support' should be shifted to the parents;<sup>101</sup> or be disregarded in circumstances of family violence.<sup>102</sup>

6.96 The Welfare Rights Centre Inc Queensland, who supported removing the requirement of continuous support for victims of family violence, considered that there is scope in the legislation surrounding fraudulent or misleading information as well as a general ability of the Commonwealth to recover monies paid when entitlements are claimed by such methods and that 'these provisions are strong enough to account for the potential of misuse if this onus were to be removed'.<sup>103</sup>

6.97 Alternatively, the Welfare Rights Centre NSW suggested that Centrelink use its powers under s 192 of the *Social Security (Administration) Act* to get financial information from parents in circumstances of family violence. However, the Welfare Rights Centre NSW noted that 'Centrelink is reluctant to use the extensive powers in this section [192] for the benefit of income support recipients'.<sup>104</sup>

### ALRC's views

6.98 In order to be considered 'independent' because it is unreasonable for the person to live at home, a person must satisfy two criteria: that it is unreasonable to live at home and that the person is not in receipt of continuous support.

97 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

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

99 National Children's and Youth Law Centre, *Submission CFV 64*, 3 May 2011.

100 Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; National Children's and Youth Law Centre, *Submission CFV 64*, 3 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

101 WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011.

102 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

103 Ibid.

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

***Unreasonable to live at home***

6.99 The ALRC considers that it may be appropriate for the *Guide to Social Security Law* to expressly refer to family violence to ensure that all forms of family violence are captured either as a circumstance of ‘extreme family breakdown’ or ‘serious risk to physical or mental well-being’.

6.100 Family violence, child abuse and neglect are not expressly included as a ‘serious risk to a person’s physical or mental well-being’ in the *Social Security Act*. The provision currently takes into account sexual, physical and psychological abuse of a child through interpretation in the *Guide to Social Security Law*. While the *Guide to Social Security Law* states that ‘severe neglect’ may be a ‘similar exceptional circumstance’ of ‘extreme family breakdown’, a similar provision is not made for as a ‘serious risk to a person’s physical or mental well-being’. The *Guide to Social Security Law* does provide, however, where allegations of child abuse or serious risk of abuse or neglect, referral should be made to a social worker.<sup>105</sup>

6.101 In the ALRC’s preliminary view, the term ‘violence’ should be replaced by ‘family violence’. Proposal 3–1, which sets out a definition of family violence for social security legislation, complements this approach. ‘Family violence’ captures a wider range of conduct than ‘violence’, insofar as that conduct is violent, threatening, controlling, coercive or engenders fear. Examples of conduct contained in the family violence definition which may not be caught by ‘violence’ include psychological or emotional abuse, deprivation of liberty, and exposing a child to family violence.

6.102 In the ALRC’s view, the existing interpretation in the *Guide to Social Security Law* are too limited, and should be amended to include child abuse and neglect.

***Serious risk to physical or mental well-being***

6.103 For it to be considered unreasonable for a person to live at home, the decision maker must be satisfied of a ‘serious risk’ to a person’s ‘physical or mental well-being’. This requires judgment as to whether there is a risk of harm to a person’s wellbeing, and whether such a risk is ‘serious’. The ALRC considers that the requirement for such judgment is unsuitable; and implies that family violence, child abuse and neglect may not harm a person’s physical or mental wellbeing in some cases. This is inconsistent with contemporary evidence about the effects of these factors on child developmental and health outcomes.

6.104 In the ALRC’s preliminary consideration, the very fact of family violence, child abuse or neglect should enable a decision that it is unreasonable for a person to live at home, without the need to prove that such conduct had a certain effect on the person.

***Continuous support***

6.105 The ALRC has identified three main concerns with the ‘continuous support’ requirement from stakeholder comments. First, the requirement may put a victim of

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<sup>105</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.2.5.50] (Assessment of Serious Risk).

family violence at risk of further violence, or the person may decide not to claim the independent rate due to fear of further violence. Secondly, despite reporting receipt of continuous support, a victim of family violence may not be receiving the support due to economic abuse. Thirdly, that the amount of continuous support is not taken into account and therefore may not be adequate.

6.106 Potential solutions provided by stakeholders included waiver or exemptions from the continuous support requirement, shifting the onus onto parents or legal guardians to provide evidence of continuous support or that Centrelink use its powers under the *Social Security Act* to collect such information.

6.107 In relation to the amount of continuous support, the ALRC considers that this is an overarching concern that would affect not only victims of family violence and therefore does not make a proposal about this matter.

### ***Waiver***

6.108 Some stakeholders recommended that the requirement to demonstrate whether or not a person was receiving continuous support should be waived in its entirety for victims of family violence. The ALRC understands that the requirement that a person is not in receipt of continuous support works to ensure that people who are not in need of support do not gain support—reflecting the theme of ‘fairness’ discussed in Chapter 2. In addition, to waive the requirement for victims of family violence only may also raise concerns of a two-tiered system. The ALRC therefore considers that there is still need for the ‘continuous support’ requirement rather than waiving the requirement for victims of family violence.

### ***Parents to provide details***

6.109 To require parents to provide their own details of any continuous support would not remedy the issue of whether or not a young person actually receives the support. In addition, a parent may refuse to do so. The ALRC therefore considers that shifting the onus onto a parent to provide information about continuous support would not address stakeholder concerns.

### ***Centrelink powers***

6.110 Centrelink’s powers under ss 192–195 of the *Social Security (Administration) Act* allow Centrelink to collect internal and external evidence about a customer’s circumstances and are primarily used to collect information to establish an individual’s eligibility or correct entitlements.<sup>106</sup> The ALRC considers that the use of such powers may be the best way to collect information about continuous support in circumstances of family violence. However, DEEWR and Centrelink may be able to determine alternative strategies.

6.111 In the Social Security Issues Paper, the ALRC also raised the issue of receiving payment directly. Payment of Youth Allowance is made to the person unless under 18 years of age and not independent, in which case, the payment is paid to a parent of

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106 Australian National Audit Office, *Centrelink Fraud Investigations* (2010).

the young person.<sup>107</sup> The ALRC considers that if improvements are made to ensure that victims of family violence are considered independent for Youth Allowance and other payments, then a person will be paid directly under the current legislative framework.

**Proposal 6–5** The *Guide to Social Security Law* should be amended 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).

**Question 6–2** Should the *Social Security Act 1991* (Cth) also be amended expressly to refer to family violence, child abuse and neglect as an example of circumstances when it is ‘unreasonable to live at home’?

**Question 6–3** Should ss 1067A(9)(a)(ii) and 1061PL(7)(a)(ii) of the *Social Security Act 1991* (Cth) be amended:

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

**Proposal 6–6** DEEWR and Centrelink should review their policies, practices and training to ensure that, in cases of family violence, Youth Allowance, Disability Support Pension and Pensioner Education Supplement, applicants do not bear sole responsibility for providing specific information about:

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

<sup>107</sup> Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 23; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [8.4.1.30] (Payments to a Third Party).

## 7. Social Security—Proof of Identity, Residence and Activity Tests

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### Summary

7.1 As discussed in Chapter 5, certain requirements must be met before a person is qualified for a social security payment or entitlement. Once a person is qualified, however, it may not be payable unless certain additional criteria are met—known as ‘payability’ criteria. Family violence is relevant to various qualification and payability requirements—such as proof of identity, residence, and activity and participation requirements attached to certain social security payments—in a number of ways.



7.2 First, accessing proof of identity documents or tax file numbers may place the safety of a victim of family violence in jeopardy if required to return to a violent home or to contact the person using family violence.

7.3 Secondly, 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.

7.4 Thirdly, requirements such as activity tests, participation requirements and other administrative requirements may be too onerous for a victim of family violence to meet. In addition, if a person does not meet these requirements, it may result in his or her social security payment or entitlement being suspended, and therefore excluded from any independent financial assistance. Activity tests and participation requirements therefore need to be flexible and responsive to an individual job seeker's needs—including if experiencing family violence—and exemptions available where a victim of family violence is unable to meet their activity or participation requirements.

7.5 In this chapter, the ALRC considers how the qualification and payability requirements could be improved to protect the safety of victims of family violence. In doing so, the ALRC is seeking to balance the integrity of the social security system with the need to enhance the safety of victims of family violence. The ALRC therefore makes proposals in relation to residence requirements—ensuring that where appropriate, certain subclasses of visas are able to access Special Benefit. The ALRC also seeks guidance from stakeholders as to what other reforms may be necessary to residence requirements to maintain this balance.

7.6 Finally, the ALRC makes a number of proposals to ensure that a person's experience of family violence is adequately considered in:

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

## **Proof of identity**

7.7 Section 8 of the *Social Security (Administration) Act 1999* (Cth) seeks to ensure that abuses of the social security system are minimised.<sup>1</sup> One way in which the social security system aims to do this is by requiring claimants and recipients to prove their identity when making new claims, or when renewing or altering claims.<sup>2</sup> To be qualified for a social security payment, a low income health care card, or a

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1 *Social Security (Administration) Act 1999* (Cth) s 8(a)(v); Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.2.1.10] (General Procedures for Verifying Identity).

2 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.2.1.10] (General Procedures for Verifying Identity).

Commonwealth senior's health card, a person must provide original proof of identity documents and, with limited exceptions, also provide a tax file number.<sup>3</sup>

7.8 Victims of family violence are not automatically exempt from providing original proof of identity documents. The *Guide to Social Security Law* states that all efforts must be made to obtain satisfactory proof of identity and that the onus for establishing proof of identity is on the claimant.<sup>4</sup> However, the *Guide to Social Security Law* provides that a departmental form—'Questions for Persons with Insufficient Proof of Identity'—can be used if a person is unable to provide sufficient evidence as to identity. This form contains questions that, because of their personal nature, are not likely to be known to other people.<sup>5</sup> 'Persons experiencing domestic violence' are among the list of persons able to use this alternate departmental form for proof of identity.<sup>6</sup>

### Tax file numbers

7.9 Tax file numbers may be requested from a person who resides in Australia and makes a claim for, or receives, a social security payment.<sup>7</sup> In addition, a person must provide the full name, date of birth, tax file number and income and asset details of any non-claimant partner, if requested.<sup>8</sup>

7.10 While a person cannot be compelled to provide a tax file number, the person's social security payment may cease if it is not provided.<sup>9</sup>

7.11 A person may be granted a tax file number exemption—including an indefinite exemption—from providing a tax file number of their partner, where the person can demonstrate a risk of violence to himself, herself, their children or dependants, or where other concerns for the health and safety of the person, their children or dependants exist.<sup>10</sup>

3 *Social Security (Administration) Act 1999* (Cth) ss 8, 75; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.2.1.10] (General Procedures for Verifying Identity); [8.1.3.20] (Providing TFN Information).

4 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.2.1.10] (General Procedures for Verifying Identity).

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

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

7 *Social Security (Administration) Act 1999* (Cth).

8 Ibid ss 8, 75; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.2.1.10] (General Procedures for Verifying Identity); [8.1.3.20] (Providing TFN Information).

9 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [8.1.3.20] (Providing TFN Information).

10 *Social Security (Administration) Act 1999* (Cth) ss 76, 77; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [8.1.3.20] (Providing TFN Information).

7.12 This exemption does not cover cases where there is merely a refusal on the part of the partner to provide the information and there are no violence or health concerns, or if a person is claiming to receive payments in his or her own right.<sup>11</sup>

### Submissions and consultations

7.13 In *Family Violence and Commonwealth Laws—Social Security* (the Social Security Issues Paper),<sup>12</sup> the ALRC asked whether the current provisions regarding the requirements for original proof of identity documents and tax file numbers created barriers for victims of family violence, and whether further measures should be put in place to ensure that a victim of family violence who has had to leave his or her home because of family violence are not required to return to the home or contact an abusive family member.<sup>13</sup>

7.14 Most stakeholders who responded to this question agreed that the requirement to provide original proof of identity documents and tax file numbers can create a barrier for persons experiencing family violence to accessing social security payments and entitlements.<sup>14</sup>

### Proof of identity

7.15 The Homeless Person's Legal Service raised concerns that:

A person who has been forced into unstable accommodation due to family violence may not have sufficient proof of identity in order to receive a social security payment, and may be exposed to risk of harm if they believe they are required to return to the home in order to obtain such proof of identity.<sup>15</sup>

7.16 Similarly, the National Children's and Youth Law Centre submitted that, for young people who have already left home, he or she 'may not wish to re-enter the violent home to locate the documents, or a parent may withhold these documents from the young person to stop them from leaving home'.<sup>16</sup>

7.17 However, the Welfare Rights Centre NSW stated that 'Centrelink officers are generally proactive in assisting young people at risk to gather the required proof of identity needed for a claim to be processed'.<sup>17</sup>

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11 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [8.1.3.20] (Providing TFN Information).

12 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011).

13 Ibid, Question 24.

14 ADFVC, *Submission CFV 71*, 11 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; National Children's and Youth Law Centre, *Submission CFV 64*, 3 May 2011; Multicultural Disability Advocacy Association, *Submission CFV 60*, 28 April 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

15 Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

16 National Children's and Youth Law Centre, *Submission CFV 64*, 3 May 2011.

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

7.18 Some stakeholders recommended an automatic exemption for victims of family violence from providing original proof of identity documents,<sup>18</sup> while others considered that information about the availability of the exemption should be provided to persons experiencing violence.<sup>19</sup>

### ***Tax file numbers***

7.19 In relation to the requirement to provide a partner's tax file number, the Multicultural Disability Advocacy Association submitted that, because control is often a common feature of family violence,

any provision that requires providing a partner's tax file number will inevitably prevent a victim from leaving violent relationships. All steps should be taken to encourage victims to leave violent relationships and avenues for exemptions should be explicit, accessible and automatic ... No one should be refused services or entitlements because a third party refuses to provide personal information.<sup>20</sup>

7.20 The Council of Single Mothers and their Children (CSMC) submitted that if the refusal of a partner to provide a tax file number prevents a victim of family violence from accessing payments he or she would otherwise be entitled to, such refusal constitutes a form of financial abuse.<sup>21</sup>

7.21 Rather than requiring a victim of family violence to provide a partner's tax file number, some stakeholders suggested that Centrelink use its powers under s 192 of the *Social Security (Administration) Act* to require the production of information, such as a partner's tax file number.<sup>22</sup>

### ***Contact details***

7.22 Some stakeholders also raised concerns about people who are experiencing family violence and who are in a state of transition between residences and not able to provide an address.<sup>23</sup> In particular, concerns were raised regarding mail being sent to the old address until a new address had been provided, thus potentially enabling the person using family violence to know the victim's affairs.<sup>24</sup>

### **ALRC's views**

7.23 The ALRC recognises the need to balance the tension between establishing the identity of a social security recipient or claimant in order to ensure the integrity of—and minimise abuse of—the social security system, with the need to ensure the safety

18 ADFVC, *Submission CFV 71*, 11 May 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

19 ADFVC, *Submission CFV 71*, 11 May 2011; National Children's and Youth Law Centre, *Submission CFV 64*, 3 May 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

20 Multicultural Disability Advocacy Association, *Submission CFV 60*, 28 April 2011.

21 Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

22 Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

23 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011.

24 Ibid.

of victims of family violence through access to social security payments and entitlements. However, the ALRC considers that some improvements may be made to the requirements for original proof of identity and tax file numbers and exemptions.

***Questions for persons with insufficient proof of identity***

7.24 The ALRC recognises the tension between ensuring the integrity of the system through proof of identity requirements and the need to protect the safety of victims of family violence. In the ALRC’s preliminary consideration, the alternate Centrelink form—‘Questions for Persons with Insufficient Proof of Identity’—aims to address this tension by providing an alternate form for people experiencing family violence. However, there is little detail provided in the *Guide to Social Security Law* as to what the form requires. The ALRC is therefore interested in stakeholder comment as to whether this form creates a sufficient alternative for victims of family violence to provide proof of identity.

7.25 The ALRC also considers that, as a mechanism available to people experiencing family violence, information about the alternate proof of identity form should be included in Proposal 4–8 to improve awareness of its existence.

***Tax file number exemption***

7.26 The ALRC considers that details about the indefinite tax file number exemption are suitably placed in the *Guide to Social Security Law*. However, the exemption somewhat narrow, insofar as it refers to a risk of ‘violence’, rather than ‘family violence’. The *Guide to Social Security Law* should expressly refer to family violence in order to capture a broader range of conduct that is violent, threatening, controlling, coercive or engenders fear. This proposed reform is complemented by Proposals 3–1 and 5–1, which would set out a definition of family violence in the *Social Security Act* and the *Guide to Social Security Law*.

7.27 In addition, as an indefinite exemption from providing a partner’s tax file number may protect a person’s safety, information about the exemption should be included in Proposal 4–8.

***Section 192 Social Security (Administration) Act***

7.28 Section 192 of the *Social Security (Administration) Act* confers a general power on the Secretary of FaHCSIA to require a person to give information or a document in a person’s custody or control where it is relevant to whether a person is qualified for a social security payment or a social security payment is payable.<sup>25</sup>

7.29 The ALRC is interested in comment as to whether s 192 of the *Social Security (Administration) Act* could and should be used to obtain a partner’s tax file number in circumstances of family violence.

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25 *Social Security (Administration) Act 1999* (Cth) s 192.

**Change of address**

7.30 The ALRC also notes that submissions raised an additional administrative concern regarding change of address and is interested in hearing whether current administrative arrangements for change of address are adequate for victims of family violence.

**Question 7–1** In practice, is the form, ‘Questions for Persons with Insufficient Proof of Identity’, sufficient to enable victims of family violence to provide an alternate means of proving identity?

**Proposal 7–1** The *Guide to Social Security Law* should be amended expressly to include family violence as a reason for an indefinite exemption from the requirement to provide a partner’s tax file number.

**Question 7–2** Section 192 of the *Social Security (Administration) Act 1999* (Cth) confers certain information-gathering powers on the Secretary of FaHCSIA. In practice, is s 192 of the *Social Security (Administration) Act 1999* (Cth) invoked to require the production of tax file numbers or information for the purposes of proof of identity? If not, should s 192 be invoked in this manner in circumstances where a person fears for his or her safety?

**Question 7–3** When a person does not have a current residential address, what processes are currently in place for processing social security applications?

**Residence****Australian resident**

7.31 A general principle of Australia’s social security system is that, to qualify for a social security payment or entitlement, a person must be an Australian resident.<sup>26</sup> In other words, a person must reside in Australia and be either:

- an Australian citizen;
- a holder of a permanent visa; or
- a protected Special Category visa holder.<sup>27</sup>

<sup>26</sup> *Social Security Act 1991* (Cth) s 7(2); Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.2.4.10] (Verifying Residence/Citizenship).

<sup>27</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.2.4.10] (Verifying Residence/Citizenship).

7.32 Exceptions to this principle are limited to Special Benefit, Crisis Payment and family payments.

7.33 To qualify for Special Benefit or Crisis Payment, a person must be either an Australian resident or the holder of a specified subclass of visa.<sup>28</sup> For family payments, there are no residential requirements.

7.34 The Minister of FaHCSIA has power to make determinations to allow the holders of particular temporary visas to meet the residence requirements for Special Benefit and, consequently, Crisis Payment. Currently, determinations are in force for ten types of temporary visa.<sup>29</sup> However, this power cannot be used on an individual or case-by-case basis. Exceptions can only be made for an entire class, or subclass, of visa by ministerial determination.<sup>30</sup>

7.35 Accordingly, a person who is neither an Australian resident nor the holder of a specified subclass of visa, does not qualify for Special Benefit or Crisis Payment.

### **Protected Special Category visa holders**

7.36 New Zealand citizens may enter Australia as holders of Special Category visas, or as holders of permanent visas under the migration program. A Special Category visa is granted to a New Zealand citizen who does not hold a visa on arrival in Australia, and who presents his or her New Zealand passport.

7.37 Before 26 February 2001, holders of Special Category visas could meet the definition of an Australian resident under social security law if they were residing in Australia, and likely to remain permanently. However, from that date, holders of Special Category visas no longer satisfy the definition of an Australian resident for social security purposes, unless they belong to a ‘protected’ group.

7.38 The protected groups include Special Category visa holders who:

- were in Australia on 26 February 2001;
- had been in Australia for at least 12 months in the two years immediately before 26 February 2001 and returned to Australia after that day;
- were residing in Australia on 26 February 2001 but were temporarily absent on that day; or

28 *Social Security (Administration) Act 1999* (Cth) ss 29, 30; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.7.1.10] (Qualification for SpB); [3.7.4.10] (Qualification for CrP—General Provisions).

29 Subclass 309—Partner (Provisional); Subclass 309—Spouse (Provisional); Subclass 310—Interdependency (Provisional); Subclass 447 (Secondary Movement Offshore Entry (Temporary)) (Class XB); Subclass 451—Secondary Movement Relocation (Temporary)) (Class XB); Subclass 785—Temporary Protection; Subclass 786 (Class UO) Temporary (Humanitarian Concern); Subclass 820—Extended eligibility (Partner); Subclass 820—Extended eligibility (Spouse); Subclass 826—Interdependency (Provisional) *Social Security (Class of Visas—Qualification for Special Benefit) Determination 2009*.

30 Department of Families, Housing, Community Services and Indigenous Affairs, *Social Security Payments Residence Criteria* (2011) <[www.fahcsia.gov.au/sa/international/policy/Residence\\_Criteria](http://www.fahcsia.gov.au/sa/international/policy/Residence_Criteria)> at 12 July 2011.

- commenced (or recommenced) residing in Australia within three months of that day.<sup>31</sup>

### Qualifying Australian residence

7.39 In addition to the legislative requirement to be an Australian resident at the time of making a claim, some social security payments—generally, the ‘pension’ type payments that are intended as long-term support—require that a person has been an Australian resident for a certain period of time.<sup>32</sup> This is called a ‘qualifying residence requirement’. The following qualifying residence requirements apply:

- Age Pension (10 years);
- Disability Support Pension (10 years);
- Widow Allowance (two years); and
- Parenting Payment (two years).

7.40 The effect of a qualifying residence period is that a person must have lived in Australia as a permanent resident for a specified period of time before they qualify for the social security payment. A person may, however, have a ‘qualifying residence exemption’.

7.41 The categories of people who have a qualifying residence exemption vary from payment to payment. Generally, refugees and former refugees and their family members have a qualifying residence exemption.<sup>33</sup> Holders of a visa of a subclass determined by the Minister of FaHCSIA are also exempt.<sup>34</sup>

### Newly Arrived Resident’s Waiting Period

7.42 Although a person may meet the residential criteria to qualify for a payment, the payment may not be payable if the person is subject to a waiting period—called a ‘Newly Arrived Resident’s Waiting Period’ (the waiting period). The waiting period applies to persons who have not been Australian residents but have resided in Australia for a period of, or periods totalling, 104 weeks (two years).<sup>35</sup> Generally, the

31 *Social Security Act 1991* (Cth); Department of Families, Housing, Community Services and Indigenous Affairs, *Social Security Payments Residence Criteria* (2011) <[www.fahcsia.gov.au/sa/international/policy/Residence\\_Criteria](http://www.fahcsia.gov.au/sa/international/policy/Residence_Criteria)> at 12 July 2011.

32 Department of Families, Housing, Community Services and Indigenous Affairs, *Social Security Payments Residence Criteria* (2011) <[www.fahcsia.gov.au/sa/international/policy/Residence\\_Criteria](http://www.fahcsia.gov.au/sa/international/policy/Residence_Criteria)> at 12 July 2011.

33 *Social Security Act 1991* (Cth) ss 7(6), 7(6AA).

34 *Ibid* s 7(6AA); *Social Security (Class of Visas—Qualifying Residence Exemption) Determination 2009* (Cth); Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.1.Q.35] (Qualifying Residence Exemption). At the time of writing, these included the following subclasses of visas: Subclass 100—Spouse; Subclass 100—Partner; Subclass 110—Interdependency; Subclass 801—Spouse; Subclass 801—Partner; Subclass 814—Interdependency; Subclass 832—Close ties; and Subclass 833—Certain Unlawful Non-Citizens.

35 From March 1997, the Newly Arrived Resident’s Waiting Period was extended from 26 weeks to 104 weeks and the range of payments to which the waiting period applies was also extended.



‘allowance’ type payments, which are intended as shorter-term income support, have a waiting period, including:

- Carer Payment;
- Youth Allowance;
- Austudy Payment;
- Newstart Allowance;
- Sickness Allowance;
- Special Benefit;
- Partner Allowance;
- Mobility Allowance;
- Pensioner Education Supplement;
- Commonwealth Seniors Health Care Card; and
- Health Care Card.

7.43 Crisis Payment does not have a Newly Arrived Resident’s Waiting Period.

### ***Exemptions***

7.44 A person may be exempt from the waiting period if they have a ‘qualifying residence exemption’, discussed above. In addition, certain people are exempt from the waiting period, including:

- current and former holders, and their family members, of a permanent refugee visa or a specified subclass of special humanitarian visa;
- current and former holders of a visa Subclass 832 and 833—that is, young people who have lived in Australia in their formative years and are granted permanent residence when they reach 18 years of age;
- former holders of spouse and interdependency provisional visas (Subclasses 309, 310, 820 and 826), once they hold a permanent visa;
- a person whose migration is approved on the basis that he or she will act as a carer for a disabled relative; and
- Australian citizens and their immediate family members, and family members of a permanent resident who has at least two years of residence in Australia.<sup>36</sup>

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<sup>36</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Social Security Payments Residence Criteria* (2011) <[www.fahcsia.gov.au/sa/international/policy/Residence\\_Criteria](http://www.fahcsia.gov.au/sa/international/policy/Residence_Criteria)> at 12 July 2011.

7.45 A ‘family member’ includes the person’s partner or their dependent child or another person who, in the opinion of the Secretary of FaHCSIA, should be treated for the purposes of this definition as a family member.<sup>37</sup>

### ***Special Benefit***

7.46 Exemption from the Newly Arrived Resident’s Waiting Period is slightly different for Special Benefit. A person is exempt from the waiting period for Special Benefit if he or she:

- has suffered a substantial change in circumstances beyond their control;<sup>38</sup>
- holds, or is the former holder of, a visa of a subclass exempted from the waiting period;<sup>39</sup> or
- is an Australian citizen or a member of their immediate family, or a family member of a permanent resident who has at least two years of residence in Australia.

7.47 A holder of a temporary spouse visa, who is still in a relationship with his or her spouse, is generally automatically exempted from the waiting period as a family member of an Australian citizen or long term resident and therefore could receive Special Benefit immediately upon arrival in Australia.

7.48 However, as of 1 January 2012, holders of Provisional Partner visas,<sup>40</sup> who would have been exempt from the waiting period as a family member, will be required to serve the waiting period before they can be eligible for income support unless they experience a substantial change in circumstances. As part of this measure, an Assurance of Support will no longer be required for some Provisional Partner Visa applicants.<sup>41</sup>

37 *Social Security Act 1991* (Cth) s 7(6D); Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.1.2.70] (Exemptions from Waiting Periods).

38 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.7.2.20] (Substantial Change in Circumstances for SpB); [3.7.1.20] (Payability of SpB).

39 The following visa subclasses are exempted from the Newly Arrived Resident’s Waiting Period for Special Benefit: Subclass 309—Partner (Provisional); Subclass 309—Spouse (Provisional); Subclass 310—Interdependency (Provisional); Subclass 820—Extended eligibility (partner); Subclass 820—Extended eligibility (spouse); Subclass 826—Interdependency (Provisional); Subclass 447 (Secondary Movement Offshore Entry (Temporary)) (Class XB); Subclass 451 (Secondary Movement Relocation (Temporary)) (Class XB); Subclass 785 (Temporary Protection); Subclass 786 (Class UO) Temporary (Humanitarian Concern); Subclass 832—Close ties; subclass 833—Certain unlawful citizens. *Social Security (Class of Visas—Newly Arrived Resident’s Waiting Period for Special Benefit) Determination 2009* (Cth).

40 Temporary Partner visa Subclasses 309, 310, 820 or 826.

41 Department of Human Services, *Budget 2011–12: Provisional Partner Visa Holders—Entitlement to Special Benefit* (2011); *Social Security and Other Legislation Amendment Bill 2011* (Cth).

### ***Substantial change in circumstances***

7.49 The Newly Arrived Resident's Waiting Period also does not apply to Special Benefit if the person has suffered a 'substantial change in circumstances beyond his or her control'.<sup>42</sup> A sponsored resident is considered to have a substantial change in circumstances if he or she had arrived in Australia and was:

- a victim of domestic violence; and
- the abuse is substantiated by documentary evidence from police, an apprehended violence order (AVO) or a medical report.<sup>43</sup>

7.50 The *Guide to Social Security Law* notes that many changes in circumstances apply equally to non-sponsored and sponsored residents.<sup>44</sup>

### **Submissions and consultations**

7.51 In the Social Security Issues Paper, the ALRC asked what reforms, if any, should be considered in relation to qualifying residence requirements and the Newly Arrived Resident's Waiting Period, for victims of family violence.<sup>45</sup>

7.52 In response, stakeholders noted concerns with the residence requirements for victims of family violence in relation to the definition of 'Australian resident', qualifying residence requirements, and the waiting period. Concerns were also raised in *Family Violence and Commonwealth Laws—Immigration Law* (the Immigration Law Issues Paper)<sup>46</sup> in relation to the limited ability for temporary visa holders to access social security payments and entitlements.<sup>47</sup>

7.53 For example, Domestic Violence Victoria and others in a joint submission submitted that, in their experience:

Access to health, counselling, family violence and sexual assault services is variable and changeable for women on temporary visas. Each visa category carries different entitlements and these entitlements change regularly. ... [T]he lack of housing options, ineligibility for public and community housing and lack of income support all limit the capacity of family violence services to support women without residency rights.<sup>48</sup>

<sup>42</sup> *Social Security Act 1991* (Cth) s 739A(7).

<sup>43</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.7.2.20] (Substantial Change in Circumstances for Special Benefit).

<sup>44</sup> Ibid, [3.7.2.20] (Substantial Change in Circumstances for SpB).

<sup>45</sup> Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 25.

<sup>46</sup> Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Immigration Law*, ALRC Issues Paper 37 (2011).

<sup>47</sup> Confidential, *Submission CFV 36*, 12 April 2011; Confidential, *Submission CFV 35*, 12 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

<sup>48</sup> Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

7.54 These concerns were captured in a case study provided in the submission from Women Everywhere Advocating Violence Elimination (WEAVE):<sup>49</sup>

**Case Study**

A woman and her children came to Australia as secondary holders of her partner's temporary, regional skilled visa. The child protection authorities removed her and the children from the family home due to his physical and sexual abuse of the children. The woman and her children were placed in domestic violence accommodation. Whilst there she received a letter from the Immigration Department telling her she was in breach of her visa conditions that could lead to her deportation. Further trauma on top of her and her children's devastating experience.

This woman had no access to the family violence provisions because of her visa type.

The option of paying for a visa in her own right was not possible given the financial cost (\$2,000) of making such an application. She had no access to Medicare, income support, Red Cross or NGO emergency moneys.

She had to rely on the support of the local domestic violence service. Not all domestic violence services have the resources to provide such long term financial and accommodation services to such women. It was only after an appeal, and many years living under such conditions, that she was granted a protection visa and became eligible for Centrelink support.

**Definition of 'Australian resident'**

7.55 In their study—*Seeking Security*—the Australian Domestic and Family Violence Clearinghouse (ADFVC) found that many migrant women had experienced significant financial hardship while waiting to qualify for residence periods:

In particular, women who were unable to access the Special Benefit and unable to work due to visa restrictions were placed in extremely vulnerable situations, entirely reliant on family (if they had any in Australia) or on charities and services. A lack of income leaves many of these women unable to access accommodation provided by refuges.<sup>50</sup>

7.56 A case study provided by the Welfare Rights Centre NSW explained the difficulties experienced by some New Zealand citizens in Australia who experienced family violence:<sup>51</sup>

**Case Study**

Etera came to Australia in 2003 when he was 11 from New Zealand. As a New Zealand citizen arriving after 26 February 2001, he could not receive social security payments in Australia. Etera grew up in an extremely violent environment and his family had severe problems with alcoholism and domestic violence, mainly from his father but also from his older brother. In both New Zealand and Australia he witnessed his mother experience extreme violence at the hands of his father. He had memories of witnessing his father break the door of their house and cut his mother's throat, causing her to be hospitalised for lengthy periods.

<sup>49</sup> WEAVE, *Submission CFV 31*, 12 April 2011.

<sup>50</sup> ADFVC, *Submission CFV 71*, 11 May 2011.

<sup>51</sup> Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011.

In Australia, Etera lived with initially his father, and then his mother. When his mother formed a new relationship, this resulted in Etera's losing all contact with his father. Etera's mother was again the victim of domestic violence at the hands of her new partner. Etera again witnessed his mother receiving physical assaults from her partner and came into conflict with his mother's new partner. When he was 14 his mother's new partner kicked him out of home. ...

Welfare Rights confirmed that Etera was not eligible for payments from New Zealand while in Australia as he does not meet the qualification for payments under the International agreement. Etera obtained immigration advice which confirmed that there is no prospect of his obtaining permanent residency in Australia as he has none of the requisite family ties or employment history.

Welfare Rights wrote to the Department of Finance seeking act of grace payments for Etera on the grounds the requiring him to live in a different country to the only family member he identifies as being close—namely his mother—is unreasonable.

The Centre suggested periodical payments equivalent to Youth Allowance for two years would be appropriate to give Etera the opportunity to obtain housing and qualify for employment. This application was refused. Etera remains in Australia without income support or housing.

7.57 To address such concerns, the Welfare Rights Centre Inc Queensland supported the removal of the distinction between permanent residents, citizens and Special Category (non-protected) visas in situations where there is family violence.<sup>52</sup> However, the Centre cautioned that any exemption or waiver of residence requirements could lead to abuse of the system and claims of family violence being falsified or manipulated in order to obtain social security payments and entitlements.<sup>53</sup>

### *Qualifying residence requirements*

7.58 Some stakeholders indicated that the 10 year qualifying residence requirement for Disability Support Pension is too long, particularly because it is known that people with disability experience higher rates of family violence.<sup>54</sup>

7.59 The Multicultural Disability Advocacy Association (MDAA) referred to its report—*Violence Through Our Eyes*—which found that the effect of denying the Disability Support Pension resulted in the inability to access other services, such as equipment such as Post-School Options Programs, Home and Community Care and the Program of Appliances for Disabled People.<sup>55</sup>

<sup>52</sup> Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

<sup>53</sup> Ibid.

<sup>54</sup> ADFVC, *Submission CFV 71*, 11 May 2011.

<sup>55</sup> Multicultural Disability Advocacy Association of NSW, *Violence Through Our Eyes: Improving Access to Services for Women from non-English Speaking Backgrounds with Disability and Carers Experiencing Violence Project Report* (2010), 14–15.

7.60 The MDAA also noted that the qualifying residence period for Disability Support Pension becomes more complicated if the person is in Australia on a dependant visa because the person is dependent on the ‘abusive partner for residence, communication, housing and financial support’.<sup>56</sup>

7.61 Both the ADFVC and the MDAA supported streamlining, and making the qualifying residence period for Disability Support Pension and Age Pension comparable to other Centrelink social security payments.<sup>57</sup>

#### ***Newly Arrived Resident’s Waiting Period***

7.62 Some stakeholders suggested that the two year waiting period may be too long for victims of family violence<sup>58</sup> and recommended that it should either be abolished,<sup>59</sup> or minimised,<sup>60</sup> in circumstances of family violence.

#### **ALRC’s views**

7.63 As discussed previously, a two stage process must generally be satisfied for residence requirements. First, a person must be an ‘Australian resident’ and have satisfied any ‘qualifying residence requirement’ and secondly, a person must have satisfied the waiting period (where applicable).

7.64 Concerns were raised by stakeholders in relation to both the qualification requirement—that is, to be an Australian citizen, permanent resident or a protected Special Category visa holder and satisfy any qualifying residence requirement—and payability requirements—that is, to serve the waiting period.

#### ***Australian resident requirements***

7.65 To maintain the integrity of the social security system, residence requirements are necessary before a person qualifies for a social security payment or entitlement. In addition, the ALRC recognises that the Minister of FaHCSIA may make a determination that certain Special Category visa holders are considered to be an ‘Australian resident’ for the purposes of social security law.<sup>61</sup> This power to make a determination exists in relation to Special Category visas—that is, New Zealand citizens who arrived after 26 February 2011. This may be seen as an example of the theme of ‘fairness’ discussed in Chapter 2—to ensure that Australia’s resources are

<sup>56</sup> Multicultural Disability Advocacy Association, *Submission CFV 60*, 28 April 2011.

<sup>57</sup> ADFVC, *Submission CFV 71*, 11 May 2011; Multicultural Disability Advocacy Association, *Submission CFV 60*, 28 April 2011.

<sup>58</sup> ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Sole Parents’ Union, *Submission CFV 63*, 27 April 2011; Multicultural Disability Advocacy Association, *Submission CFV 60*, 28 April 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

<sup>59</sup> Sole Parents’ Union, *Submission CFV 63*, 27 April 2011; P Eastale and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

<sup>60</sup> P Eastale and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

<sup>61</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Social Security Payments Residence Criteria* (2011) <[www.fahcsia.gov.au/sa/international/policy/Residence\\_Criteria](http://www.fahcsia.gov.au/sa/international/policy/Residence_Criteria)> at 12 July 2011.

fairly distributed to those in genuine need. For Special Benefit, and consequently Crisis Payment, the Minister of FaHCSIA has the power to make a determination that persons on a ‘specified subclass of visa’ are an ‘Australian resident’ for the purposes of those payments.

7.66 However, some victims of family violence, who have lived in Australia for a length of time, may be unable to access any social security support—thus jeopardising his or her safety. This is particularly so for Special Benefit, which is intended as a safety net payment, and Crisis Payment, intended to provide assistance in circumstances of crisis such as family violence.

7.67 In Chapter 20, the ALRC makes a proposal to create a new temporary visa for holders of Prospective Marriage (Subclass 300) visas who are victims of family violence.<sup>62</sup> The purpose of this temporary visa is to enable such visa holders to make arrangements to leave Australia, or to apply for a different class of visa.

7.68 To ensure that persons holding this new temporary visa have access to independent financial assistance through income support, the ALRC considers that it may be appropriate to include these new temporary visas as a ‘specified subclass of visa’ to enable them to access either Special Benefit or Crisis Payment.

7.69 However, victims of family violence who hold other types of visas may not be able to meet the ‘Australian resident’ requirement and will not fall under a ‘specified subclass of visa’. While there is a genuine need to ensure that social security payments are limited by certain residence requirements, there is also a genuine need to ensure that victims of family violence are able to access independent financial assistance to enable them to leave a violent relationship. The ALRC therefore seeks stakeholder comment as to whether other visa holders should be included as a specified subclass of visa for Special Benefit, or alternatively, what other mechanisms might be used to ensure that the safety of other visa holders who are experiencing family violence is protected.

### ***Qualifying residence requirements***

7.70 The purpose of the long residence requirements for Age and Disability Support Pensions reflects the theme of ‘fairness’ discussed in Chapter 2. That is, to ensure that these payments for the long-term contingencies of life are only granted to people who have a genuine, long-term connection with Australia and that this is considered necessary to protect Australian Government funds, which come from general revenue’.<sup>63</sup>

7.71 However, migrants with disability experiencing family violence may be unable to access Disability Support Pension because of the 10 year qualifying residence requirement and, as a result, he or she may have no option but to remain in the violent

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<sup>62</sup> Proposal 20–3.

<sup>63</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Social Security Payments Residence Criteria* (2011) <[www.fahcsia.gov.au/sa/international/policy/Residence\\_Criteria](http://www.fahcsia.gov.au/sa/international/policy/Residence_Criteria)> at 12 July 2011.

relationship. The ALRC notes that people with disability are particularly vulnerable due to dependency on carers—who may be the person using family violence—and difficulties in accessing services and support.

7.72 One solution proposed by stakeholders would be to reduce the qualifying residence period for Disability Support Pension to two years in circumstances of family violence. This may, however, raise concerns of a two-tier system in that a similar provision does not also exist for other vulnerable migrants with disability. It may also provide an incentive to make a claim of family violence—possibly falsely—in order to gain early access to Disability Support Pension.

7.73 It may be that certain subclasses of visas should be exempt from the qualifying residence period for Disability Support Pension. The ALRC seeks stakeholder comment as to the best way not only to preserve the integrity of the social security system, but also to ensure that victims of family violence with disability are able to access Disability Support Pension to enable them to leave a violent relationship.

#### ***Newly Arrived Resident's Waiting Period—Special Benefit***

7.74 Victims of family violence may be residentially qualified, but a social security payment is not payable due to the Newly Arrived Resident's Waiting Period. This may result in victims of family violence having to remain in violent relationships because they are unable to access independent financial assistance through income support to enable them to leave.

7.75 As discussed above, the ALRC makes a proposal in Chapter 20 to create a new temporary visa for holders of Prospective Marriage (Subclass 300) visas who are victims of family violence. To ensure that persons holding this new temporary visa have access to independent financial assistance, the ALRC considers that it may be appropriate to include these new temporary visas as a 'specified subclass of visa' that are exempt from the waiting period.

7.76 Victims of family violence who hold other types of visa may not be able to meet the Australian resident requirement and will not fall under a 'specified subclass of visa'. Family violence is not expressly referred to in the *Guide to Social Security Law* as a 'substantial change in circumstances' for non-sponsored residents. The ALRC considers that victims of family violence (whether sponsored or non-sponsored) should therefore be able to access Special Benefit due to a substantial change in circumstances and makes a proposal to amend the *Guide to Social Security Law* to that effect.

7.77 However, care must be taken to ensure that, where family violence is disclosed to access social security payments, 'the disclosure of violence and loss of relationship does not also result in loss of residency'.<sup>64</sup> This may occur, for example, where a person who is on a visa within a specified class for Special Benefit, claims family violence as a 'substantial change in circumstances'.

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<sup>64</sup> WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011.



7.78 Information about exemptions from the waiting period for Special Benefit on the basis of ‘substantial change in circumstances’ should be included in Proposals 4–8 and 20–5 to ensure that victims of family violence are aware of the exemption.

***Newly Arrived Resident’s Waiting Period—other payments***

7.79 Those who are qualified for other social security payments and entitlements still face a barrier in relation to the waiting period. Special Benefit would not provide relief in such circumstances as it is only available to people who are not eligible for any other pension or allowance.

7.80 To create a waiver of the waiting period in circumstances of family violence would create concerns of a two-tier system and incentivisation. However, it may be necessary to create a waiver category for persons experiencing family violence to ensure that they are able to access financial assistance to leave a violent relationship and do not have to remain in a violent relationship for the length of the waiting period. The ALRC seeks stakeholder comment as to the best way to ensure that this balance is achieved.

**Proposal 7–2** Proposal 20–3 proposes that the *Migration Regulations 1994* (Cth) be amended to allow holders of Prospective Marriage (Subclass 300) visas to move onto another temporary visa in circumstances of family violence. If such an amendment is made, the Minister of FaHCSIA should make a Determination including this visa as a ‘specified subclass of visa’ that:

- meets the residence requirements for Special Benefit; and
- is exempted from the Newly Arrived Resident’s Waiting Period for Special Benefit.

**Question 7–4** Should the Minister of FaHCSIA make a Determination including certain temporary visa holders—such as student, tourist and secondary holders of Subclass 457 visas—as a ‘specified subclass of visa’ that:

- meets the residence requirements for Special Benefit?
- is exempted from the Newly Arrived Resident’s Waiting Period for Special Benefit?

**Question 7–5** What alternatives to exemption from the requirement to be an Australian resident could be made to ensure that victims of family violence, who are not Australian residents, have access to income support to protect their safety?

**Question 7–6** In what way, if any, should the *Social Security Act 1991* (Cth) or the *Guide to Social Security Law* be amended to ensure that newly arrived residents with disability, who are victims of family violence, are able to access the Disability Support Pension? For example, should the qualifying residence period for Disability Support Pension be reduced to 104 weeks where a person is a victim of family violence?

**Proposal 7–3** The *Guide to Social Security Law* should be amended expressly to include family violence as an 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.

**Question 7–7** What changes, if any, are needed to improve the safety of victims of family violence who do not meet the Newly Arrived Resident’s Waiting Period for payments other than Special Benefit?

### Act of Grace payments

7.81 Where social security legislation produces an ‘anomalous or inequitable result’, an Act of Grace payment may be made where:

- the application of the legislation produces an unintended or unacceptable result; or
- there are circumstances which lead to the conclusion that there is a moral obligation on the Commonwealth to make payment.<sup>65</sup>

7.82 The Welfare Rights Centre NSW noted that where social security is not available, because a person is not residentially qualified (such as Special Category visa holders), the only remaining option is an Act of Grace request to argue that the legislation has produced an ‘anomalous or inequitable result’.<sup>66</sup>

7.83 The ALRC does not propose to expand the Act of Grace payment arrangements. It is outside the scope of the ALRC’s Terms of Reference to consider in detail the *Financial Management and Accountability Act 1997* (Cth). However, it may be useful to provide a case study such as the one provided by the Welfare Rights Centre NSW to inform decisions relating to Act of Grace payments.

### Activity tests, participation requirements and Employment Pathway Plans

7.84 To qualify—and remain qualified—for certain social security payments, a person must satisfy an activity test or participation requirements.

7.85 Job seekers receiving Newstart Allowance, Youth Allowance, Special Benefit and Parenting Payment have an activity test or participation requirements.<sup>67</sup> The activity test is designed to ensure that unemployed people receiving income support payments are ‘actively looking for work and/or doing everything that they can to

<sup>65</sup> *Financial Management and Accountability Act 1997* (Cth) s 33.

<sup>66</sup> Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011.

<sup>67</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.1.A.40] (Activity test (NSA, YA (job seekers))).

become ready for work in the future'.<sup>68</sup> Participation requirements 'aim to ensure that a person looks for, and undertakes, 'paid work in line with their work capacity' in order 'to increase work force participation ... and reduce welfare dependency'.<sup>69</sup>

7.86 Generally, job seekers must be 'actively seeking and willing to undertake any paid work that is not unsuitable'.<sup>70</sup> This usually requires job search, paid or voluntary work, study or other activities.

7.87 An activity test or participation requirement may include: a specified number of job searches; accepting all suitable work offers; attending all job interviews; attending interviews with Centrelink and a person's Job Services Australia (JSA) provider; attending training courses; never leave a job, training course or program without a valid reason; and entering into and complying with the terms of an Employment Pathway Plan (EPP).<sup>71</sup> Job seekers may also have a specific work experience activity requirement, and may be required to undertake a work experience activity tailored to the needs of the individual job seekers.<sup>72</sup> Other activities may include an approved program of work for unemployment payment (Work for the Dole), or courses or programs designed to help job seekers to look for and obtain work, such as vocational training or work experience.<sup>73</sup> Job seekers may also suggest activities themselves but they must be consistent with legislation and policy.<sup>74</sup>

7.88 When a person registers with Centrelink as an unemployed job seeker, they will be required to register with a JSA provider of their choice unless it is determined that these services are not the most appropriate form of assistance for them.<sup>75</sup> Those claiming Newstart Allowance or Youth Allowance, are required to attend an interview with their JSA provider within two working days of initial contact—called 'RapidConnect'.<sup>76</sup> If a job seeker is required to register with a JSA provider, they must remain connected with the provider as part of the job seeker's requirement to look for work.<sup>77</sup>

7.89 A person who does not meet their activity test or participation requirements may result in a 'failure' which may affect their social security payments. Failures are discussed below.

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68 Ibid, [1.1.A.40] (Activity Test (NSA, YA (job seekers))).

69 Ibid, [3.5.1.160] (When are EPPs Required? (PP)).

70 Ibid, [3.2.9.20] (Job Search Overview); [1.1.U.55] (Unsuitable work (NSA, YA)).

71 Ibid, [3.2.9.10] (Activity Testing for NSA/YA Job Seekers—Suitable Activities—Overview); [3.2.8.20] (Who Does Activity Testing Apply To?).

72 Ibid, [3.2.10.10] (Work Experience Activities—Overview).

73 Ibid, [3.2.8.10] (Activity Testing & Mutual Obligation for NSA/YA Job Seekers Overview).

74 Ibid, [3.2.8.10] (Activity Testing & Mutual Obligation for NSA/YA Job Seekers Overview).

75 Ibid, [3.2.8.10] (Activity Testing & Mutual Obligation for NSA/YA Job Seekers Overview).

76 Ibid, [1.1.R.05] (RapidConnect (NSA, YA)).

77 Ibid, [3.2.9.20] (Job Search Overview).

7.90 Different requirements may apply for job seekers who have a partial capacity to work, early school leavers, those who are principal carers, and those aged 55 or over.<sup>78</sup>

### **Partial capacity to work**

7.91 Most job seekers with a partial capacity to work<sup>79</sup> will be required to satisfy the activity test by undertaking suitable work of 15 hours a week or, alternatively, by looking for work or by engaging in a suitable program of assistance recommended by an Employment Services Assessment (ESAt) or Job Capacity Assessment (JCA).<sup>80</sup>

7.92 However, some job seekers with a temporarily reduced, or partial, capacity to work will be able to satisfy the activity test by attending a quarterly interview with Centrelink and not be required to work, look for work, or engage in any suitable program of assistance recommended by the ESAt or JCA.<sup>81</sup>

7.93 Quarterly interviews aim to keep people who are unable to work due to illness, injury or disability, connected to the labour market by informing them about the benefits of work and services available to help them to find work.<sup>82</sup>

### **Determining capacity to work**

7.94 Several tools and processes are in place to determine a person's capacity to work or barriers to work and to recommend the content of a person's activity test or participation requirements. These include the Job Seeker Classification Instrument (JSCI); referrals to an Employment Services Assessment (ESAt) or Job Capacity Assessment (JCA), and Comprehensive Compliance Assessments (CCA).

### **Job search**

7.95 Job search activities will be the primary activity for most job seekers. Both Centrelink and JSA providers have a role in setting a reasonable number of job search contacts for job seekers.<sup>83</sup> The number of job contacts required by a job seeker is reviewed when the job seeker makes Centrelink aware of major changes in their personal circumstances. The *Guide to Social Security Law* provides that factors to be considered in varying a job seeker's search requirements include 'domestic violence or family breakdown'.<sup>84</sup>

7.96 Job seekers must provide information about their job search efforts to obtain work. Centrelink uses tools such as the application for payment form; job seeker diaries and employer contact certificates to monitor job search effort.

78 *Social Security Act 1991* (Cth) s 16B; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.2.9.20] (Job Search—Overview).

79 *Social Security (Administration) Act 1999* (Cth) s 16B.

80 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.2.9.190] (Suitable Activity—Quarterly Interview).

81 *Ibid.*, [3.2.9.190] (Suitable Activity—Quarterly Interview).

82 *Ibid.*, [3.2.9.190] (Suitable Activity—Quarterly Interview).

83 *Ibid.*, [3.2.9.30] (Job Search—Setting Job Search Requirements—General).

84 *Ibid.*, [3.2.9.30] (Job Search—Setting Job Search Requirements—General).

***Job Seeker Classification Instrument***

7.97 A JSCI is used by Centrelink at first contact when a job seeker registers for activity tested income support. A JSCI is used to determine a job seeker's relative level of disadvantage in the labour market, and therefore, their likely difficulty in obtaining employment.

7.98 The content of the JSCI is discussed in detail in Chapter 15, however, as the JSCI is often administered by Centrelink, its administration by Centrelink is considered in this chapter. In some instances JSA providers may administer the JSCI, where a job seeker registers directly with the provider or as part of a change of circumstances reassessment. Administration by JSA providers is considered in Chapter 15. Chapter 15 also discusses the manner in which a JSCI is administered, for example, in person or by telephone interview.

***Employment Services Assessments and Job Capacity Assessments***

7.99 An ESAt or JCA is used to, among other things, determine a person's capacity to work and identify barriers to employment.<sup>85</sup> The assessment also informs the kinds of activities that a person will be required to undertake to improve their capacity to meet activity test requirements<sup>86</sup> and, in some circumstances, whether a person may be eligible for an exemption.<sup>87</sup> The ESAt and JCA process and the determination of a person's capacity to work and barriers to employment are discussed in detail in Chapter 15. The referral process by Centrelink and the recommendations from an ESAt or JCA about access to services and measures which may assist the job seeker, such as variations to a person's EPP are considered in this chapter.

***Referral by Centrelink***

7.100 A job seeker may be referred for an ESAt or JCA in a number of circumstances, including where a person:

- is applying for Disability Support Pension or having a medical review of Disability Support Pension;
- is in receipt of Newstart Allowance or Youth Allowance and applying for an activity test exemption;
- registers directly with a job services provider; or
- informs Centrelink or their job services provider of a significant change in their circumstances that affects their work capacity and/or employment assistance needs.<sup>88</sup>

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<sup>85</sup> Ibid, [3.2.1.10] (Qualification for NSA); [1.1.J.10] (Job Capacity Assessment (JCA)).

<sup>86</sup> Ibid, [3.2.1.10] (Qualification for NSA).

<sup>87</sup> Ibid, [3.2.1.45] (Exemptions from RapidConnect Provisions); [3.5.1.220] (Participation Requirements Exemption—Temporary Incapacity (PP)).

<sup>88</sup> Ibid.

7.101 Referral to an ESAt or JCA may also occur as a result of the administration of the JSCI. This referral process is considered in detail in Chapter 15.

7.102 Centrelink has primary responsibility for identifying and actioning referrals for an ESAt or JCA.

### ***Outcomes***

7.103 ESAt and JCA assessors may make a range of recommendations about access to services and measures which may assist the job seeker. In addition to referrals to JSA and Disability Employment Services (discussed in Chapter 15), other possible interventions that may be recommended include education or training and personal counselling and referral to community services.<sup>89</sup> An ESAt or JCA will also identify unsuitable activities for a job seeker, such as where work may aggravate a pre-existing illness.<sup>90</sup>

### ***Comprehensive Compliance Assessment***

7.104 If a job seeker is having difficulty meeting their activity test or participation requirements, Centrelink will use a Comprehensive Compliance Assessment (CCA) to determine the reasons why. A CCA will be automatically triggered after a job seeker has had three ‘Connection’ or ‘Reconnection Failures’, or three ‘No Show No Pay Failures’ in a six month period. Job services providers or Centrelink may also initiate a CCA at any other time they believe a job seeker’s circumstances warrant it.<sup>91</sup>

7.105 During a CCA, a Centrelink specialist officer considers the job seeker’s compliance history and looks at why the job seeker has been failing to meet their requirements. In addition to determining whether a job seeker has been persistently non-compliant, the CCA also acts to identify whether the job seeker:

- has any barriers to participation or employment;
- has been given appropriate activity test or participation requirements; and/or
- would benefit from additional or alternative assistance.<sup>92</sup>

7.106 Possible outcomes from a CCA include: referral to an ESAt or JCA for further assessment; referral to DES; referral to another JSA service stream (discussed in Chapter 15); a recommendation that the activities or requirements in the job seeker’s EPP be amended; referral to a social worker to assist the job seeker with their personal circumstance; no action where there is reasonable explanation for the past failures and/or recent compliance record is good; or application of a ‘Serious Failure’.

7.107 The findings of a CCA are also used to inform future decisions about the job seeker’s requirements.

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89 Ibid, [3.6.2.120] (Identification of Barriers & Interventions (DSP)).

90 Ibid, [1.1.U.55] (Unsuitable work (NSA, YA)).

91 Ibid, [3.1.13.70] (Comprehensive Compliance Assessments).

92 Ibid, [3.1.13.70] (Comprehensive Compliance Assessments).

## Employment Pathway Plans

7.108 All activities and participation requirements are contained in an EPP.<sup>93</sup> An EPP is an individual agreement negotiated between a customer and their job services provider or Centrelink. Any activity in an EPP must improve the person's skills and experience and therefore their prospects of obtaining suitable paid work, assist the person in seeking suitable work, and if the job seeker is an early school leaver, be educative or training exclusive.<sup>94</sup>

7.109 Employees of job services providers (including JSA and Disability Employment Services (DES)) and Centrelink have delegated powers to require a job seeker to enter into or vary an EPP; approve the terms of an EPP; and suspend or cancel an EPP.<sup>95</sup>

### Tailoring an EPP

7.110 The content of an EPP varies for different payments.<sup>96</sup> An EPP must meet, and be tailored to, the needs of an individual job seeker and not place unreasonable demands on a job seeker, having regard to their personal circumstances.<sup>97</sup> If a person has a limited capacity to meet an activity test or participation requirement, then a tailored EPP should be prepared taking into account any specific needs of the job seeker, such as family and caring responsibilities and health requirements.<sup>98</sup>

7.111 The *Guide to Social Security Law* provides that in setting the terms of a person's EPP, Centrelink or a JSA provider must take into consideration:

- the person's education, experience, skills, age, physical condition and health (including mental health);
- the state of the labour market,
- the availability of places in appropriate courses of education or training,
- transport options available where the person lives,
- the family and caring responsibilities of the person,
- the financial costs of compliance with the terms of the EPP,
- the person's accommodation situation, and
- any other relevant circumstances that may affect a person's ability to participate and comply.<sup>99</sup>

93 Ibid, [3.2.9.20] (Job Search Overview); [3.5.1.160] (When are EPPs Required? (PP)); [3.2.8.10] (Activity Testing & Mutual Obligation for NSA/YA Job Seekers Overview).

94 Ibid, [3.2.8.10] (Activity Testing & Mutual Obligation for NSA/YA Job Seekers Overview).

95 Ibid, [3.2.8.30] (What is an Employment Pathway Plan?).

96 Ibid, [3.2.8.10] (Activity Testing and Mutual Obligation for NSA/YA Job Seekers Overview); [3.2.9] (Activity Testing for NSA/YA Job Seekers—Suitable Activities); [3.5.1 PP] (Qualification & Payability).

97 Ibid, [3.2.8.30] (What is an Employment Pathway Plan?).

98 Ibid, [1.1.E.103] (Employment Pathway Plan (NSA, YA (job seekers) PP).

99 Ibid, [3.2.8.50] (What Can be Included in an Employment Pathway Plan); [3.5.1.160] (When are EPPs Required? (PP)).

7.112 For job seekers who have been assessed as having a partial capacity to work, the activities recommended by an ESA or JCA are considered to be the most suitable for inclusion in a person's EPP.<sup>100</sup>

7.113 Exemptions are available in certain circumstances—discussed below—however the *Guide to Social Security Law* states that it is preferable to reduce a person's activity or participation requirements rather than to apply an exemption from an activity test, participation requirement or EPP.<sup>101</sup>

### Exemptions

7.114 A victim of family violence may be relieved from an activity test, participation requirement, or the requirement to enter into an EPP, or may have their EPP suspended in three circumstances, where:

- a person is a principal carer of one or more children and is subjected to 'domestic violence' in the 26 weeks prior to making the exemption determination;<sup>102</sup>
- a person is a principal carer of one or more children and there are 'special circumstances' relating to the person's family that make it appropriate to make the determination;<sup>103</sup> or
- there are 'special circumstances' beyond the person's control and it would be unreasonable to expect compliance.<sup>104</sup>

7.115 The *Guide to Social Security Law* provides that special circumstances in relation to exemptions from activity tests and participation requirements include when 'a person has been subjected to domestic violence', and:

- 'the domestic violence specifically affects capacity to both look for work and participation in training activities';<sup>105</sup> or
- where it is unforeseen (or unavoidable) and causes major disruption and would be unreasonable to expect the person to comply with the relevant activity test or participation requirement.<sup>106</sup>

<sup>100</sup> Ibid, [3.2.8.50] (What Can be Included in an Employment Pathway Plan).

<sup>101</sup> Ibid, [3.2.8.10] (Activity Testing & Mutual Obligation for NSA/YA Job Seekers Overview).

<sup>102</sup> *Social Security Act 1991* (Cth) ss 502C, 501E (Parenting Payment); ss 542, 542F, 544E (Youth Allowance); ss 602B, 607C (Newstart Allowance).

<sup>103</sup> *Social Security Act 1991* (Cth) ss 502C, 501E (Parenting Payment); 542, 542F, 544E (Youth Allowance); 602B, 607C (Newstart Allowance); *Social Security (Special Circumstances Regarding a Person's Family) (DEWR) Determination 2006* (Cth).

<sup>104</sup> *Social Security Act 1991* (Cth) s 542H (Youth Allowance); s 603A (Newstart Allowance).

<sup>105</sup> *Social Security (Special Circumstances Regarding a Person's Family) (DEWR) Determination 2006* (Cth); Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.5.1.280] (Participation Requirements Exemption in Special Family Circumstances—Case-by-Case (PP)).

<sup>106</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.7.5.30] (SpB Activity Test Exemptions (Special Benefit)); [3.2.11.40] (Activity Test for NSA/YA Job Seekers—Exemptions—Special Circumstances (Newstart and Youth Allowance)); [3.5.1.250] (Participation Requirements Exemption—Special Circumstances (PP) (Parenting Payment)).



7.116 The maximum length of an exemption available to victims of family violence who are principal carers is 16 weeks. For victims of family violence who are not principal carers, the maximum exemption that can be granted is 13 weeks. While exemptions are limited to a maximum of 13 or 16 weeks, a person who is on an exemption may reapply for another exemption.<sup>107</sup> Those who are provided an exemption are also exempt from RapidConnect provisions.<sup>108</sup>

7.117 In determining whether a person is eligible for an exemption under these grounds, primary regard is to be given to a Centrelink social worker's assessment.<sup>109</sup>

7.118 In 2008, a Participation Review Taskforce (the Taskforce) examined the rules for parents and mature-age job seekers with a view to increasing flexibility within the social security system and enabling greater workforce participation. In relation to the exemptions from activity tests, participation requirements and EPPs in circumstances of family violence, the Taskforce recommended that the 16 week exemption for principal carers be replaced with a 12 month exemption to 'recognise the time needed to restore victims of family violence and to support victims to seek services'.<sup>110</sup> The Taskforce recommended that this exemption be available in 'cases where the parent is accessing services due to a domestic violence situation' such as counselling or emergency accommodation.<sup>111</sup> The Taskforce recommended that the existing 13 week 'special circumstances' case-by-case exemption would remain available in other circumstances.<sup>112</sup>

### Submissions and consultations

7.119 In the Social Security Issues Paper, the ALRC asked what measures, if any, might be taken to address any difficulties faced by victims of family violence in complying with activity tests, participation requirements and EPPs. In particular, the ALRC asked whether the current exemption periods were reasonable for victims of family violence.<sup>113</sup> *Family Violence and Commonwealth Laws—Employment and Superannuation Law* (Employment Law Issues Paper), also asked a number of questions in relation to the administration of the JSCI and the JCA referral process.<sup>114</sup>

7.120 In response, stakeholders raised concerns about the administration of the JSCI and referrals to JCAs, the flexibility of EPPs in reflecting the needs of victims of family violence, awareness of exemptions and extensions to exemptions, accessibility

107 Ibid, [3.2.11.70] (Activity Test for NSA/YA Job Seekers—Exemptions—Principal Carer Parents with Special Family Circumstances—Case-by-Case Exemptions); [3.5.1.280] (Participation Requirements Exemption in Special Family Circumstances—Case-by-Case (PP)).

108 Ibid, [3.2.1.45] (Exemptions from RapidConnect Provisions).

109 Ibid, [3.5.1.280] (Participation Requirement Exemptions in Special Family Circumstances—Case-by-Case (PP)); [3.2.11.70] (Activity Test for NSA/YA Job Seekers—Exemptions—Principal Carer Parents with Special Family Circumstances—Case-by-Case Exemptions).

110 Participation Review Taskforce, *Participation Review Taskforce Report* (2008), Australian Government.

111 Ibid, 14.

112 Ibid, 14.

113 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011).

114 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011).

of exemptions, and the adequacy of the length of exemptions. These concerns are discussed in turn below.

### ***Job Seeker Classification Instrument***

7.121 WEAVE submitted that, in administering the JSCI,

staff routinely skip questions bundling several questions into one generic question such as ‘Is there anything else you’d like to tell us about’, ‘are there any other issues that impact on your ability to undertake employment?’ For many women, these questions are not sufficiently specific for them to disclose the existence of domestic violence and they will routinely answer no, having no understanding that such issues could be considered.<sup>115</sup>

7.122 Many stakeholders emphasised the need for training of Centrelink staff in administering the JSCI.<sup>116</sup>

7.123 WEAVE commented broadly about the purpose of referral to a JCA, suggesting it should ‘form part of an informed consultation with the victim about their options—they may prefer to seek a Domestic Violence or Special Circumstances exemption, or be assessed for work capacity’.<sup>117</sup>

### ***Flexibility in tailoring an individual’s Employment Pathway Plan***

7.124 The Welfare Rights Centre NSW submitted that often,

employment pathway plans (EPPs) are ‘off the shelf’ plans which are not individually tailored to a particular person’s circumstance ... there is a lack of genuine negotiation when between the employment services provider and the jobseeker on the terms of an EPP.<sup>118</sup>

### ***Awareness of exemptions and extensions***

7.125 Some stakeholders noted a lack of awareness about available exemptions and extensions<sup>119</sup> amongst social security recipients, Centrelink<sup>120</sup> and JSA staff.<sup>121</sup>

7.126 In the ADFVC’s study, *Seeking Security*,

Women were worried about their ability to comply with activity and participation requirements, given their childcare responsibilities and a lack of affordable childcare options. Some women were not emotionally ready to return to work. Others had ongoing legal, medical and other time commitments that would make finding work

<sup>115</sup> WEAVE, *Submission CFV 14*, 5 April 2011.

<sup>116</sup> Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011.

<sup>117</sup> WEAVE, *Submission CFV 14*, 5 April 2011.

<sup>118</sup> Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011.

<sup>119</sup> ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; M Winter, *Submission CFV 51*, 27 April 2011.

<sup>120</sup> M Winter, *Submission CFV 51*, 27 April 2011; M Winter, *Submission CFV 12*, 5 April 2011.

<sup>121</sup> ADFVC, *Submission CFV 71*, 11 May 2011.

difficult. It was also concerning that few women in the financial security study were aware of the exemption from activity and participation tests.<sup>122</sup>

7.127 WEAVE submitted that customers ‘are not routinely advised of the availability of domestic violence exemptions from jobseeker participation requirements’.<sup>123</sup> WEAVE also stated that there is a ‘sceptical attitude amongst Centrelink staff to domestic violence, and a belief that jobseekers routinely try to get out of their obligations any way they can. The lack of information about the existence of a Domestic Violence exemption is the fear that it would provide a ‘perverse incentive’ to jobseekers victims to claim Domestic Violence exemptions to try to avoid their obligations’.<sup>124</sup>

7.128 In addition, the ADFVC noted that generally, JSA members are ‘poorly informed about exemptions, processes and appropriate supports and levels of assistance’.<sup>125</sup>

7.129 Stakeholders therefore recommended training for Centrelink and JSA staff and enhanced information provision to customers about exemptions and extensions.<sup>126</sup>

### ***Length and accessibility of exemptions***

7.130 Some stakeholders suggested that the exemption period be extended to reflect more accurately the demands on people who are experiencing or leaving family violence.<sup>127</sup> Some stakeholders noted anecdotally that exemptions are rarely granted for the full 16 weeks<sup>128</sup> rather,

The normal period of exemptions, when these are granted, is one or two weeks which is not enough for the victim to recover from trauma and to support her children through their recovery and the change in family circumstances when the parents have separated.<sup>129</sup>

7.131 Similarly, Myjenta Winter submitted that although principal carers can apply for an exemption under ‘special circumstances’, ‘these exemptions are usually only granted for 2 weeks if granted at all, the principal carer is then expected to go back to Centrelink and repeat the whole traumatic story again to another person to try and attain another 2 week exemption’.<sup>130</sup>

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122 Ibid.

123 WEAVE, *Submission CFV 14*, 5 April 2011.

124 Ibid.

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

126 ADFVC, *Submission CFV 71*, 11 May 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; M Winter, *Submission CFV 12*, 5 April 2011.

127 ADFVC, *Submission CFV 71*, 11 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011 M Winter, *Submission CFV 51*, 27 April 2011.

128 M Winter, *Submission CFV 51*, 27 April 2011.

129 WEAVE, *Submission CFV 14*, 5 April 2011.

130 M Winter, *Submission CFV 12*, 5 April 2011.

7.132 The ADFVC recommended the exemption be extended to at least 6 months<sup>131</sup> while others recommended a 12 month exemption in line with the recommendations of the Participation Review Taskforce.<sup>132</sup>

7.133 On the other hand, the Welfare Rights Centre Inc Queensland commented that:

It is our understanding that the legislative exemptions for family violence with respect to activity requirements are quite adequate, but that Centrelink customers needed to be made aware of the availability of exemptions.<sup>133</sup>

7.134 Myjenta Winter submitted that ‘[m]ostly principal carers are denied exemptions for caring for children who have experienced violence’<sup>134</sup> and that ‘[t]he current exemptions do not acknowledge violence against children. Principal carers of children who have been abused are only eligible for a maximum 13 week special circumstances exemption’.<sup>135</sup>

7.135 WEAVE stated that ‘Centrelink social workers advise women that they cannot renew such exemptions and that they have to refer to JCAs. JCAs in turn advise that they can’t recommend ongoing exemptions without medical evidence’.<sup>136</sup>

### **ALRC’s views**

7.136 A number of concerns were highlighted by stakeholders in relation to activity tests, participation requirements and EPPs. These related to ensuring that the circumstances of a victim of family violence were adequately taken into account in the administration of a JSCI, tailoring an EPP and in considering whether to grant an exemption. Concerns were also raised in relation to the length of exemptions available.

#### ***Job Seeker Classification Instrument***

7.137 The administration and effectiveness of the JSCI is considered in detail in Chapter 15. However, Centrelink staff may not administer the JSCI appropriately—in particular, to identify victims of family violence. The ALRC therefore considers that it may be appropriate that training be provided to Centrelink staff in administering the JSCI.

#### ***Comprehensive Compliance Assessments***

7.138 The ALRC did not seek specific information about CCAs in either the Social Security Issues Paper or the Employment Law Issues Paper. The ALRC therefore welcomes comment as to whether family violence is adequately considered by Centrelink specialist officers in conducting a CCA.

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131 ADFVC, *Submission CFV 71*, 11 May 2011.

132 M Winter, *Submission CFV 51*, 27 April 2011.

133 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

134 M Winter, *Submission CFV 12*, 5 April 2011.

135 M Winter, *Submission CFV 51*, 27 April 2011.

136 WEAVE, *Submission CFV 14*, 5 April 2011.

***Job Capacity Assessment and Employment Services Assessment***

7.139 The ALRC is also interested in comment on whether, in practice, family violence is considered in referring a job seeker to an ESAt or JCA assessor and whether recommendations made by ESAt or JCA assessors regarding the experiences of victims of family violence are taken into account by Centrelink. Whether family violence should be considered a ‘significant barrier to work’ is considered in Chapter 15.

***Flexibility in tailoring an individual’s Employment Pathway Plan***

7.140 The ALRC is concerned by stakeholder comment that EPPs are given to victims of family violence ‘off the shelf’ and do not adequately reflect the person’s individual circumstances. This may mean that victims of family violence find it difficult to meet their activity or participation requirements and consequently may be cut off from their social security payment.

7.141 In recognition of the theme of self-agency discussed in Chapter 2, a genuine conversation should take place between the job services provider and the customer to ensure that the content of an EPP connects the person with requisite services, training and work opportunities.

7.142 In particular, the *Guide to Social Security Law* does not expressly direct a Centrelink customer service adviser to consider family violence when tailoring a job seeker’s EPP. The ALRC therefore considers that the *Guide to Social Security Law* should expressly direct Centrelink customer service advisers to consider family violence when tailoring a job seeker’s EPP.

***Accessibility of exemptions***

7.143 Victims of family violence may not be aware of exemptions—and extensions to exemptions—from activity tests, participation requirements and EPPs. In addition, stakeholders raised concerns about the level of knowledge of Centrelink staff and JSA providers in relation to exemptions and extensions.

7.144 Accordingly, the ALRC proposes that information about exemptions and extensions should be included as part of the information provided to all customers as proposed in Proposal 4–8. This places the choice in the individual’s hands as to whether or not they wish to apply for an exemption or not. While some victims of family violence may need an exemption from activity tests and participation requirements, others may want to continue seeking work to increase their chances of returning to, or joining, the workforce.

7.145 In this context, it is important that the social security system does not presume a ‘one-size-fits-all’ response nor assume that the system knows what is best for an individual’s circumstances.

***Length of exemption periods***

7.146 Stakeholders raised concerns about the length of exemption periods available for victims of family violence and that the length of exemption did not reflect the nature of

family violence. Some stakeholders recommended extending the exemption in all cases to six to 12 months.

7.147 An automatic exemption of six to 12 months may isolate a victim of family violence from services. Currently, the requirement for a person to apply for a renewal of an exemption means that a customer is re-engaging with the system and has opportunity to be referred to other support mechanisms.

7.148 There are several competing consequences. First, the ‘all-encompassing’ nature of family violence can mean that an appointment to reapply for an exemption may be too overwhelming. Similarly, if a victim of family violence is required to leave home in order to reapply for an exemption, this may subject the person to further risk of violence. On the other hand however, extending exemptions for too long may have unintended consequences effectively isolating the customer from any connection to services.

7.149 There are also different exemption periods that are available to principal carers than to other social security recipients. In order to ensure consistency and not to presume that family violence necessarily has a larger impact on a principal carer than those who are not, it may be necessary that the length of exemption available to all victims of family violence be the same—that is, 16 weeks.

7.150 The ALRC considers that DEEWR should review the length of, and accessibility of, exemption periods to ensure that they reflect the nature of family violence experienced by both principal carers and those who are not.

7.151 The ALRC is also interested to hear about current methods used to engage with customers when applying for a further exemption, such as by telephone or email, to ensure that the customer remains connected with services but also remains safe.

**Proposal 7–4** Centrelink customer service advisers should receive consistent and regular training in the administration of the Job Seeker Classification Instrument including training in relation to:

- 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
- the availability of support services.

**Question 7–8** In practice, to what extent can, or do, recommendations made by ESA or JCA assessors in relation to activity tests, participation requirements, Employment Pathway Plans and exemptions account for the needs and experiences of job seekers experiencing family violence?

**Question 7–9** In practice, is family violence adequately taken into account by a Centrelink specialist officer in conducting a Comprehensive Compliance Assessment?

**Question 7–10** What changes, if any, to the Employment Pathway Plan and exemption processes could ensure that Centrelink captures and assesses the circumstances of job seekers experiencing family violence?

**Proposal 7–5** The *Guide to Social Security Law* should expressly direct Centrelink customer service advisers to consider family violence when tailoring a job seeker’s Employment Pathway Plan.

**Proposal 7–6** Exemptions from activity tests, participation requirements and Employment Pathway Plans are available for a maximum of 13 or 16 weeks. The ALRC has heard concerns that exemption periods granted to victims of family violence do not always reflect the nature of family violence. DEEWR should review exemption periods to ensure a flexible response for victims of family violence—both principal carers and those who are not principal carers.

**Question 7–11** In practice, what degree of flexibility does Centrelink have in its procedures for customers experiencing family violence:

- (a) to engage with Centrelink in negotiating or revising an Employment Pathway Plan; or
- (b) apply for or extending an exemption.

Are these procedures sufficient to ensure the safety of victims of family violence is protected?

### Move to area of lower employment prospects

7.152 Unemployment payments are designed as a safety net payment for people who are unemployed and are paid on condition that they do all they can to maximise their chances of finding suitable paid work. Moving to areas of high unemployment can disadvantage job seekers and limit their opportunities for work.<sup>137</sup> A 26 week exclusion from payment of Newstart Allowance, Youth Allowance and Special Benefit applies if a person receiving one of these payments moves to an area of lower employment prospects.

7.153 An exemption from this exclusion period applies where the reason for moving is due to an ‘extreme circumstance’ such as domestic or family violence in the original place of residence.<sup>138</sup> ‘Original place of residence’ is not defined in the *Social Security Act* or in the *Guide to Social Security Law*.

137 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.2.1.35] (Move to Area of Lower Employment Prospects for NSA, YA & SpB Recipients).

138 *Social Security Act 1991* (Cth) ss 553B (Youth Allowance); 634 (Newstart Allowance); 745N (Special Benefit).

7.154 In the Social Security Issues Paper, the ALRC asked a general question as to whether Centrelink customers were aware of exemptions available in circumstances of family violence and, if so, whether they were likely to use the exemptions.<sup>139</sup>

7.155 Stakeholders indicated that customers were generally not aware of the types of exemptions available. However, submissions did not directly address the question of exemptions available when a person has moved to an area of lower employment prospects.

7.156 As limited detail was provided in response to the Social Security Issues Paper, the ALRC is interested to hear whether the exemption available to victims of family violence to the exclusion period when a person moves to an area of lower employment prospects is an issue and, if so, what improvements might be necessary.

**Question 7–12** A 26 week exclusion period applies to a person who moves to an area of lower employment prospects. An exemption applies where the reason for moving is due to an ‘extreme circumstance’ such as family violence in the ‘original place of residence’. What changes, if any, are necessary to ensure that victims of family violence are aware of, and are making use of, the exemption available from the 26 week exclusion period? For example, is the term ‘original place of residence’ interpreted in a sufficiently broad manner to encapsulate all forms of family violence whether or not they occur within the ‘home’?

## Failures

7.157 On 1 July 2009, a new system commenced to ensure compliance by job seekers with activity tests and participation requirements. This system includes the following four levels of ‘failure’ to comply with activity tests and participation requirements:

- No Show, No Pay Failures;
- Connection Failures;
- Reconnection Failures; and
- Serious Failures.<sup>140</sup>

A failure cannot be imposed if a person has a ‘reasonable excuse’, discussed below.

7.158 A ‘No Show, No Pay Failure’ results in the loss of one day’s payment for each day that a person does not show up for one of the compulsory activities in his or her EPP, does not attend a job interview, or deliberately acts in a way in a job interview that could result in a job offer not being made.

139 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 27.

140 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.1.13.10] (Types of Failures & Penalties).



7.159 A ‘Connection Failure’ may be made if a person fails to attend an appointment with Centrelink or a JSA provider, sign an EPP, look for a job, or hand in a Job Seeker Diary. A Connection Failure does not result in a loss of payment. Rather Centrelink will contact the person to arrange a new appointment or to sign an EPP. If a person still does not satisfy these requirements—known as a ‘Reconnection Requirement’—a person may have a reconnection failure resulting in the loss of one day’s payment for every day until the requirement is met.

7.160 A ‘Serious Failure’ applies where a person has had at least three no show no pay, connection or reconnection failures or a combination of these types of failures, in the last six months and Centrelink believes that the person is deliberately and persistently not complying with requirements or a person refuses to accept a suitable job offer. The penalty for a serious failure is an eight week non-payment period.

7.161 A Serious Failure is not imposed unless a CCA decides that the job seeker has been persistently non-compliant. Where a Serious Failure is imposed, the new structure still pursues its emphasis on re-engagement by establishing a Compliance Activity option which allows the job seeker to undertake an activity similar to work experience for eight weeks in lieu of the loss of payments.

7.162 Centrelink is responsible for determining whether to impose a failure or penalty for non-compliance with activity test requirements. However, job service providers generally initiate the process by reporting to Centrelink instances of potential non-compliance by lodging a ‘Participation Report’—an online form detailing the circumstances of the job seeker’s potential non-compliance.

### Unemployment Non-Payment Period

7.163 In addition, an Unemployment Non-Payment Period—a preclusion period of an eight-week loss of payment—applies to any job seeker who voluntarily leaves a job without reasonable excuse, or loses a job through misconduct.<sup>141</sup> An Unemployment Non-Payment Period may be ended if a person is in a class of persons specified by a legislative instrument and serving the non-payment period would cause the person to be in severe financial hardship.<sup>142</sup>

7.164 Currently, those who do not have access to safe, secure and adequate housing or who are using emergency accommodation or a refuge are considered to be within the ‘class of persons’.<sup>143</sup> Access to safe, secure and adequate housing also means having a right to remain, or a reasonable expectation to remain, in their accommodation.<sup>144</sup>

141 Ibid, [3.1.13.80] (Unemployment Non-Payment Periods).

142 Ibid, [3.1.13.80] (Unemployment Non-Payment Periods).

143 *Social Security (Administration) (Ending Unemployment Non-Payment Periods--Classes of Persons) (DEEWR) Specification (No 1) 2009* ((Cth)); Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.1.13.80] (Unemployment Non-Payment Periods).

144 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.1.13.80] (Unemployment Non-Payment Periods).

However, a person experiencing family violence is not referred to expressly as a person who might fall in a relevant class of persons for unemployment non-payment periods.

### Reasonable excuse

7.165 In addition to activity tests and participation requirements, in some cases, social security recipients must comply with various administrative requirements. These may include:

- providing certain information;
- attending a particular place;
- completing a questionnaire; or
- undergoing a medical, psychiatric or psychological examination.<sup>145</sup>

7.166 Failure to comply with such administrative requirements can lead to non-payment, unless the person can demonstrate a ‘reasonable excuse’. In addition, where a person fails to meet activity or participation test requirements and does not have a ‘reasonable excuse’ or an exemption, this may constitute a ‘failure’, discussed above, and a penalty may apply. Such penalties may apply to Newstart Allowance, Youth Allowance, Parenting Payment, Austudy and Special Benefit.<sup>146</sup> As discussed above, penalties range from a reduction in the person’s payment, to non-payment for eight weeks.<sup>147</sup>

7.167 The term ‘reasonable excuse’ is not defined in the *Social Security Act*. The *Guide to Social Security Law* provides that, in determining whether a person has a reasonable excuse, the decision maker must take into account whether the person had access to safe, secure and adequate housing, or was using emergency accommodation or a refuge at the time of the failure and the person was subjected to criminal violence (including ‘domestic violence’ and sexual assault). A person is taken not to have access to safe, secure and adequate housing where such housing threatens or is likely to threaten the person’s safety.<sup>148</sup>

### Submissions and consultations

7.168 In the Social Security Issues Paper the ALRC asked whether, in practice, Centrelink customers were aware of exemptions—including the ‘reasonable excuse’

<sup>145</sup> *Social Security (Administration) Act 1999* (Cth) ss 67, 68, 192.

<sup>146</sup> *Social Security Act 1991* (Cth) s 500J (Parenting Payment; ss 550, 550B (Youth Allowance; ss 572A, 576A (Austudy); ss 615, 631 (Newstart Allowance); s 745H (Special Benefit).

<sup>147</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.1.13.10] (Types of Failures and Penalties).

<sup>148</sup> *Ibid*, [3.1.13.90] (Reasonable Excuse). *Social Security (Reasonable Excuse—Participation Payment Obligations)* (DEEWR) Determination 2009 (No.1) 2009 (Cth); Explanatory Statement, *Social Security (Reasonable Excuse: Participation Payment Obligations)* (DEEWR) Determination 2009 No.1 2009 (Cth).

exemption—available in circumstances of family violence and whether customers were likely to use the exemption.<sup>149</sup>

7.169 Stakeholders who responded to this question indicated that Centrelink customers were given very little information about provisions to help them in circumstances of family violence.<sup>150</sup>

7.170 The Commonwealth Ombudsman submitted that:

Our office is aware that family violence may be a ‘reasonable excuse’ for a failure to comply with a requirement, but it is not clear whether customers are aware of this or whether compliance staff specifically question customers about the existence of family violence ... when deciding whether to apply a failure. It may be appropriate for either the social security law or policy to provide specific guidance to staff about whether family violence may be a relevant consideration in determining whether a customer has a ‘reasonable excuse’.<sup>151</sup>

### ALRC’s views

7.171 In the context of ‘reasonable excuse’, the *Guide to Social Security Law* currently refers to ‘domestic violence’ as a criminal offence. The ALRC is concerned that not all family violence amounts to a criminal offence and therefore, not all family violence may lead a decision maker to conclude that a person has a reasonable excuse which, in turn, may mean that a victim of family violence has their payments suspended and cannot access independent financial assistance. Accordingly, the ALRC considers that the *Guide to Social Security Law* should expressly refer to family violence as a ‘reasonable excuse’ to ensure that the range of violent conduct is included. This proposal is complemented by Proposal 3–1 which proposes a broad definition of family violence for the purposes of social security law.

7.172 In addition, the ALRC is concerned about the lack of knowledge about the ‘reasonable excuse’ provisions among victims of family violence which may prevent a victim of family violence accessing the exemption and having their payment cut off. The ALRC therefore proposes that information about the reasonable excuse exemption be included in Proposal 4–8.

7.173 The ALRC is also seeking further information as to whether the current criteria on which Centrelink can end a person’s Unemployment Non-Payment Period presents a barrier to the safety of victims of family violence.

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149 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 27.

150 ADFVC, *Submission CFV 71*, 11 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; M Winter, *Submission CFV 51*, 27 April 2011.

151 Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.

**Proposal 7–7** 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.

**Question 7–13** Centrelink can end a person’s ‘Unemployment Non-Payment Period’ in defined circumstances. In practice, are these sufficiently accessible to victims of family violence?



## 8. Social Security—Payment Types and Methods, and Overpayment

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### Summary

8.1 This chapter considers mechanisms that are built into social security law and practice to assist victims of family violence, and others, including:

- special or supplementary payments;
- the way in which a person receives their regular social security payment, such as weekly or urgent payments; and
- nominee arrangements.

8.2 The chapter discusses ways in which these payments and payment arrangements may be able to better protect the safety of victims of family violence. Finally, the chapter considers reforms to provisions in social security legislation that recognise debt waiver in ‘special circumstances’, which can act to assist victims of family violence who have been subject to economic abuse or duress.

8.3 In particular, the ALRC considers a number of barriers for victims of family violence in accessing Crisis Payment, weekly and urgent payments and makes proposals to overcome these barriers. The ALRC also considers ways 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.

## Special payments and supplementary benefits

8.4 In addition to regular social security payments and entitlements, some payments are available under the *Social Security Act 1999* (Cth) due to the occurrence of a specific circumstance, or are provided as a supplement to a person's regular income support.

### Crisis Payment

8.5 'Crisis Payment' is a one-off payment, equivalent to one week of a person's eligible fortnightly payment, that is payable to a person who is in 'severe financial hardship' at the time of a particular crisis, including family violence. Crisis Payment may be paid in addition to a person's regular payment, to social security recipients, or those who have applied and qualify for social security payments. Claims must be made within seven days of an extreme circumstance.<sup>1</sup>

8.6 A person cannot be paid more than four payments of Crisis Payment due to family violence in any 12 month period.<sup>2</sup> For victims of family violence, one of the following circumstances must apply.

8.7 First, the person must have left his or her home, in circumstances where it is unreasonable to return, and intend to establish a new home. The 'extreme circumstance' is defined as the 'period of time in which the person is abused, flees the home and, in many cases, includes a period of trauma following the person fleeing the home'.<sup>3</sup> The claiming period begins when the person, having left home, decides that they cannot return home as a result of the 'extreme circumstance'.<sup>4</sup>

8.8 Secondly, the person remained in the home after the person using family violence is removed from, or leaves the home. It must be verified that the person using family violence actually lived with the victim in the home immediately before being removed. The claiming period begins when the family member leaves.<sup>5</sup>

8.9 For the purposes of Crisis Payment, 'home' means the person's house or other shelter that is the 'fixed residence' of a person for the foreseeable future. Fixed residence includes a house, apartment, on-site caravan, long-term boarding house or

<sup>1</sup> *Social Security Act 1991* (Cth) ss 1061JH, 1061JHA.

<sup>2</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.7.4.20] (Qualification for CrP—Extreme Circumstances—Domestic and Family Violence); [3.7.4.25] (Qualification for CrP—Remaining in the Home after Removal of Family Member Due to Domestic or Family Violence).

<sup>3</sup> *Ibid*, [3.7.4.20] (Qualification for CrP—Extreme Circumstances—Domestic and Family Violence).

<sup>4</sup> *Social Security Act 1991* (Cth) s 1061JH; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.7.4.20] (Qualification for CrP—Extreme Circumstances—Domestic and Family Violence).

<sup>5</sup> *Social Security Act 1991* (Cth) s 1061JHA; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.7.4.25] (Qualification for CrP—Remaining in the Home after Removal of Family Member Due to Domestic or Family Violence).

moored boat. A ‘home’ does not include a refuge, overnight hostel, squat or other temporary accommodation.<sup>6</sup>

8.10 The family violence must be used by a ‘family member’, defined as a person’s partner, parent, sister, brother, child or any other person whom the Secretary deems should be treated as a family member.<sup>7</sup>

8.11 In addition, Crisis Payment is only available to Australian residents, a Special Category visa holder or the holder of a specified subclass of visa that qualifies the person for Special Benefit (as discussed in Chapter 7).<sup>8</sup>

### **Submissions and consultations**

8.12 In *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011) (the Social Security Issues Paper), the ALRC asked a number of questions about Crisis Payment including: whether Crisis Payment should be available to those otherwise ineligible for a social security payment but due to extreme circumstances of family violence are placed in financial hardship; whether claim periods and eligibility criteria for Crisis Payment adequately reflects the breadth and nature of family violence; and how could access to Crisis Payment be improved for victims of family violence—for instance, should Crisis Payment be ‘wrapped up’ with Special Benefit.<sup>9</sup>

8.13 Stakeholders identified a number of issues faced by victims of family violence in relation to Crisis Payment. Overall, stakeholders agreed that there needed to be more information available about Crisis Payment.<sup>10</sup> Specifically, the Australian Domestic and Family Violence Clearinghouse (ADFVC) recommended the delivery of a comprehensive package of information and a dedicated case worker.<sup>11</sup>

8.14 A number of concerns relating to the qualification criteria for Crisis Payment were also raised, including the:

- requirement to be on, or eligible for, income support;
- nexus with the home and the corresponding definition of ‘extreme circumstance’;

6 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.7.4.25] (Qualification for CrP—Remaining in the Home after Removal of Family Member Due to Domestic or Family Violence).

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

8 Ibid ss 29, 30, 30A; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.7.4.10] (Qualification for CrP—General Provisions).

9 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Questions 30, 31, 32, 33.

10 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

11 ADFVC, *Submission CFV 71*, 11 May 2011.



- seven day claiming period; and
- amount of payment.

***Requirement to be on, or eligible for, income support***

8.15 In the Social Security Issues Paper, the ALRC asked whether Crisis Payment should be made available to those who are otherwise ineligible for a social security pension or benefit but—due to extreme circumstances of family violence—are placed in financial hardship.<sup>12</sup>

8.16 Most stakeholders supported the idea that financial hardship alone should be the trigger for Crisis Payment, without the additional requirement of being on, or eligible for, income support.<sup>13</sup> Stakeholders submitted that the limitation of Crisis Payment, to those already in receipt of social security payments or entitlements, excludes those who are financially dependent on the person using family violence and have no independent income.<sup>14</sup>

8.17 In these circumstances, access to Crisis Payment may be critical. For example, as noted by the Australian Domestic and Family Violence Clearinghouse (ADFVC), it ‘may mean the difference between being homeless or not, returning to the violent partner or not, seeking assistance or not’.<sup>15</sup>

8.18 In addition, if a person is not currently receiving a social security payment or entitlement, but is otherwise eligible, the requirement to apply for income support, before being able to access Crisis Payment, ‘creates an unduly long, time-consuming and arduous process of registering with Centrelink before they are able to receive a Crisis Payment’.<sup>16</sup>

***Nexus with the ‘home’***

8.19 Crisis Payment for family violence currently turns on either the victim of family violence leaving the home, or the person using family violence being removed from, or leaving, the home. Some stakeholders indicated that this requirement is too restrictive and, as a result, there are people who are affected by family violence, but are not eligible for Crisis Payment.<sup>17</sup> In particular, stakeholders identified the following scenarios that may affect the safety of a victim of family violence.

12 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 31.

13 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

14 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

15 ADFVC, *Submission CFV 71*, 11 May 2011.

16 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011.

17 Ibid; Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.

8.20 First, a victim of family violence may not have left the home shared with the person using family violence and cannot afford to do so without financial assistance.<sup>18</sup> Secondly, although a person may have been forced to leave the home as a result of family violence, it may not be a home shared with the person using family violence. For example, there may be victims of family violence who have already moved out of the home to escape the person using family violence but the person using family violence, finds him or her at the new home.<sup>19</sup> As noted in one submission, '[p]ost separation violence is a very common and serious form of family violence'.<sup>20</sup>

8.21 Thirdly, there are people who do not have stable accommodation, as a result of family violence. The Commonwealth Ombudsman gave the example of homeless customers or customers who have resided in emergency accommodation who wish to establish stable accommodation in order to escape family violence.<sup>21</sup> Similarly, NAAJA provided an example of a client who was refused payment because

she was living rough in a tent in the river bank in a small town. She couldn't go back to her tent, or shift camps because the perpetrator would find it very easy to access her. She seemed like an ideal customer for crisis payment but it was refused even on review because her home didn't fit into the definition.<sup>22</sup>

8.22 Another example given by the Ombudsman is set out in the following case study.

**Case Study—No home to leave**

Ms H contacted Centrelink to advise that she was currently homeless and had recently been physically and sexually assaulted by a family member. She requested a Crisis Payment to assist her in establishing a new home, and complained to the Ombudsman's office when this request was refused.

Our investigation identified that Centrelink refused Ms H's request for a Crisis Payment because she had not left her home (she did not have one) as a result of the violence. We advised Ms H that this decision appeared to be consistent with the qualification requirements for Crisis Payment.<sup>23</sup>

8.23 The definition of 'extreme circumstance' is also linked either to the person using family violence being removed from, or leaving the home, or the victim leaving the home. The Sole Parents' Union submitted that the definition of 'extreme circumstance' can work to prevent sole parents receiving a needed payment, because '[w]hat Centrelink considers the crucial crisis point is not necessarily the same as for the individual concerned'.<sup>24</sup>

18 Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.

19 Ibid.

20 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011.

21 North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011; Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.

22 North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011.

23 Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.

24 Sole Parents' Union, *Submission CFV 63*, 27 April 2011.

8.24 There may be additional concerns for people with disability where the person using family violence is also the carer. If the person using family violence is removed from the home, the person with disability may lose the necessary care.

### *Claiming period*

8.25 Most stakeholders submitted that the current claim period of seven days was too short.<sup>25</sup> The Welfare Rights Centre NSW recommended the claim period be extended to 21 days;<sup>26</sup> the ADFVC recommended extending the period to six months.<sup>27</sup>

8.26 In a joint submission, the Good Shepherd Youth and Family Service and others provided the following example to demonstrate the restrictiveness of the seven day claim period for victims of family violence and concerns with the nexus with the home requirement:

A woman spent more than one week in hospital due to domestic violence and upon leaving hospital was taken to [McAuley Community Services for Women] crisis accommodation program. She was 38 weeks pregnant and was suffering from Gestational Diabetes. She was denied a crisis payment for two primary reasons: The incidence of violence had occurred more than 7 days ago (it had occurred 10 days ago when she made the application). The fact she was in unconscious and hospitalised due to the act of family violence was disregarded [and the] act of family violence did not occur in her home, therefore Centrelink, City of Yarra stated ‘If it is outside the home it is an assault and not domestic violence.’<sup>28</sup>

### *Special Benefit*

8.27 In the Social Security Issues Paper, the ALRC also asked whether Crisis Payment should be ‘wrapped up’ with Special Benefit.<sup>29</sup> Most stakeholders did not consider that Crisis Payment should be ‘wrapped up’ with Special Benefit,<sup>30</sup> because the qualification requirements differ markedly;<sup>31</sup> and if it were ‘wrapped up’, Crisis Payment would be unavailable to victims of family violence who already receive a social security payment.<sup>32</sup>

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25 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

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

27 ADFVC, *Submission CFV 71*, 11 May 2011.

28 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011.

29 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 30.

30 Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; Sole Parents’ Union, *Submission CFV 63*, 27 April 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011.

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

32 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

**Amount of payment**

8.28 Some stakeholders also mentioned that the amount of Crisis Payment is ‘insufficient to meet the needs of individuals escaping domestic violence’<sup>33</sup> and that the limit of four payments in a 12 month period may be insufficient.<sup>34</sup>

**ALRC’s views**

8.29 There may be persons who have experienced, or are experiencing, family violence but are unable to access Crisis Payment for a range of reasons. These include: that a victim may not have not lived with the person using violence; are in a form of accommodation which is not covered by the definition of ‘home’; or cannot afford to leave home without the assistance that Crisis Payment would provide.

8.30 The ALRC has identified two possibilities for reform. On the one hand, a series of amendments could assist victims of family violence in circumstances such as those identified by stakeholders. For example, if the definition of ‘home’ in the *Guide to Social Security Law* was broadened to include refuges, emergency accommodation and other temporary accommodation, this would address concerns of people fleeing family violence and going into emergency accommodation. However, as discussed above, the claiming period begins when the person, having left home, decides that they cannot return home as a result of the ‘extreme circumstance’.<sup>35</sup> Therefore, if the definition of ‘home’ was expanded to include emergency accommodation, there may be circumstances where a victim of family violence does not qualify for Crisis Payment because of intending to return to the emergency accommodation.

8.31 Amending the *Social Security Act* to remove the requirement of the victim having lived with the person using family violence could also address the concerns regarding ‘post separation violence’. However, these amendments would not address the concerns that a victim of family violence may not be able to access financial assistance to leave the home and the violent relationship in the first place.

8.32 As an alternative, and as social security law is designed to provide for those in ‘need’, it may be preferable to remove the nexus to the home in its entirety and require that a person be ‘subject to’ or ‘experiencing’ family violence. The advantage of such a proposal is that it reflects the nature of the violence rather than focusing on the relationship or where the violence occurs. However, there may be concerns that such a proposal would be too broad.

8.33 The ALRC is also concerned that the seven day claim period for Crisis Payment is too short and may operate to restrict access to Crisis Payment for victims of family violence. The ALRC therefore proposes that FaHCSIA should review the claim period and the point at which the claiming period begins, to ensure a flexible response for

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33 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011.

34 Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

35 *Social Security Act 1991* (Cth) s 1061JH; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.7.4.20] (Qualification for CrP—Extreme Circumstances—Domestic and Family Violence).

victims of family violence. The ALRC considers that the above proposals should also address concerns regarding the definition of ‘extreme circumstance’.

8.34 Special Benefit provides a social security safety net, by providing income support for people who are in financial hardship due to reasons beyond their control and unable to earn a sufficient livelihood for themselves and their dependants.<sup>36</sup> One criterion for qualification is that a person is unable to receive any other social security pension or benefit.<sup>37</sup> Arguably, this may mean that a person who is experiencing family violence could access Special Benefit and not Crisis Payment.

8.35 However, as discussed in Chapter 7, there may be concerns about residential requirements for Special Benefit. There may also be concerns that Crisis Payment is designed as a one-off payment and so should also be available to those on Special Benefit. The ALRC is therefore interested in comment whether—rather than Crisis Payment being ‘wrapped up’ with Special Benefit—Special Benefit would be sufficient as an alternative for victims of family violence who do not qualify for Crisis Payment.

8.36 In addition, the ALRC proposes that information about Crisis Payment be provided to all customers as considered.<sup>38</sup>

**Proposal 8–1** The *Social Security Act 1991* (Cth) establishes a seven day claim period for Crisis Payment. FaHCSIA should review the seven day claim period for Crisis Payment to ensure a flexible response for victims of family violence.

**Question 8–1** Crisis Payment is available to social security recipients or to those who have applied, and qualify, for social security payments. However, Special Benefit is available to those who are not receiving, or eligible to receive, social security payments. What reforms, if any, are needed to ensure that Special Benefit is accessible to victims of family violence who are otherwise ineligible for Crisis Payment?

**Proposal 8–2** Crisis Payment for family violence currently turns on either the victim of family violence leaving the home or the person using family violence being removed from, or leaving, the home. The *Social Security Act 1991* (Cth) should be amended to provide Crisis Payment to any person who is ‘subject to’ or ‘experiencing’ family violence.

36 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.2.6.10] (Special Benefit (SpB)—Description)).

37 Ibid, [1.2.6.10] (Special Benefit (SpB)—Description)).

38 Proposal 4–8.

### Rent Assistance

8.37 Rent Assistance is not a separate social security payment. It is an increase in—or a supplement to—the rate of a person’s normal income support payment that is available in certain circumstances to a person who pays private rent.

8.38 Rent Assistance is available to social security recipients who:

- are not aged care residents;
- are not ‘ineligible homeowners’; and
- pay, or are liable to pay, rent and the fortnightly rent is more than the ‘rent threshold amount’.<sup>39</sup>

8.39 Rent is defined broadly in the *Social Security Act*. It does not expressly extend to mortgage repayments.<sup>40</sup> In comparison, New Zealand’s *Social Security Act 1964* provides for an ‘Accommodation Supplement’ that is a non-taxable and asset-tested income supplement that provides assistance towards accommodation costs (excluding state housing), but includes rent, board and the costs of owner-occupied homes, including mortgage repayments.

### Submissions and consultations

8.40 In the Social Security Issues Paper, the ALRC asked whether the provisions for Rent Assistance in the *Social Security Act* adequately addressed the situation where a person using family violence defaults on mortgage repayments on the house in which the victim is living, thereby jeopardising the victim’s safety. Specifically, the ALRC asked whether the definition of ‘rent’ should expressly include mortgage repayments where family violence is an issue.<sup>41</sup>

8.41 Most stakeholders supported expanding the definition of ‘rent’ in the *Social Security Act* to include mortgage repayments where family violence is an issue.<sup>42</sup> For example, the ADFVC noted that where a person using family violence defaults on a mortgage repayment may leave victims of family violence in danger of losing their home and unable to secure long term housing.<sup>43</sup>

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<sup>39</sup> *Social Security Act 1991* (Cth) ss 1070B–1070J, 1070T.

<sup>40</sup> *Ibid* ss 13(2), 13(3).

<sup>41</sup> Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 34.

<sup>42</sup> ADFVC, *Submission CFV 71*, 11 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; Sole Parents’ Union, *Submission CFV 63*, 27 April 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

<sup>43</sup> ADFVC, *Submission CFV 71*, 11 May 2011.

8.42 However, the Welfare Rights Centre NSW submitted that rather than this being a social security matter, ‘there may be role for the banking industry to play in this circumstance to relieve against mortgagee hardship’.<sup>44</sup>

### **ALRC’s views**

8.43 The ALRC considers that hardship concerning mortgage repayments should fall under the *National Credit Code* rather than social security law.<sup>45</sup> Under the *National Credit Code*, a person who has:

- either borrowed money to buy a home for personal use (rather than an investment), or used their home as security to raise money for other household, personal or domestic purposes (rather than a business);<sup>46</sup> and
- is unable to pay because of ‘illness, unemployment or other reasonable cause’; and
- can demonstrate if they receive a variation they will be able to repay the loan,

may be eligible for an extension of the term of the loan and reduction in the amount of each payment for that period, a postponement of due dates for payment, or an extension of the term of the contract and a postponement.<sup>47</sup>

8.44 However the ALRC considers that where victims of family violence come within the social security system, they should be aware of the hardship options available in the *National Credit Code*, and therefore that information about the hardship provisions in the *National Credit Code* should be provided to customers as part of Proposal 4–8.

## **Methods of payment**

8.45 Generally, all social security payments are paid on a fortnightly basis in arrears. Payments may also be made in advance, urgently or weekly. Most social security payments are made by direct deposit to the recipient’s bank, building society or credit union account. However, Centrelink may make payment to another person or organisation when a person is under 18 and receiving Youth Allowance. Payment is made to a parent or guardian unless: the young person is independent; or there is a nominee appointed (either a person or an organisation).<sup>48</sup>

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

45 *National Consumer Credit Protection Act 2009* (Cth) sch 1.

46 *Ibid* s 5.

47 *Ibid*.

48 *Social Security (Administration) Act 1999* (Cth) s 45; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [8.4.1.30] (Payments to a Third Party).

### Weekly payments

8.46 Weekly payments of social security can be made to those considered to be ‘most vulnerable’,<sup>49</sup> defined as a person who:

- is homeless, or
- is at risk of homelessness and has issues of vulnerability and significant disadvantage and would benefit from receiving payments on a weekly basis, or
- has considerable difficulty in managing their finances ... on a fortnightly basis and would benefit from receiving payments on a weekly basis.<sup>50</sup>

8.47 Weekly payments are offered in conjunction with other services and referrals, such as family violence counselling. Receiving income support payments on a weekly basis is voluntary. Centrelink works with people to assess their needs.<sup>51</sup>

8.48 In determining whether a person is eligible for weekly payments, the *Guide to Social Security Law* provides that a decision maker should take into account, among other things, ‘recent traumatic relationship breakdown, particularly if domestic or family violence was involved’ and whether the ‘person is experiencing financial exploitation’.<sup>52</sup>

### Submissions and consultations

8.49 In the Social Security Issues Paper, the ALRC asked whether, in practice, Centrelink customers, including victims of family violence, were aware of weekly payments and were provided them when requested.<sup>53</sup>

8.50 Responses from stakeholders indicated that victims of family violence were not always aware of the option to receive their social security payments weekly.<sup>54</sup> The Public Interest Advocacy Centre recommended that ‘all Centrelink customers for whom family violence has been identified, should be routinely informed of the possibility of receiving weekly payments’.<sup>55</sup>

49 *Social Security (Administration) Act 1999* (Cth) s 43; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.10.3.35] (Weekly Payments for Most Vulnerable People).

50 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.10.3.35] (Weekly Payments for Most Vulnerable People). See also *Social Security (Administration) (Weekly Payments—Classes of Persons) (DEEWR) Specification 2010* (Cth); *Social Security (Administration) (Weekly Payments—Classes of Persons) (FaHCSIA) Specification 2010* (Cth).

51 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.10.3.35] (Weekly Payments for Most Vulnerable People).

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

53 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 35.

54 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.

55 Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011.



8.51 The North Australian Aboriginal Justice Agency (NAAJA) raised an additional concern with the requirement that weekly payments are only available to the ‘most vulnerable’.

We are currently hesitant to advise people to ask for weekly payments in the NT because we are concerned that this will trigger an assessment of the customer as a ‘vulnerable’ person for the purposes of compulsory income management’.<sup>56</sup>

### **ALRC’s views**

8.52 In order to increase awareness of the availability of weekly payments, the ALRC considers that information about weekly payments should be included as part of the information provided to all customers in Proposal 4–8.

8.53 As discussed in Chapter 13, a ‘vulnerable welfare payment recipient’ may be subjected to the imposition of income management. An indicator of vulnerability includes financial hardship, financial exploitation, failure to undertake reasonable self-care or homelessness or risk of homelessness.<sup>57</sup>

8.54 The prospect of being subject to income management may mean that people experiencing family violence do not request weekly payments due to fear that they will be placed on compulsory income management. Consequently, such reluctance may jeopardise a victim’s safety as he or she is unable to access the required financial assistance.

8.55 In Chapter 13, the ALRC makes a proposal that persons experiencing family violence should not be caught by the vulnerability indicators for income management, and therefore not placed on compulsory income management. The ALRC therefore considers that the proposals made in Chapter 13 in relation to income management should address the concerns raised by stakeholders in relation to weekly payments.

### **Urgent payments**

8.56 Where a social security recipient is suffering severe financial hardship due to ‘exceptional and unforeseen circumstances’, an urgent payment of the person’s next fortnightly payment may be made.<sup>58</sup> Urgent payments result in a lower subsequent payment on the recipient’s usual payment delivery day.

8.57 An ‘urgent payment’ is to be contrasted with a ‘hardship advance payment’ or an ‘advance payment’. A hardship advance payment is an amount of a recipient’s first instalment of social security payment that is paid when first granted, or the first instalment immediately following resumption of payment, to assist people in severe financial hardship, including those recently released from prison. An advance payment is the early delivery of a recipient’s entitlement.<sup>59</sup>

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<sup>56</sup> North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011.

<sup>57</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [11.4.2.20] (Indicators of Vulnerability).

<sup>58</sup> *Ibid.*, [3.10.3.35] (Weekly Payments for Most Vulnerable People).

<sup>59</sup> *Ibid.*, [8.4.2.10] (Urgent Payments).

8.58 The *Guide to Social Security Law* does not refer to family violence as an ‘exceptional and unforeseen circumstance’. However, a one-off urgent payment may be made to a third party on behalf of a social security recipient in exceptional and unforeseen circumstances, where it is necessary to alleviate immediate hardship to the recipient, such as where the recipient is required to change a place of residence because of family breakdown.<sup>60</sup>

### ***Submissions and consultations***

8.59 In the Social Security Issues Paper, the ALRC asked whether family violence should be included in the *Guide to Social Security Law* as an example of an ‘exceptional and unforeseen circumstance’ when considering whether or not to make an urgent payment.<sup>61</sup>

8.60 Stakeholders commented that family violence should be expressly referred to as an ‘exceptional and unforeseen circumstance’.<sup>62</sup> The ADFVC submitted that ‘family violence victims may need additional financial and material support, particularly when they first separate’;<sup>63</sup> and stressed the importance of early access to financial assistance, because ‘women who were able to stabilise their financial situation quickly after separation were doing much better than women who were not’.<sup>64</sup>

8.61 The Commonwealth Ombudsman noted that, although ‘family violence would seem to fall into the broader category of family breakdown ... there would seem to be value in clearly articulating family violence as a relevant consideration for deciding whether to grant an urgent payment’.<sup>65</sup>

8.62 The Welfare Rights Centre Inc Queensland noted difficulties with the requirement that the circumstance be ‘unforeseen’, submitting that ‘[p]eople have been denied urgent payments in cases where they could easily foresee the violence occurring’.<sup>66</sup>

8.63 The Ombudsman raised an additional concern that customers experiencing family violence have been advised that they may access only Crisis Payment or an advance or an urgent payment, rather than a combination of these payments. The Ombudsman noted that such advice was not supported by social security law or policy,

60 *Social Security (Administration) Act 1999* (Cth) ss 43, 44; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [8.4.2.10] (Urgent Payments).

61 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 37.

62 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011; WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011; Public Interest Advocacy Centre, *Submission CFV 40*, 15 April 2011; P Eastal and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

63 ADFVC, *Submission CFV 71*, 11 May 2011.

64 *Ibid.*

65 Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.

66 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

but seemed ‘to indicate that staff are not considering each customer’s individual circumstances before making a decision about their assistance needs’. Accordingly, the Ombudsman suggested that ‘procedural guidance to staff regarding payments and service for customers affected by family violence be updated to provide discretion to staff to consider all available assistance and to offer any or all payments or services required in the customer’s particular circumstances’.<sup>67</sup>

### ***ALRC’s views***

8.64 Although family violence may be considered as ‘family breakdown’, there is an overarching concern that victims of family violence may be refused urgent payments merely because the family violence is ‘foreseen’. The ALRC considers it would be constructive to amend the *Guide to Social Security Law* expressly to refer to family violence as a separate category of circumstance when an urgent payment may be made so that the reference to ‘unforeseen’ is not a consideration in determining whether to make an urgent payment to a person experiencing family violence.

8.65 The ALRC also proposes that clearer guidance should be provided in the *Guide to Social Security Law* to ensure that urgent or advance payments are not refused on the basis that a person is already receiving Crisis Payment.

8.66 In addition, the ALRC considers that information about urgent payments should be included in Proposal 4–8 to ensure that victims of family violence are aware of the possibility of being able to request an urgent payment.

**Proposal 8–3** 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. As urgent payments may not be made because the family violence was ‘foreseeable’, the *Guide to Social Security Law* should be amended expressly to refer to family violence as a separate category of circumstance when urgent payments may be sought.

**Proposal 8–4** The *Guide to Social Security Law* should be amended to provide that urgent payments and advance payments may be made in circumstances of family violence in addition to Crisis Payment.

### **Payment pending review**

8.67 Under ss 131 and 145 of the *Social Security (Administration) Act*, the Secretary may continue payment, pending the outcome of an application for review. If a job seeker asks for a review of a decision to apply a ‘Serious Failure’ or an ‘Unemployment Non-Payment Period’ (discussed in Chapter 7) by an Authorised Review Officer or the Social Security Appeals Tribunal, the job seeker should be paid

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<sup>67</sup> Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.

pending the finalisation of the review.<sup>68</sup> Payment pending review is not available for ‘No Show, No Pay’ or ‘Reconnection Failures’.

8.68 The Welfare Rights Centre NSW indicated that there is a reluctance to grant payment pending a review and suggested that there should be a presumption in favour of payment pending review when the customer is at risk of, or experiencing, family violence.<sup>69</sup>

8.69 The ALRC is concerned that such a proposal for a presumption in favour of payment pending review when a customer is at risk of, or experiencing family violence, may create a ‘two-tier’ system and that others would not also benefit from such a presumption. Therefore, the ALRC does not consider a proposal should be made in this regard in this Inquiry.

### Nominee arrangements

8.70 Part 3A of the *Social Security (Administration) Act* provides for the appointment of nominees for both correspondence and payment of social security.<sup>70</sup> Nominee arrangements provide flexibility for individuals to decide who can act as their ‘agent’, and also operate as a useful mechanism in situations where an individual has limited, intermittent or declining capacity.<sup>71</sup> For victims of family violence, nominee arrangements can be useful for protecting his or her income support when they are in transitory accommodation or have no fixed address.

8.71 A number of safeguards are provided in the *Social Security (Administration) Act* and the *Guide to Social Security Law* to minimise abuse of a nominee appointment. These include safeguards concerning:

- the process of appointment;
- ensuring the capacity of the principal to consent to a nominee arrangement;
- duties of nominees;
- revocation of nominee arrangements; and
- penalties.

8.72 However, under Centrelink arrangements, the nominee need not be the person to whom the social security recipient has granted a power of attorney and there are no checks to ensure that a person holding the social security recipient’s power of attorney is informed of any Centrelink nominee arrangement.

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68 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [6.8] (Payment Pending Review).

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

70 *Social Security (Administration) Act 1999* (Cth) ss 123B, 123C.

71 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008), [70.96].

### ***Appointment of nominees***

8.73 An initial safeguard in nominee arrangements is the requirement that a nominee may only be appointed with the written consent of the person to be appointed, after taking into consideration the wishes of the proposed principal.<sup>72</sup> A copy of the appointment is to be provided to the nominee and the principal.<sup>73</sup> There are also safeguards regarding how a nominee appointment is signed—requests for nominee appointments signed with a cross or mark are not to be accepted unless there is supportive evidence as to the principal’s ‘incapacity’ to consent.<sup>74</sup>

### ***Capability of principal to consent***

8.74 Certain safeguards are in place to ensure that the principal has ‘capability to consent’ to a nominee arrangement. In determining whether a principal is incapable of consenting to the appointment of a nominee, a delegate must have sufficient evidence—such as reliable medical evidence, an order officially appointing a guardian or administrator, or some other authoritative source, such as a social work report.<sup>75</sup>

8.75 Other safeguards include provisions such that where:

- there are questions concerning the principal’s capability to consent, the situation must be investigated;
- the principal is deemed incapable of providing consent, any decision by a delegate to appoint a nominee must be supported by documentary evidence; and
- a principal has a psychiatric disability, a nominee can be appointed where there is a court-appointed arrangement.<sup>76</sup>

### ***Responsibilities and capability of nominees***

8.76 A nominee is required to act in the best interests of the principal.<sup>77</sup> Further, in the appointment of a nominee, a delegate must be satisfied that the proposed nominee understands the responsibilities and appears capable of carrying them out. The *Guide to Social Security Law* states that particular scrutiny should be given to requests where the nominee runs a boarding or rooming establishment, there are multiple voluntary

72 *Social Security (Administration) Act 1999* (Cth) s 123D(2). Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [8.5.1] (Payment Nominee); [8.5.2] (Correspondence Nominee).

73 *Social Security (Administration) Act 1999* (Cth) s 123D(3).

74 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [8.5.1] (Payment Nominee); [8.5.2] (Correspondence Nominee).

75 *Ibid.*, [8.5.1] (Payment Nominee); [8.5.2] (Correspondence Nominee).

76 *Ibid.*, [8.5.1] (Payment Nominee); [8.5.2] (Correspondence Nominee).

77 *Social Security (Administration) Act 1999* (Cth) s 123O(1); Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [8.5.3] (Responsibilities of Nominee).

nominee appointments for the same nominee, or the nominee does not live in the same residence, or in close proximity to, the principal.<sup>78</sup>

#### **Review of nominee arrangements**

8.77 There is no provision for regular review of nominee arrangements by Centrelink. Rather, any reviews of nominee arrangements are conducted as soon as any allegation of the misuse of a social security payment is received.<sup>79</sup> Any allegations of misuse of the nominee arrangements must be referred immediately to a social worker.<sup>80</sup>

#### **Revoking nominee arrangements**

8.78 A nominee arrangement may be revoked in a number of circumstances, including where the nominee:

- informs the Secretary in writing that he or she no longer wishes to be a nominee;<sup>81</sup>
- becomes subject to income management;<sup>82</sup>
- informs the Department of Families, Housing, Community Services and Indigenous Affairs that an event or change of circumstances has occurred, or is likely to occur, which will affect the ability of the nominee to act to the benefit of the principal or failure to comply with certain notices.<sup>83</sup>

#### **Penalties**

8.79 Section 123L of the *Social Security (Administration) Act* requires the nominee to provide a statement regarding the disposal of money under a nominee arrangement. A penalty may apply if the nominee fails to respond to that request.<sup>84</sup> However, no penalty applies in relation to the actual disposal of money under the nominee arrangement. In addition, no penalties attach to breach of duties of the nominee.

#### **Submissions and consultations**

8.80 In the Social Security Issues Paper, the ALRC identified that Centrelink arrangements for nominee appointments, reviews and penalties may allow economic abuse by a family member holding a nominee authority to go unnoticed.<sup>85</sup> The ALRC therefore asked whether social security law or practice concerning nominees should be amended to minimise the potential for financial abuse by people holding nominee authority. The ALRC also asked whether the *Social Security Act* should be amended to

78 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [8.5.3] (Responsibilities of Nominee).

79 Ibid, [8.5.3] (Responsibilities of Nominee).

80 Ibid, [8.5.3] (Responsibilities of Nominee).

81 *Social Security (Administration) Act 1999* (Cth) s 123E(1).

82 Ibid s 123E(1A).

83 Ibid ss 123E(2), 123K, 123L.

84 Ibid ss 123E, 123L.

85 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011); S Ellison and others, *The Legal Needs of Older People in NSW* (2004), prepared for the Law and Justice Foundation of NSW.

recognise other legal authorities of a person nominated by the social security recipient, such as under powers of attorney or enduring guardianship.<sup>86</sup>

8.81 While one stakeholder noted that current nominee arrangements are ‘likely to be used in the best interest of the principal in the majority of circumstances’,<sup>87</sup> some stakeholders raised concerns about the appropriateness, and level of knowledge, of nominee arrangements amongst nominees and principals. Stakeholders also raised concerns about:

- safeguards to determine a person’s suitability and capacity to fulfil the requirements of a nominee;<sup>88</sup>
- a lack of recognition of other legal forms of authority,<sup>89</sup> which may create inconsistencies and confusion;<sup>90</sup>
- the lack of review and assessment as to whether the nominee arrangement is in the principal’s best interest or entered into willingly;<sup>91</sup> and
- lack of penalties attached to the duties of a nominee.<sup>92</sup>

8.82 Stakeholders suggested a number of safeguards that might act to protect against economic abuse in nominee arrangements, including:

- additional checks<sup>93</sup>—such as checks for criminal record, bankruptcy, debt and character references—before a nominee is appointed;<sup>94</sup>
- improved interview arrangements, including that:
- interviews for nominee arrangements be undertaken by a Centrelink social worker or other staff with relevant training to identify and screen for issues of duress and capacity;
- the principal be interviewed without the (proposed) nominee present; and
- where it is impractical for the principal to attend an interview, the principal’s wishes are confirmed by an independent authority;<sup>95</sup>

86 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 29.

87 Elder Abuse Prevention Unit Older Person’s Programs Lifeline Community Care Queensland, *Submission CFV 77*, 31 May 2011.

88 Ibid; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011.

89 Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.

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

91 Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.

92 Elder Abuse Prevention Unit Older Person’s Programs Lifeline Community Care Queensland, *Submission CFV 77*, 31 May 2011.

93 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011.

94 Elder Abuse Prevention Unit Older Person’s Programs Lifeline Community Care Queensland, *Submission CFV 77*, 31 May 2011.

95 Ibid.

- requirements for nominees to keep their financial dealings separate from the principal's entitlement, as well as maintaining receipts and records of expenditure;<sup>96</sup> and
- informing any person holding a power of attorney or enduring guardian of the nominee arrangement.<sup>97</sup>

8.83 The Ombudsman considered that changes such as these would 'foster more consistent decision making and ensure representative arrangements that protect customers rather than potentially exposing them to greater manipulation or abuse'.<sup>98</sup>

8.84 In addition, the Elder Abuse Prevention Unit recommended that penalties should apply to nominees who do not act in the best interest of the principal, such as where the nominee defrauds the principal or Centrelink.<sup>99</sup>

### ***ALRC's views***

8.85 Inherent in any nominee arrangement there is a potential for economic abuse of the principal by the nominee. The ALRC considers that, in the social security context, this may be minimised through additional safeguards but notes that not all nominees will necessarily be a family member of the principal. Therefore, economic abuse or duress in nominee arrangements will not be 'family violence' in all circumstances. To propose review arrangements for nominee arrangements between family members and not for others would create a two-tier system. Likewise, to suggest stronger penalties for family members who are nominees would create a two-tier system but could deter family members from acting as a person's nominee. In addition, the overlap with powers of attorney and enduring guardianship—while at times may be problematic—is beyond the scope of this Inquiry.

8.86 However, the ALRC does consider that some improvements may be made to current safeguards to ensure that decision makers take into consideration the possibility or presence of family violence upon appointment of a nominee.

**Proposal 8–5** The *Guide to Social Security Law* should be amended to provide that, where a delegate is determining a person's 'capability to consent', the effect of family violence is also considered in relation to the person's capability.

<sup>96</sup> Ibid.

<sup>97</sup> WEAVE, *Submission CFV 58*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 57*, 28 April 2011.

<sup>98</sup> Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.

<sup>99</sup> Elder Abuse Prevention Unit Older Person's Programs Lifeline Community Care Queensland, *Submission CFV 77*, 31 May 2011.



## Overpayment

8.87 In delivering social security payments and entitlements, Centrelink is responsible for ensuring customer payments are correct and fraud is minimised.<sup>100</sup> If a person is overpaid a social security pension, allowance or benefit, even when not at fault, the amount overpaid is a debt to Centrelink<sup>101</sup> and can lead to criminal prosecution.<sup>102</sup>

8.88 The social security system allows for flexible arrangements in repayment of debts and, in some circumstances, debt waiver. These concepts are discussed below.

## Recovery of debts

8.89 Centrelink may recover a debt by taking the following actions:

- deduction from a person's social security payment;
- if a person is not receiving a social security payment, a repayment arrangement;
- garnisheeing of a person's wages or bank account; or
- legal proceedings.<sup>103</sup>

8.90 If a person cannot afford debt repayments, the amount of repayment can be negotiated with Centrelink.

8.91 Where Centrelink decides that a payment paid to a third party was made in error, Centrelink may attempt to recover the amount paid from the person who was entitled to the payment, and not from the third party.<sup>104</sup> For example, where a young person's Youth Allowance is paid to a parent and an overpayment occurs, Centrelink will generally seek to recover the overpayment from the young person rather from the parent into whose account the payment was made.

## Submissions and consultations

8.92 The Welfare Rights Centre Inc Queensland suggested an amendment to the *Social Security Act* to allow for fairness in debt repayment for example, in circumstances where a person has a debt but cannot repay due to family violence. In particular, the Centre recommended that a victim of family violence with an outstanding debt could apply for a suspension of the debt repayment.<sup>105</sup>

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100 Australian National Audit Office, *Centrelink Fraud Investigations* (2010), 17.

101 *Social Security Act 1991* (Cth) s 1223.

102 *Criminal Code Act 1995* (Cth) s 135.2(1).

103 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [7.2.1] (Debt Recovery—General Provisions).

104 *Ibid.*

105 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

**ALRC's views**

8.93 As the ALRC did not raise the issue of repayment of debt in the Social Security Issues Paper, the ALRC is seeking further information about the methods and barriers to debt repayment by victims of family violence and whether this affects his or her safety.

**Question 8–2** When a person cannot afford to repay a social security debt, the amount of repayment may be negotiated with Centrelink. In what way, if any, should flexible arrangements for repayment of a social security debt for victims of family violence be improved? For example, should victims of family violence be able to suspend payment of their debt for a defined period of time?

**Waiver of debt**

8.94 Section 1237AAD of the *Social Security Act* provides that the Secretary may exercise a discretion to waive the right to recover a social security debt where a person can demonstrate that:

- ‘special circumstances’ exist; and
- he or she or another person did not ‘knowingly’ make a false statement or ‘knowingly’ omit to comply with the *Social Security Act*, its predecessor, or the *Social Security (Administration) Act*.<sup>106</sup>

8.95 The purpose of s 1237AAD has been described as

to enable a flexible response to the wide range of situations which could give rise to hardship or unfairness in the event of a rigid application of a requirement for recovery of debt. It is inappropriate to constrain that flexibility by imposing a narrow or artificial construction upon the words ... But to anticipate the limits of the categories of possible cases by imposing on the language of the section a fetter upon its application which is not mandated by its words, is to erode its useful purpose.<sup>107</sup>

8.96 The National Welfare Rights Network has previously suggested that s 1237AAD of the *Social Security Act* should be amended to make allowance for ‘situations where women have been pressured by an abusive partner to claim a social security payment as a single person or not to declare the correct amounts of their earnings’.<sup>108</sup>

8.97 A Senate Legal and Constitutional Affairs References Committee Review of Government Compensation Payments, released in 2010, explored the administration and effectiveness of the debt waiver provision and concluded that ‘the recovery of debts ... where debts have been caused by the duress of another person, can clearly

<sup>106</sup> *Social Security Act 1991* (Cth) s 1237AAD.

<sup>107</sup> *Fischer v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2010] FCA 441; *Secretary, Department of Social Security v Hales* (1998) FCR 155.

<sup>108</sup> Senate Legal and Constitutional Affairs References Committee, *Review of Government Compensation Payments* (2010), [3.25].

create unfair and unjust outcomes'.<sup>109</sup> The committee therefore recommended that 'the Australian Government review waiver of debt provisions contained in social security legislation and consider amendments to that legislation where current provisions could cause unfair and unjust outcomes for welfare recipients'.<sup>110</sup>

8.98 In the Welfare Rights Centre NSW's submission to the Senate's review, the Centre highlighted concerns around debt waiver provisions where 'a person is in that position due to domestic violence or acting under duress, usually from an ex-partner'.<sup>111</sup> The Centre suggested that an amendment be made to s 1237AAD to 'make allowance for situations where women have been pressured by an abusive partner to claim a social security payment as a single person or not to declare the correct amounts of their earnings'.<sup>112</sup>

### ***Special circumstances***

8.99 The *Guide to Social Security Law* states that 'special circumstances' are circumstances that are unusual, uncommon or exceptional—'special enough circumstances ... that make it desirable to waive'.<sup>113</sup>

8.100 The *Guide to Social Security Law* requires consideration of the person's individual circumstances, but also a consideration of the general administration of the social security system. A special circumstances waiver would be appropriate only if the person's particular circumstances made it unjust for the general rule—that is, to repay the debt—to apply.<sup>114</sup>

8.101 The *Guide to Social Security Law* states that it is not possible to set out a complete list of the relevant factors to be taken into account in determining whether special circumstances exist. However, factors to consider include the person's physical and emotional state and decision-making capacity and financial circumstances.<sup>115</sup> The *Guide to Social Security Law* does not expressly direct the decision maker to consider family violence in determining whether circumstances are 'special'.

### ***Knowledge***

8.102 The discretion to waive a debt may not be used where a debt is attributable, even in part, to knowingly false statements or failure to comply with the *Social Security Act*

<sup>109</sup> Ibid, [3.51].

<sup>110</sup> Ibid, Rec 6.

<sup>111</sup> Ibid, 44.

<sup>112</sup> Ibid, 45.

<sup>113</sup> Davy and Secretary, *Department of Employment and Workplace Relations* [2007] AATA 1114; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [6.7.3.40] (Waiver of Debt on the Basis of Special Circumstances).

<sup>114</sup> Davy and Secretary, *Department of Employment and Workplace Relations* [2007] AATA 1114; Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [6.7.3.40] (Waiver of Debt on the Basis of Special Circumstances).

<sup>115</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [6.7.3.40] (Waiver of Debt on the Basis of Special Circumstances).

by a third party. The *Guide to Social Security Law* states that this knowledge must be actual and not merely constructive knowledge.<sup>116</sup> It does not refer to examples of family violence that may impinge on a person's knowledge.

8.103 Case law, however, provides that it is open to infer that a person had actual knowledge of their obligations where there were opportunities for the person to gain that knowledge and where there were no obstacles to acquire the knowledge.<sup>117</sup> Such obstacles that may be considered as preventing understanding of obligations may include a person's emotional or mental state. For example, as a result of emotional trauma and concern for family safety, the person's ability to comprehend obligations and responsibilities may be reduced.<sup>118</sup>

8.104 However, in cases of family violence, false statements or failure to comply with the *Social Security Act* may be attributable to an abusing partner—for example, where the abusing partner insists that his or her partner does not declare true income, employment circumstances, or presence in the family home in order to receive a payment.

8.105 In *Watson v Secretary, Department of Family and Community Services*,<sup>119</sup> Mrs Watson was subjected to verbal and physical abuse from her partner. She was assaulted repeatedly to 'keep her in line' and on several occasions was hospitalised with bruising and broken bones. When she attempted to leave her partner, he told her that 'If you leave I will kill you and your children'. The marriage broke up only when Mr Watson was imprisoned for social security fraud.

8.106 Mrs Watson had been receiving social security benefits of her own. These benefits were higher than they should have been because of her husband's undeclared income, and when Mr Watson's fraud became known, a substantial overpayment debt was raised against her. Mrs Watson sought waiver under s 1237AAD. It was open to the Secretary to find that Mrs Watson's own statements had not been made 'knowingly' because they had been made under coercion, but he could not waive the debt because Mr Watson ('another person') had the requisite knowledge.

8.107 Concerns have been raised in relation to the failure of s 1237AAD to recognise the effect of what is known as the 'battered wives syndrome'.<sup>120</sup> The National Welfare Rights Network has suggested that the reference to 'another person' should be amended to read 'or another person acting as an agent for the debtor':

Such an amendment would cover the situation where the debtor was instrumental in procuring the false statement or representation or the failure or omission to comply

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

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

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

119 *Watson v Secretary, Department of Family and Community Services* [2002] AATA 311.

120 National Welfare Rights Network, *Redressing the Balance of Risk and Responsibility Through Active Debt Prevention Strategies* (2009).

with the relevant legislation, but would not capture a wife or partner who was acting under duress.<sup>121</sup>

### ***Submissions and consultations***

8.108 In the Social Security Issues Paper, the ALRC asked whether the *Social Security Act* should be amended expressly to provide for waiver of debt in situations where a person is subject to duress, undue influence or economic abuse.<sup>122</sup>

8.109 Stakeholders who responded to this question generally supported an amendment to s 1237AAD of the *Social Security Act* to provide for debts to be waived in situations where a person has been subjected to duress or financial abuse in relation to the debt.<sup>123</sup> Professors Patricia Easteal and Derek Emerson-Elliott recommend that s 1237AAD of the *Social Security Act* should be amended either to remove the reference to ‘or another person’.<sup>124</sup>

8.110 For example, the Welfare Rights Centre NSW submitted that, ‘[i]n situations where, in the context of family violence, it would be appropriate to recover a debt from a person other than the recipient, it should be possible to do so’.<sup>125</sup>

### ***ALRC’s views***

8.111 The ALRC is concerned that victims of family violence may be required to repay a debt which was incurred due to duress or coercion by a family member. The ALRC does not consider that removing the words ‘or another person’ would remedy this situation. To do so may mean that circumstances where a nominee has ‘knowingly’ made a false statement or omitted to comply with the *Social Security Act* may mean that the debt will never be recoverable. The ALRC also notes that there may be concerns that if another person, such as a nominee, makes a false statement or omits to comply with the Act, the principal may be liable to repay the debt.

8.112 It may be more appropriate to qualify the term ‘or another person’ with the words ‘acting as an agent for the debtor’. Such an amendment to s 1237AAD should, in the ALRC’s opinion, address circumstances such as those in *Watson*. There may also be value in listing family violence as a ‘special circumstance’ under s 1237AAD in the *Guide to Social Security Law*. The ALRC is reluctant to propose an amendment to s 1237AAD itself as to do so may limit the flexibility intended to be provided by the section. However, care should be taken to ensure that such family violence is verified so as to avoid false claims of family violence in order to avoid repayment of a debt.

121 Ibid.

122 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 28.

123 ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011.

124 P Easteal and D Emerson-Elliott, *Submission CFV 05*, 23 March 2011.

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

**Proposal 8–6** Section 1237AAD of the *Social Security Act 1991* (Cth) provides that the Secretary may waive the right to recover a debt where special circumstances exist and the debtor or another person did not ‘knowingly’ make a false statement or ‘knowingly’ omit to comply with the *Social Security Act*. Section 1237AAD should be amended to provide that the Secretary of FaHCSIA may waive the right to recover all or part of a debt if the Secretary is satisfied that ‘the debt did not result wholly or partly from the debtor or another person acting as an agent for the debtor’.

**Proposal 8–7** The *Guide to Social Security Law* should be amended expressly to refer to family violence as a ‘special circumstance’ for the purposes of s 1237AAD of the *Social Security Act 1991* (Cth).

### Criminal charges

8.113 Obtaining a financial advantage from a Commonwealth entity, such as Centrelink, where the person knows or believes that he or she is not eligible to receive that financial advantage, is a criminal offence under the *Criminal Code 1995* (Cth).<sup>126</sup>

8.114 Referral of cases to the Commonwealth Director of Public Prosecutions (CDPP) is a decision for Centrelink. The ALRC understands that, as part of the referral process, for cases to qualify for investigation and consideration of prosecution action they must undergo assessment and satisfy Centrelink’s *National Case Selection Guidelines*.<sup>127</sup> Investigation outcomes can range from an administrative remedy through to referral to the CDPP for consideration of prosecution.<sup>128</sup>

8.115 The exception is serious fraud cases that have been assessed by Centrelink’s Intelligence staff as a high priority and must be investigated. The ultimate decision whether or not to prosecute is made by the CDPP.

8.116 NAAJA raised concerns that criminal charges may apply where a person intentionally obtained a financial advantage from Centrelink but the reason for obtaining the financial advantage was under circumstances of family violence through duress or economic abuse.<sup>129</sup>

8.117 The ALRC did not raise Centrelink’s referral process to the CDPP in the Social Security Issues Paper. However, the ALRC considers that, as a result of the proposals in Chapter 4 in relation to screening and information sharing, information about family violence should be better captured within Centrelink, which in turn, should inform the referral process to the CDPP.

126 *Criminal Code Act 1995* (Cth) s 135.2(1).

127 Australian National Audit Office, *Centrelink Fraud Investigations* (2010).

128 Ibid.

129 North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011.



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## Part C—Child Support and Family Assistance

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### Chapters

- 9. Child Support—Frameworks, Assessment and Collection
- 10. Child Support—Agreements, Personal Information, Informal Carers
- 11. Child Support and Family Assistance—Intersections and Alignments
- 12. Family Assistance

### Proposals and Questions in this Part

**Proposal 9–1** The *Child Support Guide* should be amended to include:

- (a) the definition of family violence in Proposal 3–1;
- (b) the nature, features and dynamics of family violence including: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children.

In addition, the *Child Support Guide* should refer to 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.

**Proposal 9–2** The *Child Support Guide* should provide that the Child Support Agency should screen for family violence when a payee:

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



- (c) requests that the Child Support Agency not commence, or terminate, enforcement action or departure prohibition orders.

**Proposal 9–3** The *Child Support Guide* should provide that Child Support Agency staff refer to Centrelink social workers payees who have disclosed family violence, when the payee:

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

**Proposal 9–4** The *Child Support Guide* should provide that the Child Support Agency should contact a customer to screen for family violence prior to initiating significant action against the other party, including:

- (a) departure determinations;
- (b) court actions to recover child support debt; and
- (c) departure prohibition orders.

**Proposal 9–5** The *Child Support Guide* should provide that, when a customer has disclosed family violence, the Child Support Agency should consult with the customer and consider concerns regarding the risk of family violence, prior to initiating significant action against the other party, including:

- (a) departure determinations;
- (b) court actions to recover child support debt; and
- (c) departure prohibition orders.

**Proposal 9–6** The *Child Support Guide* should provide that the Child Support Agency should screen for family violence prior to requiring a payee to collect privately pursuant to s 38B of the *Child Support (Registration and Collection) Act 1988* (Cth).

**Question 10–1** Should the Child Support Agency ensure that notices of assessment pursuant to s 76 of the *Child Support (Assessment) Act 1989* (Cth) do not include parties' names?

**Proposal 10–1** The *Child Support Guide* should provide that Child Support Agency forms or supporting documentation containing offensive material should be referred to a senior officer. The senior officer should determine whether to inform the other party of the offensive material and, where requested, provide it to the other party.

**Proposal 10–2** The *Child Support Guide* should provide that, where a customer discloses family violence, he or she should be referred to a Centrelink social worker to discuss a Restricted Access Customer System classification.

**Question 10–2** Should the Child Support Agency provide a Restricted Access Customer System classification to a customer who has disclosed family violence:

- (a) at the customer's request; or
- (b) only on the recommendation of a Centrelink social worker?

**Proposal 10–3** Where the Child Support Agency receives a threat against a customer's life, health or welfare by another party to the child support case, the *Child Support Guide* should provide that the Child Support Agency will:

- (a) place a safety concern flag on the threatened customer's file; and
- (b) refer the threatened person to a Centrelink social worker.

**Question 10–3** What reforms, if any, are necessary to improve the safety of victims of family violence who are child support payers?

*The next proposals are presented as alternate options: Proposal 10–4 OR Proposals 10–5, 10–6 and Question 10–4*

**OPTION ONE: Proposal 10–4**

**Proposal 10–4** 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 limitation on the child support eligibility of carers who are neither parents nor legal guardians in section 7B(2)–(3) of the *Child Support (Assessment) Act 1989* (Cth) should be repealed.

**OPTION TWO: Proposals 10–5, 10–6 and 10–7, and Question 10–4**

**Proposal 10–5** 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).

Section 7B(3)(b) of the *Child Support (Assessment) Act 1989* (Cth) should be amended 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'.

**Proposal 10–6** The *Child Support Guide* should provide that:

- (a) where a person who is not a parent or legal guardian carer applies for child support; and
- (b) a parent or legal guardian advises the Child Support Agency that he or she does not consent to the care arrangement; and

- (c) it is alleged that it is unreasonable for a child to live with the parent or legal guardian concerned.

the following should occur:

- (1) a Centrelink social worker should assess whether it is unreasonable for the child to live with the parent or legal guardian who does not consent, and make a recommendation; and
- (2) a senior Child Support Agency officer should determine if it is unreasonable for the child to live with the parent or legal guardian who does not consent, giving consideration to the Centrelink social worker's recommendation.

**Proposal 10–7** The *Child Support Guide* should include guidelines for assessment of circumstances in which it may be unreasonable for a child to live with a parent or legal guardian.

**Question 10–4** Should the *Child Support Guide* be amended to specify the Child Support Agency's response to an application for child support from a carer who is not a parent or legal guardian of the child, where:

- (a) only one of the child's parents consents to the care arrangements; or
- (b) neither of the child's parent consents to the care arrangements, and it is unreasonable for the child to live with one parent?

In practice, how does the Child Support Agency respond to an application for child support in these circumstances?

**Proposal 11–1** 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. A *New Tax System (Family Assistance) Act 1999* (Cth) should be amended 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' on specified grounds, including family violence.

**Proposal 11–2** The *Family Assistance Guide* should be amended to provide additional information regarding:

- (a) the duration, and process for determining the duration, of family violence exemptions from the 'reasonable maintenance action' requirement; and
- (b) the exemption review process.

**Proposal 11–3** The Centrelink e-Reference includes information and procedure regarding partial exemptions from the 'reasonable maintenance action' requirement. The *Family Assistance Guide* should be amended to make clear the availability of these partial exemptions.

**Proposal 12–1** The *Family Assistance Guide* should be amended to include:

- (a) the definition of family violence in Proposal 3–1; and

- (b) the nature, features and dynamics of family violence including: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children.

In addition, the *Family Assistance Guide* should refer to 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.

**Proposal 12–2** The *Family Assistance Guide* should be amended expressly to include ‘family violence’ as a reason for an indefinite exemption from the requirement to provide a partner’s tax file number.

**Proposal 12–3** In relation to Child Care Benefit for care provided by an approved child care service, the *Family Assistance Guide* should list family violence as an example of ‘exceptional circumstances’ for the purposes of:

- (a) exceptions from the work/training/study test; and
- (b) circumstances where more than 50 hours of weekly Child Care Benefit is available.

**Proposal 12–4** 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’. A *New Tax System (Family Assistance) Act 1999* (Cth) should be amended 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.

**Proposal 12–5** The *Family Assistance Guide* should be amended to provide definitions of abuse and neglect.



## 9. Child Support—Frameworks, Assessment and Collection

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### Summary

9.1 This chapter provides an overview of the child support frameworks relevant to this Inquiry: the legal framework and the agencies that administer it, and the policy framework—including the objectives that underpin the child support scheme. The chapter then outlines the relevance of family violence in the child support system, and proposes reforms to the key areas of interpretative frameworks around family violence, child support assessment, and the collection and enforcement of child support.

9.2 The reforms proposed in this chapter would facilitate appropriate management of child support cases by the Child Support Agency, where a customer is at risk of family violence. The proposed reforms complement the proposals in Chapter 4, and relate primarily to screening and referrals at certain key points in a child support case. In particular, the ALRC proposes that the Child Support Agency should screen for family violence, and consult with customers who have disclosed family violence, prior to initiating significant action against the other party.

## Overview

9.3 The child support scheme was established in 1988 to enforce children's rights to be supported by both their parents.<sup>1</sup> Before this, parents could obtain child support only through agreements or court orders. The legislative basis of the scheme is the *Child Support (Registration and Collection) Act 1988* (Cth) and the *Child Support (Assessment) Act 1989* (Cth). The CSA administers these Acts.

9.4 Both parents of a child may apply for child support, and in certain circumstances non-parent carers may also be eligible for child support.<sup>2</sup> The CSA uses a legislative formula to assess how much child support a parent should pay.<sup>3</sup> The assessment takes into account both parents' income, the care arrangements, and the number of dependent children, including children from other relationships. Payees may choose to collect child support privately, or for the CSA to collect and transfer child support payments.

9.5 The child support scheme interacts with the family law system. Parenting arrangements are the basis of a party's child support eligibility or liability, and also affect the amount of the child support assessment. In this way, child support law governs the child support consequences of decisions made in the family law context. It is the family law system—not the child support system—which is set up to address family violence issues in the resolution of disputes between parents about parenting arrangements.

9.6 The child support scheme also interacts with family assistance system—in particular, through the requirement on Family Tax Benefit (FTB) recipients to obtain child support. The interaction between child support and family assistance is discussed below, and is the primary theme of Chapter 11.

9.7 The CSA is part of the Department of Human Services (DHS). The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) is responsible for 'the development, implementation and monitoring of child support policy'.<sup>4</sup>

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1 Commonwealth, *Parliamentary Debates*, Senate, 17 February 1988, 165 (P Walsh—Minister for Finance).

2 The child support eligibility of non-parent carers is discussed in Ch 10.

3 See *Child Support (Assessment) Act 1989* (Cth) pt 5.

4 Department of Families, Housing, Community Services and Indigenous Affairs, *Overview* <[www.fahcsia.gov.au](http://www.fahcsia.gov.au)> at 21 July 2011.

## Scope of the Inquiry

### Terms of Reference

9.8 The scope of this Inquiry is limited by the Terms of Reference, which direct the ALRC to consider improvements to legal frameworks to protect the safety of victims of family violence.<sup>5</sup> Chapters 9–11 consider how the safety of victims of family violence may be improved by reforms in the area of child support.

9.9 Consequently, the ALRC will not examine a range of issues which—while they may affect victims of family violence—have relevance to a range of CSA customers and the operation of the child support scheme. Reforms to address these issues would be systemic, and beyond the Terms of Reference. Alternatively, recommending narrower reforms that address the effect of these issues solely on victims of family violence would introduce a two-tiered operation to aspects of the child support scheme.

9.10 The ALRC rejects as inappropriate a two-tiered system that would subject victims of family violence to substantially different practices and procedures than other CSA customers. It would compromise the integrity of the child support scheme, and may disadvantage the general CSA customer base.<sup>6</sup>

9.11 Systemic issues that are beyond the Terms of Reference are identified below. Stakeholders also raised numerous compelling issues of a systemic nature in their responses to the *Family Violence and Commonwealth Laws—Child Support and Family Assistance*, ALRC IP 38 (2010) (the Child Support Issues Paper)—some of which are mentioned in this chapter and Chapters 10 and 11.

### Matters outside the Inquiry

#### *Avoidance of child support obligations*

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

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

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5 The full Terms of Reference are set out at the front of this Discussion Paper and are available on the ALRC's website at <[www.alrc.gov.au](http://www.alrc.gov.au)>.

6 See discussion of 'system integrity' in Ch 2.

7 H McKenzie and K Cook, 'The Influence of Child Support and Welfare on Single Parent Families' (2007) 45 *Just Policy* 13, 15.



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

9.15 Avoidance of child support by payers is an issue that affects a broad range of payees, including those who may not be victims of family violence. Addressing this issue may require systemic reforms to the child support scheme that are beyond this Inquiry’s Terms of Reference.<sup>10</sup>

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

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

9.17 Child support legislation empowers the CSA to conduct investigations, however the CSA is not required to conduct any inquiries or investigations in making administrative assessments.<sup>11</sup> The *Child Support (Assessment) Act 1989* (Cth) also provides that the CSA may—but is not required to—conduct inquiries and investigations in making determinations about changes to child support assessments (also referred to as ‘departure’ determinations).<sup>12</sup>

9.18 The ALRC understands that the CSA does not, in practice, actively investigate cases. Consequently parents and carers may need to investigate the other parties’ financial circumstances themselves—for example, to support a change of assessment application. Where parents are unable to do this, they may be financially disadvantaged.<sup>13</sup>

9.19 This issue is relevant to victims of family violence, who may be ill-equipped to investigate the assets and income of persons who have used violence against them. However, the adequacy of CSA investigatory powers, and the degree to which CSA uses its existing powers, is a broad issue in relation to the child support scheme, and will not be explored at large by the ALRC in this Inquiry.

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

9 R Patrick, K Cook and A Taket, ‘Multiple Barriers to Obtaining Child Support: Experiences of Women Leaving Violent Partners’ (2007) 45 *Just Policy* 21, 26.

10 The full Terms of Reference are set out at the front of this Discussion Paper and are available on the ALRC’s website at <[www.alrc.gov.au](http://www.alrc.gov.au)>.

11 *Child Support (Assessment) Act 1989* (Cth) ss 29, 66D, 160, 161, 162A; *Child Support (Registration and Collection) Act 1988* (Cth) ss 120, 121A.

12 *Child Support (Assessment) Act 1989* (Cth) ss 98H(1)(b), 98Q(1)(b); Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011.

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

**Percentage of care**

9.20 The ‘percentage of care’ is the amount of time a parent or carer provides care for a child. A person must provide at least 35% of a child’s care to be eligible for both child support payments and FTB.<sup>14</sup> The percentage of care also affects the amount of child support and family assistance entitlements. This is an area where child support and family assistance laws intersect with family law.

9.21 It is possible that parents may seek parenting orders or agreements under the *Family Law Act 1975* (Cth) that will affect the child support assessment under the *Child Support (Assessment) Act*, or FTB under *A New Tax System (Family Assistance) Act 1999* (Cth).

9.22 The *Evaluation of the 2006 Family Law Reforms* by the Australian Institute of Family Studies (AIFS), released in December 2009, considered whether child support is relevant to positions adopted by parents in relation to parenting arrangements under the *Family Law Act*. Parents may wish to increase their care percentage to reduce their child support liability or, conversely, resist a reduction in their care percentage to maintain their child support entitlements.<sup>15</sup> Maintaining or increasing family assistance may also provide such motivation.

9.23 Manipulation of care arrangements to alter the child support assessment may affect victims of family violence, potentially motivating persons who use violence to seek more time with their children to minimise their child support assessment. However, this issue is not limited to cases of family violence. Reforms to child support and family assistance legislation to address the issue would be systemic in nature, affecting the child support formula and the rules for determining FTB. As discussed below, reforms to ensure family violence is suitably considered in determining parenting arrangements should be—and have been—aimed at the family law system.

9.24 While the legislative use of percentage of care for child support and family assistance is beyond the reference scope, in the Child Support Issues Paper, the ALRC raised for consideration the rules to determine the percentage of care—particularly in those cases when parents dispute the facts in relation to care provided. This is discussed in Chapter 11.

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14 *Child Support (Assessment) Act 1989* (Cth) ss 5(3), 7B(1). *A New Tax System (Family Assistance) Act 1999* (Cth) s 25. FTB is described in Ch 12.

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

## Legal and policy framework

### Objectives of the child support scheme

9.25 Associate Professor Bruce Smyth has described the policy ‘backbone’ of the child support scheme:

The Scheme was designed to ensure that: (a) children of separated or divorced parents receive adequate financial support; (b) both parents contribute to the cost of supporting their children according to their respective capacities to do so; and (c) government expenditure is restricted to the minimum necessary to attain these objectives. The design of the Scheme also seeks to avoid work disincentives for parents, and to be ‘simple, flexible, efficient’ and non-intrusive in its operation.<sup>16</sup>

9.26 Some of these design aims are reflected in the child support legislation. The object provisions in the two Acts differ. The *Child Support (Assessment) Act* identifies its principal object as ensuring ‘that children receive a proper level of financial support from their parents’.<sup>17</sup> The Act also lists particular objects non-exhaustively, including that:

- the amount of child support provided by parents is determined
  - ‘according to their capacity’, and
  - ‘in accordance with the costs of children’;
- carers are able to have the amount of child support ‘readily determined without the need to resort to court proceedings’; and
- children ‘share in changes in the standard of living of both their parents, whether or not they are living with both or either of them’.<sup>18</sup>

9.27 The *Child Support (Registration and Collection) Act* identifies two ‘principal objects’, which are that:

- ‘children receive from their parents the financial support that the parents are liable to provide’, and
- periodic amounts of child support are paid on ‘a regular and timely basis’.<sup>19</sup>

9.28 Both Acts state that Australia should be positioned to give effect to its international obligations.<sup>20</sup> The objects of the Acts do not refer to family violence. However, the *Child Support Guide* states that the

CSA operates in a sensitive environment and must avoid, as far as possible, actions which could contribute to family violence.<sup>21</sup>

<sup>16</sup> B Smyth, ‘Child Support Policy in Australia—Back to Basics?’ (2004) (67) *Family Matters* 42, 43.

<sup>17</sup> *Child Support (Assessment) Act 1989* (Cth) s 4(1).

<sup>18</sup> *Ibid* s 4(2).

<sup>19</sup> *Child Support (Registration and Collection) Act 1988* (Cth) s 3(1).

<sup>20</sup> *Child Support (Assessment) Act 1989* (Cth) s 4(e); *Child Support (Registration and Collection) Act 1988* (Cth) s 3(c).

<sup>21</sup> Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [6.10.1].

9.29 Mr David Richmond, in the report *Delivering Quality Outcomes: Report of the Review of Decision Making and Quality Assurance Processes of the Child Support Program* (the Richmond Review), noted that the philosophy of the CSA has changed, in particular over the period 2006–2009:

The Program has shifted from one focused primarily on collection and transfer of child support for the benefit of children, to a more holistic approach aimed at not only ensuring the financial support for children in separated families but to supporting separated parents to receive emotional, financial and legal assistance to enable them to meet the emotional and financial needs of their children.<sup>22</sup>

## Child support interactions

### Family assistance

9.30 Child support cannot be discussed in isolation from family assistance. As the Ministerial Taskforce on Child Support (Ministerial Taskforce) remarked, the

operation of the Child Support Scheme cannot be fully understood without understanding its interaction with the income support system and payments to help families with the costs of children.<sup>23</sup>

9.31 The key components of this relationship between child support legislation and family assistance legislation are necessary background for this chapter.<sup>24</sup>

9.32 Persons eligible for child support who receive more than the base rate of the family assistance payment, FTB Part A, are generally required to apply for a child support assessment and to collect—or opt for CSA to collect—the full assessed amount of child support. This is known as the ‘reasonable maintenance action’ requirement. Exemptions are available, including in cases of family violence. Family violence exemptions are discussed in more detail in Chapter 11.

9.33 Another connection between child support and family assistance is the Maintenance Income test, which reflects that an individual’s FTB Part A calculation takes into account estimated child support income. Under this test, a person’s FTB Part A is reduced by fifty cents for every dollar of child support, above an exempted amount, until the base rate of FTB Part A is reached.<sup>25</sup>

9.34 The Ministerial Taskforce noted that the reasonable maintenance action requirement and the maintenance income test

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22 D Richmond, *Delivering Quality Outcomes—Report of the Review of Decision Making and Quality Assurance Processes of the Child Support Program* (2010), [4.1.6].

23 Ministerial Taskforce on Child Support, *In the Best Interests of Children—Reforming the Child Support Scheme* (2005), [4].

24 The interaction of the two regimes is discussed in more detail in Ch 11, and family assistance legislation is discussed more generally in Ch 12.

25 See Centrelink, *Maintenance Income Test* <[www.centrelink.gov.au](http://www.centrelink.gov.au)> at 22 July 2011.

are central to the objective of limiting Commonwealth expenditure to the minimum necessary for ensuring that children's needs are met, and shifting the primary responsibility of supporting children back to separated parents.<sup>26</sup>

9.35 Centrelink administers family assistance payments on behalf of the Family Assistance Office (FAO). In this role, it ensures that persons eligible for more than the base rate of FTB Part A 'take reasonable action to obtain child support', and it adjusts the FTB payments of people receiving child support payments.<sup>27</sup>

### **Family law**

9.36 As noted above, the family law system, rather than the child support system, is set up to address family violence issues in regulating disputes about parenting arrangements. Child support legislation governs the child support consequences of arrangements made in the family law context.

9.37 Family violence is a significant factor in determining post-separation parenting arrangements under the *Family Law Act*. Parenting orders are based on the 'best interests of the child' above all other considerations.<sup>28</sup> In determining a child's best interests, the court must consider two 'primary' and 13 'additional' considerations.<sup>29</sup> The primary considerations are:

- (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.<sup>30</sup>

9.38 Family violence is also addressed in the additional considerations: the court must consider any family violence involving the child or a member of his or her family, as well as relevant family violence protection orders.<sup>31</sup> Further, when making a parenting order, a court must ensure that it does not expose a person to an unacceptable risk of family violence and is consistent with any protection order made under state and territory family violence legislation.<sup>32</sup>

9.39 The consideration of family violence and parenting proceedings has been subject to active contemporary review: it has been considered in two 2009 reports and, to a more limited extent, in ALRC Report 114, *Family Violence—A National Legal Response*.<sup>33</sup> At the time of writing this Discussion Paper, the Senate Legal and

26 Ministerial Taskforce on Child Support, *In the Best Interests of Children—Reforming the Child Support Scheme* (2005), [4.2.2].

27 Child Support Agency, *Facts and Figures 08–09* (2009), [1.5.3].

28 *Family Law Act 1975* (Cth) s 60CA.

29 *Ibid* s 60CC.

30 *Ibid* s 60CC(2).

31 *Ibid* s 60CC(2)(j) and (k).

32 *Ibid* s 60CG.

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

Constitutional Affairs Committee was considering the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011.

### Policy and procedural resources

9.40 The CSA's policy resource is *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme*—referred to in this Discussion Paper as the *Child Support Guide*. CSA staff are expected to follow the *Child Support Guide*;<sup>34</sup> and it is accessible to the public online. Policies and guides are not legally binding, but they are a relevant consideration for decision makers and may be taken into account in reviews of CSA decisions.<sup>35</sup>

9.41 Procedural Instructions are step-by-step guides for CSA staff. They are internal, electronically controlled, and subject to ongoing updates.<sup>36</sup> The following Procedural Instructions and CSA electronic resources have been provided to the ALRC: *Update Customer and Assessment Information*; *Opting out and/or discharge arrears*; *Ending assessments*; *Change of Assessment*; *SSAT* [Social Security Appeals Tribunal]; *Security Incident Management*; *Capacity to Pay*; and *Common Module—Family Violence*.<sup>37</sup>

### Other reviews

9.42 This Inquiry is one of a number of contemporary initiatives regarding child support and family violence. The CSA Family Project has been working on a family violence response since 2008, including:

- a consistent approach to family violence that is aligned with other agencies in the Human Services Portfolio
- consistent application of process and support for customers across all areas of Service Delivery
- improved support for customers through clear options and informed choice consistent with the Customer Service Principles
- improved education for staff including training to better understand family violence
- integration of processes to support customers into Procedural Instructions, the Guide and the development of a common module

34 Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [Home].

35 See *Re Confidential and Social Security Appeals Tribunal* (2010) 118 ALD 620, [6]–[7].

36 A number of other internal 'staff support tools' are listed in D Richmond, *Delivering Quality Outcomes—Report of the Review of Decision Making and Quality Assurance Processes of the Child Support Program* (2010), [7.14].

37 Department of Human Services, *PI—Update Customer and Assessment Information*, 5 July 2011; Department of Human Services, *PI—Opting Out and/or Discharge Arrears*, 5 July 2011; Department of Human Services, *PI—Ending Assessments*, 5 July 2011; Department of Human Services, *PI—Change of Assessment*, 5 July 2011; Department of Human Services, *PI—SSAT*, 5 July 2011; Department of Human Services, *Security Incident Management*, 5 July 2011; Department of Human Services, *PI—Capacity to Pay*, 7 June 2011; Department of Human Services, *Common Module—Family Violence*, 7 June 2011.

- system support to identify customers where there are orders in relation to family violence, and
- improved referrals to services that can provide support - building on existing processes and enhanced web support for customers.<sup>38</sup>

9.43 A report on family violence and the CSA was delivered by MyriaD Consulting in 2010: *Final Evaluation Report in the CSA Family Violence Project*. This report is not publicly available.

9.44 Other reports on the child support scheme mentioned in the Discussion Paper are the 2010 Richmond Review on CSA decision-making and quality-assurance processes, and the Ministerial Taskforce's 2005 report, *In the Best Interests of Children—Reforming the Child Support Scheme*, which prompted fundamental reforms to the child support scheme.

## Child support and family violence

### Conceptual framework

9.45 In the child support context, family violence may have an impact in a number of ways. A parent who has experienced family violence may fear continued interaction with the other parent and avoid all occasions of contact or opportunity for continuing control. This may influence their participation in the child support scheme—prompting decisions to, for example, not seek child support, end child support, change collection methods, or accept insufficient child support. Further, CSA-initiated actions may endanger victims by inflaming conflicts and opening possibilities for pressure and coercion.

9.46 As noted in Chapter 2, this Inquiry's overarching objective is to increase safety by improving legal frameworks. This goal complements the CSA's existing aim of 'avoid[ing] actions which could contribute to family violence', as set out in the *Child Support Guide*.<sup>39</sup> The ALRC's proposed reforms aim to increase the CSA's ability to fulfil its current policy goal.

9.47 The primary way in which the current system accounts for family violence is by exempting individuals from the reasonable maintenance action requirement (that is, allowing them to receive the full amount of FTB Part A, even though they have not applied for child support). This ensures that a victim of family violence does not have to interact with the person who has used violence regarding child support issues, which can be critical in ensuring the victim's safety. The ALRC's proposed reforms should make exemptions more accessible, by ensuring that CSA customers are aware of them, and increasing the likelihood that the CSA or Centrelink will identify persons eligible for them.

38 D Richmond, *Delivering Quality Outcomes—Report of the Review of Decision Making and Quality Assurance Processes of the Child Support Program* (2010), [4.8.6].

39 Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [6.10.1].

9.48 Alongside measures to improve the accessibility of exemptions, the ALRC seeks to enhance the overall accessibility of the child support scheme for victims of family violence. Even though victims may be safer when they obtain an exemption, they may still receive less overall income than if they received child support payments. Generally, family violence contributes to ongoing poverty for victims, and the lack of child support may compound this financial disadvantage.<sup>40</sup> As noted in relation to social security in Chapter 5, safety refers not only to physical safety from harm, but also to financial security and independence.

9.49 Consequently, the ALRC considers that, along with improved access to exemptions, there must also be efforts to increase the ability of family violence victims to obtain child support if they choose to do so. The ALRC's proposals aim, therefore, to ensure appropriate agency involvement to improve the safety of victims who participate in the child support scheme. This approach also serves the underpinning policy of the child support scheme, by facilitating the principal object that children receive proper financial support from both parents.

9.50 An important aspect of this goal is appropriate case-management of child support cases involving family violence. Many proposals regarding case-management are set out in Chapter 4, including a key proposal to give customers full and accurate information about how family violence affects the administration of child support cases. This should enable customers to make informed decisions about whether it is safe to apply for child support, and increase awareness of resources that can improve their safety should they do so, such as, for example, CSA collection of child support. Other key proposals in improving case-management are those regarding screening, staff training and interagency information-sharing.

9.51 Equally important are this chapter's proposed reforms about consulting victims prior to CSA-initiated actions. Victims of family violence are likely best able to understand whether certain actions will place them at risk. The ALRC considers that the CSA should seek input from those experiencing family violence or who have safety concerns arising from family violence—and consider their concerns—prior to initiating such actions.

9.52 The overall effect of these proposed reforms should also minimise opportunities for coercion and other forms of family violence in the child support context—including as a result of minimising CSA-initiated actions which may ignite conflict and trigger coercion.

9.53 These proposals also contribute to self-agency—a theme of this Inquiry—by empowering and enabling victims of family violence to make informed choices about participation in the child support scheme, and to contribute to decisions that affect their safety. The proposals also promote a seamless and effective approach by the CSA,

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40 See R Braaf and I Meyering, *Seeking Security: Promoting Women's Economic Wellbeing Following Domestic Violence* (2011); R Patrick, K Cook and H McKenzie, 'Domestic Violence and the Exemption from Seeking Child Support: Providing Safety or Legitimizing Ongoing Poverty and Fear' (2008) 42 *Social Policy and Administration* 749. See also discussion in Ch 11.



Centrelink and the FAO, in particular, through responsive case-management and interagency information-sharing.

### **Case-management approach**

9.54 The child support scheme primarily adopts a case-management approach to family violence, rather than an outcome-based approach, as in the family law system. In other words, family violence in the child support context generally affects the administration of cases, rather than decisions about parties' rights and entitlements.

9.55 A case-management approach to family violence should not affect the rights of the party who is alleged to have used family violence, as the context is not a forensic one. Where family violence is disclosed, cases should be managed to address potential safety risks—a response that should not affect the rights and entitlements of the person alleged to have used family violence.

9.56 The case-management response to family violence in the child support scheme has notable consequences. In the routine administration of child support cases, CSA staff should not be required to make judgements about whether family violence disclosures are true. The non-judgemental approach to family violence reflects existing policy, as described in the *Common Module—Family Violence*, which provides that staff dealing with customers experiencing family violence should:

- Adopt a non judgemental approach and actively listen to the customer.
- Respect the customer's perception of their situation, without asking probing questions on their specific involvement in family violence.
- Prioritise the customer's child support issues and offer appropriate referral services to assist them with matters that cannot be resolved by the [CSA].<sup>41</sup>

9.57 Where the rights of the person alleged to have used family violence are not affected by family violence disclosures in the child support context, verification requirements should not be onerous. A case-management response that minimises risk should be accessible to victims and should not require high levels of proof, such as findings or orders in state and territory family violence jurisdictions.

9.58 The ALRC considers that this approach provides administrative answers to family violence. Such an approach should minimise opportunities for coercion, or other forms of family violence, in the child support context—including by minimising CSA-initiated actions which may ignite conflict and trigger coercion.

### **Targeting proposals: legislation, policy and procedure**

9.59 The ALRC considers that there is a need for transparency, consistency and accountability in the way the CSA administers cases involving family violence. Consequently, where changes to CSA procedures are considered, proposed reforms are aimed at the *Child Support Guide* rather than the CSA's electronic *Procedural Instructions*, because they are not publicly available. Similarly, proposed reforms to

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41 Department of Human Services, *Common Module—Family Violence*, 7 June 2011.

family assistance procedure are aimed at the *Family Assistance Guide*, rather than the Centrelink e-Reference.

9.60 The ALRC considers that including procedural information in the guides may promote awareness regarding the ways family violence is relevant to the management of child support cases, and the purpose for family violence screening and CSA identification of customers who may be at risk.

## Common interpretative framework

### Definition of family violence

9.61 As discussed in Chapter 3, the child support legislation does not include a definition of family violence. A broad definition is, however, contained in the *Child Support Guide*:

Family violence covers a broad range of controlling behaviours. They are commonly of a physical, sexual, and/or psychological nature, and typically involve fear, harm, intimidation and emotional deprivation. It occurs within a variety of close interpersonal relationships, such as between spouses, partners, parents and children, siblings, and in other relationships where significant others are not part of the physical household but are part of the family and/or are fulfilling the function of family.<sup>42</sup>

9.62 The *Child Support Guide* also provides definitions for the following non-exhaustive list of behaviours that may be involved in family violence: physical abuse; sexual abuse; emotional abuse; verbal abuse; social abuse; economic abuse; and spiritual abuse.<sup>43</sup>

9.63 In Chapter 3, the ALRC has proposed that the following definition of family violence be included in the *Child Support Assessment Act* and the *Child Support (Registration and Collection) Act*, in addition to other Commonwealth legislation:

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

- physical violence;
- sexual assault and other sexually abusive behaviour;
- economic abuse;
- emotional or psychological abuse;
- stalking;
- kidnapping or deprivation of liberty;
- damage to property, irrespective of whether the victim owns the property;
- causing injury or death to an animal irrespective of whether the victim owns the animal; and

42 Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [6.10.1].

43 Ibid, [6.10.1].

- behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.<sup>44</sup>

9.64 In the ALRC’s preliminary consideration, the definition of family violence in the *Child Support Guide* should be amended to reflect this definition. This enhances consistency across the policy and legislative basis of the scheme. It provides victims with clarity and the certainty that family violence will be recognised and treated similarly across Commonwealth laws. It also provides increased certainty and a consistent training-basis for staff—particularly those who work across legislative regimes, such as Centrelink social workers. Further, a consistent definition across legislation and guidelines may foster a shared understanding across agencies, jurisdictions, courts and tribunals.

### Nature, features and dynamics

9.65 In *Family Violence—A National Legal Response*, ALRC Report 114 (2010), the ALRC and the New South Wales Law Reform Commission (the Commissions) recommended that provisions regarding the nature, features and dynamics of family violence should be contained in state and territory family violence legislation. The recommended provision was:

While anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children. In addition, family violence legislation should refer to the particular impact of family violence on: Indigenous persons; those from a culturally and linguistically diverse background; those from the gay, lesbian, bisexual, transgender and intersex communities; older persons; and people with disabilities.<sup>45</sup>

9.66 The Commissions also recommended that the *Family Law Act* should be amended to include a similar provision.<sup>46</sup>

9.67 The ALRC does not consider that such a provision is necessary in the child support legislation—as discussed above, prevention of family violence is not the primary purpose of child support legislation. However, there may be merit in including such a statement in the *Child Support Guide*. This would serve an important educative function—complementing proposals in relation to training in Chapter 4—and provide a contextual basis for case-management and screening. Such a measure also complements proposals regarding definitions in Chapter 3, by establishing a common interpretative framework around family violence across agencies and legal frameworks.

#### **Proposal 9–1** The *Child Support Guide* should be amended to include:

- (a) the definition of family violence in Proposal 3–1;

<sup>44</sup> Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), Recs 5–1, 6–1, 6–4.

<sup>45</sup> Ibid, Rec 7–2.

<sup>46</sup> Ibid, Rec 7–3.

- (b) the nature, features and dynamics of family violence including: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children. In addition, the *Child Support Guide* should refer to 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.

## Assessment and collection of child support

### Ending a child support assessment

9.68 The CSA identifies family violence as a common reason for a payee to end an assessment—that is, ending a child support case.<sup>47</sup> A payee may end a child support assessment pursuant to the *Child Support (Assessment) Act*.<sup>48</sup> However, where a payee receives more than the base rate of FTB Part A, the CSA cannot accept a payee's election to end the assessment without Centrelink approval, unless the payee is no longer eligible for child support.<sup>49</sup>

9.69 Centrelink does not generally approve an election to end an assessment where the payee receives more than the base rate of FTB Part A, except where it grants the payee an exemption from the requirement to take reasonable maintenance action. The *Child Support Guide* provides that when an election to end an assessment is made by a payee who receives more than base rate FTB Part A, and who is 'considered to be at risk of family violence', the CSA will refer him or her to a Centrelink social worker for a risk assessment.<sup>50</sup>

9.70 The Procedural Instruction, *Ending Assessments*, provides that CSA staff should discuss a number of issues with a payee seeking to end an assessment, including the reason for the election, and how it will affect him or her.<sup>51</sup> Under the heading of 'family violence', *Ending Assessments* provides:

If a payee elects to end their case because of family violence, check if they are in receipt of more than the base rate FTB Part A. If the payee is not in receipt of more than the base rate of FTB, proceed to [the next step:] Discuss the effect of the election to end.

<sup>47</sup> Department of Human Services, *PI—Ending Assessments*, 5 July 2011, [2.1]

<sup>48</sup> *Child Support (Assessment) Act 1989* (Cth) s 151(1).

<sup>49</sup> Ibid ss 151(4), 151A, Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [2.10.2], [6.10.1], Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.1.6.40].

<sup>50</sup> Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011 [6.10.1].

<sup>51</sup> Department of Human Services, *PI—Ending Assessments*, 5 July 2011, [2].

If the payee receives more than the base rate of FTB, advise them to contact a Centrelink social worker to discuss options, which may include an exemption. ... Warm transfer the payee to Centrelink to make an appointment with a social worker.<sup>52</sup>

9.71 Both the Procedural Instruction and the *Child Support Guide* appear to indicate that a payee will not be referred to a Centrelink social worker when that payee elects to end an assessment, has disclosed family violence, and does *not* receive more than the base rate of FTB Part A. However, the *Child Support Guide* provides that when the CSA

accepts a payee's election to end a child support assessment due to the threat of family violence, it will record details of why the case was ended on the customer's case records.<sup>53</sup>

9.72 Generally, a payee's election to end an assessment cannot be reversed, but he or she may make a new application for an assessment of child support.<sup>54</sup>

9.73 As this issue was not raised in the Child Support Issues Paper, the ALRC has not provided an outline of stakeholder comments.

#### ***ALRC's views***

9.74 Victims of family violence may be pressured or coerced to end a child support assessment by the other parent. Under current policy, payees receiving more than the base rate of FTB Part A, who elect to end an assessment, will be referred to Centrelink, and, where they disclose family violence, actively referred for an appointment with a Centrelink social worker.

9.75 However, in the ALRC's preliminary view, the *Child Support Guide* should provide that all payees who have disclosed family violence—including payees who receive not more than the base rate of FTB Part A—should be referred to a Centrelink social worker upon a request or election to end an assessment.

9.76 The payee's election—when he or she receives not more than the base rate of FTB Part A—will not affect government expenditure in the form of increased family assistance. However this proposed reform has other significant benefits. Social workers may provide support and referrals to assist payees to:

- improve their safety; or
- where appropriate, to remain within the child support scheme—improving the financial position of the payee and his or her children.

9.77 The ALRC considers that this reform may improve the accessibility of the child support scheme for victims of family violence and protect their safety.

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52 Ibid, [2.1.1]. A warm transfer or referral generally involves a service contacting another service on a customer's behalf.

53 Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [6.10.1].

54 Ibid, [2.10.2].

9.78 The ALRC further considers that a request or election to end a child support assessment should be a trigger for family violence screening for all payees. Screening should facilitate referrals to Centrelink social workers, where family violence is disclosed.

### **Departure from administrative assessment**

9.79 A parent or carer may apply to the CSA for a change of assessment, also known as a ‘departure’ from the administrative assessment, due to ‘special circumstances’.<sup>55</sup> The *Child Support (Assessment) Act* specifies a number of grounds for a departure from administrative assessment of child support by the CSA or a court.<sup>56</sup>

9.80 The CSA or a court may make a departure from the assessment if satisfied that: one or more of the grounds specified in the Act exist; it is ‘just and equitable’ for the child, the payer and the payee; and it is ‘otherwise proper’.<sup>57</sup> Family violence is not referred to in the grounds for departure. However, to a limited extent, violence is one of a number of factors which may be taken into account in determining whether a departure is just, equitable and otherwise proper. Violence may be relevant insofar as determining the period to which the decision applies, as a ‘longer term decision may prevent unnecessary tension’.<sup>58</sup>

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

### **The Richmond Review**

9.82 The Richmond Review reported that CSA staff and stakeholders consider the departure determination procedure ‘overly complex, time consuming, adversarial’ and that it ‘does not deliver quality outcomes to customers’.<sup>59</sup> It noted that the CSA has a reform program in train addressing legislative and non-legislative issues regarding departure. Relevantly to this Inquiry, the objectives for this reform program include:

- to make the process ‘less adversarial’;
- to ‘streamline the process reducing timeframes and the effort required by both the parties and the [CSA]’; and
- to ‘improve the exchange of information between the parties to only that of relevance to the decision (including removal of inflammatory information)’.<sup>60</sup>

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

56 *Ibid* s 117(2).

57 *Ibid* ss 98C(1), 117(1).

58 Department of Human Services, *PI—Change of Assessment*, 5 July 2011, [5.1].

59 D Richmond, *Delivering Quality Outcomes—Report of the Review of Decision Making and Quality Assurance Processes of the Child Support Program* (2010), [4.8.12].

60 *Ibid*, [4.8.12].

9.83 The Richmond Review also recommended certain administrative improvements, such as progression on ‘case management methodology to provide quicker decisions (where appropriate)’ and simplified forms.<sup>61</sup> The ALRC understands that reforms to the departure determination procedure in response to the Richmond Review—by FaHCSIA, DHS and the CSA—are in the process of development and implementation.

#### ***Submissions and consultations***

9.84 In the Child Support Issues Paper, the ALRC asked whether:

- family violence is adequately taken into account in the grounds for a departure determination;<sup>62</sup> and
- reforms are needed to ensure that victims of family violence obtain a departure determination where appropriate.<sup>63</sup>

#### ***Departure determinations and family violence***

9.85 The ALRC received divergent responses about the departure process and family violence. The Law Council of Australia Family Law Section (the Law Council) considered that the CSA’s ‘current practices in supporting victims of family violence, in relation to their applications for assessment or departure, appear to work well.’<sup>64</sup> Other stakeholders noted shortcomings in relation to the treatment of family violence in the departure process—the National Council of Single Mothers and their Children (NCSMC) arguing that departure is ‘a mechanism that provides control and abuse’.<sup>65</sup>

9.86 The Non-Custodial Parent (Shared Parenting) Party did not support potential reforms to this area, nor any of the other potential reforms foreshadowed in the Child Support and Family Violence Issues Paper.<sup>66</sup>

9.87 The Office of the Commonwealth Ombudsman (the Ombudsman) noted that the CSA’s Change of Assessment forms ask whether the person has a protection order against the other party—the only CSA form they are aware of that collects this information. The Ombudsman understands that the CSA requests this information ‘to assist it with deciding how best to arrange the parents’ separate conferences with the decision maker, rather than for any broader purpose’.<sup>67</sup>

#### ***Grounds for departure***

9.88 In relation to the grounds for departure, the Australian Domestic and Family Violence Clearinghouse (ADFVC) stated that, as family violence is not named as a ground, it is unlikely to be adequately taken into account in departure determinations. It

61 Ibid, [3.2.50], [3.2.51].

62 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 17.

63 Ibid, Question 18.

64 Law Council of Australia Family Law Section, *Submission CFV 67*, 5 May 2011.

65 ADFVC, *Submission CFV 53*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011.

66 Non-Custodial Parents Party (Equal Parenting), *Submission CFV 50*, 25 April 2011.

67 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

recommended amendment to the *Child Support (Assessment) Act* to include reference to family violence as grounds for departure by the CSA or court'.<sup>68</sup>

9.89 National Legal Aid presented a different view, arguing that:

the effects of family violence should be capable of consideration without it being necessary to specify it as a separate ground, for example reduced capacity for self support as a direct result of family violence, extra expenses incurred by victims such as the need to relocate, or replace damaged property.<sup>69</sup>

9.90 It suggested that education, training and publications 'should address the capacity to take the effects of family violence into account when considering an application for a departure order'.<sup>70</sup>

***Other measures to ensure victims obtain departure determinations where appropriate***

9.91 Other suggested improvements to departure procedures for victims of family violence included greater use of CSA-initiated departure determinations in family violence cases, and limiting the transfer of information between parties. These stakeholder comments and the ALRC preliminary views on these issues are discussed below and in Chapter 10.

***Investigatory role of CSA***

9.92 Stakeholders raised the issue of CSA investigations. The Australian Association of Social Workers (AASW) noted that:

while the CSA does have investigative powers they do not appear to be utilised to reduce the payee's burden of providing the level [of] proof needed to establish the true income levels of payer. If the income of the payer is disputed then the investigative powers of the agency should be enacted and the payer compelled to comply.<sup>71</sup>

9.93 National Legal Aid made a similar point in arguing for greater use of CSA-initiated departure (discussed below):

The [Change of Assessment] team should be well resourced to thoroughly investigate decisions based on capacity or financial resources (Reason 8), which clients, in their own right, might not have the resources to do, and should also be encouraged to exercise the powers that they have at their disposal to obtain enough information to make a just and equitable decision.<sup>72</sup>

9.94 In a related point, the NCSMC commented that the forms require a 'contemporary and comprehensive financial knowledge of an ex-partner'.<sup>73</sup>

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68 ADFVC, *Submission CFV 53*, 27 April 2011.

69 National Legal Aid, *Submission CFV 81*, 24 June 2011.

70 Ibid.

71 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

72 National Legal Aid, *Submission CFV 81*, 24 June 2011.

73 National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011.



**ALRC's views****Grounds for departure**

9.95 The ALRC does not propose that family violence should be included as a specific legislative ground for departure. The ALRC considers that the existing legislative grounds for departure accommodate consideration of family violence where it is relevant to the application. As discussed above, National Legal Aid has provided examples of where the effects of family violence may be relevant to, and considered in, departure determinations.

9.96 Further, amending the grounds to allow consideration of family violence when it is not otherwise relevant to the assessment would introduce an inappropriate punitive or redistributive element to departure determinations. Such a reform would be contrary to the objectives of the child support scheme as expressed in the *Child Support (Assessment) Act*.

**Investigatory role of CSA**

9.97 The CSA does not actively investigate departure cases, which may disadvantage parents who are unable to investigate the financial circumstances of the other parent themselves. This may include victims of family violence. As noted above, the degree to which CSA uses its investigatory powers is a wide-ranging issue in relation to the child support scheme, and is beyond the Terms of Reference for this Inquiry.<sup>74</sup> However, the ALRC considers that a broader review of the CSA's investigatory role may be timely, particularly given recent changes to percentage of care, discussed in Chapter 11.

**CSA-initiated departure determinations**

9.98 The CSA may initiate a departure from the child support assessment due to 'special circumstances'.<sup>75</sup> There is only one ground on which the CSA may make a determination in these circumstances, namely where the assessment results in

an unjust and inequitable determination of the level of financial support to be provided by the liable parent for the child because of the income, earning capacity, property and financial resources of either parent.<sup>76</sup>

9.99 The CSA must be satisfied that it is 'just and equitable' and 'otherwise proper' to make the determination.<sup>77</sup> The CSA refers to this process as 'Capacity to Pay' (CTP).

9.100 The *Child Support (Assessment) Act* provides that the CSA must notify the parties in writing that it is considering making the determination, and must serve on the parties a summary of the information relevant to its view that a determination should be made to change the assessment.<sup>78</sup> It must also inform the parties that they may reply

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74 The full Terms of Reference are set out at the front of this Discussion Paper and are available on the ALRC's website at <[www.alrc.gov.au](http://www.alrc.gov.au)>.

75 *Child Support (Assessment) Act 1989* (Cth) s 98K.

76 *Ibid* s 98L.

77 *Ibid* s 98L(1).

78 *Ibid* s 98M.

to the summary and, if they do so, must serve a copy of such a reply on the other party.<sup>79</sup>

9.101 The parties may jointly elect that the CSA discontinue proceedings, but only where the payee does not receive an income-tested benefit, pension, or allowance.<sup>80</sup>

9.102 Neither the legislation nor the *Child Support Guide* requires the CSA to consult with either party prior to providing written notification of CSA-initiated departure determination proceedings. However the Procedural Instruction, *Capacity to Pay*, provides that the customer should be contacted by telephone in the initial stages of CSA-initiated assessment, and this contact should be followed up in writing as soon as possible.<sup>81</sup> It also provides that:

During initial case scrutiny or discussions with the customer [the financial investigator] may become aware of a potential family violence issue. It is important that we consider the possible implications a CTP investigation may have on customers.<sup>82</sup>

9.103 *Capacity to Pay* further states that the financial investigator should refer to the following resources on family violence: the CSA's common module and the *Child Support Guide*. The financial investigator should also seek the Team Leader's assistance 'on how to manage the case and the best options for the customer', and thoroughly document his or her contact with the customer, including access to services, and information about the process and the customer's options.<sup>83</sup>

#### ***Submissions and consultations***

9.104 In the Child Support Issues Paper, the ALRC asked whether there should be a requirement in the legislation or the *Child Support Guide* for the CSA to ask payees if they have concerns about family violence before initiating change of assessment determinations.<sup>84</sup>

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79 Ibid ss 98M, 98N.

80 Ibid s 98P.

81 Department of Human Services, *PI—Capacity to Pay*, 7 June 2011, [1.2.1], [1.2.1.1].

82 Ibid, [1.2].

83 Ibid, [1.2].

84 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 19.

**Screening**

9.105 Most stakeholders commented that the CSA should be required to ask payees about family violence concerns before initiating departure determinations.<sup>85</sup> Maria Vnuk noted that such a practice should not be limited to payees—a payer should be consulted ‘if it is the payee who is subject to the CSA departure process’.<sup>86</sup>

9.106 National Legal Aid identified the reasons that victims of family violence do not wish to pursue a departure determination, including fear of the following consequences:

- immediate/threats to personal safety, their own and that of the children;
- an increase in the level of conflict that they and the children have to endure at handover and/or during the period of contact;
- an application by the perpetrator for a greater level of care of the children, including with consequences of increasing the exposure of the children to family violence behaviour;
- an interruption to any payment arrangement (in cases where payments are actually being made).<sup>87</sup>

9.107 It considers that, ‘given the nature of these fears’, CSA should always consult customers before initiating a departure determination.<sup>88</sup>

9.108 The Ombudsman stated that the CSA should

check its computer records to find out whether a person has previously disclosed the existence of family violence before it contacts their former partner to discuss the latter’s financial situation. This preliminary contact with both parents would be an opportunity for the CSA to specifically check whether a parent has a fear that initiating [departure] could place that person at further risk of family violence.<sup>89</sup>

***More CSA-initiated departure determinations in family violence cases***

9.109 A couple of stakeholders argued for greater use of CSA-initiated departure determinations in family violence cases, to ensure that victims of family violence obtain a departure determination where appropriate.<sup>90</sup>

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85 National Legal Aid, *Submission CFV 81*, 24 June 2011; Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011; ADFVC, *Submission CFV 53*, 27 April 2011; Sole Parents’ Union, *Submission CFV 52*, 27 April 2011; Confidential, *Confidential CFV 49*, 21 April 2011; M Vnuk, *Submission CFV 47*, 21 April 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011; Bundaberg Family Relationship Centre, *Submission CFV 04*, 16 March 2011.

86 M Vnuk, *Submission CFV 47*, 21 April 2011.

87 National Legal Aid, *Submission CFV 81*, 24 June 2011.

88 Ibid.

89 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

90 National Legal Aid, *Submission CFV 81*, 24 June 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011.

9.110 National Legal Aid stated that victims may be reluctant to apply for departure themselves, but may wish for the CSA to initiate a departure. It argued that there should be

a mechanism for clients who are too fearful to exercise their right to lodge an application themselves, to be able to request that CSA undertake the application. Such a request could still be subject to the CSA determining whether there was merit in making the application.<sup>91</sup>

### ***ALRC's views***

9.111 Beginning CSA-initiated departure determinations against a parent without consulting the other party may compromise safety, where the other party is a victim of family violence. CSA-initiated departure determinations have the potential to re-ignite conflicts between parties, or trigger coercion and threats in relation to proceedings.

9.112 As noted above, the requirement for consultation or telephone contact with the customers prior to the commencement of CSA-initiated departure is not provided for in the *Child Support Guide*, but is provided for in the CSA's internal Procedural Instruction, *Capacity to Pay*. The ALRC considers that family violence screening should occur at this point, so that cases inappropriate for CSA-initiated departure determinations—such as those that may compromise a victim's safety—may be more readily identified.

9.113 The ALRC further considers that where family violence has been disclosed—whether in screening triggered by anticipated CSA-initiated departure procedures or at another time—the CSA should consult with the victim of family violence before initiating a departure procedure against the other party. The CSA should consider any concerns raised by the victim, to ensure that its actions do not contribute to family violence.

9.114 The ALRC considers that these procedures should be contained in the *Child Support Guide* rather than in Procedural Instructions, for reasons of accessibility to the information, discussed above.

9.115 The ALRC acknowledges that victims of family violence, as well as other disadvantaged and vulnerable CSA customers, may benefit from a mechanism to request CSA-initiated departure determinations. The ALRC has concern, however, that this may dilute the efficacy of the procedure, which is currently based solely on the merits of the case.

## **Collection of child support payments**

### ***Background***

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

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91 National Legal Aid, *Submission CFV 81*, 24 June 2011.

CSA, unless the payee elects that the CSA not collect child support.<sup>92</sup> The *Application for Child Support Assessment* form presents applicants with the option to collect privately at the point they enter the child support system.

9.117 The methods of collection used by CSA can minimise payers' ability to avoid child support obligations. The CSA uses a range of methods to collect payments, including deductions from:

- salary and wages;<sup>93</sup>
- tax refunds;<sup>94</sup>
- social security pensions or benefits;<sup>95</sup>
- family tax benefits;<sup>96</sup>
- payments under the *Veterans' Entitlements Act 1986* (Cth);<sup>97</sup> and
- parental leave payments.<sup>98</sup>

#### ***Promotion of private collection***

9.118 In its 2007–2008 annual report, DHS notes that the 'CSA is committed to encouraging and supporting parents to manage their child support responsibilities independently through private collection arrangements'.<sup>99</sup> The Procedural Instruction, *Opting out and / or discharge arrears*, states that the CSA

encourages private collection arrangements between parents where possible. The benefits of private collection are:

- greater customer control and responsibility over their child support
- greater flexibility in payment type, method and frequency
- less cost to the community
- encouraging greater co-operation and communication between parents.<sup>100</sup>

9.119 Private collection appears to suit families in which there are low levels of conflict. DHS reports that:

CSA research undertaken in 2007–08 clearly indicates that parents using private collection arrangements are more satisfied with the child support system. For parents who are able to cooperate on parental decisions, private collection provides the most flexibility and satisfaction.<sup>101</sup>

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

93 *Ibid* s 43.

94 *Ibid* s 72.

95 *Ibid* s 72AA.

96 *Ibid* s 72AB.

97 *Ibid* s 72AC.

98 *Ibid* s 72AD.

99 Department of Human Services, *Annual Report 2008–2009*, pt 3.

100 Department of Human Services, *PI—Opting Out and/or Discharge Arrears*, 5 July 2011, [Overview].

101 Department of Human Services, *Annual Report 2008–2009*, pt 3.

**Changing method of collection****CSA collection to private collection**

9.120 Where the CSA is collecting child support, a payee (or payer and payee together) may elect to end collection by the CSA. Once the election is made, child support is payable directly to the payee. The CSA must accept the payee's decision to end CSA collection of child support.<sup>102</sup> However, the Procedural Instruction, *Opting out and/or discharge arrears*, provides that where family violence is identified, staff should 'consider if it is appropriate to proceed with the private collect application'.<sup>103</sup>

9.121 *Opting out and/or discharge arrears* states that the CSA must discuss the election to opt out of CSA collection with the payee.<sup>104</sup> The CSA must also provide information to FTB-receiving payees, and encourage further discussions with Centrelink about the effects of the election, to support them in making an 'informed choice'.<sup>105</sup> In this context, *Opting out and/or discharge arrears* identifies family violence as a risk point, and provides that where staff determine that

Family Violence is an issue and/or the payee is being coerced into making an election for private collection, ask if they would like to discuss their options of gaining an exemption from taking the reasonable maintenance action with a Centrelink Social Worker.<sup>106</sup>

**Private collection to CSA collection**

9.122 A payee who has previously chosen to collect payments privately may apply to have the CSA start collecting them. The CSA must accept the payee's application.<sup>107</sup> In these circumstances, the payee may also apply for the CSA to collect unpaid amounts of child support (arrears). The CSA must grant the payee's application to collect any arrears that accumulated in the three-month period before the CSA started enforcing child support payments.<sup>108</sup>

9.123 Where the CSA is satisfied that there are 'exceptional circumstances', it may grant a payee's application to collect arrears accumulated over a period of up to nine months.<sup>109</sup> The *Child Support Guide* provides that exceptional circumstances include where a payer has 'threatened or pressured the payee not to apply for registration for CSA collection'.<sup>110</sup> The payee must provide evidence to show exceptional circumstances.<sup>111</sup>

102 *Child Support (Registration and Collection) Act 1988* (Cth) ss 38, 38A; Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [5.6.1].

103 Department of Human Services, *PI—Opting Out and/or Discharge Arrears*, 5 July 2011, [1].

104 *Ibid.*, [3.1]

105 *Ibid.*, [3.2]

106 *Ibid.*, [3.2].

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

108 *Ibid.* s 28A.

109 *Ibid.* s 28A.

110 Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [5.1.4].

111 *Ibid.*, [5.1.4].

**Family violence**

9.124 CSA collection of child support may improve the safety of victims of family violence. Where the CSA collects child support, victims avoid direct contact about child support payments with persons who have used family violence. Participants in one study reported that they were able to ‘reduce contact and increase safety’ once the CSA collected child support.<sup>112</sup>

9.125 Victims of family violence may elect to collect privately, or to end collection by the CSA, as a result of fear of, or coercion by, a person who has used violence. The ALRC understands that, due to fear and coercion, victims may also collect less child support than they are entitled to—or no child support at all. Statistics of such cases may be ‘hidden’ as the CSA will consider them to be successful private collection cases, in the absence of any information to the contrary.<sup>113</sup> The availability of partial exemptions, where victims privately collect less than the assessed amount of child support, is discussed in Chapter 11.

**Submissions and consultations**

9.126 In the Child Support Issues Paper, the ALRC asked whether reforms are needed to protect victims of family violence who, due to fear of persons who have used violence:

- elect to collect child support privately, or elect to end collection by the CSA; and
- privately collect less than the assessed amount of child support, or no child support.<sup>114</sup>

**Victims may collect child support privately due to safety reasons**

9.127 The ADFVC identified the issue of victims collecting privately—and not collecting the full assessed amount—as an issue of concern, and one that emerged in an ADFVC study. One participant stated:

I’m actually thinking of ringing [the CSA] and saying we’ve got a verbal agreement and losing money because I can’t handle him being on my back and abusing me.<sup>115</sup>

9.128 The AASW stated that these choices may be made by payees as a result of ‘defensive acquiescence’—that is, a payee acquiesces to demands made by the person who uses violence ‘as an act of protection for herself and her children in order to contain the violence’.<sup>116</sup>

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

113 Ibid, 33.

114 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 21.

115 ADFVC, *Submission CFV 53*, 27 April 2011.

116 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

*CSA collection and family violence*

9.129 A number of stakeholders considered CSA collection the appropriate collection method in cases involving family violence.<sup>117</sup> National Legal Aid stated that clients report that CSA actively encourages them to privately collect, and that

an appropriate systems response to the issue of family violence would require a cultural shift in relation to ‘private collect’. Collection of child support by the CSA should be encouraged with CSA collect to be the default wherever family violence is identified. All communications by the CSA with the payer should emphasise that decisions are the responsibility of the CSA and not the victim.<sup>118</sup>

9.130 Similarly, the Ombudsman stated that having collection and enforcement decisions taken out of the hands of some payees, ‘including those who fear a violent reaction’, may be appropriate.<sup>119</sup>

9.131 Some stakeholders argued that the CSA should always collect in cases involving family violence. The CSMC argued that when family violence has been disclosed, the CSA ‘should not allow an election for private collection’.<sup>120</sup> A confidential submission argued that in cases of substantiated family violence, ‘the CSA should act on behalf of the victim in all situations’.<sup>121</sup> The AASW suggested a mechanism whereby, in family violence cases,

CSA collects automatically with the victim being fully informed of the option to make an application for an exemption. This then shifts the responsibility from the individual victim to the ‘system’ potentially removing one area where the perpetrator can exercise control.<sup>122</sup>

9.132 National Legal Aid also suggested a ‘default provision of CSA collection in family violence cases’, as well as a

framework for all correspondence and interactions with the liable parent that suggests that CSA is the payee/debtor. Every effort should be made to distance the payee from the debt and the process to actively counter pressure on the payee.<sup>123</sup>

9.133 National Legal Aid further suggested that an election to collect privately, or end collection by the CSA, should, of itself, prompt family violence screening. It added that appropriate referrals should be made when screening leads to concern regarding the appropriateness of private collection.<sup>124</sup>

9.134 National Legal Aid suggested other reforms complementary to CSA collection in family violence cases.<sup>125</sup> A number of these suggested reforms are addressed in

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117 National Legal Aid, *Submission CFV 81*, 24 June 2011; Confidential, *Confidential CFV 49*, 21 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

118 National Legal Aid, *Submission CFV 81*, 24 June 2011.

119 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

120 Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

121 Confidential, *Confidential CFV 49*, 21 April 2011.

122 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

123 National Legal Aid, *Submission CFV 81*, 24 June 2011.

124 Ibid.

125 Ibid.



Chapter 4, and relate to screening and risk assessment, training, and improved referrals. National Legal Aid also suggested:

- improved education and training regarding a payee’s option, in family violence cases, to collect arrears accumulated over a period of up to nine months, as ‘people are generally not aware of the capacity to collect beyond 3 months’, and
- community legal education promoting CSA collection.<sup>126</sup>

***Private collection may suit parents***

9.135 The Non-Custodial Parents Party (Equal Parenting) opposed the suggested reforms to this area, stating that:

most people (both payers and payees) prefer to have private collections made only because they do not want to deal with the Child Support Agency, in the first instance.<sup>127</sup>

***ALRC’s views***

***Victims may collect child support privately due to safety concerns***

9.136 As noted above, family violence victims may end CSA collection, resulting in less child support or none at all, due to fears for their safety or in response to threats or pressure by the other party. This may lead to financial disadvantage for both payees and their children.

9.137 The ALRC considers that, where a payee who has disclosed family violence elects to end CSA collection, he or she should be referred to a Centrelink social worker—whether or not he or she receives more than the base rate of FTB Part A. The ALRC further considers that the CSA should also screen for family violence in all cases when a payee elects to end CSA collection.

9.138 In the ALRC’s preliminary consideration, screening and referral in these circumstances is not solely meant to ensure an appropriate case-management response. Rather, its primary purpose is to support the payee in taking steps to ensure his or her safety—for example, with appropriate referrals—and to enhance a seamless response to safety concerns across agencies. It may also allow the payee to remain within the child support scheme and continue receiving payments. Alternatively, the payee may be explicitly advised that, where the risk is addressed or diminishes over time, he or she may again elect for CSA to collect child support.

9.139 Family violence, where identified, is also relevant to the management of private collect cases, particularly regarding protection and disclosure of information, discussed below. As ending CSA collection is a family violence ‘risk point’, this may be an appropriate trigger for screening.

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126 Ibid.

127 Non-Custodial Parents Party (Equal Parenting), *Submission CFV 50*, 25 April 2011.

**CSA collection and family violence**

9.140 The ALRC's preliminary view is that CSA collection is generally the most appropriate response to cases involving family violence concerns. CSA collection minimises both the need for direct inter-party contact about child support, and payers' opportunities for non-compliance with their child support obligations. The ALRC recognises that private collection may be suitable for many parents, particularly those in low-conflict cases.

9.141 The ALRC does not consider that payees who have experienced family violence should be denied the option to collect privately. Further, a victim may be best placed to make decisions that will minimise risk and improve his or her safety. Compulsory CSA collection in all cases in which payees have disclosed family violence may deter some victims from disclosure and operates against the individual's capacity to make judgments about appropriate responses.

9.142 In Chapter 4, the ALRC proposes screening for family violence upon application for child support, referrals to Centrelink social workers where family violence is disclosed, and giving customers information about the relevance of family violence to child support. The ALRC considers that CSA collection of child support, and its suitability for family violence cases for the reasons discussed above, should be addressed with the payee at this initial stage, as well as upon disclosure of family violence or safety concerns by a payee.

**Collection and enforcement of arrears and Departure Prohibition Orders****CSA action to enforce arrears**

9.143 When child support cases are registered for CSA collection, child support payments are 'debts due to the Commonwealth',<sup>128</sup> and are recoverable by the CSA.<sup>129</sup> The CSA may take action to enforce child support arrears in a number of courts, including state and territory magistrates courts, the Family Court or the Federal Magistrates Court.<sup>130</sup> Parents may also take court action to enforce child support.<sup>131</sup>

9.144 Although the CSA takes these actions in its own right,<sup>132</sup> section 113(2) of the *Child Support (Registration and Collection) Act* provides that the CSA may take such steps it considers appropriate to keep a payee informed of CSA action to recover child support debts.

9.145 Pursuant to s 47 of the *Financial Management and Accountability Act 1997* (Cth), the CSA must pursue recovery of all registered child support child support debts unless the debt is 'not legally recoverable', or it is uneconomical to pursue its recovery. The *Child Support Guide* provides that a debt may be legally irrecoverable if the CSA

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128 *Child Support (Registration and Collection) Act 1988* (Cth) s 30(1).

129 *Ibid* s 113(1).

130 *Ibid* ss 113(1), 104.

131 *Ibid* ss 113(1)(b)(ii), 113A.

132 *Ibid* s 117(1).

has ‘taken all reasonable action to recover the debt, but has not been able to collect it’, or ‘if a court is likely to rule in favour of the debtor’.<sup>133</sup> A debt may be uneconomical to pursue if ‘it would cost the Commonwealth more than the amount of the debt to recover it’, or the CSA has been unable to trace the whereabouts of a debtor and has not identified any of the debtor’s income or assets.<sup>134</sup>

9.146 The CSA can also make a Departure Prohibition Order (DPO) preventing a person with a child support debt from leaving Australia.<sup>135</sup> Such orders may be issued when a person owes child support, has not made arrangements for it to be paid, and has ‘persistently and without reasonable grounds’<sup>136</sup> failed to make payments. A person may apply for a ‘Departure Authorisation Certificate’, which authorises a person to leave the country.<sup>137</sup> There is no apparent mechanism for a payee to elect that a DPO be revoked.

### ***Election to end CSA collection of arrears***

9.147 The *Child Support (Registration and Collection) Act* provides that payees may elect for the CSA not to collect unpaid amounts of child support when he or she elects to end collection by the CSA.<sup>138</sup> This election may affect his or her FTB because Centrelink generally calculates FTB ‘on the assumption that the payee has received all privately collectable child support’.<sup>139</sup> This includes any amounts that were unpaid when the payee elected for CSA to end collection.

9.148 The *Child Support Guide* and the procedural instruction, *Opting out and/or discharge arrears*, both emphasise the importance of referring payees to Centrelink for advice regarding the consequences of ending CSA collection of arrears on FTB payments.<sup>140</sup>

### ***Submissions and consultations***

9.149 In the Child Support Issues Paper, the ALRC asked if reforms are needed to protect victims of family violence who, due to fear of persons who have used violence, elect to end CSA collection of child support debt, or request that the CSA revoke a DPO.<sup>141</sup>

133 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [5.7.1].

134 Ibid, [5.7.1].

135 *Child Support (Registration and Collection) Act 1988* (Cth) s 72D.

136 Ibid s 72D(c).

137 Ibid s 72K.

138 Ibid ss 38A.

139 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [5.6.1].

140 Ibid [5.6.1], Department of Human Services, *PI—Opting Out and/or Discharge Arrears*, 5 July 2011, [3.2], [4].

141 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 24.

**CSA enforcement, safety and accessibility**

9.150 Several stakeholders made the link between CSA debt enforcement and risks to safety.<sup>142</sup> The ADFVC noted that:

some women in our study felt that any attempt to compel their ex-partner to pay child support would expose them to further abuse or give rise to increased claims for shared care parenting arrangements, accentuating their risk of harm.<sup>143</sup>

9.151 The CSMC and the NCSMC both argued that safety must be prioritised, and the payee is best placed to judge this. ‘Her wishes must [be or form] the basis on which decisions are made, even if this means the non collection of debt’.<sup>144</sup>

9.152 Similarly, the Ombudsman commented that legal action, such as seizing and selling assets, ‘may only inflame the situation and place the payee in danger’. The Ombudsman’s submission also illustrated a link between CSA enforcement measures and the accessibility of the child support scheme:

if the payee believes the CSA’s collection activity goes ‘too far’, he or she may be forced to consider leaving the child support system, either by moving to private collect, or even by ending the child support case altogether.<sup>145</sup>

9.153 The Law Council considered that CSA staff should screen for family violence ‘before initiating action for enforcement or [debt] recovery’.<sup>146</sup> A reform suggested by National Legal Aid was the introduction of ‘safety net provisions to allow customers to reinstate debt where decisions have been made in circumstances of coercion and duress’.<sup>147</sup>

**Departure Prohibition Orders**

9.154 The Ombudsman commented that it had not identified any complaints regarding a payee request to the CSA to revoke a DPO against the payer. Rather, complaints ‘reveal a pattern of the CSA providing very little information to the payee about the steps taken to collect child support, for fear of breaching the payer’s privacy’.<sup>148</sup> The Ombudsman states that they have received

at least one complaint about the CSA’s refusal to inform a payee whether it has issued a DPO. We consider that it is important for payees to be aware if a DPO has been issued so that, in cases of family violence, they can take measures to protect themselves.<sup>149</sup>

142 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011; ADFVC, *Submission CFV 53*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

143 ADFVC, *Submission CFV 53*, 27 April 2011.

144 National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

145 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

146 Law Council of Australia Family Law Section, *Submission CFV 67*, 5 May 2011.

147 National Legal Aid, *Submission CFV 81*, 24 June 2011.

148 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

149 Ibid.

***Informing payees of CSA action***

9.155 In relation to both enforcement action and departure prohibition orders, the Ombudsman stated that the CSA should utilise s 113(2) of the *Child Support (Registration and Collection) Act* to inform a payee of enforcement action, including DPOs. This would ‘enable the payee to comment on the appropriateness of such action given any experience of family violence’.<sup>150</sup> The Ombudsman commented that this would benefit payees generally, allowing them to consider whether they should pursue private legal action to enforce child support debt.<sup>151</sup>

***ALRC’s views******Payee elections and requests for non-pursuit of debt***

9.156 A form of family violence may be to pressure victims to request the CSA to end enforcement of arrears. While there is no mechanism for payees to elect revocation of a DPO, payers who have used violence may coerce or threaten a victim to make a request of the CSA to revoke the DPO. In the ALRC’s preliminary view, referrals to a Centrelink social worker should be made when a payee who has disclosed family violence:

- elects to end CSA collection of child support arrears; or
- requests that the CSA terminate, or not begin, enforcement action or DPOs.

9.157 This may assist in ensuring that necessary supports and referrals are provided to the victim, and facilitate a seamless response across agencies, as discussed above. Social workers may also discuss various options in relation to the debt—for example, the deferral of collection or enforcement until the payee has taken steps to protective steps to ensure safety, or otherwise considers that he or she is not at risk of violence.

9.158 This may also increase the accessibility of the child support scheme by preventing victims from opting out of the system where they consider that CSA collection activity ‘goes too far’.

9.159 The ALRC notes that the CSA may be unable to delay, terminate, or decide not to initiate recovery of debts in response to safety concerns due to the application of the *Financial Management and Accountability Act*. To enable CSA to meet its policy aim of ‘avoid[ing], as far as possible, actions which could contribute to family violence’, an additional ground may need to be inserted into s 47 of this Act, providing that debts may not be pursued where doing so may cause risk of harm. The *Financial Management and Accountability Act* is not within the Terms of Reference,<sup>152</sup> and so no proposal is made in relation to such an amendment, however, the ALRC considers that the Australian government should give this consideration.

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150 Ibid.

151 Ibid.

152 The full Terms of Reference are set out at the front of this Discussion Paper and are available on the ALRC’s website at <[www.alrc.gov.au](http://www.alrc.gov.au)>.

9.160 The ALRC also considers that the CSA should screen for family violence when a payee makes the above election or requests. Where family violence is disclosed, this should trigger a case-management response, and payees may also be provided with information regarding the relevance of family violence to their child support case, in accordance with Proposal 4–8.

9.161 While the ALRC notes the suggestion of National Legal Aid regarding reinstating debts, its preliminary view is that this may create the opportunity, after the event, to raise family violence thereby possibly amounting to an incentive to assert family violence. The issue of re-instating debts is a large one and the ALRC considers that it sits outside the Terms of Reference for this Inquiry.

***Actions to be taken prior to court enforcement action or DPOs***

9.162 The ALRC notes the comments of the Ombudsman that the CSA should utilise s 113(2) of the *Child Support (Registration and Collection) Act* to inform a payee of enforcement action. While the ALRC considers that there is merit to the adoption of this approach, as it may enable a broad range of payees to give informed consideration to private enforcement, no proposal is made in this Discussion Paper as it is beyond the Terms of Reference for this Inquiry.

9.163 It is the ALRC’s preliminary view that, prior to initiating court enforcement actions or making DPOs, the CSA should contact and consult payees who have disclosed family violence. This gives the payee the opportunity to raise safety concerns, which allows the CSA to act in accordance with its policy of avoiding actions that contribute to family violence.

9.164 To complement this measure, the ALRC considers that the CSA should contact the payee to screen for family violence before initiating court enforcement actions or making DPOs against the payer. Screening at this point, as well as upon entry to the child support scheme, may increase the likelihood that customers who may be put at risk by these actions are identified by the CSA.

**CSA-initiated private collection**

9.165 Section 38B of the *Child Support (Registration and Collection) Act* provides that the CSA may require parents to collect privately where the payer has a ‘satisfactory payment record’ which is ‘likely to continue’. The CSA must also be satisfied that a decision to end collection by the CSA is ‘appropriate in relation to the liability’.<sup>153</sup> The *Child Support Guide* provides that it is inappropriate to require private collection where there has been a ‘history of family violence’,<sup>154</sup> and where a person has ‘previously been exempted from having to take reasonable maintenance action’.<sup>155</sup> It is unclear how victims of family violence are identified where they have not previously obtained an exemption.

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153 *Child Support (Registration and Collection) Act 1988* (Cth) s 38B(1).

154 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [5.6.2].

155 *Ibid.*, [5.6.2].

***Submissions and consultations***

9.166 In the Child Support Issues Paper, the ALRC asked whether reforms are needed to ensure that victims of family violence are not required by the CSA to privately collect child support.<sup>156</sup>

9.167 Several stakeholders reiterated that CSA should always collect child support in cases where family violence is disclosed.<sup>157</sup> Maria Vnuk commented that victims of family violence should not be required to collect privately by the CSA, and noted that:

If CSA routinely flags cases where family violence issues have been raised or where there has been a previous exemption then these cases should be excluded from any requirement to collect child support privately.<sup>158</sup>

9.168 The Ombudsman stated that it had been unable to identify any complaints about CSA-initiated private collection, and noted their understanding that this has been ‘used sparingly’ by the CSA since its 1999 introduction. However, the Ombudsman stated that:

If the provision is currently being used, or if the CSA intends to use it in the future, we recommend that it only be considered after detailed discussion with the payee to identify any possible concerns about family violence and the practicality of a private collect arrangement.<sup>159</sup>

***ALRC’s views***

9.169 The CSA-initiated private collection provision may be rarely used by the CSA. However, while this provision is in place, the ALRC considers that the *Child Support Guide* should provide further guidelines for identifying those with a history of family violence who will be exempt from the operation of this provision.

9.170 As noted above, the *Child Support Guide* acknowledges that CSA-initiated private collection is inappropriate—and will not be required—in family violence cases. In the ALRC’s preliminary consideration, further measures are required to ensure that the CSA identifies payees who have experienced violence or have safety concerns. Payees should also be granted the opportunity to raise ‘a history of family violence’ with the CSA, prior to CSA-initiated private collection.

9.171 The ALRC considers that the proposals related to family violence screening by the CSA and other agencies partially address this issue, as payees who have disclosed family violence will be identifiable via a ‘safety concerns flag’. The CSA could check this status before initiating private collection.

9.172 The ALRC further considers that payees should have an opportunity to raise family violence concerns before private collection is initiated by the CSA. The ALRC

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156 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 23.

157 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

158 M Vnuk, *Submission CFV 47*, 21 April 2011.

159 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

therefore considers that the CSA should screen for family violence prior to requiring a payee to collect child support privately pursuant to s 38B(1) of the *Child Support (Registration and Collection) Act*.

### Other CSA-initiated actions

#### *Submissions and consultations*

9.173 In the Child Support Issues Paper, the ALRC asked if the CSA should be required to ask customers about family violence prior to initiating other proceedings or actions and, if so, which proceedings or actions this requirement should apply to.<sup>160</sup>

9.174 Stakeholders considered that family violence screening should be: continual;<sup>161</sup> ‘at all stages of CSA involvement’;<sup>162</sup> or before all CSA actions.<sup>163</sup>

9.175 For example, National Legal Aid considered that, where a person has been identified as having experienced, or being at risk of, family violence, he or she should be contacted ‘before a significant action is taken on the case. For example, in circumstances where a collection opportunity arises, a [CSA initiated departure], a Prescribed [non-agency payment] recorded, a Departure Prohibition Order (DPO) executed, and proceedings for enforcement’.<sup>164</sup>

9.176 It commented this would better inform CSA staff deciding whether to proceed with the intended action. It further commented that Legal Aid staff

have experience of clients becoming anxious because they have become aware that some action is occurring but they are not sure of the nature of that action. If victims are notified sufficiently in advance of any intended action, then it might allay any concerns, and also provide an opportunity for them to take any extra precautions in relation to the safety of themselves and their children.<sup>165</sup>

9.177 Similarly, the Ombudsman considered that

A number of CSA decisions and actions have the potential to place a victim of family violence at greater risk of further violence. ... Further, we consider that any sudden or significant change to the child support assessment has the potential to disturb what may previously have been a reasonably smooth and trouble-free child support case.<sup>166</sup>

#### *ALRC’s views*

9.178 As discussed elsewhere, the ALRC has made a number of proposals regarding screening for family violence and sharing ‘safety concern flags’ between agencies. The ALRC considers that this flag provides an opportunity for CSA to consult with victims

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160 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 20.

161 Confidential, *Confidential CFV 49*, 21 April 2011.

162 National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

163 Sole Parents’ Union, *Submission CFV 52*, 27 April 2011; Bundaberg Family Relationship Centre, *Submission CFV 04*, 16 March 2011, 52.

164 National Legal Aid, *Submission CFV 81*, 24 June 2011.

165 Ibid.

166 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.



of family violence when it makes a change to the child support case. In particular, the ALRC has identified several CSA actions that may increase risk to victims of family violence:

- CSA-initiated departure procedures,
- court actions to recover child support debt, and
- making DPOs.

9.179 This list is non-exhaustive regarding the actions that may be taken by the CSA against the other party to a family violence victim in a child support case.

**Proposal 9–2** The *Child Support Guide* should provide that the Child Support Agency should screen for family violence when a payee:

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

**Proposal 9–3** The *Child Support Guide* should provide that Child Support Agency staff refer to Centrelink social workers payees who have disclosed family violence, when the payee:

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

**Proposal 9–4** The *Child Support Guide* should provide that the Child Support Agency should contact a customer to screen for family violence prior to initiating significant action against the other party, including:

- (a) departure determinations;
- (b) court actions to recover child support debt; and
- (c) departure prohibition orders.

**Proposal 9–5** The *Child Support Guide* should provide that, when a customer has disclosed family violence, the Child Support Agency should consult with the customer and consider concerns regarding the risk of family violence, prior to initiating significant action against the other party, including:

- (a) departure determinations;

- (b) court actions to recover child support debt; and
- (c) departure prohibition orders.

**Proposal 9–6** The *Child Support Guide* should provide that the Child Support Agency should screen for family violence prior to requiring a payee to collect privately pursuant to s 38B of the *Child Support (Registration and Collection) Act 1988* (Cth).



## 10. Child Support—Agreements, Personal Information, Informal Carers

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### Summary

10.1 This chapter begins by discussing two alternatives to Child Support Agency (CSA) assessments: child support agreements, and self-administration of child support. The chapter then addresses the treatment of personal information, including protection and exchange of information, and reporting threats of family violence. Finally, the chapter discusses the child support eligibility of carers who are neither parents nor legal guardians ('informal carers').

10.2 The proposed reforms in this chapter are in two main sets. The first set focuses on information management by the CSA. It includes proposed processes for dealing with offensive material on CSA forms, and providing higher levels of protection for the personal information of victims of family violence. The second set of proposed reforms

aims to remove barriers to child support faced by informal carers. The ALRC has proposed these reforms as children may be in informal care—often provided by grandparents—as a result of family violence.

## Child support agreements

### Background

10.3 The *Child Support (Assessment) Act 1989* (Cth) provides that parties can make an agreement regarding child support, and apply to the CSA to accept the agreement.<sup>1</sup> Parenting plans, as well as maintenance and financial agreements under the *Family Law Act*, may operate as child support agreements, where they comply with the requirements of the *Child Support (Assessment) Act*.<sup>2</sup>

10.4 The provisions that may be included in child support agreements are specified in the *Child Support (Assessment) Act*. Examples include varying the rate of child support payments, and providing for non-periodic payment of child support,<sup>3</sup> such as lump sums, or non-cash payments like school fees or rental payments.

10.5 Child support agreements contain certain safeguards that may protect parties from financial disadvantage. There are two types of child support agreement: binding child support agreements, and limited child support agreements. These agreements contain different safeguards.

10.6 A binding child support agreement must contain a statement from each party that he or she was provided with independent legal advice about the agreement's effect on his or her rights, and its advantages and disadvantages.<sup>4</sup> The agreement must also include a certificate signed by a legal practitioner stating that the advice was provided.<sup>5</sup>

10.7 In a limited child support agreement, a child support assessment must be in force at the time that parties make an application to the CSA to accept the agreement.<sup>6</sup> The annual rate of child support under the agreement must equal or exceed the annual rate of child support under the assessment.<sup>7</sup>

### Submissions and consultations

10.8 In *Family Violence and Commonwealth Laws—Child Support and Family Assistance*, ALRC IP 38 (2010), (the Child Support Issues Paper), the ALRC asked whether these safeguards in limited and binding child support agreements sufficiently protect victims of family violence from entering into disadvantageous agreements as a

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

2 Ibid s 84(5).

3 Ibid s 84(1).

4 Ibid s 80C(2).

5 Ibid s 80C(2).

6 Ibid s 92(3).

7 Ibid s 80E(2).

result of pressure or fear of the person who has used family violence—and, if not, what reforms are needed.<sup>8</sup>

### ***Existing safeguards***

10.9 The Law Council of Australia Family Law Section (Law Council) and Bundaberg Family Relationship Centre considered the existing legislative safeguards in binding and limited agreements sufficient to protect family violence victims from entering into disadvantageous agreements.<sup>9</sup> Similarly, the Commonwealth Ombudsman's Office (the Ombudsman) stated that it 'sees the value' in the existing safeguards.<sup>10</sup> National Legal Aid considered that the safeguards in binding child support agreements were sufficient.<sup>11</sup>

### ***Binding child support agreements***

10.10 National Legal Aid commented that, to ensure the safeguards are applied effectively, 'appropriate education/training for all people working in the system, including legal practitioners, must be provided'.<sup>12</sup> Bundaberg Family Relationship Centre submitted that reassurance is needed that the 'person providing the independent legal advice is aware of the violence'.<sup>13</sup> The Sole Parents' Union stated that the annexure to binding child support agreements provided by solicitors should include 'a statement as to the advice given, their satisfaction that their client understood the advice, and the reason their client gave for not accepting their advice and signing a disadvantageous agreement'.<sup>14</sup>

10.11 Regarding binding child support agreements generally, National Legal Aid noted its concern that

applying the principles of contract law to child support is inappropriate, and fails to allow for the exigencies of life as they may occur. For this reason, it is suggested that binding agreements should be limited to no more than 5 years, and that the requirements to set aside such an agreement be reduced from 'exceptional' to 'significant' circumstances. When responding to the future financial support of children, greater flexibility is required than can be delivered by contract law.<sup>15</sup>

### ***Limited child support agreements***

10.12 In relation to limited child support agreements, National Legal Aid commented that customers contemplating such agreements

should always be referred for legal advice, because limited agreements are sometimes used to have the payee pay the payer's share of an expense from the child support

8 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 25.

9 Law Council of Australia Family Law Section, *Submission CFV 67*, 5 May 2011; Bundaberg Family Relationship Centre, *Submission CFV 04*, 16 March 2011.

10 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

11 National Legal Aid, *Submission CFV 81*, 24 June 2011.

12 Ibid.

13 Bundaberg Family Relationship Centre, *Submission CFV 04*, 16 March 2011.

14 Sole Parents' Union, *Submission CFV 52*, 27 April 2011.

15 National Legal Aid, *Submission CFV 81*, 24 June 2011.

payments. This should not occur without the payee receiving advice about the terms of the agreement.<sup>16</sup>

10.13 Such referrals could then ‘facilitate any other necessary family law or personal safety advice’.<sup>17</sup>

10.14 The Ombudsman identified a different problem with limited child support agreements, which the parties can bring to an end if changed circumstances vary the child support amount by 15% or more. While acknowledging that this is an ‘important measure to ensure that child support assessments are fairly based upon the parent’s current financial situation’, the policy intention is ‘undermined if parents cannot easily avail themselves of their right to end a limited child support agreement’.<sup>18</sup>

We believe the steps required for a person to take to end a limited agreement are unnecessarily complex. This could discourage a person from exercising their right to end a limited child support agreement which no longer fairly reflects the other parent’s capacity to provide financial support for their child. This is of particular concern for a vulnerable person with a fear of family violence.<sup>19</sup>

### ***Measures to complement legislative safeguards***

10.15 National Legal Aid considered that initiatives such as the new national family violence training package for professionals in the family law system,<sup>20</sup> supplemented by screening and risk assessment initiatives, ‘will help to support the intended effect of the legislation’.<sup>21</sup> It recommended that lawyers should

certify that they have advised their clients in relation to family violence, and that a checklist to support the certification be completed. A checklist would act as a prompt for lawyers and a further safeguard to ensure that these issues are canvassed with the client.<sup>22</sup>

10.16 National Legal Aid further suggested longitudinal research into the ‘operation and effectiveness of child support agreements’ to assist policy development in this area.<sup>23</sup>

### **ALRC’s views**

10.17 The ALRC does not propose any reforms to the legislative provisions regarding child support agreements given the absence of feedback that the existing safeguards are inadequate in protecting victims of family violence from disadvantageous agreements.

10.18 While victims of family violence may come under pressure to enter into child support agreements, the existing legislative safeguards appear to protect them from

16 Ibid.

17 Ibid.

18 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

19 Ibid.

20 Australian Government Attorney-General’s Department, *Family Violence* <[www.ag.gov.au/www/agd/agd.nsf/Page/Families](http://www.ag.gov.au/www/agd/agd.nsf/Page/Families)> at 21 July 2011; R McClelland (Attorney-General), ‘New National Training to Improve Responses to Family Violence’ (Press Release, 17 March 2011).

21 National Legal Aid, *Submission CFV 81*, 24 June 2011.

22 Ibid.

23 Ibid.

financial disadvantage as a result of the agreement. The additional safeguard suggested by the Sole Parents' Union is similar to the existing legislative requirement in relation to binding child support agreements.

10.19 It is neither possible—nor desirable—to mandate a client's disclosure of family violence to a legal practitioner in the context of child support agreements, or otherwise. Clients may, however, be more likely to disclose information to practitioners who are aware of, and sensitive to, family violence issues. Clients may also be more likely to disclose where a practitioner specifically raises family violence—perhaps in response to a checklist prompt.

10.20 Relevantly, a number of recommendations in *Family Violence—A National Legal Response* addressed family violence training for legal practitioners.<sup>24</sup> The AVERT Family Violence: Collaborative Responses in the Family Law System training package also caters for professionals in the legal system, including legal practitioners. In Chapter 4, the ALRC makes proposals regarding training.<sup>25</sup>

10.21 Concerns about complicated procedures for ending limited child support agreements, as noted by the Ombudsman, may be problematic for CSA customers, including victims of family violence. However, this issue falls outside the 'safety lens', and reforms to address it are beyond the reference of this Inquiry.

## Self-administration of child support

### Background

10.22 Where a parent or carer receives no more than the base rate of Family Tax Benefit Part A (FTB Part A), he or she is not required to apply for child support. The CSA refers to such cases as self-administration, described as 'a private arrangement between parents not involving the CSA, including cases where child support is not sought'.<sup>26</sup>

10.23 The *Child Support (Registration and Collection) Act 1988* (Cth) provides that it should be construed, consistently with its objects, 'to permit parents to make private arrangements for the financial support of their children'.<sup>27</sup>

10.24 The CSA publication, *The Parent's Guide to Child Support*, includes information about the option for self-administration under the heading: 'Child support, on your terms'. It states that

Many parents can choose to arrange child support independently without any assistance from us, the courts or other government agencies. If you are separated and receive only the base rate of Family Tax Benefit Part A (or you don't receive family assistance payments at all), you and the other parent can arrange your child support to

24 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010). See, in particular, Recs 21–3, 31–1, 31–4.

25 Proposals 4–5 and 4–6.

26 Child Support Agency, *Facts and Figures 08–09* (2009), [1.6].

27 *Child Support (Registration and Collection) Act 1988* (Cth) s 4(3).



suit you, without any involvement from us. Parents who choose this option make all the arrangements—you both decide how much child support should be paid and how it should be paid. We aren't involved. However, we can provide information and help if you need it.<sup>28</sup>

### **Submissions and consultations**

10.25 Self-administered child support arrangements were not raised in the Child Support Issues Paper. However, National Legal Aid has raised some concerns about the message delivered to the community about self-administration, noting:

A recent DVD released by CSA for indigenous clients (*It's not about the Money, It's about the Kids*) downplayed the requirement for reasonable maintenance action, in order to promote the possibility of parents reaching their own agreement without CSA involvement. It suggested that 'CSA did not have to be involved' which would assist perpetrators to apply pressure to payees to forego child support payments.<sup>29</sup>

### **ALRC's views**

10.26 As with private collection of child support, self-administered child support arrangements may be appropriate and indeed desirable for many parents. However, private arrangements are likely to be inappropriate in cases of family violence. The maintenance of private arrangements may require ongoing contact between parties. Further, the option may enable people who use family violence to avoid child support payments by exerting pressure on the payee, and exacerbate opportunities for controlling conduct.

10.27 Such matters do not affect government expenditure in relation to increased rates of family assistance, as the self-administration option is unavailable to parents eligible for child support who receive FTB Part A at more than the base rate. However, to improve safety and the accessibility of the child support scheme, CSA involvement should be promoted in cases of family violence—including CSA collection of child support, as discussed in Chapter 9.

10.28 The ALRC considers that promotion of CSA involvement in family violence cases should be achieved through the proposals outlined in Chapter 4, namely, family violence training, screening and information sharing across agencies, and the provision of family violence-specific information to the general CSA customer base upon entry to the child support scheme.

## **Personal information and information exchange**

### **Disclosure of personal information**

#### ***Information exchange***

10.29 Child support legislation requires that the CSA disclose information about one party to the other party at certain stages of a child support case. A key point at which the CSA is required to exchange personal information is when making a child support

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28 Child Support Agency, *The Parent's Guide to Child Support* (2009), 6.

29 National Legal Aid, *Submission CFV 81*, 24 June 2011.

assessment. Pursuant to s 76 of the *Child Support (Assessment) Act*, the CSA must give both parties written notice of the assessment, and must specify matters such as income, the number and age range of any dependent children, and the number and age ranges of any other children for whom a party pays or receives child support.<sup>30</sup>

10.30 In addition to this legislatively required content, child support assessment notices include ‘all the information input to the assessment as well as an explanation of the formula used for calculation’.<sup>31</sup> The assessment notices also include parties’ names, as discussed below. An example assessment notice is available on the CSA website.<sup>32</sup>

10.31 Child support assessment notices were criticised in a review in 2010 (the Richmond Review), which stated that they are ‘overly complex’, and feedback from staff and stakeholders ‘suggests that this confuses and overwhelms customers’.<sup>33</sup> The Richmond Review recommended that the CSA simplify assessment notices—while complying with legislative requirements—by reducing the complexity and the amount of information required.<sup>34</sup> The ALRC understands that the DHS and the CSA have completed a review of child support assessment notices in 2011.

10.32 Personal information is also exchanged during a change of assessment (departure determination) procedure.<sup>35</sup> Section 98G of the *Child Support (Assessment) Act* provides that the CSA must forward copies of application and response forms and supporting documents to the other party,<sup>36</sup> except where they contain offensive content, as discussed below. Similarly, s 98N of the Act requires that a party’s reply to CSA-initiated change of assessment be served on the other party. Other circumstances which require information exchange include objections to CSA decisions,<sup>37</sup> and applications for Social Security Appeals Tribunal review.<sup>38</sup>

10.33 The purpose of information exchange is to ‘ensure procedural fairness (ie, a fair and reasonable decision making process)’.<sup>39</sup> The Procedural Instruction, *Change of Assessment*, states that customers ‘have the right to understand, and have input to, decisions that affect them’.<sup>40</sup> Generally, parties are provided with the information the CSA uses to make a decision, and have the right to challenge the outcome if they think it unfair or incorrect.<sup>41</sup>

30 *Child Support (Assessment) Act 1989* (Cth) s 76(1), (2).

31 D Richmond, *Delivering Quality Outcomes—Report of the Review of Decision Making and Quality Assurance Processes of the Child Support Program* (2010), [4.8.2].

32 Child Support Agency, *Your Child Support Assessment* <[www.csa.gov.au/child\\_support\\_formula/](http://www.csa.gov.au/child_support_formula/)> at 22 July 2011.

33 D Richmond, *Delivering Quality Outcomes—Report of the Review of Decision Making and Quality Assurance Processes of the Child Support Program* (2010), [4.8.2].

34 *Ibid.*, [3.1.31], [4.8.2].

35 *Child Support (Assessment) Act 1989* (Cth) s 98G.

36 *Ibid.* s 98G.

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

38 *Ibid.*, ss 95(3), 96(1).

39 Department of Human Services, *PI—Change of Assessment*, 5 July 2011.

40 *Ibid.*

41 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [4.1.6], [6.3.3].

10.34 There is a tension between concerns for the safety of family violence victims and requirements of procedural fairness in relation to information exchange. Providing one party's personal information to the other party may have a detrimental effect on victims of family violence. Victims have reported resentment at ongoing disclosure of personal financial information.<sup>42</sup>

10.35 Information exchange may also affect the safety of victims, particularly when they are unaware that information provided to the CSA will be provided to a person who has used violence. However, *Change of Assessment* provides that exchange of information should be explained to customers and include the following points, among others:

- all information (except [Tax File Numbers], non carer parent financial information and where family violence has been indicated) our customers provide on their application form and in accompanying documents will be sent to the other customer;
- it is the customer's choice what they include in their application and supporting documents;
- if a customer does not want the other customer to receive specific information they must not include it in their application (blue pages [pages forwarded to the other party]) or supporting documents;
- customers have the opportunity to comment on or correct information provided by the other party;
- the decision will be based on information that was made available to both customers. This means that any information that the customer decides not to include in their application or to obscure from the supporting documents, will also not be considered by [the CSA].<sup>43</sup>

10.36 Improving and limiting information exchange is an issue that has been subject to review. As noted in Chapter 9, the Richmond Review in 2010 pointed out that the CSA 'has in train a program of reforms aimed at addressing both legislative and non-legislative [Change of Assessment] issues'. The objectives include improving 'the exchange of information between the parties to only that of relevance to the decision' in relation to departure determination procedures.<sup>44</sup> The ALRC also understands that ongoing reviews by FaHCSIA, DHS and CSA are considering the issue of information exchange in departure determination procedures, insofar as this is consistent with the requirements of procedural fairness.<sup>45</sup>

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

43 Department of Human Services, *PI—Change of Assessment*, 5 July 2011, [7.1].

44 D Richmond, *Delivering Quality Outcomes—Report of the Review of Decision Making and Quality Assurance Processes of the Child Support Program* (2010), [4.8.12]. The Richmond Review further recommended simplification of the Change of Assessment form: [3.2.51].

45 FaHCSIA Customer Review Working Group, *Consultation*, By telephone, 13 April 2011.

***Parties' names on assessment notices***

10.37 While it is not required by the *Child Support (Assessment) Act*, the CSA includes parties' names on assessment notices.<sup>46</sup> The inclusion of names on assessment notices may put victims of family violence at risk where they have changed their names to escape family violence.

10.38 The Procedural Instruction, *Customer Update and Exchange of Personal Information*, addresses this issue.<sup>47</sup> It notes that there are three fields available to CSA staff when updating a customer's name. One of the fields is the customer's 'legal name', which is the name generally recorded and used by the CSA, and automatically used in assessment letters and notices. It states:

When a customer advises of a new name, they must be told that the [CSA] will use their new name when conducting administrative actions—including letters to the other party. The exception to this is where there is evidence of domestic violence and this is the reason for the parent changing their name.<sup>48</sup>

10.39 *Customer Update and Exchange of Personal Information* states that where a customer has changed his or her name to avoid violence or threat of violence, staff should not update the customer's legal name.<sup>49</sup> This is presumably to avoid the new name appearing on correspondence to the other party, including assessment notices.

***Submissions and consultations***

10.40 In the Child Support Issues Paper, the ALRC asked what reforms—if any—are necessary to protect the safety of victims of family violence, where the CSA discloses information about one party to another in accordance with child support legislation.<sup>50</sup> The ALRC also asked whether legislative changes are required<sup>51</sup> and indicated that any reforms must also conform to principles of procedural fairness.<sup>52</sup>

***Information exchange***

10.41 The distress caused to victims by the disclosure of personal information was illustrated in case studies provided by AASW. One customer had raised privacy issues:

B stated that once she was granted an exemption she obtained a level of privacy that was not available to her when she was 'forced' to engage with CSA. B states, 'Getting

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46 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011. See also the example child support assessment notice at Child Support Agency, *Your Child Support Assessment* <[www.csa.gov.au/child\\_support\\_formula/](http://www.csa.gov.au/child_support_formula/)> at 22 July 2011.

47 Department of Human Services, *PI—Update Customer and Assessment Information*, 5 July 2011.

48 Ibid, [4].

49 Ibid, [4]. A previous version of the Procedural Instruction, which was current at 15 June 2011, stated that a different field should be updated instead of the legal name: 'update the *Client Alias* to avoid inappropriate disclosure of a customer's new name'. Department of Human Services, *PI—Update Customer and Assessment Information*, 15 June 2011, [4].

50 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 26.

51 Ibid, Question 26.

52 Ibid, [127].

an exemption from Centrelink meant I had privacy. Anything done with CSA is open and shared material’<sup>53</sup>

10.42 In another AASW case study, ‘P’ stated that ‘while you remain in the system he has access to all your financial information. This is violating.’ The Ombudsman noted that the furnishing of private information to the other party in child support cases is a ‘common feature of complaints to our office’.<sup>54</sup>

10.43 The Australian Domestic and Family Violence Clearinghouse (ADFVC) called this a ‘vexed issue’. Some victims in the ADFVC study were ‘extremely concerned about their ex-partner having access to any personal information about them’; conversely, victims may benefit from having access to the other parties’ information, which allows them to challenge income statements and child support assessments.<sup>55</sup>

10.44 The Sole Parents’ Union considered that a victim’s personal information should not be provided to a person who has used family violence.<sup>56</sup> The ADFVC similarly argued for a ‘differentiated’ approach for customers who have disclosed violence, whereby their personal information ‘should remain confidential for safety reasons—in particular, any information that could identify their location’.<sup>57</sup>

10.45 The Sole Parents’ Union and the National Council of Single Mothers and their Children (NCSMC) made arguments to the effect that safety should be prioritised over procedural fairness.<sup>58</sup> National Legal Aid commented on the ‘tension between the requirements of natural justice and the protection of personal information’.<sup>59</sup> It stated that:

Information about parents’ incomes, relevant dependent children and the recorded level of care are integral components of the formula and should be recorded on the assessment. However, clients do express concerns that information provided to the other party is often the impetus for comments, criticisms and generally antagonises already strained relations.<sup>60</sup>

10.46 In particular, concerns were raised about information exchange in departure determination procedures.<sup>61</sup> A confidential submission stated:

You have to give all of your details and your ex gets to see them—this is incredibly prohibitive for women trying to protect their children’s location, etc, from a violent ex—transparency can equal loss of life—therefore I believe many mothers choose to live in financial hardship such as I have.<sup>62</sup>

53 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

54 Ibid.

55 ADFVC, *Submission CFV 53*, 27 April 2011.

56 Sole Parents’ Union, *Submission CFV 52*, 27 April 2011.

57 ADFVC, *Submission CFV 53*, 27 April 2011.

58 Sole Parents’ Union, *Submission CFV 52*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011.

59 National Legal Aid, *Submission CFV 81*, 24 June 2011.

60 Ibid.

61 Confidential, *Confidential CFV 49*, 21 April 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

62 Confidential, *Submission CFV 56*, 27 April 2011.

10.47 The NCSMC and the Council of Single Mothers and their Children (CSMC) also commented on the deterrent effect of information exchange in departure determination procedures.<sup>63</sup>

***Parties' names on assessment notices***

10.48 The Ombudsman raised the issue of CSA practice of including the current legal names of both parties on notices of assessment, although this is not required by the *Child Support (Assessment) Act*. They noted that, where 'a victim of family violence has changed their name in order to escape a perpetrator, they will obviously not want their new name included on notices of assessment sent to that person'.<sup>64</sup> They questioned whether, in the absence of a legislative requirement,

it is strictly necessary to include the full legal name of both parents. It might be possible to refer to the parties in a different way, such as 'you' and 'the other parent', or the 'mother' and 'father' of the named children. This could still meet the requirements of s 76 and also provide a measure of privacy for a person who fears family violence.<sup>65</sup>

***ALRC's views***

***Information exchange***

10.49 Disclosure of information in accordance with legislative requirements and CSA procedure may cause distress to family violence victims, and potentially deter them from applying for child support, objections, or applications to change child support assessments. However, procedural fairness requires that certain relevant information must be exchanged, including information relevant to child support assessments and to potential departures from assessments.

10.50 The ALRC considers that a possible way to address this tension is to limit the information that is subject to exchange. For example, in departure determination procedures, the CSA could extract relevant material for information exchange, rather than exchanging entire forms with supporting documentation. This position is consistent with the recommendations of the Richmond Review.

10.51 As noted above, FaHCSIA, the DHS and the CSA are reviewing information exchange in departure determination procedures. In these circumstances, it is unnecessary to duplicate the recommendations of the Richmond Review. However, the ALRC notes that an amendment to s 98G of the *Child Support (Assessment) Act*—and perhaps also s 98N—may be required to streamline information exchange in change of assessment proceedings.

***Parties names on assessment notices***

10.52 As described above, the CSA has procedures in place to protect persons who change their names to avoid violence. However, it is possible that victims of family

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63 National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011, Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

64 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

65 Ibid.

violence will not always disclose family violence to the CSA and advise that this is the reason prompting the name change. In these circumstances, the CSA will include the victim's name on assessment notices sent to the other party.

10.53 The ALRC is interested in hearing from stakeholders whether current CSA procedures are sufficient to protect victims of violence, or if the CSA should review the assessment notice so that they do not include parties' names—referring instead, for example, to the 'mother' and 'father' or 'you' and 'the other parent'.

**Question 10–1** Should the Child Support Agency ensure that notices of assessment pursuant to s 76 of the *Child Support (Assessment) Act* 1989 (Cth) do not include parties' names?

## Offensive content

### Background

10.54 The *Child Support Guide* provides that the CSA may refuse to make a decision in relation to an application for a change of assessment where the application includes 'obscene or otherwise offensive material'.<sup>66</sup> The CSA will not forward the form to the other party in these circumstances. Instead, it will 'contact the applicant and give them an opportunity to re-submit the application and supporting documents, without the offensive material, if they choose to'.<sup>67</sup>

10.55 Similarly, the CSA will not forward a response form containing obscene or offensive material to the other party, and the CSA will give the respondent the opportunity to resubmit the form without the offensive material.<sup>68</sup> This process also applies to objections.

10.56 A senior officer determines whether the application is ineligible due to offensive content.<sup>69</sup> The Procedural Instruction, *Change of Assessment*, provides that, while the decision about whether material is offensive is 'necessarily a subjective one', the following principles apply:

- Obscenities directed at the other parent should be considered to be 'offensive'.
- Comments that are merely impolite (e.g. 'She is a liar') are not considered 'offensive'.

<sup>66</sup> Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [2.6.5]. The legislative basis on which this policy rests is *Child Support (Assessment) Act* 1989 (Cth) s 150A. See also *Child Support (Registration and Collection) Act* 1988 (Cth) s 16A.

<sup>67</sup> Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [2.6.5]

<sup>68</sup> *Ibid.*, [2.6.5]

<sup>69</sup> Department of Human Services, *PI—Change of Assessment*, 5 July 2011, [2.5.1].

- Comments directed at the [CSA] would generally not be considered sufficiently offensive to invoke this policy.<sup>70</sup>

10.57 *Change of Assessment* also provides that where ‘written correspondence contains threats of harm (implied or overt)’ CSA staff are to immediately refer it to a Team Leader.<sup>71</sup> The procedures discussed below regarding reporting threats apply to these circumstances.

### ***Submissions and consultations***

10.58 The Ombudsman and the NCSM both raised concerns about offensive content in change of assessment forms. The Ombudsman provided a case study entitled ‘CSA in the middle’ to illustrate how CSA procedure may make the CSA a ‘conduit for family violence’.<sup>72</sup>

#### **Case study**

Ms KK is a payer. She pays child support through the CSA to Mr LL for their child. There was a history of violence between the parents, with Ms KK having had a domestic violence order against Mr LL in the past. In 2010, Mr LL applied for a change of assessment (COA). Mr LL made a number of abusive comments about Ms KK in his COA application form.

The CSA sent a copy of Mr LL’s application COA to Ms KK, as part of the open exchange of information under the COA process, but had redacted the abusive comments about her. Ms KK could still discern from the surrounding text that Mr LL had written a number of offensive comments about her. She complained to the CSA that it was allowing Mr LL to use the COA process to harass and abuse her. The CSA then sent Ms KK a second copy of the COA form, this time with further deletions. Ms KK then asked the CSA to provide her with an unedited version of the document so that she could apply for another domestic violence order against Mr LL, but the CSA refused. The CSA also told her that she would not be entitled to a copy of the document under the freedom of information process but that a subpoena could be issued to the CSA to obtain the document. Following our investigation:

- the CSA acknowledged that while its intention in editing the document was to alleviate distress to Ms KK, it had the opposite effect
- the CSA said it would develop new policies and procedures for dealing with harassment and abuse as part of the COA and objections processes
- the CSA apologised to Ms KK and provided the unedited version of the document to the court when the CSA was issued with a subpoena.

10.59 The Ombudsman suggested procedures that ‘do not tolerate violent behaviour’ and considered that the agencies should ‘communicate clearly to parties at fault that such behaviour will not be accepted’.<sup>73</sup>

<sup>70</sup> Ibid, [7.3].

<sup>71</sup> Ibid, [2.5.1].

<sup>72</sup> Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

<sup>73</sup> Ibid. Department of Human Services, *PI—Change of Assessment*, 5 July 2011; Department of Human Services, *PI—Opting Out and/or Discharge Arrears*, 5 July 2011; Department of Human Services, *PI—Update Customer and Assessment Information*, 5 July 2011; Department of Human Services, *PI—Ending Assessments*, 5 July 2011; Department of Human Services, *PI—Capacity to Pay*, 7 June 2011; Department of Human Services, *Common Module—Family Violence*, 7 June 2011.



10.60 The NCSMC also criticised CSA procedures in removing abusive language from forms before forwarding to the other party. It argued that a form that contains such material and requires modification by the CSA should not be accepted and consequent delays should not affect the other party.<sup>74</sup>

***ALRC's views***

10.61 The information about CSA's procedures for offensive material provided in the *Child Support Guide* and in the Procedural Instruction, *Change of Assessment*, is different from the accounts provided by NCSMC and the Ombudsman. Perhaps the CSA's procedures have been subject to change—as noted in the Ombudsman's case study, the CSA undertook to develop new policies and procedures in this area, and the *Child Support Guide* outlining change of assessment process was updated on 4 July 2011.

10.62 The CSA's current procedures seem to address most of the issues raised by the Ombudsman and NCSMC. However, the ALRC has some remaining concerns. Persons who use family violence may include offensive content on CSA change of assessment forms with the intent to harass, intimidate or offend the other parent—particularly because these forms are generally forwarded to the other parent. Such conduct may constitute family violence. Victims of family violence may therefore need to know about offensive content on CSA forms as it can indicate that they need to take steps to ensure their safety.

10.63 Where state and territory family violence protection orders are in place, offensive content on child support forms may be relevant, because such conduct may constitute a breach. Further, the offensive material may constitute supporting evidence in an application for a family violence protection order, or an application to extend an existing family violence protection order.

10.64 In addressing this issue, competing objectives require consideration. On the one hand, the CSA should avoid acting as a 'conduit of family violence' by forwarding forms containing offensive material to a victim. On the other, victims should be provided with information about offensive material so they can take necessary protective steps to ensure their safety, if necessary. Due to this inherent tension, instances of offensive content on CSA forms require a careful and considered response from the CSA.

10.65 The ALRC considers that, when a senior officer determines that content on a form is offensive, he or she should also consider if the other party should be notified in relation to the offensive material. Factors to consider may include, for example, whether the offensive material may constitute harassment of the other party, or whether there is a safety concern flag marked on his or her file. If the CSA decides to inform the other party, it should provide him or her with a copy of the offensive material upon request.

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74 National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011.

10.66 Consistent with current CSA procedure, the ALRC does not consider that forms containing offensive material should be considered by the CSA in relation to departure or other proceedings.

**Proposal 10–1** The *Child Support Guide* should provide that Child Support Agency forms or supporting documentation containing offensive material should be referred to a senior officer. The senior officer should determine whether to inform the other party of the offensive material and, where requested, provide it to the other party.

### Restricted Access Customer System

10.67 The personal information of all CSA customers is subject to privacy and secrecy provisions. The *Child Support Guide* provides that the CSA may ‘provide an additional level of protection to customer information’ where the unauthorised disclosure of, or access to, the information could cause ‘personal harm’.<sup>75</sup> This additional level of protection is known as the Restricted Access Customer System (RACS). A RACS classification means that the person’s information is placed under higher security and the number of CSA officers who may access the information is limited. This means that RACS-classified customers ‘may experience some short delays in having CSA respond to telephone and written enquiries’.<sup>76</sup>

10.68 The *Child Support Guide* provides that where the CSA identifies a person as being at risk of family violence, and considers that increased security is warranted, the case will be referred to an authorised RACS coordinator.<sup>77</sup> The *Common Module—Family Violence* provides that, where a customer is experiencing family violence, staff should discuss referring the case to a RACS co-ordinator with their Team Leader. It states that customers should not be advised if a referral is made.<sup>78</sup>

10.69 In considering whether to subject a person’s information to the RACS, the *Child Support Guide* provides that CSA may consider the person’s requests, as well as ‘any special protection’ provided by other government agencies for the person’s information.<sup>79</sup>

### Submissions and consultations

10.70 In the Child Support Issues Paper, the ALRC asked whether the personal information of persons at risk of family violence is adequately protected by Child

75 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [6.3.7].

76 Ibid, [6.3.7].

77 Ibid, [6.10.1].

78 Department of Human Services, *Common Module—Family Violence*, 7 June 2011.

79 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [6.3.7].

Support Agency practices, such as the RACS. It also asked whether the protection of personal information could be improved.<sup>80</sup>

10.71 Several stakeholders commented that existing procedures work well in protecting personal information.<sup>81</sup> The Law Council commented on the need for ‘significant care’ to be exercised where information about family violence is collected.<sup>82</sup> The ADFVC stated that it supports the application of the RACS classification to all customers who disclose risk of family violence.<sup>83</sup>

10.72 National Legal Aid considered that if the RACS process is to be used generally for family violence victims, the ‘CSA will need to expand the number of staff who have access to it’. It noted that

In one case when acting for a customer on restricted access, some experience of unreturned calls and information not being provided was experienced.<sup>84</sup>

10.73 The Ombudsman provided the following case study about Ms PP, who complained of the CSA’s failure to respond to family violence issues in her case. Ms PP said she had told the CSA about threats and abusive behaviour from her partner, Mr QQ. When making elections to opt out of CSA collection, she also advised the CSA that she did so for her own safety, as Mr QQ was being abusive about child support.

#### Case study

Ms PP was upset that the case was not already on restricted access and felt it was unfair that she had to formally apply for this to occur. She felt it should be obvious that she wanted her case treated according to CSA guidelines on case management of files involving allegations of family violence. She felt it was ridiculous that the CSA told her it needed a copy of an AVO before her request for a restricted access case would be considered. Upon investigating Ms PP’s complaint, the CSA noted that a Restricted Access Customer Service (RACS) classification only gives added protection to Ms PP’s information but does not afford her any additional personal protection. It is also not an automatic process that occurs whenever violence is mentioned. The CSA provided further information to Ms PP about RACS and invited her to apply.

The CSA said that it would take AVOs or police reports into consideration in a RACS classification but that it did not have the expertise to deal with domestic violence issues and instead makes appropriate referrals. The CSA did not consider that Ms PP was in fear when she reported the threatening text messages and abusive phone call and did not provide her with a referral to Centrelink to discuss an exemption.<sup>85</sup>

<sup>80</sup> Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 28.

<sup>81</sup> National Legal Aid, *Submission CFV 81*, 24 June 2011; Law Council of Australia Family Law Section, *Submission CFV 67*, 5 May 2011; Confidential, *Confidential CFV 49*, 21 April 2011.

<sup>82</sup> Law Council of Australia Family Law Section, *Submission CFV 67*, 5 May 2011.

<sup>83</sup> ADFVC, *Submission CFV 53*, 27 April 2011.

<sup>84</sup> National Legal Aid, *Submission CFV 81*, 24 June 2011.

<sup>85</sup> Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

10.74 The Ombudsman used this case study as an example of complaints that suggest that ‘the CSA does not possess the necessary expertise to determine when family violence is occurring and when special measures should be put in place on a particular case’.<sup>86</sup>

#### ***ALRC’s views***

10.75 Information about RACS should be provided to persons who disclose family violence as part of the information provided to customers routinely about family violence. This should include that, while it plays a part in a protective response, the purpose of the RACS is not personal protection but protection of information.

10.76 In relation to the Ombudsman’s concerns about CSA staff’s ability to determine the suitability of a RACS classification, the ALRC would be interested in comments about whether a RACS classification should be available upon request.

10.77 Such a reform may have resource implications, as the number of CSA staff with RACS access, while necessarily limited, may need to increase to deal with a corresponding increase in RACS classifications. It might also undermine the integrity of the process—given the necessarily restricted staff members who may access RACS-classified files. An alternative reform would be for RACS classifications to be granted upon a Centrelink social worker’s recommendations.

10.78 These alternative proposals would be complemented by the proposals made in Chapter 4, in particular proposals about providing information, screening, safety concern flags, information sharing,<sup>87</sup> and referrals to Centrelink social workers when customers disclose family violence.

**Proposal 10–2** The *Child Support Guide* should provide that, where a customer discloses family violence, he or she should be referred to a Centrelink social worker to discuss a Restricted Access Customer System classification.

**Question 10–2** Should the Child Support Agency provide a Restricted Access Customer System classification to a customer who has disclosed family violence:

- (a) at the customer’s request; or
- (b) only on the recommendation of a Centrelink social worker?

<sup>86</sup> Ibid.

<sup>87</sup> See Proposals 4–2, 4–3, 4–8, 4–10, 4–11, 4–12.

## Reporting threats

### Background

10.79 The secrecy provisions in the child support legislation allow the CSA to disclose a threat made against a person to the CSA, where it is a ‘credible threat to the life, health or welfare of a person’.<sup>88</sup> To disclose the threat, the CSA must also

- believe ‘on reasonable grounds that the communication is necessary to prevent or reduce the threat’;<sup>89</sup> or
- have reason to suspect the threat is evidence that an offence may be, or has been, committed, and communicates the information for the purpose of ‘preventing, investigating or prosecuting’ the offence.<sup>90</sup>

10.80 CSA’s internal corporate guideline, *Security Incident Management*,<sup>91</sup> provides steps for identifying and managing threats against a customer, among other security incidents. Steps include identifying and clarifying a threat, collecting information and risk assessment.<sup>92</sup> The risk assessment—conducted by the team leader—will generally determine whether police are contacted.<sup>93</sup> However, police must be contacted where there is a family violence protection order in place against the threatened person.<sup>94</sup>

10.81 CSA procedure is also described in the *Child Support Guide*—including the referral of the threat to a senior officer for consideration of a police report. The *Child Support Guide* provides that the CSA will generally advise the threatened person of the threat, and ask whether he or she wants the CSA to make a report.<sup>95</sup> The CSA will also disclose the threat ‘in order to talk to the payee about appropriate future collection activities’.<sup>96</sup>

10.82 The *Child Support Guide* notes that it is not a legislative or policy requirement for the CSA to consult the threatened person before reporting the threat to the police.<sup>97</sup> The CSA will report a threat without consultation when it considers that there is an

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

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

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

91 Department of Human Services, *Security Incident Management*, 5 July 2011.

92 Ibid, [Process steps].

93 Ibid, [Risk assessment].

94 Ibid, [Threats where a DVO or AVO is in place].

95 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [6.10.1].

96 Ibid, [6.10.1].

97 *Child Support (Registration and Collection) Act 1988* (Cth) s 16(3)(e); *Child Support (Assessment) Act 1989* (Cth) s 150(3)(e); Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [6.10.1].

‘immediate or urgent need to prevent an offence’.<sup>98</sup> In addition, the CSA may report a threat to the police against the wishes of the threatened person if the threat is serious.<sup>99</sup>

### ***Submissions and consultations***

10.83 In the Child Support Issues Paper, the ALRC asked how well this system works in practice to protect victims of family violence. It asked whether victims of family violence are adequately protected by the CSA’s procedures to deal with threats against the victim made to the CSA.

10.84 National Legal Aid reported its support for the CSA’s approach, stating that the CSA does take threats seriously.<sup>100</sup> The ADFVC also supported the existing approach, but lacked information about how it works in practice.<sup>101</sup> Bundaberg Family Relationship Centre stated that CSA staff should be required to report threats to the police and child protection agencies.<sup>102</sup> Another stakeholder stated that the CSA should be required to consult the threatened person ‘unless there is immediate or urgent need to prevent a life threatening offence’.<sup>103</sup>

### ***ALRC’s views***

10.85 The CSA’s existing procedures appear to provide for a considered and careful response to threats of family violence. The general practice articulated in the *Child Support Guide* of consulting with a threatened person prior to reporting to police appears appropriate, as does the requirement to report where there is an immediate or urgent need to prevent an offence, or where a family violence protection order is in place.

10.86 Where a person makes threats against another party’s life, health or welfare to the CSA, the CSA should mark the threatened person’s file with a safety concern flag. The threatened person should also be referred to a Centrelink social worker for referrals to services, including legal services, which may assist in addressing safety concerns. This would enable social workers to discuss options such as family violence exemptions (where the threatened person is a payee), and case-management responses that may be put in place to improve safety.

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98 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [6.10.1].

99 Ibid, [6.10.1].

100 National Legal Aid, *Submission CFV 81*, 24 June 2011.

101 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

102 Bundaberg Family Relationship Centre, *Submission CFV 04*, 16 March 2011.

103 Confidential, *Confidential CFV 49*, 21 April 2011.

**Proposal 10–3** Where the Child Support Agency receives a threat against a customer’s life, health or welfare by another party to the child support case, the *Child Support Guide* should provide that the Child Support Agency will:

- (a) place a safety concern flag on the threatened customer’s file; and
- (b) refer the threatened person to a Centrelink social worker.

## Child support payers

10.87 While many of the proposals in this chapter, as well as those in Chapters 4 and 9 would improve safety of both payees and payers, a number of them—and those in Chapter 11—would improve the safety of victims only where they are payees. Recent data by the Australian National University’s Child Support Reform Study indicates that the small but growing group of female payers are most likely—at twice the level of other groups of payers and payees—to report a ‘fearful’ relationship with their former partners.<sup>104</sup> The ALRC is interested in hearing if other reforms are needed to improve the safety of payers who are victims of family violence.

**Question 10–3** What reforms, if any, are necessary to improve the safety of victims of family violence who are child support payers?

## Informal carers

### Background

10.88 Generally, parents and legal guardians are eligible for child support if they provide at least 35 % of care (‘shared care’) for a child. For legal guardians who are not parents, the CSA will rely on a court order providing that a child is to live with a non-parent carer<sup>105</sup> to determine whether the carer is eligible for child support. This rule applies to family law orders, and state and territory child protection orders where the carer is a relative of the child.<sup>106</sup>

10.89 However, different rules apply to the child support eligibility of carers who are neither the child’s parents nor their legal guardians. This Discussion Paper refers to

<sup>104</sup> Bruce Smyth, *Correspondence*, 21 July 2011.

<sup>105</sup> Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [2.1.2]

<sup>106</sup> Section 26A of the *Child Support (Assessment) Act 1989* (Cth) provides that non-parent carers with care of a child under child protection legislation—that is foster carers or ‘formal’ carers—may only be eligible for child support where they are related to the child. Carers who care for children in accordance with child protection orders of South Australia, Western Australia, Norfolk Island, Christmas Island, or the Cocos (Keeling) Islands are not eligible carers: *Child Support (Assessment) Act 1989* (Cth) s 22; *Child Support Assessment Regulations 1989* (Cth) reg 4; Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [2.1.2].

non-parent carers and non-legal guardian carers as ‘informal carers’. This terminology is used within the family assistance framework,<sup>107</sup> although this term has slightly different meanings across different contexts.

10.90 Informal carers are usually relatives, and most commonly grandparents.<sup>108</sup> Indigenous children may live in informal kinship care arrangements,<sup>109</sup> and most studies ‘indicate that the majority of informal kinship carers are grandparents’.<sup>110</sup> Other informal kinship carers may be aunts, uncles, older siblings and unrelated friends.<sup>111</sup>

10.91 The Australian Bureau of Statistics notes that, in 2009–2010, there were 16,000 Australian families in which grandparents were raising children 17 years and younger.<sup>112</sup> However, the number of non-parent carers in the child support scheme is relatively small: in December 2010 there were approximately 3,900 non-parent carers out of around 1,330,500 payers and payees in the scheme at that time.<sup>113</sup>

10.92 There are a number of reasons why children may be in their grandparents’ care, including: family violence;<sup>114</sup> drug or alcohol misuse;<sup>115</sup> child abuse or neglect;<sup>116</sup> incarceration or death of a parent;<sup>117</sup> and problems arising from mental or physical illness or intellectual disability.<sup>118</sup> In some instances, several of these factors may be interrelated. Consequently, some children in informal care are particularly vulnerable, and may ‘exhibit a range of traumatised behaviour problems’,<sup>119</sup> or have health problems.<sup>120</sup>

10.93 Where parents cannot care for their children, there are benefits to relatives such as grandparents caring for children. These benefits have been described as

107 See Ch 12.

108 Social Policy Research Centre, *Financial and Non-Financial Support to Formal and Informal Out of Home Carers—Final Report (revised 30 November)* (2010), prepared for FaHCSIA, iv. The definition of informal carers used here captures carers who do not have child protection orders in place. These carers may or may not have family law orders. See also B Horner and others, ‘Grandparent-headed Families in Australia’ (2007) (76) *Family Matters* 76, 77.

109 See D Higgins, L Bromfield and N Richardson, *Enhancing Out-of-Home Care for* (2005).

110 Social Policy Research Centre, *Financial and Non-Financial Support to Formal and Informal Out of Home Carers—Final Report (revised 30 November)* (2010), prepared for FaHCSIA, vii.

111 Ibid, vi.

112 Australian Bureau of Statistics, *Family Characteristics, Australia*, 4442.0 (2009–10).

113 Department of Families, Housing, Community Services and Indigenous Affairs, *Correspondence*, 14 April 2011.

114 B Horner and others, ‘Grandparent-headed Families in Australia’ (2007) (76) *Family Matters* 76, 77; Council on the Ageing National Seniors, *Grandparents Raising Grandchildren* (2003), prepared for the Minister for Children & Youth Affairs, [5.3], [6.5.2].

115 B Horner and others, ‘Grandparent-headed Families in Australia’ (2007) (76) *Family Matters* 76, 77; E Baldock, ‘Grandparents Raising Grandchildren because of Alcohol and Other Drug Issues’ (2007) (76) *Family Matters* 70; Council on the Ageing National Seniors, *Grandparents Raising Grandchildren* (2003), prepared for the Minister for Children & Youth Affairs, [3.3.1].

116 B Horner and others, ‘Grandparent-headed Families in Australia’ (2007) (76) *Family Matters* 76, 77.

117 Ibid, 77.

118 Ibid, 77; Council on the Ageing National Seniors, *Grandparents Raising Grandchildren* (2003), prepared for the Minister for Children & Youth Affairs, [3.3.1].

119 Council on the Ageing National Seniors, *Grandparents Raising Grandchildren* (2003), prepared for the Minister for Children & Youth Affairs, [6.3.2].

120 Ibid, [6.5.4].



reducing separation trauma, providing greater stability, preserving significant attachments, reinforcing cultural identity, and preserving the family unit.<sup>121</sup>

10.94 However, caring for children has a significant impact on grandparents—including financially. Emma Baldock notes that this

puts stress on families who may already be on a low income. When grandparents take over the care of children they will have additional expenses—clothing, bedding, home modifications and perhaps even extensions.<sup>122</sup>

10.95 Grandparents may spend their retirement savings and superannuation on raising their grandchildren, and may find their ‘employment and retirement plans thrown into chaos’.<sup>123</sup> They may be forced to give up work to look after the children, or conversely, may need to keep working beyond their planned retirement date due to a lack of financial assistance from the government and the parents.<sup>124</sup> Limited financial resources and high legal costs may impede them from obtaining court orders regarding children’s care arrangements.<sup>125</sup>

10.96 Chapter 12 notes that grandparents may not apply for government benefits such as Family Tax Benefit for various reasons, including fears this will prompt the parents to reclaim their children, and fears of conflict and family violence. Grandparents may also be unaware of their entitlements.<sup>126</sup> Further, grandparents may be wary of drawing attention or oversight to their care arrangements, and possibly triggering state and territory child protection agency involvement. Such concerns may stem from uncertainty regarding the outcome of state involvement—for example, they may worry that the children will be removed from their care.

10.97 If grandparents are deterred from claiming government benefits due to such considerations, they are likely also to be deterred from applying for child support against parents.

### Informal carers’ child support eligibility

10.98 Where an informal carer cares for a child without the consent of the parent or legal guardian, that person is not an eligible carer for child support purposes, unless it is unreasonable for a parent or legal guardian to care for the child. Section 7B(3) of the *Child Support (Assessment) Act* provides that it is unreasonable for a parent or legal guardian to care for a child if the Registrar is satisfied that there is:

- (a) ‘extreme family breakdown’; or

121 B Horner and others, ‘Grandparent-headed Families in Australia’ (2007) (76) *Family Matters* 76, 77.

122 E Baldock, ‘Grandparents Raising Grandchildren because of Alcohol and Other Drug Issues’ (2007) (76) *Family Matters* 70, 75.

123 Council on the Ageing National Seniors, *Grandparents Raising Grandchildren* (2003), prepared for the Minister for Children & Youth Affairs, [6.2.2].

124 Ibid, [6.2.2].

125 Social Policy Research Centre, *Financial and Non-Financial Support to Formal and Informal Out of Home Carers—Final Report (revised 30 November)* (2010), prepared for FaHCSIA, 71: ‘Grandparents who do pursue permanency through the courts often find that the process is enormously expensive’.

126 Ibid, [5.2]. See also Council on the Ageing National Seniors, *Grandparents Raising Grandchildren* (2003), prepared for the Minister for Children & Youth Affairs, [6.2.1].

- (b) ‘a serious risk to the child’s physical or mental wellbeing from violence or sexual abuse in the home of the parent or legal guardian concerned’.

10.99 The *Child Support Guide* provides that the CSA will be satisfied that informal carers are eligible for child support when they establish that they have at least shared care of the child, unless the parent or legal guardian advises the CSA that they do not consent to the care arrangement.<sup>127</sup> When a parent or legal guardian advises of non-consent, the CSA will investigate to determine whether the informal carer is an eligible carer. The *Child Support Guide* states that the legislation implies that ‘if the parent does not agree to the care arrangements they must be prepared to provide care for the child’.<sup>128</sup>

10.100 The *Child Support Guide* provides further details about when the CSA will be satisfied that there has been extreme family breakdown or serious risk to the child’s wellbeing. In relation to extreme family breakdown, the *Child Support Guide* provides fairly broad criteria:

- the child has never lived with the parent; or
- there has been a substantial period since the parent has provided care for the child; or
- other circumstances indicate extreme family breakdown.<sup>129</sup>

10.101 In relation to serious risk to a child’s wellbeing from violence or sexual abuse, the CSA will consider ‘the individual circumstances of each case, including any evidence provided’.<sup>130</sup> It lists examples of evidence that may assist to substantiate a claim: police statements and reports; protection orders and applications for protection orders; and medical reports.<sup>131</sup>

10.102 The *Child Support Guide* does not list neglect as an example of violence that may cause serious risk to a child, nor is it listed as a factor in determining ‘extreme family breakdown’.<sup>132</sup>

10.103 Prior to 2001, parent and legal guardian consent was not required for a child support assessment in favour of an informal carer. The limitation on non-parent carers’ child support eligibility was introduced by the *Child Support Legislation Amendment Act 2001* (Cth). The Explanatory Memorandum expressed the following rationale for the change:

The child support scheme should not be seen to condone or assist the breakdown of families. Accordingly, this measure will generally provide that carers who are not parents or legal guardians of a child cannot be eligible carers, and therefore cannot get

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127 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [2.1.1].

128 Ibid, [2.1.1].

129 Ibid, [2.1.1].

130 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [2.1.1].

131 Ibid, [2.1.1].

132 Ibid, [2.1.1].

child support, if a parent or legal guardian has not consented to the arrangement. However, if it is unreasonable for the child to live at home because of extreme family breakdown or because of a serious risk to the child's physical or mental wellbeing from violence or sexual abuse at home, the carer can be an eligible carer.<sup>133</sup>

### Similarities in social security law and policy

10.104 The criteria for informal carer child support eligibility resemble the criteria to determine if a young person is 'independent' from his or her parents in social security legislation.<sup>134</sup> As discussed above, child support legislation provides that an informal carer is eligible for child support when it is unreasonable for a parent or legal guardian to care for the child. Similarly, social security legislation provides that a young person may be considered independent when it is unreasonable for him or her to live at home.<sup>135</sup> However, social security legislation and policy provides broader criteria for assessing unreasonable circumstances than does child support legislation and policy.

10.105 As discussed in Chapter 6, whether a person is independent affects social security payments, in particular Youth Allowance, Disability Support Pension and Pensioner Education Supplement. The *Social Security Act 1991* (Cth) provides that it may be unreasonable for a person to live at home because:

- 'of extreme family breakdown or other similar exceptional circumstances';
- '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 [exceptional or unreasonable] circumstances';<sup>136</sup> or
- because a parent or parents are unable to provide a suitable home due to 'a lack of stable accommodation'.<sup>137</sup>

10.106 In addition to a further legislative ground in the social security legislation, the inclusion of exceptional (or unreasonable) circumstances similar to both extreme family breakdown, and violence and sexual abuse, provide for more flexible criteria than that provided by s 7B of the *Child Support (Assessment) Act*. It is clear from the *Guide to Social Security Law* that the inclusion of the 'similar exceptional [or unreasonable] circumstances' clauses allows for consideration of a range of factors that may not be relevant to determinations regarding the child support eligibility of informal carers.

10.107 For example, the *Guide to Social Security Law* provides that examples of exceptional circumstances similar to extreme family breakdown include 'severe

133 Explanatory Memorandum, Child Support Legislation Amendment Bill 2001 (Cth).

134 This similarity was noted by the Commonwealth Ombudsman: Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

135 There are also other criteria to establish independence. To be independent because it is unreasonable to live at home, the person must not be receiving continuous support from his or her parents. See Ch 6 for a discussion of independence in the social security context.

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

137 This criterion applies for Youth Allowance and Disability Support Pension: Ibid s 1067A(9).

neglect’, ‘criminal activity or substance abuse by the parents’, ‘extreme and abnormal demands’ on the young person, and refusal to permit the young person to work or study.<sup>138</sup> It also provides that indicators of serious risk to a young person’s physical or mental wellbeing includes psychological abuse, in addition to physical and sexual abuse; and that a young person need not be the victim, but may live in a household where other members have been or are being abused.<sup>139</sup>

10.108 The *Guide to Social Security Law* provides procedural details about how extreme family breakdown and serious risk are assessed. Assessments must include:

- ‘personal contact with the claimant, preferably a face-to-face interview’, and
- ‘parental contact’, where the parent is not alleged to be violent or abusive, and
- verification from a third party.<sup>140</sup>

10.109 The *Guide to Social Security Law* also addresses social worker referrals in cases of child abuse or risk of abuse, and provides that contact should not be initiated with the person alleged to be abusive as this may put the young person at risk.<sup>141</sup>

### Requirement to apply against both parents

10.110 Section 25A of the *Child Support (Assessment) Act* provides that, in order to obtain child support, informal carers must apply for child support against both parents, unless there are ‘special circumstances’, or other circumstances, for example, one parent is dead or not living in Australia or a reciprocating jurisdiction.<sup>142</sup> The *Child Support Guide* provides that ‘special circumstances’ may include ‘fear of violence’, and ‘harmful and disruptive effect’, amongst others.<sup>143</sup> The requirement on informal carers to apply against both parents was introduced in 2006.<sup>144</sup>

10.111 It is unclear from the legislation, or the *Child Support Guide*, how the CSA deals with a child support application from an informal carer when only one parent consents to the care arrangement, or neither parent consents, and it is unreasonable for a child to live with only one parent.<sup>145</sup>

### Submissions and consultations

10.112 In the Child Support Issues Paper, the ALRC asked whether any changes are needed to improve access to child support payments for carers who are not parents and

138 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.2.5.40].

139 Ibid, [3.2.5.50].

140 Ibid, [3.2.5.50], [3.2.5.40].

141 Ibid, [3.2.5.50].

142 *Child Support (Assessment) Act 1989* (Cth) s 25A.

143 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [2.1.1].

144 The *Child Support Legislation Amendment (Reform of the Child Support Scheme—New Formula and Other Measures) Act 2006* (Cth) repealed and substituted *Child Support (Assessment) Act 1989* (Cth) s 25A introducing this requirement.

145 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

legal guardian, who care for children at risk of family violence.<sup>146</sup> The ALRC also asked whether, in cases of family violence, the requirement that a child's wellbeing be at 'serious risk' constitutes a barrier to child support for these carers, where parents or legal guardians do not consent to them providing care.<sup>147</sup>

10.113 Stakeholders submitted that the limitation on informal carers' child support eligibility is not justified, and that the legislative threshold of serious risk is a barrier to child support. Concerns were also raised about the general requirement on informal carers to apply for child support against both parents.

***Limitation may not be justified and is unclear***

10.114 The Ombudsman questioned the legislative limitation on informal carers' entitlement to child support, suggesting that it may not be justified. The Ombudsman referred to the Explanatory Memorandum as indicating that the limitation is

a measure enacted to give a parent a veto right over a child being cared for by a non-parent carer in some circumstances, rather than one intended to ensure that the safety of a child would be paramount, or to ensure that a parent would continue to contribute to a child's support irrespective of where the child resides. While it could be argued that this would reduce the incentive for a child to leave home against his or her parent's (reasonable) wishes, it nevertheless means that a parent will not be required to contribute to the child's support while the child lives elsewhere. This appears to be an exception to the principal object of the *Child Support (Assessment) Act*, which is to ensure that children receive a proper level of child support and the duty to provide this rests with their parents.<sup>148</sup>

10.115 The Ombudsman also stated that it is confusing to have two sets of rules for determining child support eligibility—the rules regarding informal carers do not apply in the family assistance framework, so informal carers who are not entitled to child support may receive FTB for a child. The Ombudsman questioned whether this is an 'unintended policy outcome'.<sup>149</sup>

***Child support accessibility for non-parent carers***

10.116 Several stakeholders commented that the legislative threshold of serious risk to wellbeing is a barrier to child support for informal carers.<sup>150</sup> For example, National Legal Aid stated that the requirements of 'serious' risk and 'extreme' family breakdown may present 'too high a barrier' to child support for informal carers,

146 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 2.

147 Ibid, Question 3.

148 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011. See also National Legal Aid, *Submission CFV 81*, 24 June 2011 and Bundaberg Family Relationship Centre, *Submission CFV 04*, 16 March 2011.

149 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

150 National Legal Aid, *Submission CFV 81*, 24 June 2011; Sole Parents' Union, *Submission CFV 52*, 27 April 2011; Submission 49; Bundaberg Family Relationship Centre, *Submission CFV 04*, 16 March 2011.

leaving them ‘the very challenging option of either withdrawing their support for the child or suffering financial hardship’.<sup>151</sup>

10.117 The Sole Parents’ Union stated that this is an ‘extremely contentious’ area and reported parents’ feedback that, in some situations, informal carers care for a child ‘without their permission, in circumstances where the child is not at risk of violence or abuse’. Nonetheless it stated that ‘as child support is for care of children’, informal carers should have easier access to child support.<sup>152</sup>

10.118 National Legal Aid suggested that Centrelink social workers should assess each case on its circumstances, rather than on the basis of ‘serious risk’ or ‘extreme family breakdown’.<sup>153</sup> It also suggested that the CSA should refer non-parent carers for legal advice, ‘to ensure that they and the children in their care are adequately protected from family violence (eg by way of personal protection order) and are receiving financial support which is adequate as far as possible’.<sup>154</sup>

10.119 The Law Council presented an alternative view. It argued against a change to the legislation, and submitted that where the parent or guardian does not provide consent, non-parent carers should be required to apply for court orders.<sup>155</sup>

#### ***Similarities in social security legislation and policy***

10.120 The Ombudsman drew attention to the ‘strong similarities’ between the non-parent carer limitation and the comparatively wider criteria under social security laws and policy for assessing when it is unreasonable for a young person to live with one or both their parents. The Ombudsman stated that

if the ALRC considers the non-parent carer limitation is justified, we consider there would be considerable value in aligning the circumstances when it would be considered unreasonable for a child to live with a parent for both youth allowance and child support. In particular, we note that neglect has been recognised as one of the most serious threats to a child’s long term well-being.<sup>156</sup>

#### ***Requirement to apply against both parents***

10.121 The Ombudsman stated that prior to the introduction of the requirement to apply for child support against both parents, an informal carer ‘could choose to apply only against the parent who consented to the care arrangement; or a parent who did not consent, but with whom it was nevertheless unreasonable for a child to live’. The Ombudsman further stated that since the introduction of this requirement, it is unclear in cases where neither parent consents, or it is unreasonable for a child to live with only one parent,

whether the CSA would make an assessment against both parents; refuse the application against both parents; or make an assessment against only the parent with

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151 National Legal Aid, *Submission CFV 81*, 24 June 2011.

152 Sole Parents’ Union, *Submission CFV 52*, 27 April 2011.

153 National Legal Aid, *Submission CFV 81*, 24 June 2011.

154 *Ibid.*

155 Law Council of Australia Family Law Section, *Submission CFV 67*, 5 May 2011.

156 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

whom it is unreasonable for the child to live. The CSA has undertaken to discuss this problem with FaHCSIA.<sup>157</sup>

## ALRC's views

### *Repealing the informal carers eligibility limitation*

10.122 The limitation on child support eligibility for informal carers appears inconsistent with the principal object of the *Child Support (Assessment) Act*, which provides that children should receive a proper level of financial support from their parents.<sup>158</sup> The limitation is also arguably inconsistent with other objects, including that carers should have levels of financial support for children 'readily determined without the need for court proceedings'.<sup>159</sup>

10.123 The limitation on child support eligibility for informal carers may be generally undesirable, given that evidence suggests that informal care is usually provided for by relatives—grandparents in particular—and that, when parental care breaks down, children significantly benefit by being raised by relatives. The ALRC is concerned that this limitation may disadvantage children who have experienced child abuse, neglect and family violence in their parents' home.

10.124 The limitation affects informal carers who care for these children. Informal carers may already face financial disadvantage, caused or compounded by unplanned-for child-raising—particularly where children have special needs as a result of trauma. Child support ineligibility may further disadvantage these carers. Obtaining family law orders to address ineligibility may be difficult, given the financial burden informal carers may face.

10.125 The ALRC is interested in hearing from stakeholders if the limitation on the child support eligibility of informal carers should be removed.

### *Alternatives to repealing the informal carers eligibility limitation*

#### *Changes to s 7(3)(b) of the Child Support (Assessment) Act*

10.126 If the limitation remains, the legislative criteria in s 7B of the *Child Support (Assessment) Act* require amendment. The threshold provided by the s 7B criteria—in the absence of parent or legal guardian consent to the care or 'extreme family breakdown'—is inappropriately high. Further, unlike comparable social security legislation, s 7B does not include phrases that enable consideration of exceptional or unreasonable circumstances similar to those listed. The social security legislation allows for a more flexible policy approach, catching a broad range of circumstances, as demonstrated by the *Guide to Social Security Law*.

10.127 In the ALRC's view, the term 'violence' should be replaced by 'family violence' in s 7B(3)(b). Proposal 3–2, which sets out a definition of family violence for child support legislation, complements this approach. 'Family violence' captures a

157 Ibid.

158 *Child Support (Assessment) Act 1989* (Cth) s 4(1).

159 Ibid s 4(2)(c). See also s 4(2)(d).

wider range of conduct than ‘violence’, insofar as that conduct is violent, threatening, controlling, coercive or engenders fear. Examples of conduct contained in the family violence definition that may not be caught by ‘violence’ include psychological or emotional abuse, deprivation of liberty, and exposing a child to family violence.

10.128 Child abuse and neglect are not expressly included in s 7(3)(b). The provision currently takes into account physical abuse of a child—caught by ‘violence’—and sexual abuse. This section is too limited, and should be amended to include child abuse and neglect.

10.129 For an informal carer to be eligible for child support on the basis of violence or sexual abuse in the parents’ or legal guardians’ home, the CSA must also be satisfied that this puts a child’s wellbeing at risk of serious harm. This requires judgment as to whether there is risk of harm, and whether such a risk is serious. The ALRC considers that the requirement for such judgment is inappropriate and implies that child abuse, family violence and neglect may not harm children’s physical or mental wellbeing in some cases.

10.130 In the ALRC’s view, the very fact, or risk, of child abuse, family violence and neglect, should trigger child support eligibility for the child’s new carers, without the need to prove that such conduct had a certain effect on the child.

#### ***Assessing unreasonable circumstances***

10.131 The ALRC considers that the *Child Support Guide* should provide more guidance for assessing when it is unreasonable for a child to live with his or her parents. The *Guide to Social Security Law* provides substantially more information than the *Child Support Guide*. Describing applicable procedures in the *Child Support Guide* would increase clarity, transparency and accountability, and improve the safety of victims of family violence and their informal carers.

10.132 Given the nature and effects of decisions about whether it is unreasonable for a child to live at home, and the importance of conducting assessments safely and appropriately, the ALRC considers that a Centrelink social worker should conduct the assessment and make a recommendation, and a senior CSA officer should make a decision having regard to the recommendation. The ALRC also considers that the *Child Support Guide* should provide guidelines for conducting assessments similar to those contained in the *Guide to Social Security Law*.

#### ***Screening for family violence***

10.133 An application for child support by an informal carer may be the first time that such a change comes to an agency’s attention, and may therefore be the event that triggers screening. Family violence screening at this point, as provided for in Proposal 4–2, would facilitate referrals to appropriate support services.<sup>160</sup>

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160 For a full discussion of this issue, see Ch 12.



**Requirement to apply against both parents**

10.134 The ALRC is interested in comment about whether—if the limitation on informal carers' child support is maintained—the *Child Support Guide* should provide further guidance on how s 7B(2)–(3) and s 25A(b)(i) of the *Child Support (Assessment) Act* should interact in practice. That is, should the *Child Support Guide* provide how the CSA should respond to an application for child support from informal carers when:

- only one parent consents to the care arrangements; or
- neither parent consents to the care arrangements and it is unreasonable for a child to live with only one parent.

10.135 This information may provide informal carers clarity and certainty in cases of family violence, assisting them to give proper consideration as to whether they should claim 'special circumstances'.

**OPTION ONE: Proposal 10–4**

**Proposal 10–4** 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 limitation on the child support eligibility of carers who are neither parents nor legal guardians in section 7B(2)–(3) of the *Child Support (Assessment) Act 1989* (Cth) should be repealed.

**OPTION TWO: Proposals 10–5, 10–6 and 10–7, and Question 10–4**

**Proposal 10–5** 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).

Section 7B(3)(b) of the *Child Support (Assessment) Act 1989* (Cth) should be amended 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'.

**Proposal 10–6** The *Child Support Guide* should provide that:

- (a) where a person who is not a parent or legal guardian carer applies for child support; and

- (b) a parent or legal guardian advises the Child Support Agency that he or she does not consent to the care arrangement; and
- (c) it is alleged that it is unreasonable for a child to live with the parent or legal guardian concerned:

the following should occur:

- (1) a Centrelink social worker should assess whether it is unreasonable for the child to live with the parent or legal guardian who does not consent, and make a recommendation; and
- (2) a senior Child Support Agency officer should determine if it is unreasonable for the child to live with the parent or legal guardian who does not consent, giving consideration to the Centrelink social worker's recommendation.

**Proposal 10–7** The *Child Support Guide* should include guidelines for assessment of circumstances in which it may be unreasonable for a child to live with a parent or legal guardian.

**Question 10–4** Should the *Child Support Guide* be amended to specify the Child Support Agency's response to an application for child support from a carer who is not a parent or legal guardian of the child, where:

- (a) only one of the child's parents consents to the care arrangements; or
- (b) neither of the child's parent consents to the care arrangements, and it is unreasonable for the child to live with one parent?

In practice, how does the Child Support Agency respond to an application for child support in these circumstances?



## 11. Child Support and Family Assistance— Intersections and Alignments

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### Summary

11.1 There are points of intersection and alignment between child support and family assistance frameworks. In particular, child support interacts with Family Tax Benefit (FTB)—the primary family assistance payment<sup>1</sup>—at two key points.

11.2 The first point is the ‘reasonable maintenance action’ requirement in family assistance legislation. In accordance with this requirement, eligible parents must be in receipt of child support to receive more than the minimum rate of FTB. Family assistance policy recognises that this requirement may affect victims of family violence, and provides for exemptions from the requirement to take reasonable maintenance action.

11.3 The second point is an alignment in family assistance and child support legislation and policy in relation to determinations of percentages of care. This is a component of both child support and family assistance calculations, and affects the amount or distribution of entitlements.

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

11.4 This chapter focuses on exemptions from the reasonable maintenance action requirement, as family violence exemptions are the key protective strategy for victims in both child support and family assistance contexts. A strong focus is the accessibility of exemptions for victims who require them. The proposed reforms seek to achieve this by providing information in the *Family Assistance Guide*—in particular, information about the availability of partial exemptions, the duration of exemptions, and the review process. The ALRC also proposes that exemption policy should be included in family assistance legislation. The chapter concludes with an examination of the legislative and policy bases of percentage determinations, and how the rules underpinning such determinations affect victims of family violence.

## Departments and agencies

11.5 The Child Support Agency (CSA), Family Assistance Office (FAO) and Centrelink all have roles in administering the laws and policies at the intersection of child support and family assistance frameworks. A description of each agency is set out in Chapters 9, 12, and 5 respectively.

11.6 All agencies are under the governance of the Department of Human Services (DHS). The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) develops family assistance and child support policy, and publishes the *Family Assistance Guide*.

## Reasonable maintenance action exemptions

### Reasonable maintenance action

11.7 As discussed in Chapter 9, *A New Tax System (Family Assistance) Act 1999* (Cth) (referred to in this Discussion Paper as the *Family Assistance Act*) requires a person who receives more than the base rate of FTB Part A for a child to take reasonable action to obtain maintenance, where it is reasonable to do so.<sup>2</sup> This is referred to as taking ‘reasonable maintenance action’ or the ‘maintenance action test’.<sup>3</sup> To comply with this requirement, a person is generally required to apply for child support, where eligible, and to collect payments either privately or via the CSA.<sup>4</sup> If a person does not take reasonable maintenance action, the FAO will reduce FTB Part A payments for the child to the base rate.<sup>5</sup> There is therefore a financial consequence if such action is not pursued.

11.8 Also as discussed in Chapter 9, the reasonable maintenance action requirement is a key strategy to the objective of limiting government expenditure to the minimum required to ensure that children of separated parents receive adequate financial support, and that parents have the primary responsibility of financial support for their children.

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

3 The maintenance action test is often abbreviated to ‘MAT’.

4 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.1.5.30].

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

To this end, the reasonable maintenance action requirement is complemented by the ‘maintenance income test’, which operates to reduce FTB Part A by fifty cents for every dollar of child support, above an exempted amount, until the base rate of FTB Part A is reached.

11.9 Parents who are eligible for child support have 13 weeks after separation to apply for child support or obtain an exemption, as discussed below, to avoid a reduction in their FTB Part A rate. While 13 weeks is a significant extension of the previous 28 day period, which applied before January 2007, it may not be sufficient for those experiencing family violence.<sup>6</sup>

### Family violence exemptions

11.10 Individuals may obtain exemptions from taking reasonable maintenance action on a number of grounds. Grounds relevant for victims of family violence are:

- ‘violence or fear of violence’;<sup>7</sup> and
- ‘harmful or disruptive effect’ on the payee or payer (including cases of rape or incest).<sup>8</sup>

11.11 Centrelink determines all requests for exemptions. The CSA and Centrelink refer persons who may be eligible for exemptions to Centrelink social workers. Indigenous Service Officers (ISOs) may also grant exemptions.<sup>9</sup> In some cases, family violence victims may contact Centrelink prior to contacting the CSA and receive an exemption at this stage—therefore having no contact with the CSA.

11.12 Exemptions relieve a person from the requirement to apply for child support. Exemptions may also be available to end an existing child support assessment. As discussed in Chapter 9, where payees receive more than the base rate of FTB Part A, the CSA cannot accept their elections to end the assessment without Centrelink approval, unless they are no longer eligible for child support.<sup>10</sup>

11.13 The *Family Assistance Guide* describes the role of social workers and ISOs in this context. They should ensure the customer understands that:

- child support is for the financial benefit of the child and the parent caring for the child,

6 Family Assistance Office, *The Child Support Scheme* <[www.familyassist.gov.au/payments/](http://www.familyassist.gov.au/payments/)> at 22 July 2011.

7 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.1.5.70].

8 Ibid, [3.1.5.70].

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

10 *Child Support (Assessment) Act 1989* (Cth) ss 151(4), 151A; Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [2.10.2], [6.10.1]; Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.1.6.40].

- child support improves the financial resources for children not living with both parents and can be received until the child turns 18 years,
- children are entitled to receive support from both parents, and
- child support does not have to involve contact between the parents.<sup>11</sup>

11.14 It notes that social workers may alleviate customers' privacy fears, refer the customer for other assistance needed, and 'present the advantages of the [child support scheme] for children in a more positive light'.<sup>12</sup>

11.15 Indigenous customers are referred to ISOs, who have a specific role. In determining whether to grant an exemption, the *Family Assistance Guide* provides that ISOs should consider the reason the customer does not want to obtain child support, and the likely effect on the customer and his or her community. Where customers live in remote areas, the ISO should determine if the other party is 'likely to be in a position to pay child support', and seek advice from community contacts if necessary.<sup>13</sup>

11.16 The *Family Assistance Guide* also provides that social workers or ISOs should assist the customer in verifying the grounds for an exemption, fully exploring avenues such as: health professionals; community agencies; legal practitioners; police; relatives; or friends. It states that, wherever possible, a letter of verification should be obtained from these sources.<sup>14</sup> The *Family Assistance Guide* also provides that the social worker should document the verification source, or why verification is not possible.<sup>15</sup>

### Exemptions not in legislation

11.17 Exemptions from the requirement to take reasonable maintenance action are not set out in family assistance legislation. Rather, exemption policy is contained in the *Family Assistance Guide* and, to a lesser extent, the *Child Support Guide*. In *Family Violence and Commonwealth Laws—Child Support and Family Assistance*, ALRC Issues Paper 38 (2011) (Child Support and Family Assistance Issues Paper), the ALRC asked whether legislation should provide that a person who receives more than the base rate of FTB Part A may be exempted from the requirement to take reasonable maintenance action, on grounds of family violence.<sup>16</sup>

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11 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.5.100].

12 Ibid, [3.5.100].

13 Ibid, [3.5.100].

14 Ibid, [3.5.100].

15 Ibid, [3.5.100].

16 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 8.

**Submissions and consultations**

11.18 Most stakeholders submitted that the exemption from the reasonable maintenance action requirement should be stipulated in legislation.<sup>17</sup> For example, the Welfare Rights Centre NSW argued that ‘a legislated exemption is preferred for reasons of clarity and certainty’.<sup>18</sup>

**ALRC’s views**

11.19 Exemptions from the reasonable maintenance action requirement are a significant matter of policy, and therefore should be included in the legislation itself, rather than only in the supporting policy guide. The requirement to take reasonable maintenance action is contained in the *Family Assistance Act*. Exemptions provisions would therefore be appropriately placed in that Act.

11.20 Including exemptions in legislation acknowledges their significant role in protecting victims by permitting them to opt out from the assessment and collection of child support, without a consequent reduction of their FTB Part A payments. Further advantages are that legislative provisions are more authoritative and transparent, and may provide victims of family violence with increased procedural certainty.

**Proposal 11–1** 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. A *New Tax System (Family Assistance) Act 1999* (Cth) should be amended 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’ on specified grounds, including family violence.

**Accessibility of family violence exemptions****Barriers to exemptions**

11.21 Exemptions may be inaccessible to victims of family violence for a number of reasons. They may be ‘uninformed or not aware’<sup>19</sup> of the availability of family

17 Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011; ADFVC, *Submission CFV 53*, 27 April 2011; Sole Parents’ Union, *Submission CFV 52*, 27 April 2011; M Vnuk, *Submission CFV 47*, 21 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 43*, 21 April 2011; Bundaberg Family Relationship Centre, *Submission CFV 04*, 16 March 2011.

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

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



violence exemptions or deterred by the complexity of the exemption procedure and the evidence required.<sup>20</sup>

11.22 Financial barriers may also deter victims from seeking exemptions. Where an exemption is granted, a person does not receive child support payments. The lack of child support payments may not be fully compensated by an increase in benefits. A victim of family violence who obtains an exemption may therefore receive less overall income than if he or she received child support payments.<sup>21</sup> If this prospect deters victims from requesting exemptions, their safety may be compromised. Conversely, where they do obtain exemptions, decreased levels of income may compound the financial disadvantage already widely experienced by victims of family violence.<sup>22</sup>

### *Duration of exemptions and reviews*

11.23 Exemption reviews have been identified as a factor that potentially deters victims from seeking exemptions.<sup>23</sup> The *Family Assistance Guide* provides that Centrelink should generally review cases in which it has granted an exemption at least every 12 months, although the timeframe varies depending on the circumstances and the type of exemption.<sup>24</sup>

11.24 The *Child Support Guide* provides that reviews determine ‘whether the parents’ circumstances have changed and, if so, whether the exemption is still appropriate’.<sup>25</sup> Information about exemption reviews in the *Family Assistance Guide* is limited, stating that the form of review depends on the circumstances, so that, for example, it may be conducted by telephone.<sup>26</sup>

11.25 The *Family Assistance Guide* provides for the timing of exemption reviews, according to the type of exemption. Family violence exemptions are not specifically

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

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

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

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

24 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.1.5.90].

25 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [6.10.1].

26 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.1.5.70].

listed, and therefore fall under the category ‘other circumstances’, for which the time period provided is ‘as applicable’.<sup>27</sup>

11.26 The ALRC understands that exemptions due to violence or fear of violence are initially granted for a 12-month period. Centrelink social workers review the exemptions at the conclusion of this period. In the Child Support and Family Assistance Issues Paper the ALRC noted its understanding that exemptions may be granted on a permanent basis at the 12-monthly review. The ALRC has since received different information regarding the availability of permanent exemptions, and the practice of permanent exemptions in cases of family violence is not articulated in the *Family Assistance Guide*.

### ***Submissions and consultations***

11.27 In the Child Support and Family Assistance Issues Paper the ALRC posed several questions in relation to family violence exemptions from the reasonable maintenance action requirement. The ALRC asked if legislative or policy changes are required to ensure exemptions are accessible<sup>28</sup> and, in a related question, whether CSA staff should be required to provide information about family violence exemptions when dealing with child support applications.<sup>29</sup>

11.28 Also in relation to exemption accessibility, the ALRC asked whether changes are needed to family assistance and child support legislation and policy:

- to address the financial disadvantage of victims of family violence who obtain an exemption;<sup>30</sup> and
- to ensure that exemption periods are of an appropriate duration.<sup>31</sup>

### ***Barriers to accessibility***

11.29 Stakeholders reported that customers are often unaware of the availability of exemptions, and this is a barrier to accessibility.<sup>32</sup> The Australian Domestic and Family Violence Clearinghouse (ADFVC) reported that many participants in a study it had undertaken were ‘not aware of the family violence exemption or had only found out about it after applying for child support.’<sup>33</sup> The Commonwealth Ombudsman also noted that it had received complaints from child support and FTB recipients who said they were unaware of family violence exemptions.<sup>34</sup>

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27 Ibid, [3.1.5.90].

28 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 4(a).

29 Ibid, Question 5.

30 Ibid, Question 4(c).

31 Ibid, Question 4(b).

32 National Legal Aid, *Submission CFV 81*, 24 June 2011; Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011; ADFVC, *Submission CFV 53*, 27 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

33 ADFVC, *Submission CFV 53*, 27 April 2011.

34 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

11.30 Stakeholders also commented that customers are not provided with information about exemptions. The Council of Single Mothers and their Children (CSMC) submitted that there is a lack of information about exemptions from Centrelink and CSA staff, which results in a lack of awareness about their availability.<sup>35</sup> It notes that ‘it is particularly difficult to locate information on family violence on the Child Support Agency website’.<sup>36</sup>

11.31 National Legal Aid stated that, along with a lack of awareness of exemptions, customers may decide not to pursue an exemption as they are not properly informed of consequences. It noted that the decision not to pursue an exemption may be based on reasons including ‘fear, privacy concerns, and/or because the customer thinks that even with the exemption they will not receive an increased rate of FTB by reason of income’.<sup>37</sup>

11.32 Stakeholders further noted that family violence is generally under-reported or minimised, and customers may not disclose family violence.<sup>38</sup> The ADFVC noted that barriers to disclosure include:

concerns about not being believed; having to retell their story of violence to multiple service providers and organisations, which women found retraumatising; and not recognising their experience as domestic violence.<sup>39</sup>

11.33 The Australian Association of Social Workers (Qld) (AASW) raised the issue of evidence required to support an application for exemption:

It is our view that consultation with the domestic and family violence service sector with emphasis on services for immigrant women would be useful to determine appropriate levels of evidence that are not too onerous on the victim and do not require a personal protection order. Women report that there appears to be a heavy reliance on personal protection orders as evidence of domestic and family violence. It is our experience that there are many circumstances where even with the existence of serious physical assault, it is not safe to pursue such an order.<sup>40</sup>

11.34 The Ombudsman cautioned that it should not be assumed by CSA and Centrelink staff that victims of family violence will choose not to receive child support.<sup>41</sup> National Legal Aid also commented that victims of family violence may wish to obtain child support and should be provided with various supports.<sup>42</sup>

11.35 The Non-Custodial Parents Party (Equal Parenting) commented generally that it supports the removal of the ‘artificial link’ between FTB and child support—however,

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35 Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011. See also National Legal Aid, *Submission CFV 81*, 24 June 2011; Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

36 Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

37 National Legal Aid, *Submission CFV 81*, 24 June 2011.

38 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011; ADFVC, *Submission CFV 53*, 27 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

39 ADFVC, *Submission CFV 53*, 27 April 2011.

40 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

41 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

42 National Legal Aid, *Submission CFV 81*, 24 June 2011.

it opposed the reforms proposed in the Child Support and Family Assistance Issues Paper.<sup>43</sup>

***Providing information about exemptions and screening***

11.36 A number of stakeholders considered that the CSA should be required to provide information about exemptions when dealing with applications for child support. The ADFVC stated that:

For victims of family violence to make informed decisions that impact both on their safety and well-being, they must have information about their rights and entitlements.<sup>44</sup>

11.37 The Ombudsman commented that CSA staff should provide information about family violence exemptions when dealing with applications for child support as ‘it is likely that a victim of family violence may not have thought to tell the CSA about their situation when applying for a child support assessment’.<sup>45</sup>

11.38 A couple of stakeholders expressed qualified support for family violence screening in this context.<sup>46</sup> The ADFVC considered that screening by trained officers would be useful to identify victims and provide them with targeted information.<sup>47</sup>

11.39 National Legal Aid commented on information that should be provided to victims of family violence who choose not to obtain exemptions. It stated that legal advice should be recommended to such customers, and that the CSA and Centrelink ‘should clearly explain the steps that the CSA would take to contact the other parent about payment of child support, including the time frames involved, allowing sufficient time for the customer to obtain advice and plan for their safety’.<sup>48</sup>

***Financial disadvantage due to exemptions***

11.40 There was some overlap in stakeholder responses to the issue of financial disadvantage as a result of exemptions, and the issue of reforms to ensure that persons who use family violence are not relieved of financial responsibility when victims obtain exemptions.

11.41 National Legal Aid described the ‘unfortunate paradox’ presented by the family violence exemption.<sup>49</sup> It stated that, while an exemption may be in the best interests of the child and the carer parent, they may be denied the financial support required for their day-to-day needs as a consequence. It provided the following case study.

A woman who had been on an exemption for six years due to family violence, discovered later that the liable parent was on a substantial income and that she had foregone a considerable amount of funds which could have provided significant

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43 Non-Custodial Parents Party (Equal Parenting), *Submission CFV 50*, 25 April 2011.

44 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

45 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

46 See ADFVC, *Submission CFV 53*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011.

47 ADFVC, *Submission CFV 53*, 27 April 2011.

48 National Legal Aid, *Submission CFV 81*, 24 June 2011.

49 Ibid.

financial support for the child. ... The client suffered what she considered a significant financial penalty by having an exemption in place to protect herself from family violence. The funds in question would have made a demonstrable difference to the child in terms of education and other opportunities.<sup>50</sup>

11.42 National Legal Aid considered that while safety must be prioritised ‘there are not sufficient resources to ensure that all customers with a family violence exemption are fully compensated for their loss of child support’.<sup>51</sup> Consequently, it considered that all options should be explored in identifying the appropriateness of a family violence exemption. It further stated that advice and support should be provided so that customers may make ‘informed decisions about their safety and the effect of pursuing child support’.<sup>52</sup> It noted that the amount of child support the customer is eligible to receive may be a relevant factor in such decisions.<sup>53</sup>

11.43 Stakeholders suggested a number of other reforms to address financial disadvantage due to exemptions. The ADFVC commented that some women in their study, *Seeking Security: promoting women’s economic wellbeing following domestic violence*, who had obtained an exemption were worse off financially than if they had received child support. To address this issue it supported

the child support system used in Sweden and Norway, whereby the government provides guaranteed child support payments directly to recipients, ensuring payments are made in full and on time. Payers are pursued by the government, which is infinitely better resourced to do so than individual, often vulnerable women. As a result, payees do not experience the risks involved in investigating ex-partners or pursuing non-payment themselves. Single parents can also apply for advance maintenance directly from the government. The approach aims to provide financial surety for resident parents and provide some measure of safety from retaliation, while keeping non-resident parents accountable.<sup>54</sup>

11.44 The ADFVC clarified that, in a system of guaranteed payments, the exemption option should be preserved, as some women in their study considered that any attempt to compel child support payments would increase the risk of further abuse.<sup>55</sup>

11.45 There was some focus on the role of the CSA in collecting child support. The CSMC stated that:

The current system that leaves collection of child support as an individual responsibility (sometimes facilitated through the CSA) leaves women escaping violence little option to ensure their safety, but to forgo child support payments.<sup>56</sup>

11.46 It suggested that the government ‘take responsibility for collection of the payments (eg, through the CSA). This would remove the need for individuals to be

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50 Ibid.

51 Ibid.

52 Ibid.

53 Ibid.

54 ADFVC, *Submission CFV 53*, 27 April 2011.

55 Ibid.

56 Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

responsible for arranging collection of payments from someone who uses violence against them’.<sup>57</sup>

#### *Duration of exemptions and reviews*

11.47 In relation to the duration of exemptions, the Law Council of Australia commented that the time periods—and the provisions regarding exemptions generally—‘appear to be appropriate’.<sup>58</sup> The ADFVC stated that the grant of a permanent exemption at the 12 month review was not the experience of participants in a study it conducted, who ‘expressed frustration about having to reapply for the exemption multiple times and saw this as a needless process’. It noted that ‘consistency of practice would improve this process’.<sup>59</sup>

11.48 The AASW noted that information of the availability of permanent family violence exemptions at the 12 month review is not readily available. It stated that the information should be available so that victims may make informed decisions, and prepare for a review of their circumstances at the end of this period.<sup>60</sup>

11.49 National Legal Aid commented generally on the *Family Assistance Guide*, stating that it is important for exemption policy ‘to be clear and consistent with the rationale for decisions being readily capable of being ascertained’.<sup>61</sup>

#### *ALRC’s views*

##### *Improving accessibility of exemptions*

11.50 Victims must be able to opt out of the child support scheme where obtaining child support would compromise their safety. Exemptions from the reasonable maintenance action requirement should therefore be readily accessible to victims.

11.51 On the other hand, agencies should not assume that all victims of family violence desire an exemption, nor that exemptions are the appropriate response to all family violence cases. This would conflict with the principle of self-agency discussed in Chapter 2. A key theme of Chapters 9 and 10 is improving the administration of child support cases to protect the safety of victim, thus facilitating their participation in the child support scheme. Reforms to increase the accessibility of exemptions should complement, rather than undermine, reforms to increase accessibility of the child support scheme for victims of family violence.

11.52 In the ALRC’s view, reforms proposed in Chapter 4 will increase the accessibility of exemptions. In particular, family violence screening by the CSA, FAO and Centrelink, and inter-agency information sharing about ‘safety flags’, should remove barriers to exemptions. These measures will increase the likelihood that those eligible for family violence exemptions are identified and provided with targeted

57 Ibid. See also Bundaberg Family Relationship Centre, *Submission CFV 04*, 16 March 2011.

58 Law Council of Australia Family Law Section, *Submission CFV 67*, 5 May 2011.

59 ADFVC, *Submission CFV 53*, 27 April 2011.

60 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

61 National Legal Aid, *Submission CFV 81*, 24 June 2011.

information.<sup>62</sup> Other Chapter 4 proposals that should improve the accessibility of exemptions are:

- provision of information by agencies to customers about how family violence is relevant to child support and family assistance—including information about exemptions;<sup>63</sup>
- referral of all customers who disclose family violence to Centrelink social workers;<sup>64</sup>
- training for agency customer service staff, Centrelink social workers and ISOs in relation to:
  - ensuring customers who disclose family violence know about their rights and possible service responses—including exemptions; and
  - the nature, feature and dynamics of family violence, its effect on victims, and responding to and interviewing family violence victims.<sup>65</sup>

11.53 The ALRC notes stakeholder comment that there is a reliance on personal protection orders as evidence of family violence in the administration of exemption policy. This is contrary to the procedure contained in the *Family Assistance Guide*. The reason victims report more onerous evidence requirements than provided for in the *Family Assistance Guide* is unclear. It could perhaps be attributed to limited staff understanding of the policy, or misunderstandings and communication difficulties—perhaps heightened in circumstances where victims are experiencing distress or upheaval. If this is the case, the proposals described in Chapter 4 should address the issue—in particular, those regarding providing information to customers, and staff training.

***Potential for exemptions to cause financial disadvantage***

11.54 The ALRC considers that the most effective way of addressing the potential for exemptions to lead to financial disadvantage is to improve the safety of victims through the administration of child support cases. As noted above, this should enhance the child support system’s accessibility, and limit the uptake of family violence exemptions to those cases where victims have made an informed decision that exemptions are the best strategy to ensure their safety.

11.55 A critical component of this approach is providing victims with information about the administrative options that may address any safety concerns. Customers who disclose family violence should be referred to social workers to discuss the services and supports available to victims, amongst other relevant matters. In the child support context, a key service that may improve victim safety is CSA collection of child support. As discussed in Chapter 9, CSA collection minimises inter-party contact about

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<sup>62</sup> Proposals 4–2, 4–11, 4–12.

<sup>63</sup> Proposal 4–8.

<sup>64</sup> Proposal 4–10.

<sup>65</sup> Proposal 4–6.

child support, and generally relieves victims from the responsibility of collecting payments.

11.56 Other reforms, proposed in Chapter 9, would improve the safety of victims by the CSA seeking their input before taking significant action on their case. Information about these measures may also assist victims in making appropriate choices in relation to participation in the child support scheme.<sup>66</sup>

#### ***Duration of exemptions and reviews***

11.57 The administration of family violence exemptions should apply consistently and transparently. Therefore the ALRC's preliminary view is that the *Family Assistance Guide* should provide more information regarding the duration of family violence exemptions—both for an initial period, and on review. If this is variable according to circumstances, this should be specified in the *Family Assistance Guide*—and the factors to which the social worker should have regard in determining the duration of the exemption should also be included.

11.58 There is a point of tension in enhancing the accessibility of exemptions, and enhancing the overall accessibility of the child support system for victims of family violence. This issue of the duration of exemptions sits at this tension-point. The ALRC notes stakeholder comments that numerous reviews are frustrating and potentially re-traumatising for victims of violence. However, the ALRC also acknowledges that reviews of exemptions may be desirable as, in many cases, the risk and fear of violence may decrease over time.

11.59 In such circumstances, a review of an exemption—and the associated contact with a social worker—may provide the victim an opportunity to engage with the child support system, to his or her potential financial benefit. Periodic reviews may enhance the accessibility of the child support scheme, and ensure that a victim does not incur financial disadvantage.

11.60 Periodic reviews may also be a way of ensuring that a victim remains visible within the system, with access to referrals and other supports. This function may be further consolidated or enhanced, given the ALRC's proposals regarding the training of social workers.<sup>67</sup> The proposed training may also be useful in assisting social workers to alleviate the frustration or distress that some customers experience as a result of periodic reviews.

11.61 For the above reasons, the ALRC does not propose reforms to the availability of permanent exemptions. In the ALRC's preliminary view, more detailed information about the duration of exemptions, including the availability of a permanent exemption, if applicable, should be provided to victims of family violence, in particular, prior to exemption reviews. Further, information about the review process should be readily available. The ALRC considers this information should be stated clearly in the *Family Assistance Guide*.

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66 Proposals 9–4, 9–5, 9–6.

67 Proposals 4–5, 4–6.



**Proposal 11–2** The *Family Assistance Guide* should be amended to provide additional information regarding:

- (a) the duration, and process for determining the duration, of family violence exemptions from the ‘reasonable maintenance action’ requirement; and
- (b) the exemption review process.

## Consequences of family violence exemptions

### *Persons who use family violence relieved of financial responsibility*

11.62 The operation of the exemption policy as reflected in the *Family Assistance Guide* and the *Child Support Guide* has some problematic consequences. Most notably, persons who have used family violence do not have to pay child support when the victim obtains an exemption. Persons who use family violence are therefore not required to take financial responsibility for their children in these circumstances.

11.63 The Child Support and Family Assistance Issues Paper noted the alternative model provided by some US states, where child support debts accrue while exemptions are in place. Once the exemption expires, the person who has used violence is liable to pay the debt in full.<sup>68</sup> This may prevent persons who use family violence from benefiting financially when victims obtain an exemption.

### *Victims required to pay child support*

11.64 A further issue is that there is no barrier to prevent a person who has used family violence from applying for child support, in cases where the victim has obtained an exemption. As a result, victims who have obtained an exemption may in some circumstances be required to pay child support to the parent who has used violence. This may occur following a change to care arrangements—for example, where an arrangement changes so that the person who has used violence provides more care.

### *Submissions and consultations*

11.65 In the Child Support and Family Assistance Issues Paper, the ALRC asked whether reforms are needed to ensure that persons who use family violence are not relieved from financial responsibility when victims obtain exemptions from the requirement to take reasonable maintenance action.<sup>69</sup> The ALRC also asked if a person who has been granted an exemption due to family violence should also be exempt from paying child support to the person who has used family violence.<sup>70</sup>

<sup>68</sup> R Patrick, K Cook and H McKenzie, ‘Domestic Violence and the Exemption from Seeking Child Support: Providing Safety or Legitimizing Ongoing Poverty and Fear’ (2008) 42 *Social Policy and Administration* 749, 753, 763.

<sup>69</sup> Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 6.

<sup>70</sup> Ibid, Question 7.

***Exemptions relieve persons who use family violence of financial responsibility***

11.66 Stakeholders considered that exemptions that have the effect of relieving persons who use family violence of financial responsibility is a significant problem.<sup>71</sup> The CSMC articulated the problem as follows:

those who use violence, in effect, receive a bonus for their behaviour—not having to contribute to the financial support for their children. Conversely, children are denied the financial support for which they would otherwise be entitled to.<sup>72</sup>

11.67 The National Council of Single Mothers and their Children (NCSMC) expressed a similar concern. Both the NCSMC and the CSMC suggested the introduction of a fine or penalty for persons who use family violence to address the issue. The NCSMC stated that a ‘Domestic Violence Payment and Transfer Scheme’ should be established,

premised upon the notion that perpetrators of violence should not be financially rewarded for their criminal conduct whilst ensuring that agencies protect victims. Under this proposal, perpetrators of violence would be required to make a financial contribution to this scheme. The payment would not be child support but a domestic violence penalty and it would be collected by a government department other than the Child Support Agency.<sup>73</sup>

11.68 Several stakeholders stressed that the safety of victims and their children is more important than ensuring that persons who use family violence are not relieved of financial responsibility for their children.<sup>74</sup> For example, the Ombudsman considered that ‘the overriding priority must be the safety of the carer and the children’, and pointed out that exemptions may ‘reduce the violence and fear of violence experienced by a payee that stems from applying for child support against a payer’.<sup>75</sup>

11.69 The Ombudsman also stated that this is a ‘difficult policy area’, and suggested that

it would be appropriate for Commonwealth laws, and the arrangements to administer them, to support and protect victims of family violence as far as possible, so that they can be safely encouraged to seek child support. We consider that this requires a more coordinated approach by CSA and Centrelink when a person discloses a fear of family violence.<sup>76</sup>

11.70 Similarly, National Legal Aid submitted that ‘the best systems response’ is training, screening and risk assessment, and agency collaboration ‘to ensure

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71 ADFVC, *Submission CFV 53*, 27 April 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

72 Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

73 National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011.

74 National Legal Aid, *Submission CFV 81*, 24 June 2011; Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011; Confidential, *Submission CFV 13*, 5 April 2011.

75 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

76 Ibid.

consistency in the information provided and that all options are explored with the customer'.<sup>77</sup>

***Exemptions from paying child support for victims of family violence***

11.71 Stakeholders generally supported the proposition that a person who has been granted an exemption from the requirement to take reasonable maintenance action due to family violence should also be exempt from paying child support to the person who has used family violence.<sup>78</sup> The AASW stated that, in their experiences with family violence victims, many 'do not forgo potential income from child support lightly and to also be required to pay child support is not reasonable under these circumstances'.<sup>79</sup> Maria Vnuk noted that her research indicates that there is 'considerable churn' for female payers—that is, members of this group had been payee parents at other times in the duration of their child support case or cases.<sup>80</sup>

11.72 National Legal Aid weighed up several factors in addressing this issue. It noted that a 'blanket rule' in which exempted parents are not required to pay child support could result in children being financially unsupported in cases where child support payment is appropriate. It also noted that an exempted payer parent may wish to provide support to his or her child.<sup>81</sup> On the other hand, National Legal Aid considered that such a rule may deter persons who use violence from manipulating care arrangements for child support reasons and, on balance, considered this the 'least potentially detrimental solution'.<sup>82</sup>

11.73 The Ombudsman offered a different perspective, reiterating that safety must be the overriding priority in administering exemptions:

Extending the exemption to apply to both parents may seem fair, but would arguably not achieve the same result of protecting the safety of the carer and children. It could mean additional financial hardship for the children, depriving them of a level of financial support both now and possibly into the future. It could also lead to further violence to the (now) former carer, or even the child, if the current carer is unable to obtain child support on the basis of past events and behaviour.<sup>83</sup>

11.74 The Ombudsman also pointed out that such a reform requires a fundamental review of exemptions. Currently, no findings are made in the process of granting exemptions. However, the Ombudsman also noted that if granting an exemption to a person could affect the other parent's entitlement to current or future child support, then 'procedural fairness calls for a more stringent test regarding the presence of

<sup>77</sup> National Legal Aid, *Submission CFV 81*, 24 June 2011.

<sup>78</sup> ADFVC, *Submission CFV 53*, 27 April 2011; Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011; Confidential, *Submission CFV 13*, 5 April 2011.

<sup>79</sup> Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

<sup>80</sup> M Vnuk, *Submission CFV 47*, 21 April 2011.

<sup>81</sup> National Legal Aid, *Submission CFV 81*, 24 June 2011.

<sup>82</sup> Ibid.

<sup>83</sup> Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

violence or fear of violence’ and there needs to be ‘an objective test that would also call for a response from the alleged perpetrator’.<sup>84</sup>

### ***ALRC’s views***

#### ***Exemptions relieve persons who use family violence of financial responsibility***

11.75 It is problematic that family violence exemptions may relieve persons who use family violence of financial responsibility for their children. The ALRC considers that the best way to address this issue is to improve the accessibility of the child support scheme for victims, thereby enhancing their ability to participate in the scheme. To this end, the ALRC has incorporated a number of stakeholder suggestions to improve the child support scheme and establish a consistent inter-agency response to family violence. These proposed reforms are set out in Chapter 4—and some of the key proposals are discussed above.

11.76 Exemptions protect victims by addressing the risk of violence that may otherwise be triggered by a child support application or liability. In cases where exemptions are deemed necessary by victims, their safety must be prioritised over concerns about relieving persons who use family violence of their financial responsibilities.

11.77 The ALRC does not propose to introduce a system, similar to that in some US states, whereby child support debt accrued during an exemption period is payable when the exemption is lifted. Requiring a person who has used violence to pay a child support debt at a later stage may compromise the safety of victims. The ALRC considers that reforms to impose financial penalties against persons who use family violence would be a quasi-criminal response, which is not accommodated by the objects or the operation of the child support scheme.

#### ***Exemptions from paying child support for victims of family violence***

11.78 Reforms to make family violence exemptions available to child support payers who have previously been exempted from obtaining child support may have unintended and adverse consequences. Making exemptions available to payers, or to customers who are payers for periods of their child support case, may create an incentive to manipulate claims of family violence. Persons who use family violence—and others—may apply for an exemption solely to avoid child support liabilities. This may financially disadvantage victims, as well as other members of the general payee population, and their children.

11.79 Making exemptions available to child support payers would also necessarily reduce the accessibility of exemptions. In the existing system, granting an exemption to a parent does not affect the other parent’s rights or entitlements. Therefore, there is a relatively low threshold for supporting evidence, as demonstrated by the policy contained in the *Family Assistance Guide*. Further, Centrelink does not—and need

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84 Ibid.

not—make findings of family violence to grant exemptions, and there is no need to inform the other party and obtain his or her response to allegations.

11.80 However, if such a reform were introduced, granting an exemption to a parent may affect the other parent’s current or future child support entitlements. As pointed out by the Ombudsman, this would require a fundamental overhaul of the exemption process. The updated process would import procedural fairness requirements—including providing the other party the opportunity to respond, and providing him or her with relevant information and evidence. It would also require more stringent evidence standards to support an exemption application.

11.81 This tightening of procedure is likely to undermine the effectiveness and accessibility of exemptions, and seriously compromise victims’ safety in those cases where exemptions are the appropriate protective response. Consequently, the ALRC does not propose reforms broadening the availability of exemptions to payers, or potential future-payers.

## **Partial exemptions**

### ***Background***

11.82 As discussed in Chapter 9, payees may elect to collect child support privately. Unless a payee has been granted an exemption, he or she must collect the full amount of child support to fulfil the ‘reasonable maintenance action’ requirement. If the payee does not collect the full amount, he or she may be required to change from private collection to CSA collection.<sup>85</sup> If the payee does not comply, his or her FTB Part A is reduced to the base rate. The FAO will assume that the payee is collecting the full amount of child support, unless the payee advises otherwise.<sup>86</sup>

11.83 The Ombudsman provided a useful summary of how this works in practice:

The CSA reports each ‘private collect’ payee’s ‘entitlement’ to Centrelink, which then assesses the payee’s FTB Part A on the basis of an assumption he or she has collected 100% of their assessed entitlement, on time and in full. The automated transfer of data between the CSA and Centrelink is an efficient way to assess fortnightly FTB entitlements. It is subject to a ‘reconciliation’ at the end of the financial year, where the payee/FTB recipient is asked to confirm that he or she collected their child support. If the payee advises Centrelink that he or she received less child support than he or she was entitled to it places them at risk of being found to have failed the ‘reasonable maintenance action’ test.<sup>87</sup>

11.84 The application of the reasonable maintenance action test in these circumstances may affect victims of family violence. Where payees do not disclose that they are not collecting the full amount of child support, they may be disadvantaged by having their FTB calculated according to a higher child support income than they are actually receiving. Victims of family violence may be affected by these consequences. As

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85 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.1.6.70].

86 *Ibid.*, [3.1.6.70].

87 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

stated in Chapter 9, victims may elect to collect privately, and collect less than the assessed amount, due to fear of, or coercion by, a person who has used violence.

11.85 The Centrelink e-Reference—described in Chapters 5 and 12—provides that payees may obtain a partial exemption to enable them to privately collect less than the full amount of child support.<sup>88</sup> In such cases, payees will not be required to change to CSA collection. In addition, their FTB Part A will be calculated on the amount of child support actually received, rather than the amount of the child support assessment.<sup>89</sup> Partial exemptions are available on grounds of family violence.<sup>90</sup>

11.86 The e-Reference is not a publicly available document, and neither the *Family Assistance Guide* nor the *Child Support Guide* explicitly mentions partial exemptions. The *Family Assistance Guide* does provide that where payees receive less than the assessed child support amounts, their FTB may be reduced to the base rate, except where the payee applies for CSA collection or an exemption has been granted.<sup>91</sup> It also provides that:

Unless the applicant/recipient has been granted an exemption, they must privately collect 100% of the amount payable under the order/agreement or the formula assessment, otherwise CSA collection will be required.<sup>92</sup>

11.87 FaHCSIA, in correspondence with the ALRC, has indicated that it considers that it could be clearer in the *Family Assistance Guide* that payees with an exemption may privately collect less than the full amount of assessed child support, and it will update the *Family Assistance Guide* accordingly.<sup>93</sup>

### ***Submissions and consultations***

11.88 In the Child Support and Family Assistance Issues Paper, the ALRC asked if, in practice, the requirement to take reasonable maintenance action affects victims of family violence who collect less than the full amount of child support. It further asked if any reforms are needed to ensure that victims of family violence in these circumstances are not financially disadvantaged by receiving less FTB Part A.<sup>94</sup>

11.89 The Sole Parents' Union illustrated the issue:

Some victims of violence elect to collect child support privately as a way to avoid child support altogether. Because of the requirement to take reasonable maintenance action, they are then forced into the situation [where] they either have to lie about the

88 Department of Families, Housing, Community Services and Indigenous Affairs, *Correspondence*, 29 June 2011, provided an extract from the E-Reference: 007.32510 *Customer not receiving full child support entitlement privately*.

89 Ibid.

90 Ibid.

91 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [3.1.5.50].

92 Ibid, [3.6.1.70].

93 Department of Families, Housing, Community Services and Indigenous Affairs, *Correspondence*, 29 June 2011.

94 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 22.

child support collected, or they settle for minimum family tax benefit. Neither situation is acceptable.<sup>95</sup>

11.90 The Ombudsman submitted that the policy currently ‘seems only to allow a payee who fears family violence to choose to receive all their child support, or none of it, at the risk of losing their FTB’.<sup>96</sup> The Ombudsman also considered that the *Family Assistance Act* ‘does not require a rigid ‘all or nothing’ approach to maintenance action’.<sup>97</sup>

#### ***ALRC’s views***

11.91 Partial exemptions would appear to address the issue of adverse FTB consequences for family violence victims who privately collect less than the full amount of child support. However, partial exemptions are not adequately provided for in the *Family Assistance Guide* and, unsurprisingly, stakeholders appeared unaware of the existence or availability of partial exemptions for victims of family violence.

11.92 The ALRC considers that the *Family Assistance Guide* should be amended to provide explicitly for partial exemptions, and supports FaHCSIA’s intention to update and clarify the text. This is an important strategy for raising awareness among customers and their advocates.

11.93 The ALRC further considers that customers should be generally informed of partial exemptions, and that this should be a component of the exemption-related information to be provided to customers in accordance with Proposal 4–8.

11.94 More targeted information about partial exemptions should be provided by Centrelink social workers to payees who have disclosed family violence, particularly when they end CSA collection. This measure is accommodated by Proposals 9–3, which provides that payees who elect to end an assessment or CSA collection should be referred to Centrelink social workers, and also Proposal 4–10, which provides that all customers who disclose family violence should be referred to Centrelink social workers.

11.95 Proposed reforms regarding screening may also assist the provision of targeted information about partial exemptions, insofar as they would facilitate referrals to Centrelink social workers. In particular, the ALRC proposes in Chapter 9 that the CSA should screen for family violence, and refer payees who have disclosed family violence to Centrelink social workers, when payees request to end a child support assessment, or elect to end CSA collection of child support.<sup>98</sup>

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95 Sole Parents’ Union, *Submission CFV 52*, 27 April 2011.

96 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

97 Ibid.

98 Proposals 9–2, 9–3.

**Proposal 11–3** The Centrelink e-Reference includes information and procedure regarding partial exemptions from the ‘reasonable maintenance action’ requirement. The *Family Assistance Guide* should be amended to make clear the availability of these partial exemptions.

## Determination of percentage of care

### Percentage of care

11.96 The ‘percentage of care’ is the amount of time a parent or carer provides care for a child (also referred to as the ‘care percentage’). A person must provide at least 35% of care to be eligible for both child support payments and FTB.<sup>99</sup>

11.97 The percentage of care is used in the child support formula to take into account the costs of the child that are met by a parent or carer by caring for the child.<sup>100</sup> It also affects how FTB is apportioned between persons who share care of a child. The percentage of care is not equivalent to the percentage of FTB payable to the parent or carer.

11.98 From 1 July 2010, the FAO and the CSA determine percentages of care in the same way. Determinations of percentages of care under family assistance legislation apply for child support purposes, and determinations under child support legislation apply for family assistance purposes<sup>101</sup>—and each agency will apply a percentage of care determined by the other agency

11.99 In the Child Support and Family Assistance Issues Paper, the ALRC identified issues regarding the percentage of care—in particular the manipulation of the percentage of care for child support or FTB purposes—as beyond the Terms of Reference,<sup>102</sup> for reasons outlined in Chapter 9. However, the ALRC discussed the discrete issue of the way the FAO and the CSA determine the percentage of care, and whether this affects victims of family violence.

### Child support and percentage of care

#### *Determinations by the CSA*

11.100 Amendments to the *Child Support (Assessment) Act 1989* (Cth) have changed the rules for determining percentages of care from 1 July 2010.<sup>103</sup> From 1 July 2010, the CSA will usually determine the percentage of care based on the actual care

99 *Child Support (Assessment) Act 1989* (Cth) ss 5(3), 7B(1); *A New Tax System (Family Assistance) Act 1999* (Cth) s 25.

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

101 Ibid s 54K; *A New Tax System (Family Assistance) Act 1999* (Cth) s 35T.

102 The full Terms of Reference are set out at the front of this Discussion Paper and are available on the ALRC’s website at <[www.alrc.gov.au](http://www.alrc.gov.au)>.

103 The changes do not apply to cases involving ex-nuptial children in Western Australia. Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [1.4.3].



that is occurring.<sup>104</sup> Actual care is generally based on the number of nights a person has cared for a child, or is likely to care for a child, over a 12-month period.<sup>105</sup>

11.101 The CSA may request information from the parties in order to determine care patterns. The *Child Support Guide* recognises that actual care may be reflected in care arrangements agreed upon by the parties.<sup>106</sup> Since the July 2010 amendments, care arrangements are defined by the *Child Support (Assessment) Act* as written agreements, parenting plans and court orders—including parenting orders and state and territory protection orders.<sup>107</sup>

***When parties dispute the care that is occurring***

11.102 Parties may disagree about the actual care that is occurring, and provide conflicting information about how much care each is providing. The *Child Support Guide* indicates that the CSA encourages parents to resolve such disputes. If the parties cannot resolve the issue, the CSA will request additional information and evidence from the parties.<sup>108</sup> The CSA will determine a percentage of care based on this information.

11.103 The *Child Support Guide* states that CSA will consider a ‘wide range of evidence’.<sup>109</sup> This may include documentary records, such as diary entries, and records of visits to services, such as health care providers. The CSA may consider its records of customer contact, as well as Centrelink information. The CSA may also consider third party statements, if the third party is willing to be identified as the source of information, and the statement is provided to the other parent.<sup>110</sup> The CSA has a policy not to obtain or consider information from children.<sup>111</sup>

11.104 The *Family Assistance Guide* is more illustrative than the *Child Support Guide* in relation to types of evidence that may be taken into account in determining percentage of care.<sup>112</sup> As the FAO and the CSA use the same rules to verify the actual care that is occurring,<sup>113</sup> it is likely that the CSA has regard to the same or similar evidence. Examples of evidence which may be taken into account by the FAO are outlined below.

11.105 If the differences in the information provided by the parties cannot be reconciled, CSA will determine the care percentage on the balance of probabilities. If

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

105 *Ibid* s 54A (1).

106 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [2.2.1].

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

108 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [2.2.1].

109 *Ibid*, [2.2.1].

110 *Ibid*, [2.2.1].

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

112 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.1.1.30].

113 *Ibid*, [2.1.1.30].

the CSA cannot reach a conclusion on the balance of probabilities, then the CSA will assume that the state of affairs at the time the assessment occurred will continue, and the care percentage will not change.<sup>114</sup> It is unclear how the CSA makes a determination where there has not been a prior assessment.

### *Interim determinations*

11.106 *The Child Support (Assessment) Act* provides for interim determinations about percentage of care in specified circumstances. In these cases, the percentage of care is not based on actual care. Interim determinations generally have effect for a period of 14 weeks, and may be extended to up to 26 weeks in special circumstances.<sup>115</sup>

11.107 The CSA will not use actual care to determine the percentage of care where care arrangements (written agreements, parenting plans and court orders) are not being complied with, and the person with reduced care is taking ‘reasonable action’ to ensure compliance with the care arrangement. The *Child Support Guide* provides that what may constitute ‘reasonable action’ depends on the circumstances of the case. Examples may include:

- initiating court action for contravention of a court order,
- initiating mediation, through a Family Relationship Centre or other service, to re-establish the care arrangement,
- negotiating with the other parent with a view to re-establishing the care arrangement.<sup>116</sup>

11.108 In these circumstances, the CSA may make an interim determination, in which the care percentage is based on the care the person should have had under the care arrangement.<sup>117</sup>

11.109 The CSA may also make an interim determination where a care arrangement is not being complied with, and the person with reduced care is taking ‘reasonable action’ to make a new care arrangement, which provides the person with less care than in the current care arrangement, but more care than the actual care that he or she has. To make an interim determination in these circumstances, the CSA must also be satisfied that the person who is seeking a new care arrangement has ‘special circumstances’.<sup>118</sup>

11.110 The *Child Support Guide* provides a non-exhaustive list of special circumstances. It includes situations where the parent could not continue to have

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114 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [2.2.1].

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

116 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [2.2.8].

117 *Child Support (Assessment) Act 1989* (Cth) s 51.

118 *Ibid* s 52.

previous levels of care due to, for example, serious medical problems.<sup>119</sup> In these circumstances, the CSA may base the care percentage on the care the person would have under the new care arrangement.

### ***Percentage of care prior to 1 July 2010***

11.111 Prior to the amendments to the *Child Support (Assessment) Act*, the CSA generally made care percentage determinations in accordance with oral or written agreements, parenting plans or court orders related to care of a child.<sup>120</sup> Where there was no agreement, plan or order in place, the CSA determined the care percentage on the actual care the parties were likely to have over the care period.<sup>121</sup>

11.112 Interim care percentage determinations were available in limited circumstances where care was not occurring in accordance with an agreement, plan or order. Interim determinations were based on the actual percentage of care that was occurring.<sup>122</sup>

### ***Effect of the amendments on victims of family violence***

11.113 The pre-July 2010 policy, as articulated in the *Child Support Guide*, did take account of the consequences of family violence for victims in the context of interim orders. However, evidence suggests that basing the percentage of care on court orders and agreements may have disadvantaged some customers, including some victims of family violence.

11.114 The Australian Institute of Family Studies report considered the link between parenting orders and financial issues, including child support. This report predates the July 2010 amendments to the *Child Support (Assessment) Act*, and provides a useful insight into the effect of the pre-amendment rules. The AIFS report noted that ‘family law system professionals expressed concern about child support payments being based on court order arrangements that subsequently change’.<sup>123</sup>

11.115 The report also noted that parents may be reluctant to seek new court orders to reflect changes in care due to barriers such as the costs of litigation, ‘burn out’, and personal circumstances.<sup>124</sup> In particular, in family violence cases, lawyers considered it an appropriate strategy not to apply to change orders, in order to avoid re-inflaming the family situation. This noted reluctance to engage with the legal system was not limited

119 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [2.2.8].

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

121 *Child Support (Assessment) Act 1989* (Cth) s 50, amended by the *Child Support and Family Assistance Legislation Amendment (Budget and Other Measures) Act 2010* (Cth); Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [2.2.5].

122 *Child Support (Assessment) Act 1989* (Cth) ss 52(1), (2), amended by the *Child Support and Family Assistance Legislation Amendment (Budget and Other Measures) Act 2010* (Cth); Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <<http://www.csa.gov.au/guidev2>> at 22 July 2011, [2.2.6].

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

124 *Ibid.*, 229.

to the courts, and also applied to Family Dispute Resolution processes. Parents therefore accepted the child support consequences of having assessments based on outdated care orders or agreements.<sup>125</sup>

### Family tax benefit and percentage of care

11.116 The rules to determine the percentage of care in the *Family Assistance Act* reflect those in the *Child Support (Assessment) Act*, as described above—including in relation to interim determinations.<sup>126</sup> Prior to 1 July 2010, the FAO based the percentage of care on the child's 'living arrangements'—which was not defined in the legislation.<sup>127</sup>

11.117 The *Family Assistance Guide* provides that the FAO may consider various sources in order to determine the percentage of care, where parties disagree as to the arrangements that are in place. It provides that each party should be asked to provide evidence to support their claim, and lists a wide range of examples of evidence which may be taken into account.<sup>128</sup> In addition to parenting plans, written agreements, and court orders, the FAO will consider evidence such as:

- confirmation of play group, kindergarten or school enrolment,
- proof of attendance or membership of local organisations or activities,
- receipts for expenses incurred while the child was in care,
- confirmation of care arrangements from close family friends or relatives,
- confirmation from professional members of the community who have regular contact with the family, such as teachers, police, ministers of religion, accountants, lawyers or doctors,
- social worker reports, especially in cases where there may be a fear of violence if the other parent is contacted,
- proof of travel arrangements at contact times (e.g. rail or airline tickets), and
- records from the FAO or other government agencies which may confirm present or previous patterns of care ...<sup>129</sup>

11.118 The FAO, like the CSA, will not seek verification about care from a child.<sup>130</sup> The *Family Assistance Guide* also provides that, where parties do not agree on care, the FAO 'must carry out further investigation to determine' the actual care.<sup>131</sup>

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125 Ibid.

126 *A New Tax System (Family Assistance) Act 1999* (Cth) Part 3, div 1, subdiv D; *Child Support (Assessment) Act 1989* (Cth) pt 5 div 4 subdiv B.

127 *A New Tax System (Family Assistance) Act 1999* (Cth) s 22(6D), amended by the *Child Support and Family Assistance Legislation Amendment (Budget and Other Measures) Act 2010* (Cth).

128 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.1.1.30].

129 Ibid, [2.1.1.30].

130 Ibid, [2.1.1.30].

131 Ibid, [2.1.1.45].

11.119 The *Family Assistance Guide* does not outline the applicable procedure where differences in the information provided by the parties cannot be reconciled. As the rules are aligned with the CSA, it is likely that the rules applied by the CSA to these circumstances, described above, apply.

### Submissions and consultations

11.120 In the Child Support and Family Assistance Issues Paper, the ALRC asked whether the following could be improved for victims of family violence:

- the legislative bases for CSA and FAO determinations about the percentage of care;<sup>132</sup> and
- the rules, as stated in the *Child Support Guide* and the *Family Assistance Guide*, for the CSA and the FAO to verify actual care when parents dispute the care that is occurring.<sup>133</sup>

### Child support

#### Percentage of care based on actual care

11.121 The Sole Parents' Union and the ADFVC welcomed the shift to basing the care percentage on actual care in child support legislation.<sup>134</sup> The ADFVC stated that

The previous system was a source of significant complaint in the ADFVC study on abused women's financial security. That is, where violent men applied for more time with children through the courts in order to reduce their child support obligation, then failed to meet their care responsibilities. The effect of this was women receiving less child support than their actual caring responsibilities allowed for.<sup>135</sup>

11.122 The Ombudsman made comments on certain consequences of basing percentage of care on actual care, reporting receipt of complaints alleging that the emphasis on actual care encourages contravention of court orders. However, they also note that the interim care determination provisions may 'discourage non-compliance' with court orders.<sup>136</sup>

11.123 The issue of parents refusing to return a child to the primary carer, or taking a child from the primary carer, and receiving child support or FTB as a result, emerged in two case studies provided by stakeholders. The Ombudsman outlined a case in which a parent, following a court-ordered contact visit, refused to return a child to the other parent, and then advised the CSA that he had permanent care of the child.<sup>137</sup>

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132 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Questions 15 and 31.

133 Ibid, Questions 16 and 32.

134 ADFVC, *Submission CFV 53*, 27 April 2011; Sole Parents' Union, *Submission CFV 52*, 27 April 2011.

135 ADFVC, *Submission CFV 53*, 27 April 2011.

136 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

137 Ibid. The Ombudsman notes that the information in this case-study was provided anonymously and indirectly.

### Reliance on parties to verify care

11.124 Stakeholder comments applied broadly to cases where levels of actual care are in dispute by parents, as well as cases which are not disputed. Stakeholder comment reflected the problems experienced by customers as a result of the lack of CSA investigations.<sup>138</sup> For example, National Legal Aid stated that the ‘practical difficulties’ for the CSA in determining actual care, noting that ‘institutions such as schools, child care programmes, and sporting clubs are reluctant, or do not have the resources, to provide supporting evidence about which parent collects or drops off children’. It suggested that consideration be given ‘to use of proactive investigatory powers’.<sup>139</sup>

11.125 Stakeholders also raised concern about the CSA’s reliance on parties to verify actual care.<sup>140</sup> The Ombudsman noted that the CSA

seem to rely heavily upon a parent either confirming or consenting to the care change that the other parent has advised, or providing documentary evidence to support their claim.<sup>141</sup>

11.126 Stakeholders commented that this reliance on parents may put victims of violence and their children at risk,<sup>142</sup> or might disadvantage parents who are scared to challenge the other parent’s word, unwilling to involve third parties, or ashamed to disclose their situation to friends and family.<sup>143</sup> Similarly, the Sole Parents’ Union commented that victims of violence may not seek to make changes ‘because it is too difficult for them to do so and may even increase the opportunities for further abuse’.<sup>144</sup> It also expressed concern that victims of violence may not be aware that their child support assessment may be changed due to care levels.<sup>145</sup>

11.127 Comments were also made that parents should be relieved of their role in establishing levels of care. The CSMC submitted that:

This responsibility must be removed from the victim of violence, with the Child Support Agency, or other support service, taking on the role of verifying levels of care.<sup>146</sup>

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138 Ibid; Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011. See also Bundaberg Family Relationship Centre, *Submission CFV 04*, 16 March 2011.

139 National Legal Aid, *Submission CFV 81*, 24 June 2011.

140 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011; National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011; Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

141 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

142 Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

143 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

144 Sole Parents’ Union, *Submission CFV 52*, 27 April 2011.

145 Ibid.

146 Council of Single Mothers and their Children, *Submission CFV 44*, 21 April 2011.

11.128 Similarly, the NCSMC commented this issue demonstrates the benefit that may be provided by a specialist team, who could collect and establish information.<sup>147</sup>

***When the CSA cannot make a determination on the information provided***

11.129 The Ombudsman expressed concern about CSA policy—as stated in the *Child Support Guide*, and described above—regarding the procedure where the CSA cannot determine the care percentage based on information provided by parties, or on the balance of probabilities. The Ombudsman considered it inappropriate for the CSA simply to assume that the former care percentage continued to be accurate if the evidence indicated that it had changed:

In order to bring clarity to the child support case, we consider that the CSA should avoid relying on the status quo and, instead, always make a decision regarding the percentage of care.<sup>148</sup>

***Family tax benefit***

***Complex and inflexible framework***

11.130 The Welfare Rights Centre Inc Queensland commented that the ‘decision-making framework is unnecessarily complex’ and submitted that it would be more sensible for actual care to be described as days per week or fortnight, rather than as a percentage.<sup>149</sup> It also commented that:

by using a formula for making decisions on eligibility for payment based on a mathematical-sounding system, the complexity and rigidity hampers good decision making, accountability and transparency as well as effective access to review mechanisms.<sup>150</sup>

11.131 Welfare Rights Centre Inc Queensland also advocated the removal of the 35% care threshold, calling it ‘empty and useless’.<sup>151</sup> Similarly, the AASW submitted that the current 35% threshold is arbitrary, and leads to unjust outcomes. It argued for a more flexible system, and stated that this is ‘particularly important during the initial phases when a victim who is escaping violence is more vulnerable and in fact requires financial support’.<sup>152</sup>

***Time consuming and intrusive procedure***

11.132 The Ombudsman noted it has received complaints from customers regarding having percentages of care and the FAO procedures for disputed care. Customers state the latter are ‘time-consuming and intrusive, in that they require customers to go out of their way to obtain and submit evidence from third parties’. Customers who have

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147 National Council of Single Mothers and their Children, *Submission CFV 45*, 21 April 2011.

148 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

149 Welfare Rights Centre Inc Queensland, *Submission CFV 43*, 21 April 2011.

150 Ibid.

151 Ibid.

152 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

experienced family violence report feeling that ‘these disputes are another form of harassment’.<sup>153</sup>

11.133 The Ombudsman comments that some customers have ‘argued that the FAO should not assist perpetrators of violence to ‘harass’ them via the disputed care process’. However, they state that

the principles of procedural fairness require that both parties affected by a potential decision have the opportunity to contribute evidence for consideration in that decision—even where one of them may be a perpetrator of family violence.<sup>154</sup>

11.134 The Ombudsman suggests consideration of whether ‘law or policy around disputed care decisions could be streamlined or sped up for vulnerable customers’—in the context of the paramount requirement to balance parties’ interests.<sup>155</sup>

#### ***Taking or failing to return a child***

11.135 A couple of stakeholders referred to children being removed from a carer without consent.<sup>156</sup> The Welfare Rights Centre Inc Queensland provided a case study which illustrates the FTB consequences of a parent taking a child:

A migrant woman’s infant was taken from her by the estranged father. He simply ran off with the stroller plus child while the woman was shopping one day. He immediately claimed Family Tax Benefit and [social security payment] Parenting Payment Single and, as there was no order in place, the mother’s FTB and [Parenting Payment Single] were cancelled.

With no income, she fell behind on her rent and was in danger of losing her accommodation, thereby making it less likely that a court would order the child be returned to her care.<sup>157</sup>

The AASW made reference to the same (or a similar) case study, and commented that its members ‘report that they have worked with many similar cases’.<sup>158</sup> Both the AASW and the Welfare Rights Centre Inc Queensland commented that anecdotal evidence suggests family violence—or escalation of family violence—is likely in such circumstances and that parents may be unable to have ‘reasonable discussions’ about care arrangements.<sup>159</sup>

#### ***Interim orders***

11.136 The AASW and the Welfare Rights Centre Inc Queensland noted that the legislation—presumably in relation to interim orders—does not provide for cases where court orders are not in place.<sup>160</sup> For example, regarding the case study above, the

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153 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

154 Ibid.

155 Ibid.

156 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 43*, 21 April 2011.

157 Welfare Rights Centre Inc Queensland, *Submission CFV 43*, 21 April 2011.

158 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

159 Ibid; Welfare Rights Centre Inc Queensland, *Submission CFV 43*, 21 April 2011.

160 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 43*, 21 April 2011.



AASW noted that as the woman had no orders in place, her FTB was cancelled.<sup>161</sup> Further, Welfare Rights Centre Inc Queensland points out that even those

who do have court orders or registered parenting plans, the requirement to take ‘reasonable steps’ to recover the care of the child may be too onerous or too risky in situations of family violence. If the parent cannot show they are taking ‘reasonable steps’, they will forfeit FTB.<sup>162</sup>

### **ALRC’s views**

11.137 Legislation that calculates the percentage of care based on actual care would, on the face of it, appear to benefit victims of family violence, as well as other customers, in cases where actual care does not correspond to care arrangements ordered by courts or previously agreed on between parties. As noted above, evidence regarding the pre-July 2010 child support system suggested that parents were reluctant to update court orders or agreements—particularly where they had experienced family violence—and accepted the often detrimental financial consequences.

11.138 However, an unfortunate consequence of care percentages based on actual care is that it may financially benefit a parent who takes a child from, or fails to return a child to, the child’s primary carer. Another problematic aspect of the legislation is that it does not provide an avenue for parties to obtain interim determinations where there are no court orders or agreements in place, even when a party disrupts an established care pattern.

11.139 Aspects of the agencies’ procedures for determining care percentages also appear problematic. Heavy reliance on parties to provide evidence to establish care patterns may be burdensome and intrusive. Further, the CSA’s—and perhaps the FAO’s—practice of reverting to previous care percentage determinations when parties disagree on care, and their conflicting evidence cannot be reconciled, appears unsatisfactory.

11.140 Some of these issues may particularly affect victims of family violence. For example, in the child support context, where victims may once have been reluctant to initiate court proceedings for updated orders, they may now be reluctant to challenge information and evidence provided to the CSA or the FAO by a person who has used family violence. Victims may also be reluctant to enter into procedures to deal with actual care disputes, particularly given the agencies’ reliance on parties to provide evidence.

11.141 However, these issues generally affect the broader customer population, and are systemic in nature—as are the potential solutions. While reforms are not proposed to address this issue, as this would be beyond the Terms of Reference,<sup>163</sup> the ALRC does consider that this is an area requiring further attention.

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161 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

162 Welfare Rights Centre Inc Queensland, *Submission CFV 43*, 21 April 2011.

163 The full Terms of Reference are set out at the front of this Discussion Paper and are available on the ALRC’s website at <[www.alrc.gov.au](http://www.alrc.gov.au)>.

11.142 The ALRC therefore considers that DHS and other relevant departments and agencies should review the family assistance and child support laws regarding determination of percentage of care. Any such review may be complemented by research regarding the effect of the amendments introduced by the *Child Support and Family Assistance Legislation Amendment (Budget and Other Measures) Act 2010* (Cth). The role of the CSA and the FAO in conducting investigations regarding care percentages should also be reviewed.



## 12. Family Assistance

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### Summary

12.1 Chapter 11 and, to a lesser extent Chapter 9, examine family assistance laws largely in their interaction with child support laws. This chapter discusses the family assistance framework and the ways in which it addresses, and in some instances fails to address, family violence. This discussion focuses on the two primary family assistance payments—Family Tax Benefit (FTB) and Child Care Benefit (CCB).

12.2 The safety of family violence victims who are family assistance applicants or recipients should be improved by the reforms targeted at legal frameworks—primarily family assistance, social security and child support—that are proposed in Chapter 4. The proposed reforms regarding family violence screening, information provision and referrals largely address the family violence issues that were raised in *Family Violence and Commonwealth Laws—Child Support and Family Assistance*, ALRC IP 38 (2010) (the Family Assistance Issues Paper).

12.3 This chapter proposes further reforms specifically targeted at family assistance law and policy, where needed, particularly in relation to CCB. Family assistance legislation provides for increased CCB in certain circumstances. The proposed reforms seek to improve accessibility to increased CCB in cases of family violence. The ALRC proposes that this be achieved by amending the *Family Assistance Guide* to explicitly

recognise family violence as exceptional circumstances that may qualify for increased CCB, and by amending family assistance legislation to lower the eligibility threshold for increased rates of CCB where children are at risk of abuse or neglect.

## Background

12.4 The Commonwealth has provided family allowances since 1941.<sup>1</sup> The current framework for family assistance comprises a range of payments and is primarily governed by two statutes: *A New Tax System (Family Assistance) Act 1999* (Cth) and *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth). In this Discussion Paper, these are referred to as the *Family Assistance Act* and the *Family Assistance (Administration) Act* respectively.

12.5 Family assistance legislation was introduced to ‘simplify the structure and delivery of assistance for families’<sup>2</sup> by establishing one body to administer a consolidated set of payments, which all have ‘similar eligibility rules’.<sup>3</sup> This body is the Family Assistance Office (FAO)—the ‘delivery point’ for family assistance payments.<sup>4</sup>

12.6 Family assistance payments play a significant role in supporting low-income families,<sup>5</sup> and comprise a range of types, including: FTB;<sup>6</sup> baby bonus;<sup>7</sup> maternity immunisation allowance;<sup>8</sup> CCB;<sup>9</sup> child care rebate;<sup>10</sup> and FTB advance.<sup>11</sup> As of 1 January 2011, paid parental leave is available. In addition to these payments, the FAO offers other types of support, such as rent assistance.<sup>12</sup> FTB is the ‘centrepiece’ of family assistance.<sup>13</sup>

12.7 The FAO operates under governance of the Department of Human Services (DHS).<sup>14</sup> The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) ‘develops policy and implements and monitors the performance of a range of budget measures’ including family assistance.<sup>15</sup> While Centrelink

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

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

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

4 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.3].

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

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

7 *Ibid* pt 3 div 2.

8 *Ibid* pt 3 div 3.

9 *Ibid* pt 3 div 4.

10 *Ibid* pt 3 div 5.

11 *Ibid* s 3(1), definition of ‘family assistance’.

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

13 Ministerial Taskforce on Child Support, *In the Best Interests of Children—Reforming the Child Support Scheme* (2005), [4.1].

14 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.3].

15 FaHCSIA, *Annual Report 2009–10* (2010), Ch 3.

administers family assistance payments on behalf of the FAO,<sup>16</sup> the FAO provides a range of ‘first-point-of-contact services’, including:

- operating an FAO call centre;
- assisting with family assistance enquiries;
- providing information about payment options;
- receiving claim forms; and
- making appointments with other FAO staff for complex enquiries and interviews.<sup>17</sup>

12.8 The *Family Assistance Guide* is available online at the FaHCSIA website.<sup>18</sup> As noted in Chapters 5 and 9, guides, as articulations of policy, are not binding in law, but nonetheless are a relevant consideration for the decision maker. Centrelink also uses electronic guidelines, referred to as the e-Reference, as a further procedural resource. The e-Reference is not generally publicly available.<sup>19</sup>

12.9 Family assistance legislation does not include objects. However, the *Family Assistance Guide* sets out the key administrative principles in the administration of the *Family Assistance Act*. One of these principles is that the *Family Assistance Act* is beneficial legislation, which means that ‘where legislative ambiguities arise in the Act, the legislation should be interpreted in a way that is most beneficial to applicants/recipients as a whole’.<sup>20</sup>

## Common interpretative framework

12.10 As discussed in Chapter 3, neither the *Family Assistance Act* nor the *Family Assistance (Administration) Act* provides a definition of ‘family violence’. The *Family Assistance Guide* also leaves the term undefined, although as noted in Chapter 5, the *Guide to Social Security Law*, which is also hosted on the FaHCSIA website, contains a definition of family violence.<sup>21</sup>

12.11 Proposals 3–3 and 3–4 state that family assistance legislation should provide a definition of family violence, and set out the proposed definition. The ALRC also considers that the *Family Assistance Guide* should include:

- the definition of family violence provided in Proposal 3–1; and

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

17 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.3].

18 Ibid.

19 In writing this Discussion Paper, the ALRC was provided with an extract from the e-Reference, which is discussed in Ch 11.

20 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.4].

21 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.1.D.235].

- a description of the nature, feature and dynamics of family violence, including: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children. In addition, the *Family Assistance Guide* should refer to 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.

12.12 These additions to the *Family Assistance Guide* are desirable for the reasons set out in relation to the *Child Support Guide* in Chapter 9. These measures are complemented by the proposal in Chapter 4 regarding the development of a protocol, applicable to the Family Assistance Office, to ensure an appropriate response to the disclosure of family violence.<sup>22</sup>

**Proposal 12–1** The *Family Assistance Guide* should be amended to include:

- (a) the definition of family violence in Proposal 3–1; and
- (b) the nature, features and dynamics of family violence including: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children.

In addition, the *Family Assistance Guide* should refer to 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.

## Family Tax Benefit

### Background

12.13 FTB is an income-tested payment for eligible parents and carers. FTB includes two parts: FTB Part A and FTB Part B.

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

<sup>22</sup> Proposal 4–9.

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

12.15 FTB Part B is a benefit for eligible single parent families and families with one primary income earner. The rate of FTB Part B depends on the age of the youngest child and, in families with two working parents, the income of the parent who is the secondary income earner.<sup>24</sup>

12.16 FTB is paid for dependent children under the age of 16 and, in certain circumstances, for dependent children over the age of 16.<sup>25</sup> Parents and carers must provide at least 35% of a child's care to receive FTB.<sup>26</sup> When more than one person provides care for a child, and they are not members of the same couple, FTB payments can be shared.<sup>27</sup>

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

- policies regarding the payment of FTB in cases of informal care, when a child has experienced family violence;
- exemptions from tax file number requirements;
- determinations of percentage of care, discussed in Chapter 11; and
- the requirement for recipients of more than base rate FTB to obtain child support where eligible (take reasonable maintenance action), discussed in Chapters 9 and 11.

## Children in formal and informal care

### *Formal and informal care*

12.18 The *Family Assistance Guide* distinguishes between formal and informal care. Formal care occurs where there is a change in legal responsibility for the child, usually under state and territory care and protection legislation. People who provide formal care are generally foster carers. Other formal carers may have parenting orders under the *Family Law Act 1975* (Cth).<sup>28</sup>

12.19 Informal care is 'a private agreement between the parent and another party, where there is no change to any form of legal responsibility'.<sup>29</sup> The *Family Assistance Guide* also provides that where a child protection agency 'facilitates the placement of a

24 *A New Tax System (Family Assistance) Act 1999* (Cth) sch 1 pt 4; Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.1.2]. The secondary income earner is the member of the couple with a lower income.

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

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

27 *Ibid* s 59, sch 1 cl 11.

28 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.1.1.85].

29 *Ibid*.



child but does not gain legal responsibility it is considered informal care'.<sup>30</sup> Grandparents, relatives and family friends are identified in the *Family Assistance Guide* as persons who usually provide informal care.<sup>31</sup>

### **Informal carers**

12.20 Chapter 10 discusses evidence in relation to informal carers. In brief, informal carers are most commonly grandparents. There are many reasons for informal care arrangements, including, for example, family violence, child abuse, neglect, drug or alcohol misuse, parental death or incarceration, and problems arising from mental or physical illness or intellectual disability. In some cases, children in informal care may be traumatised or otherwise vulnerable. Children may benefit from being cared for by relatives when parental care has broken down. However, caring for children may impose a considerable financial burden on informal carers, and having access to FTB or child support may go some way to meeting it.

12.21 Informal carers face a number of barriers in relation to entitlements such as FTB and child support. In a 2010 report prepared for FaHCSIA, the Social Policy Research Centre reported that grandparents often do not receive the payments they are eligible for, such as FTB,

either because they cannot prove their eligibility, or because they are reluctant to claim these benefits for fear that the biological parents will reclaim the children if family payments are at stake. In some cases grandparents may also fear 'retribution, i.e. increased family violence or conflict'.<sup>32</sup>

12.22 As discussed in Chapter 10, a further barrier to entitlements such as FTB is that grandparents may be wary of drawing attention to or attract oversight of their care arrangements, and may be concerned that children will be removed from their care as a result of the involvement of state and territory child protection agencies.<sup>33</sup>

12.23 Lack of information for informal carers may also constitute a barrier. The Social Policy Research Unit identified a possible 'information gap about income support entitlements', stating that some grandparents find it difficult to obtain information about entitlements and support services.<sup>34</sup>

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30 Ibid.

31 Ibid.

32 Social Policy Research Centre, *Financial and Non-Financial Support to Formal and Informal Out of Home Carers—Final Report (revised 30 November)* (2010), prepared for FaHCSIA, [5.2].

33 FaHCSIA Non-Parent Carers Group, *Consultation*, By telephone, 19 April 2011.

34 Social Policy Research Centre, *Financial and Non-Financial Support to Formal and Informal Out of Home Carers—Final Report (revised 30 November)* (2010), prepared for FaHCSIA, [5.2].

***Changes to care***

12.24 Family assistance legislation and the *Family Assistance Guide* set out the effect on FTB payments when there is a change in care, and a child is no longer cared for by their original carer.<sup>35</sup> The original carer is likely to be the child's parent or parents.

12.25 Where possible, FTB is paid to the person providing actual care for the child.<sup>36</sup> When a person no longer has care of a child, he or she is required to notify the FAO.<sup>37</sup>

12.26 In some cases, the original carer may continue to receive FTB where the child is not in his or her care. Generally the original carer should not receive FTB for more than a four-week period in these circumstances.<sup>38</sup> However, if the original carer has legal responsibility for the child, but the child is removed without his or her consent or legal authority, and he or she is taking reasonable steps to regain care of the child, the original carer may receive FTB for up to 14 weeks.<sup>39</sup>

12.27 Informal carers can obtain FTB when their care of a child is ongoing:

When it is clear from the outset that a child will be in ongoing care, then the carer will be eligible for FTB from the date the child enters their care. When care has been on a temporary and short-term basis and it subsequently becomes ongoing, a change of care applies at the point it becomes ongoing and FTB may be payable.<sup>40</sup>

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

12.28 The *Family Assistance Guide* provides principles for dealing with cases when informal care arrangements may not be in the best interests of a child.<sup>41</sup> It states that a case should be referred to a social worker where:

- the child is not a family member of the person claiming FTB or a social security payment that is dependent on the provision of care for a child, and
- the person has not supplied documentation to support that the child is legally in his or her care, or
- the person has previously lost care of children.<sup>42</sup>

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

36 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.1.1.85].

37 *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) s 25; Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.1.1.60].

38 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.1.1.85].

39 *A New Tax System (Family Assistance) Act 1999* (Cth) s23; Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.1.1.85].

40 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.1.1.85].

41 *Ibid.*, [2.1.1.100].

42 *Ibid.*, [2.1.1.100].

12.29 Examples are provided of care arrangements that may not be in the child's best interests—such as those in which the child's well-being or daily needs are disregarded, the child is exposed to drugs or alcohol, or there is a 'lack of guidance and oversight'.<sup>43</sup> Family violence is not specifically mentioned in the *Family Assistance Guide*.

12.30 The *Family Assistance Guide* prescribes a broad role for Centrelink social workers in cases where a child is at risk. It includes obtaining information about the reason for the change in care and how long the arrangement is likely to last, contacting the original carer, and making a recommendation to the FAO about FTB and other payments. Social workers may also seek approval to disclose information to a state welfare authority.<sup>44</sup> The ALRC understands that Centrelink social workers may also provide support services to carers and children in these circumstances. Where the child is Indigenous or a refugee child, social workers are required to consult with Indigenous Service Officers (ISOs) and Multicultural Service Officers (MSOs).<sup>45</sup>

12.31 The *Family Assistance Guide* provides that where FTB to the original carer is cancelled due to a change to informal care, it should be cancelled only after the social worker has made a recommendation. The social worker's recommendations must be given 'due weight'.<sup>46</sup>

### ***Submissions and consultations***

12.32 In the Family Assistance Issues Paper, the ALRC asked whether reforms are needed to:

- ensure that the Family Assistance Office identifies, and refers to social workers, cases in which children living in informal care may be at risk of harm because of family violence;<sup>47</sup> and
- improve the safety of children considered at risk of family violence, when the Family Assistance Office, due to a change in care, cancels a former carer's Family Tax Benefit, or starts paying Family Tax Benefit to a new carer.<sup>48</sup>

12.33 Stakeholder comment regarding these questions was limited. For example, the Australian Domestic and Family Violence Clearinghouse (ADFVC) considered that family violence should be included as an example of where care arrangements are not in a child's best interest.<sup>49</sup> Another stakeholder stated that, where family violence is

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<sup>43</sup> Ibid, [2.1.1.100].

<sup>44</sup> Ibid, [2.1.1.100]. *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) s 168 allows for the disclosure of information about a person in certain circumstances, including where the Secretary certifies it 'necessary in the public interest' in that case or class of cases; or where the person to whom the information relates authorises the information being communicated to another person.

<sup>45</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.1.1.100].

<sup>46</sup> Ibid, [2.1.1.100].

<sup>47</sup> Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 33.

<sup>48</sup> Ibid, Question 34.

<sup>49</sup> ADFVC, *Submission CFV 53*, 27 April 2011.

identified, cases should be referred to a social worker.<sup>50</sup> National Legal Aid suggested specific referencing of family violence in the *Family Assistance Guide*, and appropriate education and training about family violence including screening and risk assessment processes.<sup>51</sup>

### ***ALRC's views***

12.34 The ALRC considers it unnecessary for the *Family Assistance Guide* to include family violence as a specific example of where informal care arrangements are not likely to be in a child's best interests. In such circumstances, children may be more likely to be at risk of family violence in the home of their parents—indeed, this may be the underlying reason for a change to informal care arrangements. Consequently, the ALRC does not propose change to the *Family Assistance Guide*, particularly given that the list of examples it provides is not exhaustive, and family violence may be considered where necessary.

12.35 Informal carers of children who have experienced family violence may choose not to obtain entitlements for reasons discussed above and in Chapter 10. However, when they choose to obtain entitlements, they should be supported in accessing FTB. The ALRC considers that the accessibility of FTB should be improved for informal carers of children who have experienced family violence, including measures to address the 'information gap' about the availability of FTB.

12.36 The proposals for reform in Chapter 4 may improve FTB accessibility for informal carers of children who have experienced family violence, and also assist them to access support services. The proposed reforms would operate so that, where informal carers apply for FTB, Centrelink will screen for family violence.<sup>52</sup> When carers disclose family violence—through the screening process or otherwise—they will be referred to a Centrelink social worker.<sup>53</sup>

12.37 The screening and referral proposals apply not only to informal carers who apply for FTB, but to all Centrelink, CSA and FAO customers. This means that even when an informal carer is not an FTB applicant or recipient, she or he may be referred to a Centrelink social worker. The Centrelink social worker should provide referrals, and inform him or her of support services and FTB entitlements—as well as any other relevant entitlement, such as Grandparent Child Care Benefit.

12.38 Further, the proposed reforms would also ensure that all informal carers who are customers of Centrelink, the Child Support Agency or the FAO—including those who are not referred to social workers—are provided with the information and referrals described above.<sup>54</sup>

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50 Confidential, *Confidential CFV 49*, 21 April 2011.

51 National Legal Aid, *Submission CFV 81*, 24 June 2011.

52 Proposal 4–2.

53 Proposal 4–10.

54 Proposal 4–8.

12.39 These reforms are complemented by proposals about training for agency staff. The ALRC has suggested multifaceted training that should improve staff skills and knowledge base, including:

- family violence screening;
- making appropriate referrals to other services;
- the services that may be provided by the agency; and
- the nature, features and dynamics of family violence, and its impact on victims, in particular those from high risk and vulnerable groups.<sup>55</sup>

12.40 The ALRC considers that this package of reforms should improve FTB accessibility for informal carers of children who have suffered family violence. It should also improve accessibility to entitlements generally across family assistance, child support and social security frameworks. These reforms should also improve the safety of informal carers and the children they care for, by facilitating referrals to appropriate supports—for example, legal referrals where state and territory family violence protection orders are required.

## Exemptions from tax file number requirements

### Background

12.41 The *Family Assistance (Administration) Act* provides that an individual applying for FTB must provide both a tax file number (TFN)<sup>56</sup> and a TFN for his or her partner during the relevant payment period.<sup>57</sup> If an applicant either does not know his or her TFN or is currently applying for one, then the person may authorise the Commissioner of Taxation to share his or her TFN with the FAO and file a statement to that effect.<sup>58</sup> The Act provides for an exemption from the requirement for applicants to provide their partners' TFN, or partners' authorisation for the ATO to provide the TFN, where applicants cannot obtain these from their partners.<sup>59</sup>

12.42 The *Family Assistance Guide* describes the limited circumstances in which an individual may qualify for an exemption, including where a partner is violent, imprisoned for life, or seriously ill or disabled.<sup>60</sup> In particular, an indefinite exemption may be granted when the applicant has a

well based reason to believe that as a result of their request to the partner for TFN information:

<sup>55</sup> Proposal 4–5, 4–6.

<sup>56</sup> *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) s 7.

<sup>57</sup> *Ibid* s 3(1), definition of 'TFN claim person'.

<sup>58</sup> *Ibid* s 8(4)–(5).

<sup>59</sup> *A New Tax System (Family Assistance) Act 1999* (Cth) s 8(7). Tax file number exemptions are also provided for in the social security framework. See Ch 7.

<sup>60</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [4.1.1.20].

- the partner could become violent to the applicant or a child, or
- there would be other concerns for the safety or the health of the applicant or a child.<sup>61</sup>

12.43 The *Family Assistance Guide* provides that these cases are determined on request. Requests are referred to a social worker or an ISO for advice and assistance.<sup>62</sup>

### ***Submissions and consultations***

12.44 In the Family Assistance Issues Paper, the ALRC asked whether

- improvements are needed to ensure that applicants for family assistance are aware of, and using, the exemption from providing their partners' tax file numbers in cases of family violence; and
- the *Family Assistance (Administration) Act* should expressly refer to family violence as an example for an indefinite exemption.<sup>63</sup>

12.45 Stakeholders who responded to these questions commented that persons who use family violence may withhold necessary information as a means of control,<sup>64</sup> and that victims may be unaware of the exemption.<sup>65</sup> The Office of the Commonwealth Ombudsman similarly stated that customers do not realise that family violence may be a relevant factor in determining entitlements and exemptions in relation to family assistance, such as the exemption from providing a partner's TFN.<sup>66</sup>

12.46 The ADFVC referred to its suggestions about providing information to victims of family violence—discussed in Chapter 4—in order to increase awareness of the exemption. It considers that this information should be provided to customers when they first disclose family violence to Centrelink, the Child Support Agency (CSA) and the FAO.<sup>67</sup> The Ombudsman suggested an active screening process, combined with general information to customers in claim forms, payment information booklets and letters may assist to better educate customers.<sup>68</sup>

12.47 Additionally, three stakeholders stated that an indefinite family violence exemption should be provided for in the legislation.<sup>69</sup>

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61 Ibid.

62 Ibid.

63 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 35.

64 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 43*, 21 April 2011.

65 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 43*, 21 April 2011. See also ADFVC, *Submission CFV 53*, 27 April 2011.

66 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

67 ADFVC, *Submission CFV 53*, 27 April 2011.

68 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

69 National Legal Aid, *Submission CFV 81*, 24 June 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011, Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

**ALRC's views**

12.48 The reforms in Chapter 4 should increase awareness about, and therefore the accessibility of, the exemption to tax file number requirements. In particular, Proposal 4–8 provides that all customers should be informed of how family violence is relevant to family assistance, and should be given information about exemptions.

12.49 The ALRC considers that details about the indefinite family violence exemption are suitably placed in the *Family Assistance Guide*, and therefore it is unnecessary to amend the *Family Assistance (Administration) Act*. However, the exemption in the *Family Assistance Guide* is somewhat narrow, insofar as it refers to ‘violence’, rather than ‘family violence’.

12.50 The ALRC considers that the *Family Assistance Guide* should explicitly refer to family violence. This captures a broader range of conduct than ‘violence’, insofar as that conduct is violent, threatening, controlling, coercive or engenders fear. This proposed reform is complemented by Proposals 3–3, 3–4 and 12–1(a), which would set out a definition of family violence in family assistance legislation and the *Family Assistance Guide*. It is further complemented by Proposals 12–1(b) and 4–6, which state that the *Family Assistance Guide* should include a description of, and staff should receive training about, the nature, features, and dynamics of family violence.

**Proposal 12–2** The *Family Assistance Guide* should be amended expressly to include ‘family violence’ as a reason for an indefinite exemption from the requirement to provide a partner’s tax file number.

**Child Care Benefit****Background**

12.51 Child Care Benefit (CCB) is an income-tested payment that assists eligible parents and carers with the cost of child care. In addition to assisting parents and carers with child care costs, CCB aims to provide incentives for parents and carers with low and middle incomes to participate in the workforce and community, and to support parents and carers to ‘balance work and family commitments’.<sup>70</sup>

12.52 CCB is available to parents or carers responsible for child care costs where their children attend ‘approved child care services’<sup>71</sup>—that is, services approved for the purposes of family assistance law.<sup>72</sup> The FAO website states that approved child care services meet certain standards and requirements:

70 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.2.4].

71 This term is used in both the *A New Tax System (Family Assistance) Act 1999* (Cth) and the *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth).

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

This includes having a licence to operate, qualified and trained staff, being open certain hours, and meeting health, safety and other quality standards.<sup>73</sup>

12.53 The following services may provide approved care:

- long day care services;
- family day care services;
- in-home care services;
- occasional care services; and
- outside school hours care services.<sup>74</sup>

12.54 CCB may be paid to the approved child care service and passed on to the person as a fee reduction; or the person may pay child care fees and claim CCB as a lump sum at the end of the financial year.<sup>75</sup> All eligible parents and carers may receive up to 24 hours CCB per week for care provided by an approved child care service.<sup>76</sup> Parents and carers may receive up to 50 hours per week where they meet a 'work/training/study test',<sup>77</sup> or other conditions provided for in the legislation.<sup>78</sup>

12.55 CCB is also available for up to 50 hours per week where child care is provided by a person who has been approved as a registered carer by the FAO, and parents or carers meet a work/training/study test.<sup>79</sup> Registered carers may include, for example, grandparents, friends, relatives or nannies. CCB for registered care is only available in a lump sum for child care for which parents or carers have already paid.<sup>80</sup>

12.56 The work/training/study tests differ depending on whether care is provided by an approved child care service or a registered carer. To satisfy the work/training/study test, applicants using approved child care services must undertake 30 hours per fortnight of work, training or study. Applicants using registered care are not required to meet a minimum amount of work, training or study hours.<sup>81</sup>

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

74 *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) s 194.

75 *A New Tax System (Family Assistance) Act 1999* (Cth) ss 41(2), 43, 44; *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) ss 219B, 219BA; Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.2.4].

76 *A New Tax System (Family Assistance) Act 1999* (Cth) s 53(3).

77 *Ibid* s 54(2), (3).

78 *Ibid* s 54.

79 *Ibid*; *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) s 45; Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.6.3.10].

80 *A New Tax System (Family Assistance) Act 1999* (Cth) ss 41(2), 45; Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.2.4].

81 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.6.3.10].



12.57 Parents or carers generally lodge a claim for CCB with the FAO,<sup>82</sup> although in certain circumstances described below, the approved child care service may lodge the claim. The CCB rate when approved child care services provide care is substantially higher than the CCB rate when registered carers provide care. For example, the 2011–12 maximum CCB rate for non school-age children for 50 hours is \$189 for approved child care and \$31.60 for registered care.<sup>83</sup>

### Exceptional circumstances

#### *More than 24 hours CCB*

12.58 As noted above, to obtain more than 24 hours CCB, and up to 50 hours CCB, eligible parents and carers using approved child care services must meet a work/training/study test. Both the applicants and their partners must satisfy the test, unless applicants, their partners or their families are ‘exceptions’ from the test.<sup>84</sup>

12.59 The exceptions to the work/training/study test are provided for in the family assistance legislation and the *Family Assistance Guide*.<sup>85</sup> The exceptions may apply where an applicant or his or her partner is incarcerated, is with disability, cares for a child or adult with disability, or lives overseas. Further exceptions are available for families using approved care child care services: for example, where a grandparent or great-grandparent is the applicant; a child is at risk of serious abuse or neglect (discussed below); or there are ‘exceptional circumstances’.<sup>86</sup>

12.60 The *Family Assistance Guide* defines ‘exceptional circumstances’ as ‘short-term family crises that result in the parent, and their partner, if they have one, being unable to care for their child for a period longer than 24 hours per week’.<sup>87</sup> A non-exhaustive list of exceptional circumstances is set out:

- hospitalisation;
- short term physical incapacity;
- short term episodes of psychological or psychiatric illness;
- short term carer responsibilities for other family members;
- serious illness of a sibling;
- intensive medical treatment;

82 Family Assistance Office, *Information Booklet About Your Claim for Family Assistance*.

83 Centrelink, *Child Care Benefit* <[www.centrelink.gov.au](http://www.centrelink.gov.au)> at 21 July 2011.

84 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.6.3.10].

85 *A New Tax System (Family Assistance) Act 1999* (Cth) ss 15, 54, 55. Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.6.3.10]. This Discussion Paper uses the *Family Assistance Guide* terminology of ‘exceptions’.

86 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.6.3.10].

87 *Ibid*, [1.1.E.50].

- voluntary work in an emergency or disaster, such as bush fires, storms or floods;
- travel to attend a funeral or bereavement;
- travel for resolution of a family member's estate; and
- jury duty or appearance as a witness.<sup>88</sup>

12.61 The list does not specifically include family violence. The *Child Care Service Handbook 2010–2011* provides that it is not possible to list all exceptional circumstances, and that each case is to be ‘considered on its merits’.<sup>89</sup>

12.62 To apply for increased hours of CCB for approved care on the basis of exceptional circumstances, the parent or carer must complete the ‘Claim for Special Child Care Benefit and/or increased weekly limit of hours’ form with the approved child care service, and include supporting documents. The service sends the form to the FAO for determination. The FAO may grant the claim for the period of time considered necessary, up to a maximum of 13 weeks. Parents or carers may re-apply for further periods where the exceptional circumstances continue.<sup>90</sup> In these circumstances, payment delivery of CCB is only available in the form of reduced child care fees.<sup>91</sup>

### ***More than 50 hours weekly child care benefit***

12.63 More than 50 hours of CCB per week may be available to families where both parents, or the sole parent, have work, study or training commitments which make them unavailable to care for the child for more than 50 hours per week. Other circumstances where more than 50 hours of CCB is available are where a child is at risk of serious abuse or neglect—discussed below—or where the family is experiencing exceptional circumstances.<sup>92</sup>

12.64 The exceptional circumstances criteria, described above in relation to exceptions from the work/training/study test, apply.<sup>93</sup> The procedures described above in relation to applications, approvals, and payment delivery also apply.<sup>94</sup>

88 Ibid.

89 Department of Education, Employment and Workplace Relations, *Child Care Service Handbook, 2010–2011* (2010), 158.

90 Ibid, 159.

91 Ibid, 160.

92 *A New Tax System (Family Assistance) Act 1999* (Cth) s 55; Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.6.3.20].

93 *A New Tax System (Family Assistance) Act 1999* (Cth) s 55(4); Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.6.3.20], [1.1.E.50].

94 *A New Tax System (Family Assistance) Act 1999* (Cth) s54(8)(9); Department of Education, Employment and Workplace Relations, *Child Care Service Handbook, 2010–2011* (2010), 162–63.

## Child at risk of serious abuse or neglect

### *Increased weekly hours and higher rates of Child Care Benefit*

12.65 Where an approved child care service considers a child is at risk of ‘serious abuse or neglect’, the FAO may grant more than 50 hours per week of approved child care,<sup>95</sup> or, where a 24 hour limit would have applied, raise the limit to 50 hours.<sup>96</sup> The FAO may also pay CCB at a higher rate.<sup>97</sup> The higher rate of CCB is described in the *Family Assistance Guide* and elsewhere—although not in the family assistance legislation—as the Special Child Care Benefit (SCCB). SCCB may be approved for up to the total amount of weekly child care fees.<sup>98</sup>

12.66 Increased weekly hour limits for CCB due to risk are sometimes also called SCCB, as on the ‘Claim for Special Child Care Benefit and/or increased weekly limit of hours’ form.<sup>99</sup> However, the *Family Assistance Guide* provides that CCB for more than 50 hours of approved care due to risk is not the same as SCCB.<sup>100</sup>

12.67 If an approved service believes a child is at risk of serious abuse or neglect, it may approve SCCB or increase weekly hour limits for a maximum of 13 weeks.<sup>101</sup> The service may apply to the FAO for approval of further periods of SCCB or increased weekly hour limits.<sup>102</sup> The additional weekly hours can be paid at the SCCB rate.<sup>103</sup>

12.68 SCCB and increased weekly hour limits are available only in the form of reduced child care fees.<sup>104</sup> Lump sums at the end of the financial year are not available for these benefits.

12.69 Neither family assistance legislation nor the *Family Assistance Guide* defines the terms ‘abuse’ or ‘serious abuse’. The *Child Care Handbook* directs child care services to a ‘commonly accepted definition of abuse and neglect’ in the National Child Protection Clearinghouse’s resource sheet, ‘What is Child Abuse and Neglect?’.<sup>105</sup> This resource sheet provides a broad definition of child abuse and neglect (or child maltreatment):

any non-accidental behaviour by parents, caregivers, other adults or older adolescents that is outside the norms of conduct and entails a substantial risk of causing physical

95 *A New Tax System (Family Assistance) Act 1999* (Cth) s 55.

96 *Ibid* s 54.

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

98 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.6.7].

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

100 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.6.3.20].

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

102 *Ibid* ss 54, 55, 81; Department of Education, Employment and Workplace Relations, *Child Care Service Handbook, 2010–2011* (2010), 162, 208.

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

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

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

or emotional harm to a child or young person. Such behaviours may be intentional or unintentional and can include acts of omission (i.e., neglect) and commission (i.e., abuse).<sup>106</sup>

12.70 The resource sheet describes five main types of child abuse and neglect:

- physical abuse;
- emotional maltreatment;
- neglect;
- sexual abuse; and
- witnessing family violence.<sup>107</sup>

### ***Protective function***

12.71 SCCB and increased weekly hours of child care have a protective function. The Department of Education, Employment and Workplace Relations and the Office of Early Childhood Education and Childcare state that the SCCB—including additional hours of CCB—is designed to support attendance at child care, where costs are a barrier,<sup>108</sup> so that:

- the amount of time the child spends in the risk environment is reduced
- the amount of time the child spends in a stable and developmentally beneficial environment is maintained or increased
- the child remains ‘visible’ in the community and opportunities to link the family with other appropriate services are increased
- the parent/carer has an opportunity for respite or to seek assistance from other agencies such as health and family support services.<sup>109</sup>

### **Submissions and consultations**

12.72 The Family Assistance Issues Paper did not raise the issue of exceptional circumstances in relation to obtaining more than 24 or 50 hours of CCB, and the ALRC has not received stakeholder input or feedback on these issues. The Family Assistance Issues Paper did address increased CCB where children are at ‘risk or serious abuse or neglect’, and in this context the ALRC asked whether:

- increases in weekly CCB hours and higher rates of CCB are sufficiently accessible in cases of family violence, and whether reforms are needed to improve accessibility;<sup>110</sup>

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106 R Price-Robertson and L Bromfield, *National Child Protection Clearinghouse Resource Sheet No 6: What is Child Abuse and Neglect?* (2009), prepared for the Australian Institute of Family Studies.

107 Ibid.

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

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

110 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 38.

- the legislative requirement that the child be at ‘risk of serious abuse’ serves as an unreasonable barrier to eligibility for higher rates of CCB and increased weekly hours of CCB;<sup>111</sup>
- family assistance legislation should be amended to include definitions of ‘abuse’ or ‘serious abuse’, and whether the *Family Assistance Guide* should provide definitions of ‘abuse’ or ‘serious abuse’.<sup>112</sup>

### Accessibility

12.73 In relation to accessibility, the Ombudsman reported that, while it does not have complaint data in relation to this issue, it is possible that the FAO may be missing opportunities

to identify customers who are eligible for increased hours and rates of CCB. We are aware that many customers receiving family assistance payments are encouraged to claim and manage their entitlements via online self-service arrangements. While these arrangements are convenient and preferred by many customers, they also minimise the opportunities for direct contact with FAO staff and, in turn, minimise opportunities for an assessment of any increased assistance needs.<sup>113</sup>

12.74 The Welfare Rights Centre NSW stated increased CCB should be available not only when a child care service considers a child at risk of serious abuse or neglect, but also where

Centrelink forms the opinion (e.g. during an assessment with a social worker) that a child is at risk of abuse and/or that granting the special rate may reduce the risk to the child.<sup>114</sup>

### Serious abuse

12.75 Generally stakeholders criticised the legislative requirement of serious abuse or neglect. Stakeholders submitted that the ‘serious abuse’ requirement is flawed,<sup>115</sup> and that the word ‘serious’ should be removed.<sup>116</sup> The ADFVC commented that

Research has shown that all children exposed to domestic violence are at risk of serious harm and, therefore, all children in these situations should be entitled to additional Child Care Benefit and increased weekly hours of Child Care Benefit.<sup>117</sup>

12.76 The Welfare Rights Centre NSW suggested that if there must be a qualifying mechanism, it should apply to the level of risk rather than the nature of the abuse—for example, a ‘not insignificant’ risk.<sup>118</sup>

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111 Ibid, Question 39.

112 Ibid, Question 40.

113 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

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

115 Ibid.

116 Welfare Rights Centre Inc Queensland, *Submission CFV 43*, 21 April 2011.

117 ADFVC, *Submission CFV 53*, 27 April 2011.

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

### **Definitions**

12.77 Stakeholders generally supported the definitions being included in legislation or policy. Several stakeholders considered that abuse and serious abuse should be defined in both the *Family Assistance Guide* and family assistance legislation.<sup>119</sup> The Ombudsman commented that there would be value in defining ‘serious abuse’ in either legislation or the *Family Assistance Guide*, given ‘the potential for varying applications of the term’.<sup>120</sup> The Australian Association of Social Workers (AASW) stated that it would support legislative definitions of abuse or serious abuse

if it were going to enhance procedural certainty for victims of violence. If it were not going to enhance procedural certainty for victims then this may be better placed in policy supporting the legislation.<sup>121</sup>

12.78 National Legal Aid submitted that definitions of abuse should be consistent across jurisdictions. It noted that the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 is before Parliament.<sup>122</sup> The Bill contains a revised definition of child abuse.

12.79 The Welfare Rights Centre NSW considered that abuse ‘should be given its ordinary meaning’. As noted above it considered that the word ‘serious’ should be removed from the provision, and so did not comment on the definition of serious abuse.<sup>123</sup>

### **ALRC’s views**

#### ***Exceptional circumstances***

12.80 The ALRC considers that there is merit in the *Family Assistance Guide* specifically listing family violence as a type of exceptional circumstance, for the purposes of obtaining CCB for more than 24 hours—as an exception from the work/training/study test—or for more than 50 hours, when care is provided by approved child care services. These short term additional benefits may improve the accessibility of child care, which may assist victims when they and their families are escaping a person who has used family violence. Increased weekly payments of CCB may also be useful for victims during periods in which they are obtaining services or attending court for the purpose of improving their safety.

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

#### ***Accessibility***

12.81 The proposed package of reforms to increase customer awareness of how family violence affects entitlements, and to improve identification of family violence by the CSA and FAO, should improve accessibility to increased CCB where children are at

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119 ADFVC, *Submission CFV 53*, 27 April 2011; 04, 13, 49.

120 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

121 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

122 National Legal Aid, *Submission CFV 81*, 24 June 2011.

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

risk of abuse. These proposed reforms are discussed above in relation to the baby bonus, FTB for informal carers, and exemptions from tax file number requirements.

12.82 The ALRC notes stakeholder suggestions that Centrelink social workers should be able to approve increased CCB on the basis of risk of abuse or neglect. In the ALRC's preliminary consideration, such a reform is unnecessary. Rather, when Centrelink social workers become aware that increased CCB may be available—whether due to risk of abuse or neglect or exceptional circumstances—they should inform the customer, and refer the person to the approved child care service.

### ***Serious abuse***

12.83 The ALRC considers that risk of serious abuse and neglect is an inappropriately high threshold for CCB. It requires approved child care services to make judgments about the severity of abuse, and to exclude cases of abuse that are not deemed to meet the threshold. The ALRC considers that children at risk of abuse should generally benefit from the protective function of increased CCB.

12.84 In the ALRC's preliminary view, the *Family Assistance Act* should therefore be amended to provide that increases in weekly CCB hours and higher rates of CCB are available when children are at risk of abuse and neglect. An amendment to the *Family Assistance Act* will require a consequential amendment to s 71E(5) of the *Family Assistance (Administration) Act*.

### ***Definitions***

12.85 The ALRC considers that the *Family Assistance Guide* should be amended to define abuse and neglect. This may increase visibility of the definition and increase transparency around the administration of increased CCB for children at risk of abuse or neglect. This may assist parents and carers, child care services, and the FAO in considering eligibility and determining claims for SCCB and increases in weekly hours of CCB. If the definition is provided for in the *Family Assistance Guide*, it is the ALRC's preliminary view that it is not necessary to insert the definition into family assistance legislation.

12.86 The ALRC does not propose that serious abuse be defined, given the proposal that the word serious should be removed from family assistance legislation in relation to increased CCB.

12.87 The *Family Assistance Guide* definition of abuse or neglect may be based on the comprehensive definition provided by the National Child Protection Clearinghouse, to which approved child care services are currently referred. Alternatively, if the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 is passed, and the definition of child abuse in the *Family Law Act* is revised, the *Family Assistance Guide* could reflect the *Family Law Act* definition of child abuse (which includes neglect). This would provide the advantages of consistency and shared understanding of abuse across legal frameworks.

**Proposal 12–3** In relation to Child Care Benefit for care provided by an approved child care service, the *Family Assistance Guide* should list family violence as an example of ‘exceptional circumstances’ for the purposes of:

- (a) exceptions from the work/training/study test; and
- (b) circumstances where more than 50 hours of weekly Child Care Benefit is available.

**Proposal 12–4** 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’. A *New Tax System (Family Assistance) Act 1999* (Cth) should be amended 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.

**Proposal 12–5** The *Family Assistance Guide* should be amended to provide definitions of abuse and neglect.

## Baby bonus

12.88 The baby bonus is a flat rate payment—\$5,437 in 2011–12—to assist with the costs of a newborn or adopted child.<sup>124</sup> It is generally paid in 13 fortnightly instalments<sup>125</sup> to a parent of a child or a person who cares for or adopts the child.<sup>126</sup>

12.89 The *Family Assistance Guide* discusses the payment of the baby bonus by instalments and referrals to a social worker, ISO or MSO. The *Family Assistance Guide* states that young people, especially those 17 years or younger, are ‘generally inexperienced in handling large sums of money and/or may be subject to pressure to use the payment unwisely’.<sup>127</sup> These applicants must be referred to a social worker or specialist officer to discuss available services such as financial planning and support groups.<sup>128</sup>

12.90 Some applicants who are older than 17 are also referred to social workers or specialist workers. This includes applicants who have experienced family violence, have had a child subject to child protection, are considered ‘vulnerable to exploitation’, or may be ‘subject to pressure to use the payment unwisely’.<sup>129</sup> The social worker or specialist officer will assess the applicant’s needs, and the support he or she requires,

124 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.2.2], [3.3].

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

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

127 Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* <[http://www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.4.3].

128 Ibid.

129 Ibid.



and will provide information and referrals regarding appropriate services to the applicant.<sup>130</sup>

### Submissions and consultations

12.91 In the Family Assistance Issues Paper, the ALRC asked whether reforms are needed to ensure that

- baby bonus applicants who have experienced family violence are referred to Centrelink social workers and specialist officers;<sup>131</sup> and
- social workers and specialist officers are able to access information about whether a baby bonus applicant has a protection order or a child subject to child protection.<sup>132</sup>

12.92 The ADFVC commented that victims of family violence may be particularly vulnerable during pregnancy and after childbirth. It suggested a number of reforms to facilitate heightened awareness of this risk by CSA and Centrelink staff, as follows:

- amending family assistance legislation to include a definition of family violence;
- establishing a family violence policy;
- screening for family violence;
- assigning dedicated caseworkers to baby bonus applicants who disclose family violence.<sup>133</sup>

12.93 The Welfare Rights Centre Inc Queensland stated that this is a matter about the training and resources required to ensure Centrelink staff identify and understand family violence, and are ‘aware of the signs and issues involved to detect the possibility and have access to resources and referral systems to aid the potential victims’.<sup>134</sup>

12.94 To ensure that social workers and specialist officers have access to relevant orders, several stakeholders supported access to the national register for social workers and specialist officers,<sup>135</sup> as recommended in *Family Violence—A National Legal Response*. The AASW and the ADFVC qualified this support by stating that the national register should be accessed only with the consent of the applicant.<sup>136</sup>

12.95 The Welfare Rights Centre Inc Queensland did not support access to the national register by Centrelink social workers and specialist officers. Instead it suggested that

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130 Ibid.

131 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 36.

132 Ibid, Question 37.

133 ADFVC, *Submission CFV 53*, 27 April 2011.

134 Welfare Rights Centre Inc Queensland, *Submission CFV 43*, 21 April 2011. See also Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

135 Sole Parents’ Union, *Submission CFV 52*, 27 April 2011; Confidential, *Confidential CFV 49*, 21 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

136 Australian Association of Social Workers (Qld), *Submission CFV 46*, 21 April 2011.

applicants should be ‘encouraged to present documents such as protection orders and evidence of formal proceedings in matters relevant to family violence or abuse’.<sup>137</sup> It suggested this may be achieved through training for Centrelink staff, and readily available referrals and brochures at Centrelink and other agencies.<sup>138</sup>

### ALRC’s views

12.96 Reforms proposed in this Discussion Paper should facilitate the FAO’s objective to refer baby bonus applicants who have experienced family violence to social workers and specialist officers. The proposed reforms may also assist social workers and specialist officers to assess the needs of victims, and to provide appropriate referrals, information, and support.

12.97 In the ALRC’s preliminary consideration, Centrelink or the Family Assistance Office should screen baby bonus applicants for family violence.<sup>139</sup> Additionally, customers who have previously disclosed family violence to Centrelink, the FAO or the CSA, should be identified by a ‘safety concerns flag’.<sup>140</sup> These measures, captured in the broader proposals of Chapter 4, should improve the identification of victims of family violence, facilitating their referral to a social worker or specialist officer.

12.98 A legislative definition of family violence that is consistent across family assistance, social security and child support legislation should assist social workers and specialist officers in providing necessary supports to baby bonus applicants who have experienced family violence.<sup>141</sup> In particular, the proposed definition’s treatment of economic abuse may assist in determining when an individual may be subject to coercion or exploitation in relation to baby bonus payments. Replicating the definition in policy guides—including the *Family Assistance Guide*—along with descriptions of the nature, features and dynamics of family violence may also assist social workers and specialist officers.<sup>142</sup>

12.99 Proposals regarding training of Centrelink and FAO staff—including social workers and specialist officers—complement these suggested reforms. Proposed training components are set out above.

12.100 In the ALRC’s preliminary view, the proposed reforms regarding screening, interagency information sharing about safety concerns, a consistent legislative and policy definition of family violence, and training, should improve service responses to baby bonus applicants who have experienced family violence. Such a response supports victims experiencing financial exploitation and coercion, and assists them to take other protective measures where required.

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137 Welfare Rights Centre Inc Queensland, *Submission CFV 43*, 21 April 2011.

138 Ibid.

139 Proposal 4–2.

140 Proposal 4–11 and 4–12.

141 See Ch 3.

142 Proposal 12–1.



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## Part D—Income Management

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### Chapter

#### 13. Income Management—Social Security Law

### Proposals and Questions in this Part

**Proposal 13–1** The *Social Security (Administration) Act 1999* (Cth) and the *Guide to Social Security Law* should be amended to ensure that a person or persons experiencing family violence are not subject to Compulsory Income Management.

**Question 13–1** Are there particular needs of people experiencing family violence, who receive income management, that have not been identified?

**Proposal 13–2** In order to inform the development of a voluntary income management system, the Australian Government should commission an independent assessment of voluntary income management on people experiencing family violence, including the consideration of the Cape York Welfare Reform model of income management.

**Proposal 13–3** Based on the assessment of the Cape York Welfare Reform model of income management in Proposal 13–2, the Australian Government should amend the *Social Security (Administration) Act 1999* (Cth) and the *Guide to Social Security Law* to create a more flexible Voluntary Income Management model.

**Question 13–2** In what other ways, if any, could Commonwealth social security law and practice be improved to better protect the safety of people experiencing family violence?

**Proposal 13–4** Priority needs, for the purposes of s 123TH of the *Social Security (Administration) Act 1999* (Cth) are goods and services that are not excluded for the welfare recipient to purchase. The definition of ‘priority needs’ in s 123TH and the *Guide to Social Security Law* should be amended to include travel or other crisis needs for people experiencing family violence.



## 13. Income Management—Social Security Law

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### Summary

13.1 '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.

13.2 This chapter discusses the relevance of family violence to income management measures and the treatment of family violence in the income management of welfare payments under the *Social Security (Administration) Act*. The chapter briefly explains the nature and the history of income management regime and how income management may be improved to work to protect the safety of people experiencing family violence. By way of comparison, the income management model in the *Family Responsibilities Commission Act 2008* (Qld) is discussed.

13.3 In particular, this chapter examines the implications of family violence for how individuals may become subject to, or obtain exemptions from, the application of the income management regime; and the consequences of income management for people experiencing family violence.

13.4 The ALRC concludes that the complexity of family violence and the intertwining of family violence in a number of the ‘vulnerability indicators’ that trigger the imposition of compulsory income management leads to serious questions about whether it is an appropriate response. The ALRC proposes that there should be a flexible and voluntary form of income management offered to people experiencing family violence to ensure that the complex needs of victims are provided for and their safety protected.

13.5 The ALRC also proposes a review of the voluntary income management measures and streams to provide welfare recipients experiencing family violence with a flexible opt-in and opt-out measure.

## Background

### Introduction of income management

13.6 Income management was first introduced in 2007 as part of the Northern Territory Emergency Response (NTER) to allegations of child abuse in specific Indigenous communities. Under the *Social Security and Other Legislation (Welfare Payment Reform) Act 2007* (Cth), the NTER imposed income management upon peoples receiving income support or family assistance payments in 73 prescribed communities.<sup>1</sup>

13.7 The Australian Government implemented the income management legislation as a ‘special measure’ for the purposes of the *International Convention on the Elimination of All Forms of Racial Discrimination*<sup>2</sup> and the *Racial Discrimination Act 1975* (Cth) (RDA).<sup>3</sup> In 2010, the income management regime was amended,<sup>4</sup> following legal challenges to the NTER legislation on the basis of racial discrimination against Indigenous peoples.<sup>5</sup>

1 *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth).

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

3 *Racial Discrimination Act 1975* (Cth) s 8.

4 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of the Racial Discrimination Act) Act 2010* (Cth).

5 For example, in the High Court case of *Wurridjal v Commonwealth* (2009) 237 CLR 309 Kirby J observed that the *Northern Territory Emergency Response Act 2007* (Cth) ‘expressly removes itself from the protections in the *Racial Discrimination Act 1975* (Cth) and hence, from the requirement that Australia, in its domestic law, adhere to the universal standards expressed in the *International Convention on the Elimination of All Forms of Racial Discrimination*, to which Australia is a party’: [213]. See Department of Parliamentary Services, *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill* (2009) <<http://aph.gov.au/Library/pubs/bd/2009-1-/10bd094.pdf>> at 28 April 2011, which included changes to the *Social Security Act 1991* (Cth), *A New Tax System (Family Assistance) Act 1999* (Cth) and *Veterans’ Entitlements Act 1986* (Cth).

13.8 The Australian Government announced in the 2011–2012 Budget that income management will, from July 2012, apply to all Australians in a non-discriminatory manner and no longer be a part of the Northern Territory Response policy.<sup>6</sup> As the NTER is set to expire in August 2012, the government will further amend income management laws to continue a new phase of the intervention.<sup>7</sup>

### The New Income Management Model

13.9 On 1 July 2010, the Government introduced a new welfare reform phase as the New Income Management model (New IM).<sup>8</sup> The New IM measure applies to persons who meet the income management criteria, irrespective of race or ethnicity.<sup>9</sup> The New IM has four areas: the Participation/Parenting, the Child Protection, Vulnerable and Voluntary streams.<sup>10</sup>

13.10 The New IM commenced on 1 August 2009 and currently operates in urban and rural areas such as the Barkly region, Alice Springs, Katherine, East Arnhem, Darwin, Palmerston and other outback locations of the Northern Territory.<sup>11</sup> In March 2011, the estimates for Indigenous and non-Indigenous persons on New IM within the Northern Territory were 15,464 and 1,165 persons respectively.<sup>12</sup>

13.11 From 1 July 2012, income management will operate in other parts of Australia that include: Bankstown (NSW), Logan (Qld), Rockhampton (Qld), Playford (SA), and Greater Shepparton (Vic).<sup>13</sup> This is described as place-based income management.

13.12 The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) has the primary responsibility for the income management system, which is administered by Centrelink. The Department of Human Services (DHS) provides a central policy and coordination role for the government's delivery of services, which now includes Centrelink under its Human Services Portfolio.<sup>14</sup> The national strategy of service delivery for Compulsory and Voluntary Income Management is undertaken by DHS.

6 Australian Government, *Stronger Futures in the Northern Territory* (2011), [5].

7 M Franklin and M Rout, 'No Retreat on Northern Territory Intervention', *The Australian*, 22 June 2011, <<http://www.theaustralian.com.au/national-affairs/no-retreat-by-julia-gillard-on-northern-territory-intervention/>>. See also Australian Government, *Stronger Futures in the Northern Territory* (2011).

8 See Department of Families, Housing, Community Services and Indigenous Affairs, *The New Model of Income Management* (2010) <<http://www.fahcsia.gov.au/sa/families/pubs/nim/Pages/p2.aspx>> at 24 June 2011. NIM was introduced on 1 July 2010 and applied to people irrespective of race or ethnicity.

9 Department of Families, Housing, Community Services and Indigenous Affairs, *Evaluation Framework for New Income Management* (2010) <<http://www.fahcsia.gov.au/sa/families/pubs/nim/Pages/p2.aspx>> at 27 June 2011, [2].

10 Department of Families, Housing, Community Services and Indigenous Affairs, *The New Model of Income Management* (2010) <<http://www.fahcsia.gov.au/sa/families/pubs/nim/Pages/p2.aspx>> at 24 June 2011.

11 Department of Families, Housing, Community Services and Indigenous Affairs, *Evaluation Framework for New Income Management* (2010) <<http://www.fahcsia.gov.au/sa/families/pubs/nim/Pages/p2.aspx>> at 27 June 2011.

12 Department of Families, Housing, Community Services and Indigenous Affairs, *Centrelink Administrative Data*, 7 April 2011.

13 Department of Families, Housing, Community Services and Indigenous Affairs, *Income Management* (2011) <[http://www.fahcsia.gov.au/sa/indigenous/proserv/ntresponse/about\\_res](http://www.fahcsia.gov.au/sa/indigenous/proserv/ntresponse/about_res)> at 24 June 2011.

14 T Plibersek, *The Human Services Portfolio* <[http://www.mhs.gov.au/the\\_human\\_services\\_portfolio.php](http://www.mhs.gov.au/the_human_services_portfolio.php)> at 22 July 2011.



## Operation of income management

13.13 Under income management, a percentage of a person's welfare payments is set aside for their 'priority needs' and that of their children; namely, for services such as food, rent and utilities.<sup>15</sup> Income management does not affect or otherwise reduce the total amount of welfare payments payable to a recipient. Rather, it changes the way in which a person receives their payment. This is achieved by requiring persons to buy goods with a BasicsCard at approved stores, or through direct payment arrangements with landlords or utility providers.<sup>16</sup>

13.14 Income managed funds cannot be used to purchase excluded goods, such as alcohol, tobacco products, pornographic material and gambling goods and activities.<sup>17</sup>

## Objects

13.15 The objects of income management, as set out in the *Social Security (Administration) Act* are:

- (a) to reduce immediate hardship and deprivation by ensuring that the whole or part of certain welfare payments is directed to meeting the priority needs of:
  - (i) the recipient of the welfare payment; and
  - (ii) the recipient's children (if any); and
  - (iii) the recipient's partner (if any); and
  - (iv) any other dependants of the recipient;
- (b) to ensure that recipients of certain welfare payments are given support in budgeting to meet priority needs;
- (c) to reduce the amount of certain welfare payments available to be spent on alcoholic beverages, gambling, tobacco products and pornographic material;
- (d) to reduce the likelihood that recipients of welfare payments will be subject to harassment and abuse in relation to their welfare payments;
- (e) to encourage socially responsible behaviour, including in relation to the care and education of children;
- (f) to improve the level of protection afforded to welfare recipients and their families.<sup>18</sup>

## Who is subject to income management?

13.16 Under New IM, a person may be income managed under either the compulsory or voluntary measure. Both measures apply for various welfare payment categories.<sup>19</sup> To be subjected to compulsory income management, a person must fall within one of three streams identified below.

<sup>15</sup> See Social Policy Research Centre, *Evaluation Framework for New Income Management* (2010), 7.

<sup>16</sup> See eg Department of Families, Housing, Community Services and Indigenous Affairs, 'Voluntary Income Management (VIM)' <[http://www.fahcsia.gov.au/sa/families/pubs/income\\_factsheet/Documents/factsheet\\_8.pdf](http://www.fahcsia.gov.au/sa/families/pubs/income_factsheet/Documents/factsheet_8.pdf)> at 12 August 2011.

<sup>17</sup> Social Policy Research Centre, *Evaluation Framework for New Income Management* (2010), 7.

<sup>18</sup> *Social Security (Administration) Act 1999* (Cth) s 123TB.

<sup>19</sup> Information on the welfare payments that are covered by income management are found in the legislation and on the home pages of relevant government agencies and the Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011.

13.17 First, a person is subject to compulsory income management under the participation/parenting (mainstream) stream if the person:

- meets the criteria relating to the Disengaged Youth Payment Recipient; or
- meets the criteria relating to the Long-term Welfare Payment Recipient.

13.18 In the case of Vulnerable Welfare Payment, Disengaged Youth and Long-term Welfare Payment Recipients, a person is subject to compulsory income management if the person's place of usual residence is, at the test time, within a 'declared income management area'.<sup>20</sup>

13.19 Secondly, a person is subject to compulsory income management under the child protection stream if a child protection officer of a state or territory refers the person to be subject to the income management regime.

13.20 Thirdly, a person is subject to compulsory income management under the vulnerable stream if:

- the Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs (the Secretary) has determined that the person is a vulnerable welfare payment recipient;
- the person, or the person's partner, has a child who does not meet school enrolment requirements;
- the person, or the person's partner, has a child who has unsatisfactory school attendance; or
- the Queensland Commission requires the person to be subject to the income management regime.<sup>21</sup>

### Compulsory income management

13.21 Under 'Compulsory income management' (Compulsory IM), an individual's income support and family assistance payments are income managed at 50% (for participation/parenting, vulnerable and voluntary schemes), or 70% (for the Child Protection Scheme).<sup>22</sup>

13.22 One way a person is subjected to Compulsory IM is if the person is a vulnerable welfare payment recipient,<sup>23</sup> and there is a determination under the *Social Security (Administration) Act* by the Secretary (or a delegated Centrelink staff) to that effect.<sup>24</sup>

20 *Social Security (Administration) Act 1999* (Cth) s 123UCA. See also s 123TFA which defines 'declared income management area' to be a specified area, state or territory, determined by the Minister by legislative instrument.

21 *Ibid* s 123TC defines 'Queensland Commission', referring to the Family Responsibilities Commission established under the *Family Responsibilities Commission Act 2008* (Qld), as part of the Cape York Welfare Reform model—discussed below.

22 See eg Orima Research, *Evaluation of the Child Protection Scheme of Income Management and Voluntary Income Management Measures in Western Australia* (2010), prepared for the Department of Families, Housing, Community Services and Indigenous Affairs, 24.

23 *Social Security (Administration) Act 1999* (Cth) s 123UCA.

24 *Ibid* s 123UGA.

In determining whether a person is a vulnerable welfare payment recipient, the Secretary must comply with certain decision-making principles set out in the Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2010 that require, among other things, an express consideration as to whether the person is ‘experiencing an indicator of vulnerability’.<sup>25</sup>

#### *Indicators of vulnerability*

13.23 The *Guide to Social Security Law* and the Principles provide the following examples of indicators of vulnerability:

- financial hardship;
- financial exploitation;
- failure to undertake reasonable self-care; or
- homelessness or risk of homelessness.<sup>26</sup>

13.24 When placing an individual on Compulsory IM based upon the indicators of vulnerability and ‘the circumstances of the person’, Centrelink staff must consider whether:

- the person is experiencing an indicator of vulnerability;
- whether the person is applying appropriate resources to meet some or all of their priority needs;
- if the person is experiencing an indicator of vulnerability—income management is an appropriate response to that indicator of vulnerability;<sup>27</sup> and
- whether income management will assist the person to meet some or all of the person’s priority needs.<sup>28</sup>

13.25 Reforms that require the compulsory quarantining of a person’s welfare payment have been, and continue to be, the most controversial welfare reform in income management.

#### **Voluntary income management**

13.26 Under the *Social Security (Administration) Act*, a person may enter into a written agreement with the Secretary agreeing to be subject to the income management

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<sup>25</sup> Ibid pt 2, cl 5.

<sup>26</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [11.4.2.20] (Indicators of Vulnerability).

<sup>27</sup> *Social Security (Administration) Act 1999* (Cth) s 123UCA.

<sup>28</sup> See Department of Families, Housing, Community Services and Indigenous Affairs, *Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles* (2010) and the Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011 [11.4.2.10].

regime throughout the period in force (which must be at least 13 weeks).<sup>29</sup> The agreement remains in force until it is terminated, or the period in force expires.<sup>30</sup>

13.27 Under voluntary income management (Voluntary IM), all lump sum and advance payments are income managed at 100%, while other regular payments are income managed at 50%.<sup>31</sup>

### Exemptions

13.28 Exemptions from income management can be sought by people under various measures, where the person is:

- in a specified class;<sup>32</sup>
- without dependent children;<sup>33</sup>
- with dependent children;<sup>34</sup>
- a full-time student;<sup>35</sup> or
- a school age child.<sup>36</sup>

13.29 The availability of these exemptions is subject to meeting a range of conditions in the *Social Security (Administration) Act*.<sup>37</sup> The Minister has discretion, under s 123UGB, to specify a class of welfare payment recipients as exempt from income management.

13.30 A person on income management may qualify for an exemption under s 123UGD of the *Social Security (Administration) Act*, if the person has school-aged children who are enrolled and attending, or participating in other prescribed activities, and the Secretary of FaHCSIA is ‘satisfied that there were no indications of financial vulnerability in relation to the person during the 12-month period ending immediately before the test time’.

13.31 The *Guide to Social Security Law* sets out some ‘core principles’ that should be applied in cases where a person seeks an exemption from income management. These principles, in part, state that:

- It is intended that income management promote personal responsibility and positive social behaviour by providing pathways to evidence based exemptions for people who have a demonstrated record of responsible parenting, or participation in employment or study.

29 *Social Security (Administration) Act 1999* (Cth) s 123UM.

30 *Ibid* s 123UN(1)(b) (duration); s 123UO (termination).

31 Factsheet: VIM. ‘Voluntary Income Management (VIM)’, <[http://www.fahcsia.gov.au/sa/families/pubs/income\\_factsheet/Documents/factsheet\\_8.pdf](http://www.fahcsia.gov.au/sa/families/pubs/income_factsheet/Documents/factsheet_8.pdf)>

32 *Social Security (Administration) Act 1999* (Cth) s 123UGB.

33 *Ibid* s 123 UGC.

34 *Ibid* s 123 UGD.

35 *Ibid* s 123 UGF.

36 *Ibid* s 123 UGG.

37 *Social Security (Administration) Act 1999* (Cth) s 123UGB, under pt 3B, div 2, subdiv BB.

- Exemptions are available in cases where income management is not necessary because a person has met the broad outcomes that comprise the objectives of income management. That is, the person can demonstrate that they:
  - are not experiencing hardship or deprivation and are applying appropriate resources to meet their families' priority needs,
  - can budget to meet priority needs,
  - are not vulnerable to financial exploitation or abuse, and
  - are demonstrating socially responsible behaviour, particularly in the care and education of dependent children, or
  - that they are meeting workforce participation requirements for those who are not a principal carer of a child.<sup>38</sup>

13.32 As of March 2009, Centrelink data indicated that 649 clients had applied for and been granted an exemption from income management, which represented 9.8% of managed clients. Three in five exemptions (58%) were due to clients permanently moving away from their community.<sup>39</sup>

#### **Exemption review process**

13.33 Where an exemption is refused by Centrelink, the welfare recipient has various ways to request a review of the decision. A person can request an internal review of the decision made by the Centrelink officer, which is conducted by a Centrelink Authorised Review Officer (ARO).<sup>40</sup> If the ARO decides not to exempt the person from income management, a person can seek review before the Social Security Appeal Tribunal.<sup>41</sup>

13.34 The Commonwealth Ombudsman, in a review of rights for income managed people in the Northern Territory, recommended that Centrelink develop criteria against which to review and prioritise a decision for people experiencing 'vulnerability'.<sup>42</sup> The Ombudsman highlighted the complexity involved for a welfare recipient to have a refused exemption reviewed by Centrelink, and to appeal, before the Social Security Appeals Tribunal.<sup>43</sup>

38 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, 2 February 2011, [11.1.14.10] (Overview of Exemptions from Income Management).

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

40 Commonwealth Ombudsman, *The Right of Review: Having Choices, Making Choices* (2011) <[www.ombudsman.gov.au/files/centrelink\\_the\\_right\\_of\\_review\\_having\\_choices\\_making\\_choices.pdf](http://www.ombudsman.gov.au/files/centrelink_the_right_of_review_having_choices_making_choices.pdf)> at 23 March 2011.

41 Social security decisions made by a delegate of the Minister for FaHCSIA are subject to external review by the SSAT. Under the NTER, amendments were made to the Act which provided that the SSAT could not review a decision made under pt 3B to apply income management to a person, or to exempt them from income management. However, amending legislation in 2009 provided the right to seek external review from the SSAT: *Family Assistance and Other Legislation Amendment (2008 Budget and Other Measures) Act 2009* (Cth) sch 2.

42 Commonwealth Ombudsman, *The Right of Review: Having Choices, Making Choices* (2011) <[www.ombudsman.gov.au/files/centrelink\\_the\\_right\\_of\\_review\\_having\\_choices\\_making\\_choices.pdf](http://www.ombudsman.gov.au/files/centrelink_the_right_of_review_having_choices_making_choices.pdf)> at 23 March 2011. The criteria include factors as to the complexity of the case, consequences of the decision and consent, whether it is informed or where consent was not given by Centrelink staff.

43 Commonwealth Ombudsman, *Review of Rights for Income Managed People in the Northern Territory* (2010).

### Issues related to family violence

13.35 The ALRC has identified 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.

### Compulsory income management and family violence

13.36 This section considers the appropriateness of compulsory income management as a means to improve the safety of victims of family violence. It does so by examining how the assessment of ‘indicators of vulnerability’ may affect victims of family violence. It also considers how this assessment may affect a victim’s willingness to disclose family violence, and the criteria for exemption from income management.

#### Indicators of vulnerability

13.37 There is no express reference to family violence as an indicator of vulnerability in the *Guide to Social Security Law* or the *Social Security (Administration) Act*. However, the *Guide to Social Security Law* recognises a number of links between indicators of vulnerability and family violence. For example, ‘financial exploitation’ may occur when ‘a person is subject to undue pressure, harassment, violence, abuse, deception or exploitation for resources by another person or people, including other family and community members’.<sup>44</sup> Similarly, homelessness may be a flawed indicator of vulnerability for people experiencing family violence, because the lack of adequate community housing creates few options for permanent accommodation.<sup>45</sup>

13.38 Therefore, while the determination to impose Compulsory IM may be triggered by the particular indicators set out in the *Guide to Social Security Law*, family violence may be the overall context and cause of particular indicators assessed under the indicators of vulnerability, either individually or together.

13.39 The decision-making principles in the *Guide to Social Security Law* do not identify why, or how, income management may assist a person who is experiencing family violence. The *Guide to Social Security Law* sets out the principles ‘for determining that there were no indications of financial vulnerability’ during the previous 12 months:

44 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [11.4.2.20] (Indicators of Vulnerability). The Guide also recognises that family violence may lead to homelessness, in circumstances where the victim is forced to leave his or her home.

45 Department of Families, Housing, Community Services and Indigenous Affairs, *Indigenous Homelessness Within Australia* (2011) <[http://www.fahcsia.gov.au/SA/INDIGENOUS/PUBS/HOUSING/INDIGENOUS\\_HO...](http://www.fahcsia.gov.au/SA/INDIGENOUS/PUBS/HOUSING/INDIGENOUS_HO...)> at 2 February 2011.

- a person has been applying appropriate resources to meet priority needs,
- a person had control over their money and was not subject to financial exploitation,
- a person had stable payment patterns and budgeting practices and is meeting priority needs from their income support and family assistance payments,
- a person did not regularly require urgent funds to pay for foreseeable costs, or did not frequently change their income support pay dates and consideration is given to the reason for seeking the urgent payment.<sup>46</sup>

13.40 The Australian Domestic and Family Violence Clearinghouse (ADFVC) in the report, *Seeking Security*, argued that compulsory income management may remove people who experience family violence from the decision-making process, leaving them disempowered.<sup>47</sup>

One reason given for compulsory income management is to ensure that payments are spent on basic needs like food, rather than on undesirable expenses such as alcohol, drugs and gambling. However, this study found limited evidence from the literature that women who are affected by domestic violence generally have less capacity than other people to manage their own affairs.<sup>48</sup>

13.41 The Australian Human Rights Commission has stated that applying family violence as a trigger for the imposition of income management may have unintended consequences because people experiencing family violence and on low income welfare payments often require support services, not ‘merely’ financial management.<sup>49</sup>

### Disclosure of family violence

13.42 The prospect of the imposition of income management may lead to non-disclosure of family violence, which may be bound up in the vulnerability indicators that trigger it. Victims of family violence may prefer not to disclose family violence due to fear that income management will be imposed. They may choose to stay in an abusive relationship rather than leaving and, for example, claiming Crisis Payment.<sup>50</sup> Imposing income management on people experiencing family violence, who are capable of looking after themselves and their families, may reduce their ability to take steps to seek protection and safety.

13.43 As identified in the report, *No Way to Live*, by Dr Lesley Laing, victims and children experiencing family violence and post-separation from violence may have their decision making affected by the trauma—what the report termed ‘trauma

46 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011 [11.1.14.30] (Parental Exemptions from Income Management—Financial Vulnerability Test).

47 R Braaf and I Meyering, *Seeking Security: Promoting Women’s Economic Wellbeing Following Domestic Violence* (2011), 11.

48 Ibid, 100.

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

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

informed decision making’.<sup>51</sup> This may affect the victims’ understanding of the consequences of sharing personal information.

## Submissions and consultations

### *Indicators of vulnerability and family violence*

13.44 In *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011) (Social Security Issues Paper), the ALRC asked whether family violence should be included as an indicator of vulnerability for the purposes of administering the Vulnerable Welfare Payment under the income management provisions and, if so, what definition of family violence should apply.<sup>52</sup> The ALRC also asked what additional decision-making principles or guidelines would be desirable—in particular, taking into account that a person may be a victim or a person using family violence, or both.<sup>53</sup>

13.45 Most stakeholders opposed adding to the definition of vulnerability by including ‘family violence’ as an indicator, and argued instead that the indicators of vulnerability should be removed altogether.<sup>54</sup> Stakeholders emphasised their concern that ‘vulnerability indicators’ may result in a person experiencing family violence being ‘triggered’ into income management and, as a consequence, compounding the problem through quarantined payments where the person wants to flee family violence.<sup>55</sup>

13.46 The North Australian Aboriginal Justice Agency (NAAJA) submitted that, although the specific words ‘domestic or family violence’ are not included in the indicators of vulnerability in policy or legislative instruments, the ‘vulnerable indicators’ described in social security policy and legislation would trigger Compulsory IM for people experiencing family violence.<sup>56</sup>

13.47 The ADFVC stated that screening for domestic and family violence is not a simple process;<sup>57</sup> and a welfare recipient attempting to demonstrate that there are no ‘indications of financial vulnerability’ faces a high threshold of proof.

51 L Laing, ‘No Way to Live’: *Women’s Experiences of Negotiating the Family Law System in the Context of Domestic Violence: Interim Report* (2009), 91.

52 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011).

53 Ibid, Questions 38, 39.

54 Central Australian Aboriginal Legal Aid Service, *Submission CFV 78*, 2 June 2011; North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011; ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

55 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

56 North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011. NAAJA identified that the organisation had argued against the inclusion of the words ‘family violence’ in the indicators of vulnerability as it broadened the reach to vulnerable people. NAAJA Aboriginal legal services to the top end of the Northern Territory and operates offices in Darwin, Katherine and Nhulunbuy, with a dedicated Welfare Rights Outreach Program, including income management advice.

57 ADFVC, *Submission CFV 71*, 11 May 2011.



13.48 Some stakeholders noted that indicators may reflect broader social conditions, rather than particular attributes of the individual. With respect to ‘financial hardship’, the Council of Single Mothers and their Children (Vic) pointed out that many people receiving income support payments will fall into the category of experiencing financial hardship due to the combination of the low rates of welfare payments and the high cost of living.<sup>58</sup>

13.49 The ADFVC found that people experiencing domestic and family violence have a higher level of need in numerous situations, for example, when people separate and require other accommodation, relocation costs, travel, caring for children or dependants, to attend medical appointments and health reasons.<sup>59</sup> Current payment levels do not reflect the cost of living where victims of family violence incur additional costs and support services.<sup>60</sup>

13.50 While economic abuse may be a particular manifestation of family violence, the Central Australian Aboriginal Legal Aid Service (CAALAS) commented that it cannot be assumed that a person suffering domestic and family violence is also suffering economic abuse, nor should it be assumed that because of domestic violence, a person is unable to manage their financial affairs.<sup>61</sup>

#### ***Disclosure of family violence***

13.51 Several stakeholders submitted that people experiencing family violence are likely to be more reluctant to disclose their circumstances where such disclosure may lead to Compulsory IM, which may result in the victim missing out on appropriate services and support.<sup>62</sup> In particular, the disclosure of family violence was highlighted by stakeholders as a serious concern for people experiencing family violence who are afraid that disclosure to agencies may affect their social security payments.<sup>63</sup>

13.52 These issues are exacerbated where English is not the first language and where there are issues related to the person’s decision-making capacity, such as the experience of trauma.

13.53 Some stakeholders submitted that all Commonwealth employees who have a decision making or intervention role with people experiencing family violence must undergo regular training in child abuse, domestic and family violence practice, to facilitate disclosure.<sup>64</sup>

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58 Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

59 ADFVC, *Submission CFV 71*, 11 May 2011.

60 Ibid.

61 Central Australian Aboriginal Legal Aid Service, *Submission CFV 78*, 2 June 2011. CALAAS operates two permanent offices in Alice Springs and Tennant Creek and operates the Welfare Rights Outreach Project (WROP) which provides legal and policy advice on welfare rights issues, casework, community legal education for Indigenous peoples in the Northern Territory, particularly on income management, housing and other social security matters.

62 Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

63 WEAVE, *Submission CFV 58*, 27 April 2011.

64 WEAVE, *Submission CFV 58*, 27 April 2011.

*The appropriateness of compulsory IM for people experiencing family violence*

13.54 Most stakeholders indicated that they did not support Compulsory IM, or for the income management policy to be applied to people experiencing family violence.<sup>65</sup> Themes from submissions included:

- the considerable impact of trauma for persons experiencing family violence, concerns for informed decision making;
- the perpetrator blaming the welfare recipient for Compulsory IM;
- the undermining of fundamental principles of justice and human rights; and
- the lack of empirical evidence about the impact of income management on people experiencing family violence.<sup>66</sup>

13.55 For example, CALAAS stated that it did not support compulsory income management, nor the inclusion of family violence

as an indicator of vulnerability at either a legislative or policy level. Compulsory IM in any form and the full ability to manage any income is vital to victims of domestic and family violence.<sup>67</sup>

13.56 Similarly, NAAJA commented that it would have concern for the safety of a customer who was made subject to income management after a family violence incident, and queried the usefulness of income management in family violence.<sup>68</sup>

13.57 Stakeholders identified that income management should be assessed on the individual needs of the person experiencing family violence. They also commented that agency procedures and communication strategies with the person should ensure privacy and provide options.<sup>69</sup> Stakeholders also drew attention to the lack of autonomy for people experiencing family violence under the income management regime.<sup>70</sup> For example, a number of stakeholders indicated that the welfare recipient should be fully engaged with any decision on what percentage of their income, if any, may be quarantined. Full flexibility and control of the process by the person experiencing family violence was paramount. The Welfare Rights Centre Inc Qld

<sup>65</sup> Central Australian Aboriginal Legal Aid Service, *Submission CFV 78*, 2 June 2011; North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011; ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Sole Parents' Union, *Submission CFV 63*, 27 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

<sup>66</sup> ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; WEAVE, *Submission CFV 58*, 27 April 2011.

<sup>67</sup> Central Australian Aboriginal Legal Aid Service, *Submission CFV 78*, 2 June 2011.

<sup>68</sup> North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011.

<sup>69</sup> Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011.

<sup>70</sup> Central Australian Aboriginal Legal Aid Service, *Submission CFV 78*, 2 June 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

argued that the role of the social security system is to promote autonomy, dignity and choice.<sup>71</sup>

13.58 The ADFVC argued it would disempower people already experiencing family violence and only lead to more hardship for them.<sup>72</sup> Another commented that:

Family violence, the exercise of power and control of one person over another, is an attack on the individual's autonomy, agency, and the freedom of the victim. The risks of further disempowerment and loss of independence from compulsory income management are high. Replacing individual power and control with state power and control is at best only a risky stop-gap and at worst further abuse.<sup>73</sup>

13.59 Further, where a person experiencing family violence is placed on Compulsory IM following a violent incident, safety issues may arise for the victim, as the perpetrator may blame the victim for being income managed.<sup>74</sup> As one stakeholder remarked:

Family violence requires renewed and careful consideration in relation to social security law, especially given current income management policies and increasing knowledge of financial abuse and other financial aspects of family violence. Safety is probably a more fundamental consideration for family violence victims than for any other social security applicants ... the responsibility of the social security system to assist women whenever necessary to leave and re-build their lives is clear.<sup>75</sup>

13.60 Other stakeholders argued that people experiencing family violence should be exempt from Compulsory IM, except in cases where statutory case management was required;<sup>76</sup> and that family violence victimisation should not be a trigger for Compulsory IM.<sup>77</sup> Further, the Sole Parents' Union commented that income management should not apply to people on the basis of receiving social security payments.<sup>78</sup>

### **Exemptions**

13.61 In the Social Security Issues Paper, the ALRC asked whether people experiencing family violence should be exempt from income management in specified circumstances, where to do so would assist them to take steps to prevent or reduce violence.<sup>79</sup>

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<sup>71</sup> Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

<sup>72</sup> ADFVC, *Submission CFV 71*, 11 May 2011.

<sup>73</sup> Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011.

<sup>74</sup> North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011.

<sup>75</sup> Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011.

<sup>76</sup> Ibid.

<sup>77</sup> WEAVE, *Submission CFV 58*, 27 April 2011.

<sup>78</sup> Sole Parents' Union, *Submission CFV 63*, 27 April 2011.

<sup>79</sup> Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 40.

13.62 A number of stakeholders supported an unqualified exemption for people experiencing family violence.<sup>80</sup> One stakeholder supported an exemption for those people experiencing family violence, except where individual determinations are made within a statutory case management process.<sup>81</sup>

13.63 CAALAS submitted that access to an exemption is unduly onerous to navigate and places an administrative burden of proof on people seeking to be exempt from income management.<sup>82</sup> In addition, NAAJA considered that the exemption process is time consuming, for example, the review and appeal decision process.<sup>83</sup>

13.64 NAAJA suggested that the test time of 12 months under s 123UGD(1)(d) should be amended, for example, where a welfare recipient experiencing family violence has recently left a violent relationship and settled down to a safe environment, the person is still required to wait 12 months for the exemption period to end.<sup>84</sup>

### ALRC's views

13.65 Multiple issues affect people experiencing family violence, many of which are beyond the control of victims and their children. The ALRC considers that notable policy and implementation gaps exist within the legislative framework of income management, particularly as applied to victims of family violence.

13.66 The key concerns for people experiencing family violence raised in the submissions and during consultations were: the unsuitability of the compulsory measure; the vulnerability indicators and their application; privacy issues, including disclosure and consent; and the inadequate funding of services for welfare recipients to meet income management compliance requirements.

#### *Unsuitability of compulsory measures*

13.67 The complexity of family violence and the intertwining of family violence in a number of vulnerability indicators prompts questioning about whether Compulsory IM is an appropriate response. Later in the chapter the ALRC considers an alternative model, in light of the experience in Cape York, and whether a more nuanced response to income management can be achieved.

13.68 The *National Plan to Reduce Violence Against Women and Their Children* identified that specialist and mainstream services are critical to assist people to rebuild their lives following violence and the first point of contact for people experiencing family violence should also provide capable and compassionate assistance—including

80 Central Australian Aboriginal Legal Aid Service, *Submission CFV 78*, 2 June 2011; North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011; ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Sole Parents' Union, *Submission CFV 63*, 27 April 2011; WEAVE, *Submission CFV 58*, 27 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

81 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011.

82 Central Australian Aboriginal Legal Aid Service, *Submission CFV 78*, 2 June 2011.

83 North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011.

84 Ibid.

specialist children services for those who have witnessed family violence.<sup>85</sup> Where ‘first contact’ takes place with Centrelink staff, for people experiencing family violence, the assessment to income manage a victim appears inconsistent with the National Plan.

13.69 If victims of family violence withhold information due to fear of income management or intervention, they are left without adequate protection. Compulsory income management makes withholding of information more likely. In addition, people experiencing family violence have many social pressures where the absence of support services to meet their statutory or personal requirements may affect their priority needs, or a lack of funded community shelters, refuges, or social or community housing that would result in homelessness. Income management fails to take into account the substantial effect of inadequate services.

13.70 The ALRC considers that treatment of people experiencing family violence should be determined on a case by case basis, with links to support services and immediate access to financial assistance, including individually determined access and control of their income management accounts.

#### **Indicators of vulnerability**

13.71 Questions may be raised about whether family violence should nevertheless be included as an express indicator of vulnerability—especially given the widely accepted view that economic abuse should be recognised as a form of family violence.<sup>86</sup> The ALRC notes that various vulnerability indicators may cause or result from exposure to family violence and therefore may lead to a determination for the application of Compulsory IM. However, the ALRC does not consider that Compulsory IM is an effective remedy to assist family violence.

13.72 The ALRC therefore proposes that family violence be considered as a reason why income management may be an inappropriate response to indicators of vulnerability. Amending the *Guide to Social Security Law* would allow decision makers to recognise the problems resulting from subjecting victims of family violence to required quarantining of income.

#### **Exemptions**

13.73 The ALRC considers that the general approach to exemptions within income management, as reflected in the decision-making principles under the *Social Security (Administration) Act*, would make it difficult for most people experiencing family violence to obtain an exemption. The decision-making criteria do not provide an automatic case for exemption for people experiencing family violence. Even if family violence is included as an exemption, the process for challenging exemptions is a time-

85 Department of Families, Housing, Community Services and Indigenous Affairs, *National Plan to Reduce Violence Against Women and Their Children—Including the First Three-year Action Plan* (2011).

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

consuming one and the onus is on the welfare recipient to demonstrate why he or she should be exempt.

13.74 The vulnerable position of people experiencing family violence, and the complex needs for their safety and protection, requires an urgent and simplified process that enables welfare recipients freely to enter and exit income management.

13.75 Submissions have mentioned the various problems for a person seeking an exemption and the process of appealing the refusal by a decision maker. The difficulty of meeting the requirements for exemption under the *Social Security (Administration) Act* may be exacerbated where people experiencing family violence live in rural, remote or discrete communities, because they have limited access to support services, low-income housing and temporary accommodation.

13.76 The ALRC proposes that persons experiencing family violence should not be subjected to Compulsory IM. This may be achieved in two ways, by:

- amending the *Guide to Social Security Law* to say that family violence should be taken into account in considering whether income management is an appropriate response to indicators of vulnerability; or
- including family violence as an exemption—which is likely to be ineffective unless the review process were streamlined.

13.77 These proposals should be supported by the adequate and regular funding of family violence services that provide support and safety for people experiencing family violence, and are a crucial link in the web of services necessary to support victims of family violence.

**Proposal 13–1** The *Social Security (Administration) Act 1999* (Cth) and the *Guide to Social Security Law* should be amended to ensure that a person or persons experiencing family violence are not subject to Compulsory Income Management.

**Question 13–1** Are there particular needs of people experiencing family violence, who receive income management, that have not been identified?

## Voluntary income management and family violence

13.78 Income management remains a highly controversial policy within urban, rural and remote Australian communities. As noted above, the most controversial welfare reform in income management has, and continues to be, the compulsory quarantining of a person's welfare payment. Despite various amendments to Compulsory IM, there has been an ongoing call to the Australian Government for its abolition.<sup>87</sup>

87 United Nations Special Rapporteur, *Observations on the Northern Territory Emergency Response in Australia* (2010) <[http://indigenouspeoplesissues.com/attachments/4136\\_NTER\\_observations.pdf](http://indigenouspeoplesissues.com/attachments/4136_NTER_observations.pdf)> at 12 July 2011, point 12.

13.79 As described above, Voluntary IM measures provide an alternative approach to income management. Under the *Social Security (Administration) Act*, a welfare recipient must remain on income management for a minimum of 13 weeks.<sup>88</sup> The Secretary must terminate the Voluntary IM agreement on the request of the welfare recipient and the grounds of termination must be met.<sup>89</sup> When a recipient applies to terminate the voluntary agreement, the recipient cannot make a new voluntary agreement for a period of 21 days.<sup>90</sup>

### Cape York Welfare Reform model

13.80 The Cape York Welfare Reform model, legislated under the *Family Responsibilities Commission Act 2008* (FRCA), is an alternate model to that in the *Social Security (Administration) Act*. The income management regime is described as ‘conditional income management’.<sup>91</sup> The model is being trialled in the Cape York communities of Aurukun, Coen, Hope Vale, and Mossman Gorge and associated outstations, and will run until 31 December 2011.<sup>92</sup>

13.81 The legislative framework of the Cape York Welfare Reform model varies from the *Social Security (Administration) Act* system of income management. It is meant to design and adapt income management measures to meet the needs of individuals and their communities.<sup>93</sup> The FRCA establishes the Families Responsibilities Commission (FRC), which has the power to make decisions in relation to notices given to it by agencies concerning matters including school attendance, enrolment, and child safety and welfare matters.<sup>94</sup> The FRC has power to hold a conference about the agency notice to discuss the matter with the relevant person to whom the notice relates, after which it may decide to refer the person to Centrelink to be subject to income management.<sup>95</sup> The FRC may require a person to be subject to income management for at least three months, but not more than one year.<sup>96</sup> The FRC advises Centrelink as to how much of a person’s income may be managed—this is likely to be 60 or 75% of regular fortnightly payments and all of any advance and lump sum payments.<sup>97</sup>

88 *Social Security (Administration) Act 1999* (Cth) ss 123UM, 123UN.

89 *Ibid* s 123UO.

90 *Ibid*.

91 Cape York Institute for Leadership and Policy, *Welfare Reform* (2010) <<http://www.cyi.org.au/welfarereform.aspx>> at 22 July 2011. The notion of conditional welfare as a tool of welfare reform takes a ‘carrot and stick’ approach to welfare recipients receiving government payments, which rewards or punishes the welfare recipient according to their behaviour or compliance to receiving welfare entitlements and payments.

92 Department of Families, Housing, Community Services and Indigenous Affairs, ‘Cape York Welfare Reform’ <<http://www.fahcsia.gov.au/sa/families/progserv/welfarereform/Pages/CapeYorkWelfareReform.aspx>> at 12 August 2011.

93 Family Responsibilities Commission, *Annual Report 2010-2011*, 1.

94 *Family Responsibilities Commission Act 2008* (Qld) s 40 (Notice about school attendance); s 41 (Notice About School Enrolment); s 42 (Notice about child safety and welfare measures).

95 *Ibid* s 69.

96 *Ibid* s 69(1)(b)(iv).

97 Department of Families, Housing, Community Services and Indigenous Affairs, ‘Income Management for Cape York Welfare Reform’, <<http://www.fahcsia.gov.au/sa/families/pubs/CapeYorkWelfareReform/Pages/IncomeManagement.aspx>> at 12 August 2011.

13.82 The main difference between the Cape York Welfare Reform model and that of the *Social Security (Administration) Act* is that the Cape York policy does not impose blanket quarantining of welfare payments.<sup>98</sup> Other differences include:

- the Commissioners of the FRC recognise customary practice and take into account the customs and traditions of the individual;<sup>99</sup>
- appointed Commissioners are representative of their community and satisfy the ‘good standing’ criteria for appointment;<sup>100</sup>
- a community resident in Cape York can apply to the FRC for a voluntary referral to income management; the FRC takes into account ‘the best interest of the person, a child of the person or another member of the person’s family’<sup>101</sup> in the decision-making process;
- the person or welfare recipient may participate in decision making to income manage—for example, the FRC holds conferences with community members<sup>102</sup> to enable the person to enter into a Family Responsibilities Agreement and prepare a case plan;<sup>103</sup> and
- under the FRCA, income management is applied as a last resort.<sup>104</sup>

13.83 FaHCSIA plans an evaluation of the welfare reform regime implemented under the Cape York model in 2011.

13.84 The Cape York Welfare Reform model is generally consistent with recommendations in the *National Plan to Reduce Violence Against Women and Their Children (2010–2022)* and the *Royal Commission into Aboriginal Deaths in Custody* (the Royal Commission). The *National Plan* encouraged communities to identify and develop their own solutions to localised family violence;<sup>105</sup> and the Royal Commission recommended that Indigenous communities be self-determining and resolve violence within their own communities.<sup>106</sup>

98 Cape York Institute for Leadership and Policy, *Welfare Reform* (2010) <<http://www.cyi.org.au/welfarereform.aspx>> at 22 July 2011.

99 *Family Responsibilities Commission Act 2008* (Qld) s 5 (Principles for administering Act); *Family Responsibilities Commission Act 2008* (Qld) s 63 (Particular matters about conduct of conference).

100 *Family Responsibilities Commission Act 2008* (Qld) s 12 (Membership of commission); *Family Responsibilities Commission Act 2008* (Qld) s 18 (Eligibility for appointment as local commissioner). Welfare recipients outside the Cape York community are assessed by the relevant department.

101 *Family Responsibilities Commission Act 2008* (Qld) s 108 (Responding to request about referral to income management).

102 *Ibid* s 5(2)(c) provides that the principles for administering the Act include that ‘Aboriginal tradition and Island custom must be taken into account in matters involving Aboriginal people or Torres Strait Islanders’.

103 *Ibid* s 68 (Decision to enter into agreement). *Family Responsibilities Commission Act 2008* (Qld) s 76 (Meaning of case plan).

104 P Billings, ‘Social Welfare Experiments in Australia: More Trials for Aboriginal families?’ (2010) 17 *Journal of Social Security Welfare* 164, [17].

105 Department of Families, Housing, Community Services and Indigenous Affairs, *National Plan to Reduce Violence Against Women and Their Children—Including the First Three-year Action Plan* (2011), 18–24.

106 P Memmott and others, *Violence in Indigenous Communities* (2001), prepared for the Crime Prevention Branch, Attorney-General’s Department, [17].



13.85 The Cape York Welfare Reform model is also consistent with the findings of the Fitzgerald Cape York Justice Study, which noted that government policies aiming to protect victims of violence have little hope of success if the community is not engaged in the process. It recommended developing community-based solutions to meet the needs of victims.<sup>107</sup>

13.86 These reports and studies emphasised the importance of individual agency and community involvement. By contrast, income management under the *Social Security (Administration) Act*—particularly compulsory quarantining of income—is inherently paternalistic, eroding individual agency and community self-determination.<sup>108</sup>

### Submissions and consultations

13.87 In the Social Security Issues Paper, the ALRC asked whether voluntary income management for people experiencing family violence should be adopted more broadly and, if so, how this should be done.<sup>109</sup> The ALRC also asked whether there was any evidence that income management has improved the safety of people experiencing family violence.<sup>110</sup>

#### *Support for voluntary income management*

13.88 Although most stakeholders did not support Compulsory IM,<sup>111</sup> many submissions expressed qualified support for voluntary income management measures, provided they are flexible and focused on the individual needs of people experiencing family violence.<sup>112</sup> In addition, a number of stakeholders commented on the problems that exist under the current Voluntary IM measure.

13.89 CAALAS submitted that the provisions are unduly inflexible: 50% of the welfare recipient's income is quarantined, and recipients must remain on the Voluntary IM measure for 13 weeks before being able to exit. CAALAS argued that people experiencing family violence should be able to determine the percentage of their payment to be quarantined and not be subject to a minimum time period on income management. CAALAS suggested that one way of increasing flexibility would be to amend s 61(a) of the *Social Security (Administration) Act* to allow an individual entering a voluntary agreement under s 123UM to determine the deductible portion of a

107 Human Rights and Equal Opportunity Commission, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities: Key Issues* (2006) 113.

108 R Braaf and I Meyering, *Seeking Security: Promoting Women's Economic Wellbeing Following Domestic Violence* (2011), 100–102.

109 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 43.

110 Ibid, Question 44.

111 Central Australian Aboriginal Legal Aid Service, *Submission CFV 78*, 2 June 2011; North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011; ADFVC, *Submission CFV 71*, 11 May 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011; Sole Parents' Union, *Submission CFV 63*, 27 April 2011; WEAVE, *Submission CFV 58*, 27 April 2011; Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

112 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, 4 May 2011, Council of Single Mothers and their Children (Vic), *Submission CFV 55*, 27 April 2011.

welfare payment. CAALAS also noted the importance of ensuring that an individual entering a Voluntary IM arrangement is fully informed and understands the options for exiting the arrangement.<sup>113</sup>

13.90 WEAVE commented that income management should only be available for ‘voluntary use in circumstances where a person has a demonstrated history of being unable to manage their income’. WEAVE noted that conditions such as intellectual disability, chronic substance abuse or a gambling addiction may be relevant in this determination.<sup>114</sup>

13.91 The Sole Parents’ Union submitted that the implementation of an income management system should be offered on a needs basis.<sup>115</sup> The Welfare Rights Centre Inc Queensland suggested that this had the potential to offer dignity and choice in the very complex system of social security compliance.<sup>116</sup>

13.92 The ADFVC submitted that a system of voluntary income management should be supported by voluntary financial counselling and access to financial products. As their research showed,

women who were able to stabilise their financial situation quickly after separation were doing much better than women who were not. Women who were able to find long term, affordable accommodation, who were able to find work, who did not have protracted legal battles and who could attend to health needs were doing better than those who were not.<sup>117</sup>

### *The need for evidence*

13.93 A number of stakeholders were critical of the lack of appropriate evidence-based research to evaluate the full effect of income management—particularly for people experiencing family violence. For example, the Welfare Rights Centre Inc Queensland commented that ‘[t]he evaluation of income management has been inadequate and inconclusive’.<sup>118</sup>

13.94 The Welfare Centre NSW highlighted this concern:

The Government is pursuing financial control measures in the absence of clear evidence that either it will deliver positive benefits or that massive administrative costs of income management will be offset by significant improvements in the social and economic health of those targeted by this regime.<sup>119</sup>

13.95 The Welfare Rights Centre NSW emphasised the importance of further evidence-based research to identify and recommend any progressive improvements from amended income management policy.<sup>120</sup>

113 Central Australian Aboriginal Legal Aid Service, *Submission CFV 78*, 2 June 2011.

114 WEAVE, *Submission CFV 58*, 27 April 2011.

115 Sole Parents’ Union, *Submission CFV 63*, 27 April 2011.

116 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011.

117 ADFVC, *Submission CFV 71*, 11 May 2011.

118 Welfare Rights Centre Inc Queensland, *Submission CFV 66*, 5 May 2011. See also, Central Australian Aboriginal Legal Aid Service, *Submission CFV 78*, 2 June 2011; Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011.

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

120 Ibid.

The question of safety for people experiencing family violence, including children, is an issue that the evaluation into the extension of Compulsory Income Management ... there is no reliable evidence about whether income management per se, makes for safer families and children ... The question of whether income management has improved family safety is highly complex and controversial.<sup>121</sup>

### **ALRC's views**

13.96 Income management under the NTER and the New IM measure continue to be debated as government policy and operate upon the most disadvantaged people in Australia, those who receive Centrelink payments and entitlements. The policy operates on an assumption that income management improves wellbeing.

13.97 The ALRC considers that the compulsory element of income management may hinder access to welfare and support for victims of family violence. A more flexible voluntary approach to income management may provide a more measured response. However, this reform approach should focus on ensuring individual autonomy and respecting the core principles of human rights in the context of social security.

13.98 The ALRC considers that the Cape York Welfare Reform model provides an instructive model for the Australian Government and the administering agencies of welfare reform. Under the Cape York model there is a great deal of flexibility in the approach to income management and a focus on the individual needs of the person. In contrast with the *Social Security (Administration) Act* model, the Cape York Welfare Reform model provides more engagement and empowerment of the individual within welfare reform and involves the welfare recipient in the decision-making process and the determination of income management.

13.99 The Cape York Welfare Reform model thus provides a basis on which to conduct further research and trials for a flexible voluntary policy, that is an opt-in and opt-out one, coordinated with meaningful community consultation. As the evidence from the Cape York trial becomes available and is reviewed, it would be timely to review the income management approach more generally—in particular for people experiencing family violence.

13.100 Many submissions recognised the importance of evidence-based policies, and the ALRC considers that any specific recommendations should be made only after the development of an evidence base. The ALRC suggests developing an independent assessment of the effectiveness of voluntary income management for people experiencing family violence. This assessment should include consideration of the Cape York model of income management. This process should incorporate the active participation of the community and family violence service providers to identify and evaluate the effect of programs on people experiencing family violence.

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121 Ibid.

13.101 Aspects of voluntary income management schemes that any assessment should consider include:

- ways to ensure that individuals understand the consequences of voluntary income management, particularly where victims of family violence may be experiencing trauma or have language barriers;
- options for individuals to leave voluntary income management;
- ways in which the community may be involved in voluntary income management to ensure appropriate support for individuals; and
- other measures, such as financial counselling, which may support and strengthen the effectiveness of any voluntary income management measures.

13.102 In the ALRC's view, it is important to offer a flexible welfare policy to address the needs and safety of the welfare recipient and his or her children. Such an approach will also need to apply to those welfare recipients under the original NTER who are subject to Compulsory IM.

**Proposal 13–2** In order to inform the development of a voluntary income management system, the Australian Government should commission an independent assessment of voluntary income management on people experiencing family violence, including the consideration of the Cape York Welfare Reform model of income management.

**Proposal 13–3** Based on the assessment of the Cape York Welfare Reform model of income management in Proposal 13–2, the Australian Government should amend the *Social Security (Administration) Act 1999* (Cth) and the *Guide to Social Security Law* to create a more flexible Voluntary Income Management model.

**Question 13–2** In what other ways, if any, could Commonwealth social security law and practice be improved to better protect the safety of people experiencing family violence?

## Accounts and BasicsCard

13.103 Under income management, payments to particular welfare recipients are held in separate, notional, accounts called 'income management accounts'.<sup>122</sup> A welfare recipient under income management may be issued with a stored value card, vouchers or receive other approved payments.<sup>123</sup> Stored value cards called 'BasicsCards', may be used at community stores and other approved outlets. Stored value cards, vouchers or approved payments may not be used to purchase excluded

<sup>122</sup> *Social Security (Administration) Act 1999* (Cth) s 123WA.

<sup>123</sup> *Ibid* pt 3B, div 6, subdiv B.

goods and services, which include alcoholic beverages, tobacco products, pornographic material and gambling.<sup>124</sup>

13.104 Concerns have been raised, however, about unintended consequences of the income management account system—including for people experiencing family violence. Problems have been identified in relation to:

- obtaining access to money for travelling interstate;
- delays in the transfer of needed funds;
- increased cost of goods and services through the use of the BasicsCard because of the lack of community stores or merchants;
- limits placed on daily expenditure using the BasicsCard are problematic during a crisis of family violence;
- restricted access to account balances because of inadequate facilities and technology; and
- assessment and reassessment of priority needs by Centrelink and at the approved store, which can be time consuming, invasive and demeaning, because the recipient must seek permission to purchase goods and services not covered by the priority needs list.<sup>125</sup>

13.105 Under income management, access to welfare payments for other goods and services is made subject to rules that determine when welfare recipients are granted access to their money and what payments may be spent on.<sup>126</sup> These are called ‘Restricted or Unrestricted Direct Payments’.<sup>127</sup> With respect to a restricted payment, the welfare recipient must demonstrate a genuine need and meet the priority needs list.<sup>128</sup> Subject to Centrelink approval, the unrestricted payment may allow access to part or, in some certain circumstances, all of the welfare recipient’s income-managed funds.<sup>129</sup>

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124 Ibid s 123TI.

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

126 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011.

127 *Social Security (Administration) Act 1999* (Cth) s 123YM, ‘restricted direct payments’; s 123YO, ‘unrestricted direct payments’. Restricted Direct Payments are used for Compulsory IM; and Unrestricted Direct Payments are used for child protection IM and Voluntary IM, where required, to reduce the percentage of income management ‘quarantined’. An Unrestricted Direct Payment is provided for all income management measures for direct payment by cheque, cash or store value card to the welfare recipient’s income managed account or with the recipients consent, to a third party: Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011.

128 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011; [11.1.3.80].

129 Ibid, [11.1.3.90].

13.106 In a crisis situation for people experiencing family violence, welfare recipients require Centrelink approval for a direct transfer of funds from an income management account to the person's personal bank account and under Compulsory IM the 'Restricted Direct Payments'<sup>130</sup> are difficult to obtain, in times of crisis, for victims of family violence.

13.107 The social security system has been described as 'requiring a micro examination of every aspect of a recipient's financial circumstances that exceeds the rigours of applying for a bank loan'.<sup>131</sup> Under income management, welfare recipients who receive quarantined payments have minimal control over their income and are scrutinised on all expenditures or intended purchases—for example, in advance payments for whitegoods. Access to funds to an income management account is based on narrow criteria that do not take into account the 'totality of a person's circumstances'.<sup>132</sup>

13.108 The decision-making principles under social security law, as referred to earlier, may not be flexible enough to assist victims of family violence to leave their residence or community, or to take other urgent steps to avoid violence. Access to resources to cover an immediate departure is likely to be limited by the use of the BasicsCard. Moreover, travel or other crisis needs where a person has to escape family violence may not amount to a priority need.<sup>133</sup>

13.109 It has also been observed that the restrictions of the BasicsCard may affect cultural sharing practices—for example, for Indigenous communities during 'sorry business', and where cash is contributed to the deceased's family.<sup>134</sup> Where family members have experienced family violence, an inability to contribute an amount of cash may exacerbate their vulnerability to the pressures of immediate and extended family, especially where family violence already exists; these socio-cultural practices can apply to other groups.

13.110 In addition, for remote, discrete and rural communities, geographical isolation combined with the lack of transport and accommodation may inhibit access to a person's income management account funds or use of the BasicsCard; and also the ability to attend Centrelink for an emergency payment.

130 A Restricted Direct Payment may be made available for a specific purpose to an income managed account of the welfare recipient or a joint account or to a third party. The purpose of this payment is to provide an alternative to cash payment. See the Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [11.1.3.80]. See *Social Security (Administration) Act 1999* (Cth) s 123YM.

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

132 *Ibid.*, 2.

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

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

13.111 Other access issues for the use and operation of the BasicsCard include limited operating locations (the location where the BasicsCard can be read—described as ‘kiosks’). In addition, there are privacy concerns for using the BasicsCard, for example, there is no anonymity for people carrying the card, especially in communities where privacy concerns exist and where the perpetrator and the victim/s reside in lowly populated areas.

13.112 In the case of a deceased welfare recipient, there are other issues for residual funds left in an income management account.<sup>135</sup> The *Guide to Social Security Law* sets out how the deceased’s account is disbursed and to whom.<sup>136</sup> For welfare recipients who die without a will (intestate), or who have not identified a person to administer and distribute their residual funds in the income management account, the funds may remain in the person’s account.<sup>137</sup>

13.113 For example, where the victim’s surviving family and children are identified to Centrelink as payment nominees, the disbursement of the deceased’s funds can provide ongoing safety and protection; the surviving children or dependants are to be prioritised under principles for ‘the best interests of the children’.<sup>138</sup> The report by the Australian Domestic and Family Violence Clearinghouse (ADFVC) identified that abuse continues post-separation, and beyond the acts of violence to the surviving children:

Relationship abuse can generate physical and mental trauma for women and their children, often extending well beyond the cessation of the abusive behaviour.<sup>139</sup>

### Submissions and consultations

13.114 In the Social Security Issues Paper, the ALRC asked about changes that could be made to law or practice relating to the administration of income management accounts to assist welfare recipients who are victims of family violence. In particular, the ALRC asked whether there were alternatives to stored value cards such as the BasicsCard, that may provide additional flexibility or portability, where a person needs to escape family violence and possible changes to ‘priority needs’ for the purposes of the income management regime.<sup>140</sup>

13.115 Stakeholders identified a range of problems with the BasicsCard—particularly the lack of flexibility and difficulties of access.

135 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011 at [11.1.11.80]; *Social Security (Administration) Act 1999* (Cth) ss 123WL and 123WM.

136 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011 at [11.1.11.80]; ss 123WL and 123WM.

137 *Social Security (Administration) Act 1999* (Cth) ss 123WL and 123WM.

138 Ibid s 123B; any children or surviving dependants should be amended under this provision.

139 R Braaf and I Meyering, *Seeking Security: Promoting Women’s Economic Wellbeing Following Domestic Violence* (2011).

140 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Questions 41, 42.

***Inflexibility***

13.116 CAALAS, for example, submitted that, for people experiencing family violence, the ability to manage and control their payments is vital and any restriction on the use of a person's social security payment could directly affect their safety including access to travel, finding new accommodation, and protecting their children or dependants.<sup>141</sup> CAALAS therefore recommended that travel and crisis needs should be included in the 'priority needs' provision of the *Social Security (Administration) Act* for the purposes of income management.<sup>142</sup>

13.117 As NAAJA pointed out, although income-managed funds are not able to be spent on 'excluded goods' under the legislation, there is no additional restriction on what the remaining managed monies may be spent on—for example, the balance could be spent on DVDs.<sup>143</sup>

***Access issues***

13.118 Many stakeholders raised additional issues that continue to make the use and specific operation of the BasicsCard system ineffective, including:

- obtaining an account balance and being denied by failed systems;<sup>144</sup>
- limited access due to poor internet service;<sup>145</sup>
- limited access to balance readers as they are only in certain locations and often offline;<sup>146</sup>
- limited or no access due to poor mobile reception;<sup>147</sup>
- limited card access and ineffective use results in welfare recipient being unable to meet 'priority needs';<sup>148</sup>
- limited literacy and numeracy skills of the recipient impacts on card use;
- limited or no access to permanent Centrelink offices and the Indigenous Call Centre (ICC) in remote and rural regions;<sup>149</sup> and
- the use of the BasicsCard may demean, humiliate and control persons experiencing family violence.<sup>150</sup>

141 Central Australian Aboriginal Legal Aid Service, *Submission CFV 78*, 2 June 2011.

142 Ibid.

143 North Australian Aboriginal Justice Agency, *Submission CFV 73*, 17 May 2011.

144 Central Australian Aboriginal Legal Aid Service, *Submission CFV 78*, 2 June 2011.

145 Ibid.

146 Ibid.

147 Ibid.

148 Ibid.

149 Ibid.

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



13.119 CAALAS submitted that a more accessible process is required to obtain the balance from the BasicsCard, by an ATM receipt or by the printed record on the end of a store receipt.<sup>151</sup> CAALAS also suggested that Unrestricted Direct Payments should be utilised by Centrelink in relation to people experiencing family violence,<sup>152</sup> as this method provides an improved access to funds. CAALAS expressed the view that:

Changes to the income management regime would facilitate the immediate transfer of income managed funds to a person's bank account or in cash in situations of crisis.<sup>153</sup>

### ALRC's views

13.120 The use and operation of the BasicsCard reveals a series of significant problems that directly affect the welfare recipient in accessing their income management account. These problems are magnified when they occur in rural or remote areas of Australia, and for people experiencing family violence in times of crisis or who need to flee violence to protect their safety and that of their children. In light of the many serious issues raised by stakeholders the ALRC considers that welfare recipients need to have access to their income managed funds by the transfer of funds into their personal account.

13.121 Although the ALRC does not make a proposal on the BasicsCard, the ALRC anticipates that if a fully flexible and voluntary income management system is introduced then the BasicsCard will be reviewed in due course.

13.122 The ALRC considers that a number of changes with respect to the access of income management accounts would provide support for, and therefore improve the safety of, victims of family violence. These also include ensuring the residual funds from the deceased victim's income management account are disbursed to their children, waiving the waiting period for crisis payments, and ensuring that the BasicsCard is fully accessible for people experiencing family violence.

13.123 In the ALRCs view, given the complex environment of family violence it is imperative that people experiencing family violence should have unfettered access to their welfare payments for travel and crisis needs, and on this basis the law should be amended to recognise travel and crisis needs as priority needs.

**Proposal 13–4** Priority needs, for the purposes of s 123TH of the *Social Security (Administration) Act 1999* (Cth) are goods and services that are not excluded for the welfare recipient to purchase. The definition of 'priority needs' in s 123TH and the *Guide to Social Security Law* should be amended to include travel or other crisis needs for people experiencing family violence.

151 Central Australian Aboriginal Legal Aid Service, *Submission CFV 78*, 2 June 2011.

152 Ibid.

153 Ibid.

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## Part E— Employment

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### Chapters

- 14. Employment Law—Overarching Issues and a National Approach
- 15. The Pre-Employment Stage
- 16. Employment—The *Fair Work Act 2009* (Cth)
- 17. Employment—The *Fair Work Act 2009* (Cth) Continued
- 18. Occupational Health and Safety Law

### Proposals and Questions in this Part

**Question 14–1** In addition to removal of the employee records exemption in the *Privacy Act 1988* (Cth), what reforms, if any, are needed to protect the personal information of employees who disclose family violence for the purposes of accessing new entitlements such as those proposed in Chapters 16 and 17?

**Proposal 14–1** 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 should, in consultation with unions and employer organisations:

- (a) develop a model privacy policy which incorporates consideration of family violence-related personal information; and
- (b) develop or revise guidance for employers in relation to their privacy obligations where an employee discloses, or they are aware of, family violence.

**Proposal 14–2** The Australian Government should initiate a national education and awareness campaign about family violence in the employment context.

**Proposal 14–3** Section 653 of the *Fair Work Act 2009* (Cth) should be amended to provide that Fair Work Australia must, in conducting the review and research required

under that section, consider family violence-related developments and the effect of family violence on the employment of those experiencing it, in relation to:

- (a) enterprise agreements;
- (b) individual flexibility arrangements; and
- (c) the National Employment Standards.

**Question 14–2** In addition to review and research by Fair Work Australia, what is the most appropriate mechanism to capture and make publicly available information about the inclusion of family violence clauses in enterprise agreements?

**Question 14–3** How should Fair Work Australia collect data in relation to the incidence and frequency with which family violence is raised in unfair dismissal and general protections matters?

**Proposal 14–4** In the course of its 2012 and 2014 reviews of modern awards, Fair Work Australia should consider issues relating to data collection.

**Question 15–1** In what ways, if any, should the Australian Government include a requirement in requests for tender and contracts for employment services that JSA and DES providers demonstrate an understanding of, and systems and policies to address, the needs of job seekers experiencing family violence?

**Question 15–2** How is personal information about individual job seekers shared between Centrelink, DEEWR, the Department of Human Services, and JSA, DES and IEP providers?

**Question 15–3** How does, or would, the existence of a Centrelink ‘Deny Access Facility’, or other similar safety measures, such as a ‘safety concern flag’, affect what information about job seekers DEEWR and JSA and DES providers can access?

**Proposal 15–1** Centrelink, DEEWR, JSA, DES and IEP providers, and ESAt and JCA assessors (through the Department of Human Services) 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.

**Proposal 15–2** The current circumstances in which a job seeker can change JSA or DES providers should be extended to circumstances where a job seeker who is experiencing family violence is registered with the same JSA or DES provider as the person using family violence.

**Question 15–4** Should JSA and DES providers routinely screen for family violence? If so:

- what should the focus of screening be;
- how, and in what manner and environment, should such screening be conducted; and
- when should such screening be conducted?

**Question 15–5** Under the *Job Seeker Classification Instrument Guidelines* if a job seeker discloses family violence, the job seeker should immediately be referred to a Centrelink social worker. What reforms, if any, are necessary to ensure this occurs in practice?

**Proposal 15–3** JSA and DES providers should introduce specialist systems and programs for job seekers experiencing family violence—for example, a targeted job placement program.

**Proposal 15–4** As far as possible, or at the request of the job seeker, all Job Seeker Classification Instrument interviews should be conducted in:

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

**Question 15–6** The Job Seeker Classification Instrument includes a number of factors, or categories, including ‘living circumstances’ and ‘personal characteristics’. Should DEEWR amend those categories to ensure the Job Seeker Classification Instrument incorporates consideration of safety or other concerns arising from the job seeker’s experience of family violence?

**Proposal 15–5** DEEWR should amend the Job Seeker Classification Instrument to include ‘family violence’ as a new and separate category of information.

**Question 15–7** A job seeker is referred to an ESAt or JCA where the results of the Job Seeker Classification Instrument indicate ‘significant barriers to work’. Should the disclosure of family violence by a job seeker automatically constitute a ‘significant barrier to work’ and lead to referral for an ESAt or JCA?

**Question 15–8** Where a job seeker has disclosed family violence, should there be streaming of job seekers to ESAt and JCA assessors with specific qualifications or expertise with respect to family violence, where possible?

**Question 15–9** When conducting an ESAt or JCA, how do assessors consider the impact of family violence on a job seeker’s readiness to work? What changes, if any, could ensure that ESAts and JCAs capture and assess the circumstances of job seekers experiencing family violence

**Question 15–10** In practice, to what extent can, or do, recommendations made by ESAt or JCA assessors in relation to stream placement or referral to DES account for the needs and experiences of job seekers experiencing family violence?

**Proposal 15–6** DEEWR and the Department of Human Services should require that all JSA, DES and IEP provider staff and ESAt and JCA assessors receive regular and consistent training in relation to:

- (a) the nature, features and dynamics of family violence, including: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can

involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children;

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

**Question 15–11** In what ways, if any, should the Australian Government include a requirement in requests for tender and contracts for employment services that IEP projects and services, or panel providers, demonstrate an understanding of, and systems and policies to address, the needs of Indigenous job seekers experiencing family violence?

**Question 15–12** In what ways, if any, should the JSA, DES, IEP or CDEP systems be reformed to assist Indigenous job seekers who are experiencing family violence?

**Question 15–13** In what ways, if any, should the JSA or DES systems be reformed to assist job seekers from culturally and linguistically diverse communities who are experiencing family violence?

**Question 15–14** In what ways, if any, should the JSA or DES systems be reformed to assist job seekers with disability who are experiencing family violence?

**Question 15–15** In the context of the Australian Government review of new approaches for the delivery of rural and remote employment services, in what ways, if any, could any new approach incorporate measures to protect the safety of job seekers experiencing family violence?

**Question 16–1** How do, or how could, Fair Work Australia's role, functions or processes protect the safety of applicants experiencing family violence?

**Question 16–2** In making an application to Fair Work Australia, applicants are required to pay an application fee. Under the *Fair Work Regulations 2009* (Cth) an exception applies if an applicant can establish that he or she would suffer 'serious hardship' if required to pay the relevant fee. In practice, do people experiencing family violence face difficulty in establishing that they would suffer 'serious hardship'? If so, how could this be addressed?

**Question 16–3** In applying for waiver of an application fee, referred to in Question 16–2, applicants must complete a ‘Waiver of Application Fee’ form. How could the form be amended to ensure issues of family violence affecting the ability to pay are brought to the attention of Fair Work Australia?

**Question 16–4** In Proposals 14–1, 17–1 and 17–3 the role of the Fair Work Ombudsman is discussed. In what other ways, if any, could the Fair Work Ombudsman’s role, function or processes protect employees experiencing family violence?

**Proposal 16–1** Section 65 of the *Fair Work Act 2009* (Cth) should be amended to provide that an employee who is experiencing family violence, or who is providing care or support to a member of the employee’s immediate family or household 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.

This additional ground should:

- (a) remove the requirement that an employee be employed for 12 months, or be a long-term casual and have a reasonable expectation of continuing employment on a regular and systemic basis, prior to making a request for flexible working arrangements; and
- (b) provide that the employer must give the employee a written response to the request within seven days, stating whether the employer grants or refuses the request.

*The next proposals are presented as alternate options: Proposal 16–2 OR Proposals 16–3 and 16–4*

**OPTION ONE: Proposal 16–2**

**Proposal 16–2** The Australian Government should amend the National Employment Standards under the *Fair Work Act 2009* (Cth) to provide for a new minimum statutory entitlement to 10 days paid family violence leave. An employee should be entitled to access such leave for purposes arising from the employee’s experience of family violence, or to provide care or support to a member of the employee’s immediate family or household who is experiencing family violence.

**OPTION TWO: Proposals 16–3 and 16–4**

**Proposal 16–3** The Australian Government should amend the National Employment Standards under the *Fair Work Act 2009* (Cth) to provide for a minimum statutory entitlement to an additional 10 days paid personal/carer’s leave. An employee should be entitled to access the additional leave solely for purposes arising from the employee’s experience of family violence, or to provide care or support to a member of the employee’s immediate family or household who is experiencing family violence.

**Proposal 16–4** The Australian Government should amend the National Employment Standards under the *Fair Work Act 2009* (Cth) to provide that an

employee may access the additional personal/carer's leave referred to in Proposal 16–3:

- (a) because the employee is not fit for work because of a circumstance arising from the employee's experience of family violence; or
- (b) to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support as a result of their experience of family violence.

**Proposal 17–1** The Fair Work Ombudsman should develop a guide to negotiating individual flexibility arrangements to respond to the needs of employees experiencing family violence, in consultation with the Australian Council of Trade Unions and employer organisations.

**Proposal 17–2** The Australian Government should encourage the inclusion of family violence clauses in enterprise agreements. Agreements should, at a minimum:

- (a) recognise that verification of family violence may be required;
- (b) ensure the confidentiality of any personal information disclosed;
- (c) establish lines of communication for employees;
- (d) set out relevant roles and responsibilities;
- (e) provide for flexible working arrangements; and
- (f) provide access to paid leave.

**Proposal 17–3** 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, the Australian Council of Trade Unions and employer organisations.

**Proposal 17–4** In the course of its 2012 review of modern awards, Fair Work Australia should consider the ways in which family violence may be incorporated into awards in keeping with the modern award objectives.

**Proposal 17–5** In the course of its first four-yearly review of modern awards, beginning in 2014, Fair Work Australia should consider the inclusion of a model family violence clause.

**Proposal 17–6** Fair Work Australia members should be provided with training to ensure that the existence of family violence is adequately considered in deciding whether there are 'exceptional circumstances' under s 394(3) of the *Fair Work Act 2009* (Cth) that would warrant the granting of a further period within which to make an application for unfair dismissal.

**Question 17–1** Section 352 of the *Fair Work Act 2009* (Cth) prohibits employers from dismissing an employee because they are temporarily absent from work due to illness or injury. Regulation 3.01 of the *Fair Work Regulations 2009* (Cth) prescribes kinds of illness or injury and outlines a range of other requirements. In what ways, if

any, could the temporary absence provisions be amended to protect employees experiencing family violence?

**Proposal 18–1** Safe Work Australia should include information on family violence as a 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’; and
- (c) any other code that Safe Work Australia may develop in relation to other topics, such as bullying and harassment or family violence.

**Proposal 18–2** Safe Work Australia should develop model safety plans which include measures to minimise the risk posed by family violence in the work context for use by all Australian employers, in consultation with unions, employer organisations, and bodies such as the Australian Domestic and Family Violence Clearinghouse.

**Proposal 18–3** Safe Work Australia should develop and provide education and training in relation to family violence as a work health and safety issue in consultation with unions, employer organisations and state and territory OHS regulators.

**Proposal 18–4** Safe Work Australia should, in developing its Research and Data Strategy:

- (a) identify family violence and work health and safety as a research priority; and
- (b) consider ways to extend and improve data coverage, collection and analysis in relation to family violence as a work health and safety issue.

**Question 18–1** What reforms, if any, are needed to occupational health and safety law to provide better protection for those experiencing family violence? For example, should family violence be included in the National Work Health and Safety Strategy?





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

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### Summary

14.1 This chapter provides an overview of Commonwealth employment law and, together with Chapters 15–17, examines possible options for reform to employment-related legislative, regulatory and administrative frameworks to improve the safety of people experiencing family violence. The chapter examines the relevance of family violence to the employment law system; issues associated with disclosure of family violence—including verification of family violence and privacy issues; the need for national initiatives which address family violence in the context of employment; and associated reforms to data collection.

14.2 The ALRC's key proposal is that the Australian Government should initiate a national education and awareness campaign around family violence in the employment context. The ALRC also proposes that the Office of the Australian Information Commissioner should develop a model privacy policy and guidance material in relation to family violence-related personal information. With respect to data collection, the ALRC considers the possible roles that Fair Work Australia should play in considering the effect of family violence on the employment of those experiencing family violence in relation to the National Employment Standards, enterprise agreements and individual flexibility arrangements.

## Family violence and employment

14.3 Family violence is increasingly recognised as a significant and complex issue and one which 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 must operate in both the private and public spheres. This is particularly so in the context of employment, given that unless addressed at a systemic level, these same factors can affect the workplace, ‘with the effects of one sphere positively or negatively influencing the other’.<sup>1</sup>

14.4 Two thirds of Australian women who report violence by a current partner are in paid employment.<sup>2</sup> Research in the United States has indicated that between 50% and 74% of employed women experiencing family violence are harassed by their partners while at work.<sup>3</sup> This illustrates the point made by lawyers John Stanton and Gordon Jervis that family violence ‘has no boundaries and doesn’t stop at the front door of the workplace’.<sup>4</sup>

### *The effect of family violence on employees*

14.5 Many victims of family violence face ongoing difficulties in gaining and retaining paid employment and in disclosing family violence where it may have an impact on their employment. For example, women who have experienced family violence generally have a more disrupted work history, receive lower incomes, and are more often in casual and part-time employment.<sup>5</sup>

14.6 Where victims of family violence are employed, family violence may arise in the workplace in one of three commonly identified categories of occupational violence: ‘internal’ violence, ‘client-initiated’ violence, or ‘external’ violence.<sup>6</sup> Internal violence refers to violence between employees within the same organisation, for example where employees work together in a family business or where a majority of residents in a particular area are employed by the same organisation. Client-initiated and external violence largely occurs in client-service based organisations that may provide ‘accessibility for partners or ex-partners to be targeted at their place of work’.<sup>7</sup>

1 S Murray and A Powell, *Working It Out: Domestic Violence Issues in the Workplace* (2008) 1, referring to J Swanberg, T Logan and C Macke, ‘Intimate Partner Violence, Employment and the Workplace. Consequences and Future Directions’ (2005) 6 *Trauma, Violence and Abuse* 286.

2 Australian Bureau of Statistics, *Personal Safety Survey*, Catalogue No 4906.0 (2005), 11, 34.

3 L McFerran and R Braaf, ‘Domestic Violence is a Workplace Issue’ (Paper presented at Balance Brings Everything to Life Conference, Sydney, 11 September 2007) referring to Family Violence Prevention Fund, *The Workplace Guide for Employers, Unions and Advocates* (1998). Note, in light of the lack of available statistics in Australia, the comparative US statistics are used for illustrative purposes.

4 J Stanton and G Jervis, ‘Domestic Violence and the Workplace’ (2010) (7) *National Safety Magazine* 36.

5 M Costello, D Chung and E Carson, ‘Exploring Pathways Out of Poverty: Making Connections Between Domestic Violence and Employment Practices’ (2005) 40 *Australian Journal of Social Issues* 253, 256; S Franzway, C Zufferey and D Chung, ‘Domestic Violence and Women’s Employment’ (Paper presented at Our Work, Our Lives National Conference on Women and Industrial Relations, Adelaide, 21 September 2007).

6 S Murray and A Powell, *Working It Out: Domestic Violence Issues in the Workplace* (2008), 3.

7 *Ibid.*, 4.

14.7 In brief, within these categories, family violence may present itself in the workplace in numerous ways, including by:

- stalking or harassing the victim at a place of work or making harassing telephone calls;
- actively undermining the victim's work by hiding or destroying work property, such as paperwork or uniforms;
- promising to mind children, then refusing to do so;
- physically preventing the victim from leaving the house or preventing access to transport;
- where the victim works from home, interfering or preventing the victim from working; or
- using work time or resources to facilitate violent behaviour.<sup>8</sup>

14.8 There may also be broader consequences, including:

- victim sleep deprivation, stress and reduced concentration affecting relations with colleagues and work performance and safety;
- effects on co-workers, including increased workloads due to absenteeism or dealing with disruptions such as harassing phone calls in the workplace; and
- in the most extreme cases, workplace family violence-related homicide.<sup>9</sup>

14.9 As a result, family violence can affect workplace productivity, by absenteeism and staff turnover as well as, in some instances, employee and workplace safety.

### ***The benefits of employment for victims of family violence***

14.10 The traditional approach to family violence has focused on crisis intervention. Increasingly however, there has been recognition of the impact of family violence in an employment context and on the benefits of employment for people experiencing family violence.

14.11 Employment may afford victims of family violence a measure of financial security, independence, confidence and, therefore, safety. While some evidence suggests that victims of family violence may experience higher levels of abuse when

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8 See, eg.: L McFerran and R Braaf, 'Domestic Violence is a Workplace Issue' (Paper presented at Balance Brings Everything to Life Conference, Sydney, 11 September 2007); A Moe and M Bell, 'Abject Economics: The Effects of Battering and Violence on Women's Work and Employability' (2004) 10(1) *Violence Against Women* 29. See also Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

9 See, eg.: L McFerran and R Braaf, 'Domestic Violence is a Workplace Issue' (Paper presented at Balance Brings Everything to Life Conference, Sydney, 11 September 2007); C Reeves and A O'Leary-Kelly, 'The Effects and Costs of Intimate Partner Violence for Work Organisations' (2007) 22 *Journal of Interpersonal Violence* 327.

they initially gain employment,<sup>10</sup> employment is a key factor in enabling victims to leave violent relationships,<sup>11</sup> providing longer-term benefits associated with financial security.<sup>12</sup>

14.12 The importance of financial security and independence through employment has been emphasised by Sex Discrimination Commissioner Elizabeth Broderick:

The primary way the majority of us lay the foundations of our economic security is through participation in paid work. We must develop better workplace responses to domestic and family violence to ensure that women can stay attached to the workforce. Doing this will mean three things. Firstly, we will protect women's financial security in the immediate term—women will be less likely to lose their job in a period of crisis. Secondly, if we can keep women attached to the labour market, we will better protect their economic security in the longer term—they will be less likely to live in poverty in their twilight years. But thirdly, and most importantly from an employer's perspective, individual businesses will be better able to prevent the unnecessary loss of talented staff.<sup>13</sup>

14.13 As a result, in considering safety in the context of employment law, the ALRC acknowledges the role that financial security and independence through paid employment can play in protecting victims of family violence.

### ***The social and economic cost of family violence***

14.14 In addition to the negative effects of family violence on employees and the benefits of employment, family violence also generates an enormous economic and social cost, with broader implications for employers and the economy.

14.15 As outlined in Chapter 1, family violence is projected to cost the Australian economy an estimated \$15.6 billion in 2021–22.<sup>14</sup> In 2004, it reportedly cost the corporate and business sectors over \$1.5 billion through direct costs.<sup>15</sup> Where family violence affects employees in the workplace, or leads to them leaving employment, individual employers face costs associated with:

10 This may result from the threat that employment poses to the power and control exercised by those who use family violence—referred to as the 'backlash hypothesis': S Franzway, 'Framing Domestic Violence: Its Impact on Women's Employment' (Paper presented at Re-Imagining Sociology Conference, Melbourne, 20 December 2008).

11 S Potton, *Pathways: How Women Leave Violent Men* (2003), 71.

12 See, eg: M Costello, D Chung and E Carson, 'Exploring Pathways Out of Poverty: Making Connections Between Domestic Violence and Employment Practices' (2005) 40 *Australian Journal of Social Issues* 253.

13 E Broderick, 'Launch of Domestic Violence Clauses' (Paper presented at Launch of UNSW Domestic Violence Clause, Sydney, 15 April 2010).

14 In terms of the overall economic impact of family violence, several key studies have been conducted estimating the total annual cost of violence against women by their partners. While the focus of the studies has been on women, the results are also useful to indicate the enormous economic impact of family violence more broadly. See, eg, National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 43. KPMG, *The Cost of Violence against Women and their Children* (2009), prepared for the National Council to Reduce Violence Against Women and their Children.

15 See, eg, Victorian Community Council Against Violence, *Family Violence is a Workplace Issue: Workplace Models to Prevent Family Violence* (2004).

- absenteeism, including administration costs;
- decreased productivity;
- recruitment following staff turnover—estimated as 150 per cent of an employee’s salary annually;<sup>16</sup> and
- training for new employees and loss of corporate knowledge.<sup>17</sup>

14.16 The employment law system in Australia is premised on the need to provide a balanced framework that promotes labour market engagement, economic productivity and social inclusion. In light of the enormous social and economic costs of family violence, and the high proportion of victims of family violence who are employed, ensuring the employment law system appropriately identifies, responds and addresses family violence, is central to achieving these aims.

### **Disclosure of family violence**

14.17 People experiencing family violence may wish to disclose family violence to individuals and organisations within the employment law system—such as job services providers, employers or union representatives—for many reasons, including:

- to ensure their experiences of family violence are considered in attempting to gain or retain employment;
- to alert them to the impact of family violence on their attendance or performance;
- to seek assistance or access to entitlements; or
- because of safety concerns.

14.18 As a result, workplaces have the potential to play a key role in supporting and protecting the safety of victims of family violence. However, victims may be reluctant to disclose family violence.

### **Barriers to disclosure**

14.19 In *Family Violence—A National Legal Response*, Issues Paper 36 (2011) (Employment Law Issues Paper), the ALRC and the NSW Law Reform Commission (the Commissions) identified a range of reasons for non-disclosure of family violence:

A victim of family violence may hide the abuse due to feelings of shame, low self esteem or a sense that he or she, as the victim, is responsible for the violence. A victim may feel that he or she will not be believed. A victim may hope that the violence will stop, or might believe that violence is a normal part of relationships.

16 ADFVC, *Why Domestic Violence Entitlements Makes Economic Sense: The Economic Costs of Domestic Violence on the Workplace*, referring to Australian Human Resources Institute, ‘Love ’Em don’t Lose ’Em: Identifying Retention Strategies that Work’ (2008) 2(1) *HR Pulse* 1.

17 ADFVC, *Why Domestic Violence Entitlements Makes Economic Sense: The Economic Costs of Domestic Violence on the Workplace*. For US research see: C Reeves and A O’Leary-Kelly, ‘The Effects and Costs of Intimate Partner Violence for Work Organisations’ (2007) 22 *Journal of Interpersonal Violence* 327.

Because of the family violence, a victim may feel powerless and unable to trust others, or fear further violence if caught disclosing it.<sup>18</sup>

14.20 General barriers to disclosure of family violence include:

- difficulty in recognising their experiences as family violence;
- shame;
- fear of not being believed, of adverse consequences, or of stigma associated with family violence;
- having to repeat an account of family violence multiple times; and
- lack of opportunity to disclose family violence.

14.21 In the context of the employment law system, there are particular manifestations of these general barriers, as well as a range of additional barriers.

### ***Barriers in the employment law context***

14.22 In the Employment Law Issues Paper, the ALRC sought stakeholder comment about barriers faced by victims of family violence in disclosing family violence in the employment context.

14.23 Stakeholder responses indicated a range of barriers, including that victims may be reluctant to disclose family violence because they fear such disclosure will jeopardise their job or career, they will be stigmatised, or that their employer will not be responsive. Stakeholders also suggested that, in some cases, employees experiencing family violence consider work to be a ‘safe haven’ away from the violence and were therefore reluctant to disclose.

14.24 In particular, stakeholders suggested that employees fear that an ‘employer may lose confidence in the ability of the victim’<sup>19</sup> following disclosure of family violence.

14.25 Stakeholders also emphasised that privacy concerns inhibit disclosure.<sup>20</sup> For example, the Australian Services Union expressed the view that

One of the most significant barriers preventing employees experiencing family violence from disclosing family violence in employment related contexts is the lack of assuredness around privacy. Victims cannot be certain that their experience will be kept confidential and fear that should they make a disclosure of family violence, their disclosure will be discovered by others in the workplace.<sup>21</sup>

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

19 Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

20 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 17*, 5 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011; Women’s Health Victoria, *Submission CFV 11*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

21 Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

14.26 Organisational culture and its impact on disclosure was also discussed in some submissions. For example, Women’s Health Victoria expressed the view that:

Disclosure may also be affected by the prevailing organisational culture within a workplace ... An organisational culture in which there exists a traditional gender divide, where women are not respected, and where there is widespread sexism, may not be one in which a victim of family violence would feel comfortable disclosing ... In contrast, a workplace that is respectful and supportive of women, that also sends a clear message that family violence is not tolerated, will foster employee disclosure.<sup>22</sup>

14.27 In addition, employees from particular groups or communities may face additional barriers or have different concerns preventing disclosure of family violence. For example, an Indigenous victim may be reluctant to disclose family violence in an employment context where they work in an organisation with family or kin, or in a business in a small community. An employee who is a member of a same-sex couple, but who is not ‘out’ at work, may fear stigmatisation or discrimination on the basis of their sexuality, as well as their experiences of family violence.

14.28 Addressing systemic social, economic and cultural factors perpetuating family violence is a principal way to reduce barriers to disclosure.<sup>23</sup> However, the ALRC also considers that the introduction of national initiatives such as those outlined below, ensuring systems identify and respond to disclosures of family violence and that those experiencing family violence are protected, will assist in addressing barriers to disclosure within the employment law system.

### **Impact of disclosure in certain areas and on certain professions**

14.29 In the Employment Law Issues Paper, the ALRC expressed concerns about the potential impact that disclosure of family violence may have on the responsibility or liability of those to whom violence is disclosed. In particular, the ALRC suggested that union representatives, or individuals in the Northern Territory (NT) to whom mandatory reporting provisions apply under the *Domestic and Family Violence Act 2007* (NT) may have concerns about the potential impact of encouraging disclosure of family violence in employment-related contexts.<sup>24</sup>

### **Submissions and consultations**

14.30 Submissions received in response to the ALRC’s question about the impact disclosure of family violence may have on the responsibility or liability of employers, union delegates or others, largely indicated there would be no additional responsibility or liability. Stakeholders emphasised that some of these concerns may be addressed by

<sup>22</sup> Women’s Health Victoria, *Submission CFV 11*, 5 April 2011.

<sup>23</sup> The ALRC acknowledges the work done by the Australian Government in this respect, including in particular the Australian Government, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (2009).

<sup>24</sup> Under the *Domestic and Family Violence Act 2007* (NT) s 124A (1), an adult commits an offence if he or she believes on reasonable grounds that another person has caused, or is likely to cause, harm to someone else (the victim) with whom the other person is in a domestic relationship; or the life or safety of the victim is under serious or imminent threat because domestic violence has been, is being or is about to be committed; and he or she does not report that to a police officer. Note, under s 124A(2) there is a defence available if the defendant has a reasonable excuse for failing to report.



ensuring that there is clarity around the role and responsibilities of those to whom an employee has disclosed family violence.<sup>25</sup>

14.31 Several stakeholders expressed opposition to the current mandatory reporting system in the NT.<sup>26</sup>

14.32 Stakeholders also indicated that disclosure of family violence may also have a particular impact in certain professions. For example, the Australian Domestic Violence Clearinghouse (ADFVC) submitted that:

The New South Wales Police Service is currently considering the ramifications for its unsworn officers and employees of disclosure of domestic violence under their current code of conduct. The Clearinghouse understands, for example, that disclosure of a domestic violence assault (though not an apprehended violence order) triggers a risk assessment process. The Clearinghouse is consulting with NSW Police on this matter.<sup>27</sup>

### ***ALRC's views***

14.33 The ALRC acknowledges the need to ensure that family violence-related measures and workplace instruments and policies clearly outline the obligations and responsibilities of those to whom an employee has disclosed family violence. As reiterated throughout Chapters 14–18, workplace approaches and policies will need to be tailored to meet the needs of individual workplaces and employees within those workplaces. The impact of disclosure of family violence as a trigger for risk assessment is a matter for particular workplaces to address in their enterprise agreement, workplace policy or similar.

14.34 However, the ALRC considers that it is likely that obligations, such as employer duties of care, are already sufficiently broad to cover any responsibility arising from disclosure of family violence by an employee.

14.35 Consideration of issues arising in relation to child protection reporting and the operation and impact of mandatory reporting provisions under the *Domestic and Family Violence Act 2007* (NT) is beyond the Terms of Reference for this Inquiry.<sup>28</sup>

## **Verifying family violence**

14.36 While ensuring that the needs of employees experiencing family violence are met, there is also a need to preserve the integrity of the system to ensure disclosure of family violence is not seen as an easy way to, for example, gain additional leave, thereby ‘incentivising’ a claim of family violence—a theme of this Inquiry discussed in Chapter 2. As a result, to ensure the integrity of the employment system, it is necessary, in certain circumstances, to require verification of claims of family violence.

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25 See, eg, Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

26 See, eg, ADFVC, *Submission CFV 26*, 11 April 2011.

27 Ibid.

28 These issues, in particular child protection and mandatory reporting, were considered in Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010).

14.37 Verification of family violence within the employment law system is discussed in Chapters 16 and 17, in particular, in relation to requirements under s 107 of the *Fair Work Act* for accessing leave under the NES and as a component of a family violence clause in an enterprise agreement or modern award. In Chapter 17, the ALRC recognises that in order to preserve the integrity of the leave system there is a need to ensure that employees accessing family violence leave are subject to the same requirements to demonstrate their entitlement to the leave as other forms of leave.

14.38 Throughout the Inquiry, stakeholders have consistently recognised that verification of family violence by employers and others may be required in certain circumstances.<sup>29</sup>

14.39 A key issue that arises is what type of verification of family violence should be required. For example, in the context of access to family violence leave, stakeholders suggested a wide range of documentary verification to support a claim of family violence may be appropriate, including a document issued by a:

- police officer;
- court;
- health professional, including doctor, nurse or psychiatrist/psychologist;
- lawyer;
- family violence service or refuge worker; and/or
- the employee, in the form of a signed statutory declaration.<sup>30</sup>

14.40 The Office of the Australian Information Commissioner (OAIC) emphasised the importance of individual choice with respect to verification, or demonstration of an entitlement to a particular benefit:

Where there is more than one acceptable way of demonstrating an entitlement it is often better practice to offer alternatives and give individuals the choice as to the personal information they provide. Providing choice as to the source of information enables individuals to exercise a level of control over their personal information and may assist in minimising barriers to disclosure.<sup>31</sup>

14.41 Where relevant in Chapters 15–17, the ALRC has noted the need for verification of family violence. The ALRC also considers that providing employees and employers with information about what might constitute appropriate verification could form part of the national education campaign or workplace policy referred to below, as well as

<sup>29</sup> See, eg, Office of the Australian Information Commissioner, *Submission CFV 18*, 6 April 2011.

<sup>30</sup> Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; Queensland Law Society, *Submission CFV 21*, 6 April 2011; Office of the Australian Information Commissioner, *Submission CFV 18*, 6 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Women's Health Victoria, *Submission CFV 11*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

<sup>31</sup> Office of the Australian Information Commissioner, *Submission CFV 18*, 6 April 2011.

being included in material developed in relation to developing family violence clauses in enterprise agreements.

## Privacy and confidentiality

14.42 A key challenge is to ensure that measures that are likely to lead to disclosure of family violence contain appropriate privacy safeguards regarding the handling of that personal information. This is particularly important given concerns about privacy appear to be a central barrier to disclosure of family violence in the context of employment law.

14.43 There are several key issues considered in this chapter—general obligations under the *Privacy Act 1988* (Cth) and *Fair Work Act*, the employee records exemption under the *Privacy Act*, as well as the need for workplace policies regarding the protection of employees' personal information.

14.44 The need to ensure appropriate privacy safeguards are introduced as part of any reforms is also discussed in Chapter 15 with respect to information-sharing arrangements in the pre-employment system and Chapter 17 in the context of family violence clauses in enterprise agreements and awards.

### The *Privacy Act* and the *Fair Work Act*

14.45 Where employees experiencing family violence disclose family violence to Job Services Australia (JSA) providers, employers or others within the employment law system, issues of privacy arise.

14.46 The principal piece of federal legislation governing information privacy in Australia is the *Privacy Act 1988* (Cth), which regulates the handling of personal information by the Australian Government and the ACT Government—to which 11 Information Privacy Principles apply—and the private sector—to which 10 National Privacy Principles apply.<sup>32</sup>

14.47 There is limited privacy protection for private sector employees under either the *Privacy Act* or the *Fair Work Act*. That said the *Fair Work Act* does contain some provisions with respect to employer obligations in relation to employee records.<sup>33</sup> For example, s 107 of the *Fair Work Act* notes that personal information disclosed to an employer for the purposes of accessing leave under the NES may be regulated by the *Privacy Act*.

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32 In June 2010, the Government released an exposure draft of legislation intended to unify the Information Privacy Principles and the National Privacy Principles in a single set of 13 Australian Privacy Principles (APPs), as recommended by the ALRC in Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008). The Senate Standing Committee on Finance and Public Administration was considering the exposure draft at the time of writing. The Government has indicated that it will consider the exemptions under the *Privacy Act 1988* (Cth).

33 In addition to ss 107 and 535, the *Fair Work Act 2009* (Cth) also imposes certain privacy obligations on permit holders (usually a union official) in relation to information obtained from the exercise of a right of entry.

14.48 Further, s 535 of the *Fair Work Act* requires employers to make, and keep for seven years, employee records of the kind prescribed in the *Fair Work Regulations*, which include: basic employment details; leave entitlements; and individual flexibility arrangements.<sup>34</sup> Of particular relevance in light of discussion of these issues in Chapters 16 and 17, is the requirement that employers must make and keep records which, in relation to leave, set out any leave the employee takes,<sup>35</sup> and in relation to individual flexibility arrangements, include a copy of the agreement.<sup>36</sup> However, the *Fair Work Regulations* only require employers to maintain, provide access to, and correct records for inspection and auditing purposes, rather than to protect the privacy of those records.

#### ***Employee records exemption***

14.49 Under the *Privacy Act*, the handling of an ‘employee record’ by a public sector employer is treated differently from the handling of such a record by a private sector employer. Section 6 of the *Privacy Act* defines ‘employee record’ as a record of personal information relating to the employment of the employee. Examples of such personal information include information about the employee, such as terms and conditions of employment, personal details, performance, conduct and hours of employment and leave.

14.50 To the extent that disclosure of family violence to employers is related to the employment of the employee—for example, for the purposes of obtaining leave or utilising provisions of a family violence clause in an enterprise agreement—it is personal information that constitutes an employee record.

14.51 Government agencies must handle employee records in compliance with the *Privacy Act*. Private organisations however, are exempt from the operation of the Act where an act or practice is related directly to: the employment relationship between the organisation and the individual; and an employee record held by the organisation.<sup>37</sup> This exemption is usually referred to as the ‘employee records exemption’.

14.52 While this type of information was considered ‘deserving of privacy protection’ when the privacy legislation was extended to the private sector in 2000, the Government noted that ‘such protection is more properly a matter for workplace relations legislation’.<sup>38</sup>

14.53 In *For Your Information: Australian Privacy Law and Practice*, ALRC Report 108 (2008) (*For Your Information*), the ALRC concluded that there is no sound policy justification for retaining the employee records exemption and recommended its removal.<sup>39</sup> Specifically, the ALRC stated that there is a lack of adequate privacy

34 Ibid s 535; *Fair Work Regulations 2009* (Cth) ch 3, pt 3–6, div 3.

35 *Fair Work Regulations 2009* (Cth) reg 3.36.

36 Ibid reg 3.38.

37 *Privacy Act 1988* (Cth) ss 7(1)(ee), 7B(3).

38 *Debates*, House of Representatives, 12 April 2000, 15752 (D Williams—Attorney-General). See also Revised Explanatory Memorandum, Privacy Amendment (Private Sector) Bill 2000 (Cth) 4, [109].

39 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008), Rec 40–1.

protection for employee records in the private sector, despite the sensitivity of personal information held by employers and the potential for economic pressure to be exerted over employees to provide personal information to their employers.

14.54 The ALRC concluded that privacy protection of employee records should be located in the *Privacy Act* to ensure maximum coverage of agencies and organisations and to promote consistency, but commented that this protection should be in addition to that provided by other laws, such as the relevant provisions in the then *Workplace Relations Regulations*.<sup>40</sup>

#### ***Submissions and consultations***

14.55 In the Employment Law Issues Paper, the ALRC expressed the view that to the extent that the employee records exemption creates additional barriers to the disclosure of family violence by private sector employees, this provides further reason for the amendment of the *Privacy Act* to remove the employee records exemption.

14.56 However, as the ALRC did not directly ask a question about the employee records exemption, few stakeholders addressed the issue in the course of this Inquiry. However, both the Office of the Australian Information Commissioner (OAIC) and the Australian Chamber of Commerce and Industry (ACCI) expressed particularly strong, but opposing views.

14.57 OAIC expressed the view that:

As previously outlined, concern over the way in which those who receive disclosures of family violence handle that information may further contribute to individuals choosing not to disclose the information. Where employers receive such sensitive information they should be required to accord that information comparable protection to that provided under the *Privacy Act*. Despite the sensitivity of the personal information held, where the employee records exemption applies private sector organisations are not required to comply with obligations under the *Privacy Act*. The OAIC supports the removal of the employee records exemption provided in section 7B(3) of the *Privacy Act* to better protect and support those experiencing family violence.<sup>41</sup>

14.58 In contrast, in response to the statement that the employee records exemption may create an additional barrier to disclosure of family violence, ACCI submitted that there is ‘no evidence that ACCI is aware of that justifies such a statement’ and that

this statement pre-supposes there is a common occurrence where employees have disclosed matters affecting them in their personal lives to their employer, such information is not treated and handled with standard of care and sensitivity. It is the experience of many thousands of employers that they treat these matters with the

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<sup>40</sup> Ibid, Ch 40.

<sup>41</sup> Office of the Australian Information Commissioner, *Submission CFV 18*, 6 April 2011. Similarly, Redfern Legal Centre supported the removal of the employee records exemption for private sector employers, suggesting that ‘it is vital for the safety of a victim of family violence that her residential address, email address and telephone numbers are not disclosed by her employer to any person’: Redfern Legal Centre, *Submission CFV 15*, 5 April 2011.

utmost confidentiality and would not seek to break that trust and confidence with their valued staff.<sup>42</sup>

14.59 Ultimately, ACCI expressed the view that the employee records exemption should be retained and that

there is no evidence that employers have abused, mishandled or treated confidential personal information from employees other than on a proper and legitimate basis. Employee concerns that such information may be mishandled does not count. And where isolated events do occur, they should not provide a policy reason for the removal of a perfectly working and appropriate exemption, *holus bolus*.<sup>43</sup>

14.60 ACCI also submitted that the Senate Committee ‘is currently examining exposure draft legislation and the issue is therefore being considered by other inquiries in more detail and the ALRC should make no findings in this inquiry as a result’.<sup>44</sup>

14.61 With respect to privacy provisions under the *Fair Work Act*, the Australian Human Rights Commission (AHRC) submitted that:

The Commission notes the provisions in the Australian Services Union model enterprise agreement clause which include that information concerning domestic violence will be kept confidential, and that ‘no information will be kept on an employee’s personnel file without their express written permission’. The Commission supports the inclusion of this, or similar wording, in the FWA.<sup>45</sup>

#### ***ALRC’s views***

14.62 In *For Your Information*, the ALRC recommended that the employee records exemption under the *Privacy Act* be repealed on the basis that removing the exemption would ensure that the privacy of employee records held by private organisations is protected under the *Privacy Act*.

14.63 The ALRC notes that concerns by an employee about privacy may lead to reluctance to disclose family violence. However, the ALRC is unaware of evidence to suggest, either way, that employers have or do intentionally abuse or mishandle the personal information of employees. However, to the extent that the employee records exemption may create any additional concerns or barriers on behalf of employees, which may discourage disclosure of family violence, the ALRC considers that this (in addition to the policy reasons expressed in *For Your Information*) provides an additional consideration in support of amendment of the *Privacy Act* to remove the employee records exemption.

14.64 Where employees disclose family violence for the purposes of accessing new entitlements recommended in Chapters 16 and 17, such as family violence leave or flexible working arrangements under the NES, care must be taken to ensure that appropriate privacy protection is provided. As a result, while some privacy issues are discussed in more detail in other chapters, in light of the interactions between the

42 ACCI, *Submission CFV 19*, 8 April 2011.

43 Ibid.

44 Ibid.

45 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011.

employer obligations under the *Fair Work Act*, the ALRC welcomes stakeholder comment on what other changes, if any, are needed to protect the personal information of employees who disclose family violence in such circumstances.

**Question 14–1** In addition to removal of the employee records exemption in the *Privacy Act 1988* (Cth), what reforms, if any, are needed to protect the personal information of employees who disclose family violence for the purposes of accessing new entitlements such as those proposed in Chapters 16 and 17?

### Guidance material and workplace policies

14.65 In this Inquiry, the ALRC makes a number of proposals which, if adopted, are likely to increase disclosure of family violence by employees in an employment context to, for example, access family violence leave or flexible working arrangements.

14.66 Accordingly, in order to assist employers to comply with their obligations under the *Privacy Act*, or where they are exempted from such obligations to handle the personal information of employees experiencing family violence sensitively and appropriately, there may be a need for the provision of additional information and guidance in this area.

14.67 In *For Your Information*, the ALRC recommended that the then Office of the Privacy Commissioner, should develop and publish specific guidance on the application of the *Privacy Act* to employee records to assist employers in fulfilling their obligations.<sup>46</sup>

14.68 The OAIC and the Fair Work Ombudsman (FWO) currently produce a range of material. For example, the OAIC produces a range of information sheets, case notes and other publications. FWO produces a Best Practice Guide on Workplace Privacy.<sup>47</sup>

### Submissions and consultations

14.69 In the Employment Law Issues Paper, the ALRC noted that a number of privacy issues may arise where family violence is disclosed in the context of employment. A number of submissions emphasised the need to maintain the confidentiality of any information about family violence disclosed to an employer, particularly where such disclosure is required to access workplace rights or entitlements.<sup>48</sup> For example, the Australian Association of Social Workers (Queensland) (AASW) emphasised that

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46 ALRC actually suggested guidance on application of Unified Privacy Principles to employee records to assist employers fulfil obligations under the Privacy Act: Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008).

47 Fair Work Ombudsman, *Best Practice Guide: Workplace Privacy*.

48 Australian Association of Social Workers (Qld), *Submission CFV 17*, 5 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011.

where family violence is disclosed, there is a need to consider ‘how information is used, who has access to this, how is it shared and so on’.<sup>49</sup>

14.70 Several stakeholders highlighted the role played by the FWO in publishing Best Practice Guides and similar material. For example, ACCI suggested that:

Whilst no one-size fits all clause is appropriate, ACCI would support additional information to be published by the FWO for the benefit of employers and employees when ... formulating policies.<sup>50</sup>

### ***ALRC’s views***

14.71 Disclosure of family violence in the employment law context will necessarily require the development or revision of existing workplace approaches and policies to ensure the information is handled sensitively and appropriately. While in many cases workplaces may already have adequate privacy policies in place, the ALRC considers that additional guidance that addresses safeguarding the personal information of employees who have disclosed family violence may be necessary.

14.72 As a result, the ALRC proposes that the OAIC and FWO should, in consultation with unions and employer organisations, develop a model privacy policy and develop or revise guidance for employers which, as well as ensuring compliance with obligations arising under the *Privacy Act 1988* (Cth), specifically safeguards the personal information of employees who have disclosed family violence.

**Proposal 14–1** 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 should, in consultation with unions and employer organisations:

- (a) develop a model privacy policy which incorporates consideration of family violence-related personal information; and
- (b) develop or revise guidance for employers in relation to their privacy obligations where an employee discloses, or they are aware of, family violence.

### **National initiatives**

14.73 A central theme that has emerged in the course of this Inquiry is the need for effective education and training of all those within the employment law system. A proper appreciation and understanding of the nature, features and dynamics of family violence, and its potential impact on an employee, and in the workplace, is fundamental to ensuring that the employment law system is able to respond

<sup>49</sup> Australian Association of Social Workers (Qld), *Submission CFV 17*, 5 April 2011.

<sup>50</sup> ACCI, *Submission CFV 19*, 8 April 2011.



appropriately to the needs of employees experiencing family violence, and ultimately, protect their safety to the relevant extent in the employment context.

14.74 A range of family violence strategies and projects have included an education component about family violence in the employment context, or at a minimum, about workplace family violence prevention strategies. For example, at a Commonwealth level, in 2010, the Government provided the ADFVC funding for the Domestic Violence Workplace Rights and Entitlements Project, with a focus on large-scale employers, which involves:

- briefing unions and employers nationally on family violence as a workplace issue;
- promoting the adoption of family violence clauses in enterprise agreements and other workplace instruments;
- developing with unions and employers a set of model workplace information and training resources for staff, human resources personnel, union delegates and supervisors;
- producing model domestic violence and the workplace policies and safety plans to assist in the informed introduction of domestic and family violence clauses;
- surveying union members to provide baseline qualitative and quantitative data on the impact of domestic and family violence in the workplace; and
- developing a framework for future monitoring and evaluation of the outcomes of introducing domestic violence clauses and other instruments.<sup>51</sup>

14.75 A number of state and territory family violence initiatives have also included an education component about workplace family violence prevention strategies.<sup>52</sup> While stakeholders and commentators have emphasised the need for a national and ongoing community education campaign about the effect of family violence in the workplace,<sup>53</sup> with the exception of the ADFVC project, there has been no systemic Government-funded initiatives to examine or address family violence in the employment context.

14.76 In submissions and consultations, stakeholders suggested initiatives such as:

- education and training in workplaces around Australia, including by employees, employers, managers and supervisors;

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<sup>51</sup> ADFVC, *Domestic Violence Workplace Entitlements Project Factsheet*.

<sup>52</sup> For example, the Western Australian Government funded Freedom from Fear Campaign Against Domestic Violence, which commenced in 1998; the Northern Territory Government's Domestic Violence Strategy which was introduced in 1994; and the Victorian Government's Safer Streets and Homes Violence Prevention Strategy, which included research on models of family violence workplace prevention strategies: S Murray and A Powell, *Working It Out: Domestic Violence Issues in the Workplace* (2008) 15–16.

<sup>53</sup> See, eg, C Zufferey and others, 'Domestic Violence and Multidimensional Factors: Investigating the Impact of Domestic Violence on Women's Employment, Health and Housing' (Paper presented at Our Work, Our Lives National Conference, Darwin, 12 August 2010).

- development of model policies, guides, guidelines and other resources to complement legislative or workplace entitlements;
- posters, newsletters, factsheets, online information and advertisements;
- material relating to risk assessment and safety plans; and
- additional research into family violence as a workplace issue.<sup>54</sup>

#### ***ALRC's views***

14.77 To complement the proposals made by the ALRC in Chapters 14–18, the ALRC considers it is necessary for the Australian Government to initiate a national education campaign in relation to family violence in the employment context.

14.78 The ALRC considers that the project being undertaken by the ADFVC may provide the basis for the development of the campaign, but that a national campaign should be funded by the Australian Government and be based on a coordinated approach involving all key stakeholders and participants in the employment law system, including: employees, employers, government agencies and departments, job services providers, unions, employer organisations, family violence support services and legal services. Bodies such as the FWO, the Equal Opportunity in the Workplace Agency, the AHRC, Safe Work Australia and the OAIC should also play a key role in the campaign.

14.79 The development and delivery of any campaign needs to be tailored to meet the particular needs of employers and businesses of all sizes as well as specific groups within the community.

14.80 While the content of the national education campaign should be developed in consultation with the groups outlined above, the ALRC considers it could encompass:

- the definition of family violence;
- the nature, features and dynamics of family violence;
- barriers to disclosure of family violence;
- the effect of family violence on job seekers, employees, workplaces and the economy;
- verification of family violence where necessary to access entitlements; and
- privacy issues arising from disclosure of family violence.

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<sup>54</sup> Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011; Women's Health Victoria, *Submission CFV 11*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

14.81 It could also include assistance, information and support for:

- employees experiencing family violence—in particular in relation to the entitlements proposed in Chapters 16 and 17; and
- employers and employer organisations—with a focus on new responsibilities and obligations arising from proposals in Chapters 16–18, and adapting workplace responses to suit particular business needs and realities.

14.82 The ALRC considers that further work and consultation will be required to establish the most effective approach to national education, training and measures aimed at increase awareness about family violence in the employment context and welcomes stakeholder feedback on this.

**Proposal 14–2** The Australian Government should initiate a national education and awareness campaign about family violence in the employment context.

## Data collection

14.83 In *Time for Action*, the National Council highlighted that ‘data relating to violence against women and their children in Australia is poor’.<sup>55</sup> The Council noted that:

Data on services sought by, and provided to, victims is not readily available, and the way in which information is reported is generally inconsistent and does not allow for a comprehensive understanding of family violence against women.<sup>56</sup>

14.84 Similarly, there is a lack of Australian data about the intersections between family violence and employment. This lack of meaningful data collection and analysis has been identified by stakeholders, commentators and governments who have emphasised the importance of accurate and comprehensive data in informing policy initiatives in this area.

14.85 In Chapters 14–18, the ALRC makes a range of proposals, in light of which there is a need to ensure data collection mechanisms allow meaningful analysis to support policy change and to assess its impact. In particular, data could be collected in relation to:

- the NES—requests for flexible working arrangements and family-violence related inclusions in individual flexibility arrangements;
- family violence clauses in enterprise agreements;
- family violence clauses or provisions in modern awards; and

<sup>55</sup> National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 49.

<sup>56</sup> *Ibid.*, 47.

- instances in which family violence is raised in the context of unfair dismissal and general protection proceedings.

14.86 Under s 653 of the *Fair Work Act*, the General Manager of FWA is required to review developments in making enterprise agreements and conduct research about, amongst other things individual flexibility arrangements and requests for flexible working arrangements under the NES. In doing so, the General Manager must consider the effect of these on certain groups including, for example, women and part-time employees.

14.87 Section 653 also requires the General Manager of FWA to give the Minister a written report of the review and research as soon as practicable, and in any event, within six months after the end of the period to which it relates. The Minister must table a copy of the report within 15 sitting days.<sup>57</sup>

### **The NES**

14.88 In Chapter 16, the ALRC proposes amendment to the NES to include family violence as a basis upon which an employee may request flexible working arrangements. Chapter 17 also includes discussion about the use of individual flexibility arrangements in circumstances where an employee is experiencing family violence.

14.89 Under s 653 of the *Fair Work Act*, the General Manager of FWA is required to conduct research into the extent to which individual flexibility arrangements under modern awards and enterprise agreements are being agreed to, and the content of those arrangements. Research is also required in relation to the operation of the provisions of the NES relating to requests for flexible working arrangements, including the circumstances in which they are made, the outcome and the circumstances in which such requests are refused.

### **FWA proceedings**

14.90 There is a lack of publicly available data about the frequency with which family violence is raised in the context of FWA proceedings as the majority of unfair dismissal and general protection matters are resolved prior to any formal hearing.<sup>58</sup>

14.91 However, in facilitating the resolution of applications, FWA is privy to certain information, including the basis for the application. In some cases manifestations of family violence, such as performance or behaviour issues are raised before FWA, but family violence itself may not be.

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<sup>57</sup> *Fair Work Act 2009* (Cth) s 653(3),(4).

<sup>58</sup> During the 2009/10 period 93 percent of termination of employment applications to Fair Work Australia (including general protections applications involving dismissal) were finalised at or prior to conciliation: Fair Work Australia, *Annual Report 2009–2010*, 12.

## Enterprise agreements and modern awards

### *Enterprise agreements*

14.92 As discussed in Chapter 17, there are now a range of family violence clauses included in enterprise agreements around Australia. However, there is no central publicly available source of data about the inclusion of the clauses.

14.93 In 2011, the Social Policy Research Centre at UNSW developed a framework for the ADFVC to monitor and evaluate the outcomes of the introduction of family violence clauses. The framework acknowledges that there is no one data set available to monitor the inclusion of family violence clauses in enterprise agreements or the effectiveness of complementary measures. As a result, it recommends a mixed method approach to data collection including:

- use of data already routinely collected—such as the ABS Survey of Employment Arrangements, Retirement and Superannuation;
- modification and expansion of existing instruments used for routine data collection; and
- collection and analysis of project-specific data on implementation and impact—such as workplace and union surveys.<sup>59</sup>

14.94 In addition, the Department of Education, Employment and Workplace Relations (DEEWR) maintains the Workplace Agreements Database (WAD) which contains information on federal enterprise agreements that have been lodged with or approved by FWA.<sup>60</sup> The WAD includes information on agreement details such as the sector and industry of the enterprise agreement, duration and employee coverage as well as data on wage increases and employment conditions in each agreement.

14.95 The ALRC is advised that:

Prior to the start of each calendar year, a review is conducted on the conditions data collected for the WAD with an aim to improve the efficiency and relevance of data collection. The recent review in 2010 included both internal and external stakeholders and achieved the capture of a range of new data on enterprise agreement content, modification of some data to enhance relevancy and usage and discontinuation of other lower priority data.<sup>61</sup>

14.96 The General Manager of FWA is also required to review the developments, in Australia, in making enterprise agreements.<sup>62</sup>

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59 Social Policy Research Centre, *Framework to Monitor and Evaluate the Outcomes of the Introduction of Domestic Violence Clauses* (2011).

60 It also contains information about agreements lodged with or approved by the AIRC and Workplace Authority.

61 Department of Education, Employment and Workplace Relations, *Correspondence*, 27 June 2011.

62 *Fair Work Act 2009* (Cth) s 653(1)(a).

**Modern awards**

14.97 Under the *Fair Work (Transitional Provisions and Consequential Amendments Act 2009* (Cth), FWA is required to undertake an initial two year review of modern awards.<sup>63</sup> This review is due to commence from 1 January 2012. The scope of the review is limited to FWA considering whether modern awards achieve the modern awards objectives. In addition, s 156 of the *Fair Work Act* also provides for review of each modern award every four years. The first review of this kind must commence as soon as practicable after 1 January 2014.

**ALRC's views**

14.98 A commitment to quality data collection and evaluation is crucial to ensuring systemic change and improvement—and is an important element in an effective and ongoing national response to family violence as a workplace issue. Comprehensive, up to date and accurate data help to underpin evidence-based policy and legal responses to family violence, and inform quality education and training programs.

14.99 There are a range of existing data collection mechanisms and processes that may be utilised in order to create a mixed method approach to data collection in the employment law system.

14.100 In the ALRC's view, where possible, FWA is the most appropriate body to collect information about family violence in an employment law context. The ALRC suggests that the Australian Government should amend s 653 of the *Fair Work Act* to provide that the General Manager of FWA must, in conducting the review and research required in relation to enterprise agreements, individual flexibility arrangements and the NES, consider family violence-related developments and the effect on the employment of those experiencing family violence.

14.101 The ALRC also considers that the framework developed by the Social Policy Research Centre (UNSW), as well as the use of DEEWR's Workplace Agreements Database may be useful and appropriate mechanisms through which to collect and make available data in relation to the inclusion of family violence clauses in enterprise agreements. The ALRC welcomes stakeholder comment on the most appropriate data collection methods with respect to the inclusion of family violence clauses in enterprise agreements.

14.102 With respect to the lack of publicly available data on the basis for unfair dismissal applications, the ALRC would be interested in stakeholder comment on any ways in which FWA may be able to monitor the frequency with which family violence is raised in unfair dismissal applications, whether resolved at conciliation or not.

14.103 Finally, the ALRC is also of the view that FWA should consider data collection issues, primarily relating to the inclusion of family violence clauses in modern awards, in the course of the reviews referred to above.

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63 *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) sch 5, s 6.

**Proposal 14–3** Section 653 of the *Fair Work Act 2009* (Cth) should be amended to provide that Fair Work Australia must, in conducting the review and research required under that section, consider family violence-related developments and the effect of family violence on the employment of those experiencing it, in relation to:

- (a) enterprise agreements;
- (b) individual flexibility arrangements; and
- (c) the National Employment Standards.

**Question 14–2** In addition to review and research by Fair Work Australia, what is the most appropriate mechanism to capture and make publicly available information about the inclusion of family violence clauses in enterprise agreements?

**Question 14–3** How should Fair Work Australia collect data in relation to the incidence and frequency with which family violence is raised in unfair dismissal and general protections matters?

**Proposal 14–4** In the course of its 2012 and 2014 reviews of modern awards, Fair Work Australia should consider issues relating to data collection.

## 15. The Pre-Employment Stage

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### Summary

15.1 In this Inquiry, the ALRC is considering what improvements could be made to the Commonwealth employment law framework—beginning with the pre-employment stage. This chapter examines ways in which Job Services Australia (JSA)—the national employment services system—Disability Employment Services (DES) and the Indigenous Employment Program (IEP) systems do, or could, respond to the needs of job seekers experiencing family violence. In particular, this chapter considers:

- JSA—including tender arrangements, information sharing processes and protocols and screening for family violence;
- JSA and DES provider responses to disclosure of family violence by job seekers;



- Job Seeker Classification Instrument (JSCI)—conduct and content of JSCIs;
- Employment Services Assessment (ESAt) and Job Capacity Assessment (JCA)—referral to, and conduct of, ESAts and JCAs and the impact of family violence;
- education and training; and
- employment services for specific groups of job seekers, including Indigenous peoples, job seekers from culturally and linguistically diverse (CALD) backgrounds, job seekers with disability and those in rural and remote areas.

15.2 Through examining ways in which these systems can effectively identify family violence and address barriers to work faced by those experiencing family violence, the aim is to secure access for victims of family violence to the financial and emotional benefits of employment, to protect their safety.

15.3 In particular, the ALRC proposes that those who wish to tender to become employment service providers must demonstrate an understanding of family violence and its impact on job seekers. The ALRC also proposes that the JSCI should include a new category of information in relation to family violence. With the enhanced disclosure of family violence that might result, the ALRC also considers what information-sharing processes and protocols, as well as privacy safeguards, are appropriate. Other proposals in this chapter concern JSA and DES provider responses to the disclosure of family violence, the conduct of ESAts and JCAs, and education and training for a range of people involved in the pre-employment stage.

### **Family violence and pre-employment**

15.4 In considering the safety of job seekers who are victims of family violence, the ALRC refers both to actual safety from harm (for example, through ensuring a job seeker is not required to attend the same employment services provider as the perpetrator, or through placement in a safe working environment) but also to the financial security and independence ultimately derived from paid employment.

15.5 The impact of family violence on the pre-employment system is significant in a number of respects.

15.6 In many cases family violence may constitute a significant barrier to employment for individual job seekers. Family violence may affect all aspects of a job seeker's life including, for example, physical and mental health, living circumstances, and caring responsibilities as well as ability to attend work regularly or punctually. As a result, in order to assist job seekers to find (and retain) employment, the system must consider the barriers to work that family violence may impose and respond appropriately or, where necessary, refer the job seeker to a more appropriate system.<sup>1</sup>

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1 The interaction between the pre-employment system and social security system is discussed in more detail below. See also, Chs 5–8.

15.7 The primary focus of the pre-employment system and of employment services providers is to ensure a job seeker possesses the necessary skills to find employment (and if they do not, to assist them to obtain those skills) and ultimately, to find employment opportunities for the job seeker. However, without early disclosure of family violence or identification of, and appropriate responses to, the family violence-related barriers faced by individual job seekers, ensuring the system achieves these purposes becomes increasingly difficult.

### **Interaction with social security**

15.8 Employment service structures such as JSA and DES are the ‘foundation stone of social inclusion policies’.<sup>2</sup> Without these systems, many people in Australia would be required to rely on income support where they are unable to obtain employment independently. As a result, the other key component of the pre-employment system, aside from JSA, DES and IEP, is social security.

15.9 Engagement with employment services is triggered by receipt of certain social security payments, discussed in Chapter 7. In brief, to qualify for the relevant social security payments, a person must satisfy an activity test or participation requirements. Job seekers receiving Newstart Allowance, Youth Allowance and Special Benefit, have an obligation to meet an activity test.<sup>3</sup>

15.10 Job seekers who are receiving Parenting Payment do not have to comply with an activity test, although they are required to comply with an Employment Pathway Plan (EPP) or other special requirements and are also subject to ‘participation requirements’.

15.11 The content of an activity test or participation requirement varies for different payments.<sup>4</sup> If a job seeker is required to register with a JSA or DES provider, then remaining connected with the provider forms part of the job seeker’s requirement to look for work.<sup>5</sup> Failure to attend is considered a ‘connection failure’;<sup>6</sup> this and a range of other compliance issues are discussed in Chapter 7 (including the role of JSA and DES providers in compliance).

15.12 Activity tests and participation requirements are contained in an EPP.<sup>7</sup> An EPP must meet, and be tailored to, the needs of individual job seekers and not place unreasonable demands on them, having regard to their personal circumstances.<sup>8</sup> An

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2 Australian Council of Social Service, *Submission to Minister for Employment Participation on the Future of Job Services Australia* (2011) 3.

3 An activity test is designed to ensure that unemployed people receiving income support payments are actively looking for work and/or doing everything that they can to become ready for work in the future: Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [1.1.A.40]

4 Ibid, [3.2.8]; [3.2.9]; [3.2.9.210] (Suitable Activity—Principal Carer).

5 Ibid, [3.2.9.20] (Job Search Overview);

6 Ibid, [3.2.9.40] (Job Search—Setting Job Search Requirements—Job Seekers with part-time Requirements).

7 Ibid, [3.2.9.20] (Job Search Overview); [3.5.1.160] (When are EPPs Required? (PP)).

8 Ibid, [3.2.8.30] (What is an Employment Pathway Plan?).

ESAt or JCA, discussed in further detail below, are in part used to determine a person's capacity to work.

15.13 While noting the interaction between the pre-employment and social security systems is important—as engagement with the social security system is often a precursor to engagement with the pre-employment system—overall, the focus of this chapter is on the processes aimed at finding employment for those job seekers who are required to register and engage with JSA and DES providers. The remaining social security-related issues are discussed in Chapters 5–8.

## Overview of the pre-employment system

15.14 Employment service structures, such as JSA, DES and IEP play a central role in 'the Australian Government's labour force participation, productivity and social inclusion policies'.<sup>9</sup> JSA, introduced in 2009 is the Australian Government's national employment services system. The introduction of JSA was prompted by significant concern about the way in which the previous Job Network system was operating, and its suitability to the Australian economic environment.<sup>10</sup> In part, the purpose of introducing JSA was an attempt to shift the job services system away from focusing on maintaining the labour market engagement of job seekers towards more individualised assistance for those facing substantial barriers to work.<sup>11</sup>

15.15 JSA delivery is provided by approximately 115 contracted employment service providers known as JSA providers.<sup>12</sup> The role of providers is to assist individual job seekers to gain sustainable employment including, where necessary, connecting job seekers to skills development and training opportunities in order to assist them to obtain employment. Providers can also provide a range of services, such as advising job seekers on job search methods or career options, assisting in the preparation of cover letters and resumes, arranging work experience, or referring the job seeker to appropriate support services.

15.16 Importantly, the focus of the JSA system as a whole is on a job seeker's capacity and readiness to work, as distinct from the focus of the social security system, as discussed in Chapter 5.

15.17 In March 2010, a system of specialist providers—referred to collectively as DES—replaced the former Disability Employment Network and Vocational Rehabilitation Services to provide employment services for job seekers with disability. DES comprises approximately 220 providers.<sup>13</sup>

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9 Department of Education, Employment and Workplace Relations, *Job Services Australia Industry Information Paper* (2011), 1.

10 Ibid.

11 Australian Council of Social Service, *Submission to Minister for Employment Participation on the Future of Job Services Australia* (2011), 3.

12 J Disney, A Buduls and P Grant, *Impacts of the new Job Seeker Compliance Framework: Report of the Independent Review* (2010), 11. See below for further discussion of tender and contract arrangements. JSA providers operate in geographical areas known as Employment Service Areas.

13 Ibid, 11.

15.18 Further, integrated Indigenous employment services are available through the JSA network, in conjunction with the IEP and, in areas with poor labour markets, Community Development Employment Projects.

### **Process**

15.19 Once a job seeker registers for activity or participation tested income support, Centrelink, or in some cases a JSA provider, administers a questionnaire called the JSCI to evaluate a job seeker's barriers to work. Based on the results of the JSCI, job seekers are classified as being in one of four 'streams': the least disadvantaged job seekers are categorised as Stream 1, while increasingly more disadvantaged applicants are placed in Stream 2, Stream 3 or Stream 4, respectively.

15.20 The stream into which a job seeker experiencing family violence is placed affects how much and what type of assistance he or she will receive. For example, a job seeker in Stream 1 may receive assistance to access job search facilities; revise his or her curriculum vitae or access training. In Streams 2–4, job seekers receive more intensive services.

15.21 In some cases, where the results of the JSCI indicate 'significant barriers to work', job seekers will be referred to one of two additional assessments, either an ESA or JCA.

15.22 Referral by Centrelink is the key way in which job seekers connect with JSA providers. Upon referral, job seekers are able to choose the JSA provider to which they are allocated, or where they do not choose a preferred provider, are allocated a provider depending on factors such as geographical location and the availability of appointments. However, in some cases job seekers will register directly with a JSA provider. The DES system operates somewhat differently, as job seekers are usually referred to a DES provider following a JCA.

15.23 Once registered with a provider, the job seeker and provider work cooperatively with Centrelink to negotiate an EPP. Negotiation and revision of EPPs, including the capture and assessment of the circumstance of job seekers experiencing family violence are discussed in the context of social security in Chapter 7.

15.24 Once a job seeker is placed in a particular stream the role of providers is to assist individual job seekers to gain sustainable employment including, where necessary, connecting job seekers to skills development and training opportunities in order to assist them to obtain employment. Depending on the stream into which the job seeker is placed, providers may also be required to provide other services. This is particularly so in the case of DES providers.

15.25 Where a job seeker has been receiving participation payments for 12 months, they are re-assessed in a Stream Services Review, to determine whether the job seeker is still placed in the most appropriate stream or whether they should be transferred to

the ‘work experience phase’.<sup>14</sup> Additional mechanisms for re-assessment include referral to an ESA or JCA or, in the context of a JSCI, through a Change in Circumstances Reassessment.

### **Job Services Australia—Employment Services Deeds and the tender process**

15.26 JSA and DES delivery is provided by contracted employment service providers. JSA and DES providers are currently contracted under Employment Services Deeds. ‘Different versions of the Deed were prepared to reflect the different combination of services’.<sup>15</sup>

15.27 The current Deeds for JSA expire on 30 June 2012, however the Deed provides the Government with the ability to extend them. As part of the 2011–12 Budget, and then in June 2011, the Government announced that:

The procurement methodology for Job Services Australia 2012 – 2015 [and Disability Employment Services 2012 – 2015] will be a mix of contract extensions, business reallocation, and open tender processes available to existing providers and prospective new providers. This mix is designed to maintain the stability of the current model, while ensuring the highest quality employment services for job seekers.<sup>16</sup>

15.28 In June 2011, the Government released two Industry Information Papers containing information regarding the purchasing arrangements for JSA and DES from 1 July 2012. The Government also indicated it will release a second DES Industry Information Paper in October 2011 with further information on the tender, an Exposure Draft of a Request for Tender in February 2012 and a final Request for Tender in May 2012.<sup>17</sup>

### **ALRC’s views**

15.29 Concerns have been raised about the structure and operation of the JSA system. In particular, there was concern about the way in which DEEWR monitors provider performance and outcomes as well as the fee structure—to the extent that it provides financial incentives to place certain job seekers. These systemic issues extend beyond the scope of the Terms of Reference for this Inquiry.

15.30 However, to the extent that the ALRC can consider ways in which JSA and DES providers could be required to account for the needs of job seekers experiencing family violence, the ALRC considers that the upcoming Business Review and tender

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14 An activity test or participation requirement may include a range of things, including a specific work experience activity requirement, an approved program of work for unemployment payment (Work for the Dole).

15 Department of Education, Employment and Workplace Relations, *Employment Procurement Services* <[www.deewr.gov.au/employment/employmentservicesprocurement](http://www.deewr.gov.au/employment/employmentservicesprocurement)> at 20 June 2011.

16 Department of Education, Employment and Workplace Relations, *Job Services Australia Industry Information Paper* (2011).

17 Ibid; Department of Education, Employment and Workplace Relations, *Disability Employment Services Industry Information Paper* (2011).

processes may provide avenues through which the Government could require providers to consider and address family violence-related issues in this area.

15.31 The ALRC welcomes stakeholder comment on whether the Government should include a requirement that JSA and DES providers demonstrate an understanding of, and systems and policies to address, the needs of job seekers experiencing family violence in requests for tender and contracts for employment services, and if so how.

**Question 15–1** In what ways, if any, should the Australian Government include a requirement in requests for tender and contracts for employment services that JSA and DES providers demonstrate an understanding of, and systems and policies to address, the needs of job seekers experiencing family violence?

### Information sharing and privacy

15.32 The ALRC is directed by the Terms of Reference to consider whether the extent of sharing of information across Commonwealth, state and territory agencies is appropriate to protect the safety of those experiencing family violence.<sup>18</sup>

15.33 The primary focus of this chapter is the Commonwealth jurisdiction, including agencies such as DEEWR, Centrelink, the Department of Human Services (DHS), and JSA, DES and IEP providers. Information sharing between each of these agencies and providers is vital to ensuring the JSA and DES systems effectively identify and respond to family violence where it may affect a job seeker's capacity for work, or their barriers to employment. The sharing of information is also central to ensuring steps taken in a pre-employment context are based on all the relevant information and that information is shared appropriately to ensure, as far as possible, the safety of job seekers experiencing family violence.

15.34 In many cases, Centrelink is the first point of contact for a job seeker. A job seeker may not differentiate between various government agencies, or between Centrelink and their JSA or DES provider, and may assume that family violence has been disclosed, and there is no need to inform another person or agency.

15.35 In light of this, information sharing between these agencies is linked to broader information-sharing issues and questions raised in Chapter 4. For example, the ALRC makes a range of proposals with respect to:

- the placement of a safety concern flag on a customer's file when safety concerns are raised; and
- inter-agency information sharing protocols.<sup>19</sup>

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18 The full Terms of Reference are set out at the front of this Discussion Paper and are available on the ALRC's website at <[www.alrc.gov.au](http://www.alrc.gov.au)>.

19 See Ch 4.

15.36 In the context of the pre-employment system, job seekers may disclose family violence to Centrelink staff, JSA, DES and IEP provider staff, or to an ESAt or JCA assessor, in a range of circumstances, including:

- in the course of a JSCI, ESAt or JCA;
- in the course of developing an EPP;
- to seek particular assistance, or by way of explanation for certain work preferences; or
- because of safety concerns.

15.37 The ALRC understands that there are information-sharing protocols and arrangements already in place between some of these agencies and providers and that, in addition, some information-sharing systems under the Human Services portfolio are being integrated as part of the Service Delivery Reform.<sup>20</sup>

15.38 The Employment Services Deed also contains information on the control of personal and protected information and specifies that providers must carry out and discharge the obligations contained under the *Privacy Act*, as if they were an agency.<sup>21</sup>

15.39 However, in considering the sharing of personal information about job seekers between agencies and providers, there is a need to ensure information is shared where it will assist the job seeker and that privacy concerns associated with the sharing of information are addressed. For example, where sensitive personal information, such as family violence, is disclosed, this may raise issues of consent.

15.40 General privacy issues arising from disclosure that may arise in the context of the pre-employment phase are dealt with in Chapter 14. However, to the extent that privacy issues arise specifically with respect to information sharing arrangements, they will be discussed separately in this chapter.

### ***Submissions and consultations***

15.41 In *Family Violence—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011) (Employment Law Issues Paper), the ALRC did not ask a specific question with respect to information sharing between Centrelink, DEEWR, JSA, DES or IEP providers, or ESAt or JCA assessors. However, in two other Issues Papers, the ALRC asked whether information about family violence should be shared between government agencies such as Centrelink and the CSA.<sup>22</sup> Accordingly, it is consistent with the approach taken throughout this Inquiry, and as a precursor to other proposals made in relation to the JSA system, to consider the issue in the pre-employment context.

<sup>20</sup> See fuller discussion in Ch 4.

<sup>21</sup> See, eg, Department of Education, Employment and Workplace Relations, *Employment Services Deed 2009-2012: SS NEIS* (2009) cl 5C; Department of Education, Employment and Workplace Relations, *Disability Employment Services Deed 2010-2012* (2010) cl 3C.

<sup>22</sup> Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011), Question 14; Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), Question 5.

15.42 In response to the other Issues Papers, stakeholders suggested that information sharing could be improved between agency officers and different services agencies, to avoid the need to re-disclose family violence and to allow agencies to share information. However, stakeholders emphasised that any information sharing should only be done with express and informed consent. In suggesting information sharing, stakeholders emphasised the need for the protection of information and compliance with obligations under the *Privacy Act*.<sup>23</sup>

15.43 For example, in submissions and consultations in response to the Employment Law Issues Paper, stakeholders expressed particular concern about ensuring the confidentiality of job seeker information. Stakeholders submitted that in their experience,

[t]here have been reports of instances where perpetrators have rung JSPs and successfully obtained personal information by tricks such as ‘my sister Judith has an appointment there today and asked me to pick her up when she finished but I forgot the time she told me and I don’t have her mobile number, can you tell me when her appointment is or give me her phone number so I can call her?’<sup>24</sup>

15.44 Similar to the ‘safety concern flag’ proposed by the ALRC in Chapter 4, WEAVE suggested the introduction of:

A high privacy flag on personal information held about the victim which is only accessible to a case worker with personal responsibility for the client and a clear understanding that there is a safety risk for the person if information is accessible to others.<sup>25</sup>

### ***ALRC’s views***

15.45 A balance must be struck between ensuring information is shared where it will assist the job seeker and avoiding job seekers having to re-disclose family violence, with privacy concerns associated with the sharing of personal information. Inter-agency protocols already exist between some of these key agencies and bodies. Some information sharing matters are also already dealt with in the Employment Services Deed.

15.46 In order to inform the direction of reforms in this area, the ALRC seeks stakeholder feedback on the sharing of information between Centrelink, DEEWR, DHS and JSA, DES and IEP providers. In particular, the ALRC is interested in stakeholder comment on:

- how is, or how would, personal information about individual job seekers be shared between Centrelink, DEEWR, JSA/DES/IEP providers and DHS; and

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<sup>23</sup> See Ch 4.

<sup>24</sup> WEAVE, *Submission CFV 14*, 5 April 2011.

<sup>25</sup> Ibid. This was also suggested by other stakeholders in the context of Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance* ALRC Issues Paper 38 (2011) and Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011).



- how the existence of a Centrelink Deny Access Facility—which restricts access to the file—or any other similar safety measure, such as a ‘safety concern flag’, may affect what job seeker information DEEWR and JSA and DES providers can access.<sup>26</sup>

15.47 While the ALRC is seeking further information on how information is shared between these agencies and providers in practice, and how any new arrangements may operate, the ALRC considers that it is appropriate to make two key proposals in this area.

15.48 First, information sharing between each of these agencies and providers is vital to ensuring the JSA and DES systems effectively identify and respond to family violence where it may affect a job seeker’s capacity for work, or amounts to a barrier to employment. The sharing of information is also central to ensuring steps taken in a pre-employment context are based on all the relevant information and that information is shared appropriately to ensure the safety of job seekers experiencing family violence.

15.49 The ALRC does not intend to specify the exact content or type of the information-sharing arrangements that should exist. However, the ALRC has formed the view that it is necessary and appropriate for Centrelink, DEEWR, JSA, DES, IEP providers and ESAt and assessors—through DHS—to consider issues arising with respect to the personal information of individual job seekers who have disclosed family violence in the context of their information-sharing arrangements and to make any changes that may be necessary or appropriate. The ALRC also notes that the information-sharing arrangements between DEEWR, Centrelink, DHS, FaHCSIA, the Family Assistance Office and the Child Support Agency, referred to in Chapter 4, will have a bearing on the arrangements made or developed in this context.

15.50 Secondly, in sharing information between these agencies and providers, there is a need to ensure the confidentiality of that information and adherence to obligations under the *Privacy Act 1988* (Cth) as well as any associated requirements under Employment Services Deeds. In particular, the ALRC emphasises the need to consider the privacy issues arising from the sharing of any ‘safety concern flag’ and to ensure that issues of a job seeker’s consent are considered. As a result, the ALRC proposes that, in developing or reviewing information sharing arrangements to allow the sharing of information between Centrelink, DEEWR, JSA, DES and IEP providers and ESAt and JCA assessors (through DHS), appropriate privacy safeguards are in place.

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26 The Denied Access Facility is discussed in more detail in Ch 8 and appears to be similar to the Restricted Access Customer System (RACS) discussed in Ch 10.

**Question 15–2** How is personal information about individual job seekers shared between Centrelink, DEEWR, the Department of Human Services, and JSA, DES and IEP providers?

**Question 15–3** How does, or would, the existence of a Centrelink ‘Deny Access Facility’, or other similar safety measures, such as a ‘safety concern flag’, affect what information about job seekers DEEWR and JSA and DES providers can access?

**Proposal 15–1** Centrelink, DEEWR, JSA, DES and IEP providers, and ESAt and JCA assessors (through the Department of Human Services) 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.

## Providers—processes and responses

15.51 There are approximately 115 JSA providers.<sup>27</sup> JSA and DES providers include a range of for-profit and not-for-profit organisations of differing sizes that operate in geographical ESAs. This section of the chapter outlines how improvements could be made to the processes and responses of providers that would enhance the safety of victims of family violence. These include:

- the process of allocation to a JSA provider;
- screening for family violence by JSA and DES providers; and
- JSA and DES provider responses to disclosure of family violence—including: referral to Centrelink social workers as well as systems and programs to assist job seekers experiencing family violence.

## Allocation

15.52 Each JSA provider is contracted to provide, and ‘guaranteed a specified percentage of the referrals of job seekers in [a particular] area to JSA providers’.<sup>28</sup> This is known as a ‘business share’. Upon referral, job seekers are usually able to choose the JSA provider to which they are allocated. In some cases, however, where the JSA provider has already achieved ‘its upper tolerance of business share’, the job seeker will be requested to choose another preferred JSA provider.<sup>29</sup> Where a job seeker does not choose a preferred provider, they will be allocated a provider, depending on factors such as geographical location and the availability of appointments.

27 J Disney, A Buduls and P Grant, *Impacts of the new Job Seeker Compliance Framework: Report of the Independent Review* (2010), 11. See below for further discussion of tender and contract arrangements.

28 Ibid, 11.

29 Department of Education, Employment and Workplace Relations, *Request for Tender for Employment Services 2009–2012* (2008) 12.

15.53 Job seekers usually remain with the same JSA provider whilst looking for work, however the ALRC understands that in some circumstances they may change JSA provider. For example, if the job seeker changes address and cannot access the provider's office, or requests to change provider in circumstances where the job seeker:

- is unable to maintain a reasonable and constructive servicing relationship with the provider;
- requests a change in provider and both new and old providers agree to the change; or
- can demonstrate they would receive better services from another provider that could enhance their employment prospects.<sup>30</sup>

15.54 Stakeholders suggested that there may be a need to ensure that a victim of family violence can change JSA or DES providers where the perpetrator of family violence attends the same provider.<sup>31</sup> For example, WEAVE submitted that in its experience, 'victims have gone to [providers] and found their perpetrator in the same seminar'.<sup>32</sup>

15.55 The ALRC acknowledges that in some areas, for example rural areas, it may be difficult to change providers where there is limited access to provider services. However, in light of the safety concerns that may arise where a job seeker experiencing family violence is required to attend the same provider as the person using family violence, to the extent that this is not already possible, the ALRC considers that in such circumstances the victim should be entitled to change JSA or DES providers upon request.

**Proposal 15–2** The current circumstances in which a job seeker can change JSA or DES providers should be extended to circumstances where a job seeker who is experiencing family violence is registered with the same JSA or DES provider as the person using family violence.

### Screening for family violence

15.56 Screening is the first step in a risk assessment process that involves the systemic application of a series of questions to 'identify individuals at sufficient risk of violence to benefit from further investigation and/or direct preventative action'.<sup>33</sup> Screening is primarily a safety precaution. To be effective, however, screening must be followed by a positive and appropriate response.<sup>34</sup>

<sup>30</sup> Ibid, [2.4.3].

<sup>31</sup> ADFVC, *Submission CFV 26*, 11 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011.

<sup>32</sup> WEAVE, *Submission CFV 14*, 5 April 2011.

<sup>33</sup> Australian Institute of Social Relations, *Screening, Risk Assessment and Safety Planning* (2010).

<sup>34</sup> See Ch 4.

15.57 In light of the barriers to disclosure of family violence discussed in Chapters 4 and 14, there may be a need to screen for family violence in the context of the pre-employment system. In most cases, job seekers will be connected to the JSA or DES system by way of referral from Centrelink. The screening processes and procedures Centrelink has in place with respect to family violence are discussed in Chapter 4. However, the ALRC has heard that, in some cases, a job seeker may disclose family violence to a JSA or DES provider, without having necessarily previously disclosed family violence.

15.58 Disclosure of family violence may occur at a number of stages of the JSA or DES provider service delivery, including formulation of the EPP (in which case, Centrelink is usually directly involved); the administration of the JSCI (which is dealt with below); or in the general course of the JSA or DES provider assisting the job seeker to obtain relevant education or training in preparation for employment, or in facilitating the person's finding of employment. The ALRC is therefore interested in stakeholder feedback as to whether JSA and DES providers should conduct screening for family violence more broadly and routinely.

15.59 The strengths and limitations of screening are discussed in Chapter 4. In pre-employment, the primary benefits of screening for family violence include that it may:

- improve identification of job seekers experiencing violence;
- assist JSA and DES providers to provide more appropriate and tailored employment services; and
- foster interagency collaboration, for example between DEEWR, Centrelink, DHS, and JSA and DES providers.

15.60 If JSA and DES providers should screen for family violence, several key issues arise in considering screening in this context, including: what to screen for; how such screening should occur, including the manner and environment in which to conduct screening; and when to conduct screening.

15.61 If screening were introduced, JSA and DES provider staff would need regular and consistent training to ensure that screening is conducted appropriately and that, if family violence is disclosed in the course of a JSCI (whether in the context of screening, or in response to any new family violence category of information), they respond sensitively and appropriately.

### ***What to screen for***

15.62 In response to the Social Security and Child Support and Family Assistance Issues Papers, stakeholders generally considered that screening should enquire about: the presence of violence;<sup>35</sup> the safety of both the individual and any children involved;<sup>36</sup> non-physical as well as physical abuse;<sup>37</sup> the general indicators of violence

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35 Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Sole Parents' Union, *Submission CFV 63*, 27 April 2011.

36 Sole Parents' Union, *Submission CFV 63*, 27 April 2011.

37 ADFVC, *Submission CFV 71*, 11 May 2011.

(for example, controlling behaviour regarding finances); and a number of vulnerability indicators—including homelessness, disability, illiteracy and mental illness—because often these indicators occur in combination.<sup>38</sup>

***How should screening occur?***

15.63 In considering how screening should occur in a pre-employment context, it is important to distinguish discussion of general screening processes from questions asked in the context of any new category of information included under the JSCI for the purposes of determining a job seeker's barriers to employment.

15.64 There are a number of ways screening could occur: provision of information to allow for self-disclosure; direct questioning through a series of questions about family violence; or both. Another approach may involve a two-stage process in which general information is provided and, where fear of violence is identified, a more detailed screening process is conducted.<sup>39</sup>

15.65 Provision of information in order to facilitate self-disclosure, for example through application forms, correspondence or telephone prompts, could potentially include information about:

- family violence;
- processes for disclosure;
- what impact disclosure of family violence may have in the pre-employment system (for example, referral to Centrelink and potential access to specialised services or targeted job placement programs); and
- the availability of resources and support.

15.66 Direct and routine questioning of job seekers by JSA or DES providers could involve questions about whether the job seeker has any current concerns for their own safety or the safety of members of their household.

15.67 The manner and environment in which screening for family violence occurs is also important. For example, consideration may need to be given to explaining why screening is occurring, how the information will be used and the information protections available as well as screening in a private environment.

***When should screening occur?***

15.68 Screening could occur at a number of points in the pre-employment context (in addition to where conducted by Centrelink). For example, JSA or DES providers could screen for family violence on first contact or initial assessment, and/or more routinely. This issue is discussed in more detail in the social security and child support and family assistance systems in Chapters 4, 5, and 9–11.

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38 Commonwealth Ombudsman, *Submission CFV 54*, 21 April 2011.

39 For a fuller discussion of how screening could occur in the context of the social security and child support and family assistance systems, see Ch 4.

**Submissions and consultations**

15.69 A large number of submissions received in response to the Child Support and Family Assistance Issues Paper and the Social Security Issues Paper recognised the importance of screening processes in those contexts.<sup>40</sup> Many suggested that agencies have an obligation to seek information from customers about circumstances which may affect their capacity to engage, or their entitlement to payments or services.<sup>41</sup>

15.70 In the context of the JSA system, WEAVE submitted that:

Job Services Providers like to argue that domestic violence cases have been screened out so they don't need to do anything ... When a client discloses family violence and they have not seen a Centrelink social worker the JSP should refer the client back to Centrelink ... JSPs also need to inquire on intake if there are any threats to the person's safety or other in their household. If the person discloses current or recent violence they should be given full information about all Centrelink supports and exemptions available to them so they can make an informed decision about their next steps.<sup>42</sup>

15.71 A range of other stakeholders supported the introduction of screening for family violence in the context of the pre-employment system.<sup>43</sup> For example, the ADFVC recommended 'the introduction of standard questions for raising family violence issues with clients. These questions could be similar in structure to those currently adopted by the New South Wales Health Routine Screening for Domestic Violence Program'.<sup>44</sup>

**ALRC's views**

15.72 Providers play a primary role in assisting job seekers to gain sustainable employment, and, where necessary, connecting them to skills development and training opportunities, as well as provision of a range of other services.

15.73 In ensuring that the JSA and DES systems are effective in assisting job seekers, all circumstances and barriers that may affect a job seeker's ability to work are relevant and need to be considered. While there are difficulties with introducing screening for family violence by JSA or DES provider staff, to the extent that screening for family violence facilitates consideration of the impact of family violence on a job seeker, and ultimately assists the job seeker to gain or retain employment, the ALRC considers it would be a positive development. However, the ALRC would be interested in stakeholder comment on what the focus of any screening by JSA or DES provider staff should be, for example: physical safety, the presence of violence, other indicators potentially affecting a job seeker such as homelessness, or all of these.

15.74 Determining the most effective way for JSA and DES providers to identify family violence issues is a difficult issue. As a result, the ALRC welcomes stakeholder feedback about the most appropriate way in which to conduct screening, including

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40 Chapter 4.

41 See, eg, Commonwealth Ombudsman, *Submission CFV 62*, 27 April 2011.

42 WEAVE, *Submission CFV 14*, 5 April 2011.

43 Ibid; M Winter, *Submission CFV 12*, 5 April 2011.

44 ADFVC, *Submission CFV 26*, 11 April 2011.

how, in what manner and environment and when. The ALRC considers that it may be appropriate for JSA and DES providers to screen for family violence at the first contact with a job seeker and, thereafter, routinely, but welcomes stakeholder feedback concerning the points at which JSA and DES providers should screen for family violence. Any screening for family violence should also take into consideration a job seeker's cultural and linguistic background as well as the person's capacity to understand, for example, in circumstances involving job seekers with a cognitive disability.

15.75 Finally, the introduction of screening for family violence by JSA and DES provider staff would involve a new process. If introduced, the ALRC considers that it is important that regular and consistent training is provided to staff who conduct screening and that monitoring and evaluation are built into the screening process to ensure that screening increases the disclosure of family violence, and that it is positively assisting job seekers experiencing family violence. Monitoring and evaluation should also be conducted routinely and the outcomes made publicly available.

**Question 15–4** Should JSA and DES providers routinely screen for family violence? If so:

- what should the focus of screening be;
- how, and in what manner and environment, should such screening be conducted; and
- when should such screening be conducted?

### Referral to Centrelink

15.76 For screening for family violence to be effective, it must be followed by a positive and appropriate response. In particular, there must be a 'clear signal' to victims that they will receive assistance and support following disclosure of family violence.<sup>45</sup>

15.77 In light of the procedures and mechanisms already in place within the social security system, in the context of the JSA and DES systems the current response is referral back to Centrelink and, in particular, to a Centrelink social worker. A range of existing DEEWR material provided to JSA and DES providers includes information about the appropriate response where a job seeker discloses 'domestic violence, family grief or trauma':

If a job seeker discloses domestic violence, family grief or trauma, the job seeker should be immediately referred to a Centrelink social worker. The Social Worker will assess the job seeker's eligibility for a participation activity exemption and refer the job seeker to other appropriate services for immediate assistance. If the information is

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<sup>45</sup> WEAVE, *Submission CFV 14*, 5 April 2011.

being disclosed while the JSCI is being conducted, the JSA provider should complete and submit the JSCI.<sup>46</sup>

15.78 Referral allows job seekers to have their eligibility for exemptions from activity and participation requirements considered and facilitates connections to support services.

15.79 The ALRC is interested in stakeholder feedback on whether, in practice, job seekers are referred to a Centrelink social worker. The ALRC is interested in reforms to ensure this occurs in practice. For example, it may be beneficial to include the referral requirement in additional material.

**Question 15–5** Under the *Job Seeker Classification Instrument Guidelines* if a job seeker discloses family violence, the job seeker should immediately be referred to a Centrelink social worker. What reforms, if any, are necessary to ensure this occurs in practice?

### Systems or programs for job seekers experiencing family violence

15.80 Where victims of family violence disclose family violence in the pre-employment context, ideally this will trigger a number of responses: at the outset, they will be referred to a Centrelink social worker.<sup>47</sup> If the proposals in relation to the JSCI later in the chapter are adopted, it may also affect the stream placement of the job seeker.

15.81 There are a number of other system responses to disclosures of family violence, including potential access by providers to funds under the Employment Pathway Fund (EPF), which is a flexible pool of funds available to providers to purchase a broad range of assistance to help job seekers access training and support to find and retain a job.<sup>48</sup>

15.82 In addition, there is also a need to ensure ongoing support for job seekers experiencing family violence throughout the job search process. However, as far as the ALRC is aware, JSA and DES providers do not currently have formal systems or programs in place within the stream system to account for the particular needs of job seekers experiencing family violence.

15.83 However, the ALRC understands that some JSA providers, on an informal basis, have measures in place to assist job seekers experiencing family violence to gain and retain employment. For example, through finding a job seeker work that will avoid

46 See, eg, Department of Education, Employment and Workplace Relations, *Job Seeker Classification Instrument Guidelines, Version 1.6* (2011), 11; Department of Education, Employment and Workplace Relations, *Conducting the Job Seeker Classification Instrument Job Aid* (2011).

47 Disclosure of family violence also triggers social security responses, including the tailoring of EPPs, discussed in Ch 7.

48 Department of Education, Employment and Workplace Relations, *Job Services Australia: Stream Services* <[www.deewr.gov.au/Employment/JSA/EmploymentServices/Pages/streamServices.aspx](http://www.deewr.gov.au/Employment/JSA/EmploymentServices/Pages/streamServices.aspx)> at 4 July 2011.



having contact with external clients in order to avoid any risk posed by the perpetrator attending the workplace. In its submission the ADFVC suggested the development of a targeted job placement program that

screens prospective employers who might be more supportive of employees who are victims of violence, and likely to provide flexible hours and other measures to enable workforce participation.<sup>49</sup>

### ***ALRC's views***

15.84 The development of specific systems or programs could ensure that where job seekers are either not eligible for activity or participation exemptions, or make the choice to work, they are provided with additional tailored pre-employment support. In addition, such moves may address stakeholder concerns that, under the current system, 'there is no clear signal to victims that they will receive any help by disclosing violence'.<sup>50</sup>

15.85 In *Family Violence—A National Legal Response*, the ALRC and the New South Wales Law Reform Commission (the Commissions) favoured the specialisation of key individuals and institutions that deal with family violence.<sup>51</sup> The ALRC's preliminary view in this Inquiry is that the safety of job seekers experiencing family violence may be improved through the introduction of specialist systems and programs by JSA and DES providers. The ALRC envisages that JSA and DES providers could introduce a range of initiatives, such as:

- a targeted job placement program that screens employers for understanding or support of issues arising from family violence, relevant workplace policies and clauses, and provision of access to flexible working arrangements or leave; or
- making arrangements to ensure a job seeker can work in a position that will not require them to work alone, or have contact with external clients, in order to avoid any risk posed by the perpetrator attending the workplace.

15.86 Involvement in any such systems or programs would need to be on an opt-in basis, to ensure the job seeker has a right to choose whether or not their experiences of family violence should affect the employment services he or she is receiving. Any system or program would also need to provide ongoing support to the job seeker while they are experiencing family violence. Further, any such system or program would need to be introduced in the context of Proposal 4–9, which provides for a case management response to disclosures of family violence by, amongst others, Centrelink and DEEWR, and would need to work with any specialist team developed in response to the discussion in Chapter 4.

<sup>49</sup> ADFVC, *Submission CFV 26*, 11 April 2011.

<sup>50</sup> WEAVE, *Submission CFV 14*, 5 April 2011.

<sup>51</sup> Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), Ch 32.

**Proposal 15–3** JSA and DES providers should introduce specialist systems and programs for job seekers experiencing family violence—for example, a targeted job placement program.

## Job Seeker Classification Instrument

15.87 The JSCI questionnaire is used to determine a job seeker's relative level of disadvantage in the labour market and, therefore, the likely difficulty of obtaining employment.<sup>52</sup> In the course of the JSCI, job seekers are assigned points according to their answers to specific questions which, in turn, indicate factors that correlate with disadvantage in the labour market. The total score is designed to reflect how disadvantaged a job seeker is in the labour market: a higher score should reflect a greater level of disadvantage.

15.88 For example, a job seeker is assigned two points for having poor English proficiency, three points for living in temporary accommodation, four points for being unemployed, and up to twelve points for being on income support for over two years or living in certain remote Indigenous locations.<sup>53</sup> Job seekers are classified as Stream 1 if they have fewer than 19 points; Stream 2 if they have 20–28 points; and Stream 3 if they have more than 29 points. Entry to Stream 4 is based on an ESAt or JCA, as discussed later in this chapter. DEEWR considers that this process is 'essential to ensuring that, in line with Government policy, resources are preferentially directed to those who are most in need'.<sup>54</sup>

15.89 Where a JSCI has been administered but a job seeker's individual circumstances have changed or the job seeker discloses new or additional information, such that their original JSCI, or the result of their last Stream Services Review, is affected a Change of Circumstances Reassessment (COCR) may be conducted.<sup>55</sup> COCR is the term for the process used to determine employment services eligibility.<sup>56</sup> In conducting a

52 The JSCI was first introduced in 1998 and was revised by DEEWR in 2008–09. The review looked at 'the effectiveness, appropriateness and efficiency of the JSCI' with the goal of 'improving labour market participation and [providing] early intervention for disadvantaged job seekers': Department of Education, Employment and Workplace Relations, *Review of the Job Seeker Classification Instrument* (2009), app C. The review relied on consultations, qualitative research, cognitive testing of questions, and econometric analysis: Department of Education, Employment and Workplace Relations, *Review of the Job Seeker Classification Instrument* (2009), 5.

53 Department of Education, Employment and Workplace Relations, *Description of JSCI Factors and Points*, 3, 5, 8, 11–12.

54 Department of Education, Employment and Workplace Relations, *Correspondence*, 15 June 2011.

55 COCRs may be conducted by a JSA provider at any time during the servicing of job seekers in Streams 1 to 3 in such circumstances. JSA providers refer job seekers in Stream 4 requiring a COCR for an ESAt. Similarly, for DES, COCRs are undertaken through an ESAt. Centrelink can refer all job seekers for a COCR where they identify further assessment is required: Department of Education, Employment and Workplace Relations, *Conducting a Change of Circumstance Reassessment Using the Job Seeker Classification Instrument Job Aid* (2011); Department of Education, Employment and Workplace Relations, *Correspondence* 26 July 2011.

56 Department of Education, Employment and Workplace Relations, *Correspondence* 26 July 2011.

COCR, a JSA provider may ask the job seeker all the JSCI questions again, or only those questions that relate to the change in circumstances or disclosed information.<sup>57</sup>

15.90 In response to the Employment Law Issues Paper stakeholders expressed a range of broad concerns about the JSCI, in particular indicating that it does not encourage job seekers to disclose sensitive information, such as family violence. In addition, two key aspects of the JSCI emerged as of central relevance to job seekers experiencing family violence:

- the administration of the JSCI, which may prevent job seekers from feeling comfortable enough to disclose family violence; and
- the content of the JSCI, which, even where family violence is disclosed, may inadequately recognise the extent to which experience of family violence is a barrier to employment.

15.91 A related issue is referral to the ESAt and JCA, which is discussed in further detail later in the chapter.

15.92 DEEWR advised the ALRC that it plans to re-estimate the JSCI ‘through detailed econometric analysis’ in 2011–12 using labour market and job seeker outcomes data. This may involve ‘refinement to the weights for the 18 factors, or adjustment of the JSCI score band widths that allocate job seekers to different service streams’. DEEWR also advised the ALRC that ‘appropriate refinement of the ‘triggers’ that identify job seekers who may require referral for JCAs could also occur as an outcome of this research’.<sup>58</sup>

### Administration of the JSCI

15.93 Ordinarily, the JSCI questionnaire is administered by Centrelink, often at first contact when a job seeker registers for activity tested income support. JSA or DES providers or JCA/ESAt assessors may also administer the JSCI in certain circumstances.<sup>59</sup> The JSCI may be administered in person, or by telephone interview.

15.94 The JSCI Guidelines provide that a JSCI:

must be conducted in a private setting. It must also be conducted face-to-face, unless there are Exceptional Circumstances. For an initial JSCI, all questions must be asked in full. Interpreter services should be used where appropriate ... A job seeker can be

<sup>57</sup> Department of Education, Employment and Workplace Relations, *Job Seeker Classification Instrument Guidelines, Version 1.6* (2011), 11, 12.

<sup>58</sup> Department of Education, Employment and Workplace Relations, *Correspondence*, 15 June 2011.

<sup>59</sup> JSA and DES providers administer the JSCI where a job seeker directly registers with the provider (for DES providers only in cases of non-activity tested job seekers); where the job seeker does not have an active JSCI and require commencement; and where they require a Change of Circumstances Reassessment (for JSA providers only for job seekers in streams 1–3) or do not have a Centrelink Customer Reference Number (for JSA providers only for job seekers in streams 1–3). JCA/ESAt assessors may administer a JSCI where a job seeker discloses new or different information during the JCA/ESAt or the job seeker has a recommended referral to streams 1–3 but does not have a JSCI: Department of Education, Employment and Workplace Relations, *Job Seeker Classification Instrument Guidelines, Version 1.6* (2011).

accompanied by a nominee, including a family member, advocate, social worker or counsellor for support when the JSCI is conducted.<sup>60</sup>

15.95 Several organisations have expressed concern that the way in which the JSCI is administered impedes the identification of sensitive issues, like family violence. Criticisms have related to:

- conduct of the JSCI over the phone, in public areas within Centrelink or in the presence of partners;
- the JSCI being premised on self-disclosure and barriers to disclosure; and
- difficulties updating the JSCI.<sup>61</sup>

15.96 The revised JSCI includes wording and sequencing changes designed to highlight the importance of full disclosure and make job seekers more comfortable disclosing sensitive information. To compensate for nondisclosure, the revised JSCI allocates job seekers one point for not answering certain voluntary questions and one point for having received a Centrelink Crisis Payment in the previous six months.<sup>62</sup>

15.97 These revisions may address some of the concerns raised in the 2008–09 review. Other concerns—such as the increasing use of phones to conduct interviews—were recognised by DEEWR, but not addressed in the revised form of the JSCI.<sup>63</sup> The ALRC asked for stakeholder comment about whether the reforms have encouraged greater disclosure of information about family violence.

### ***Submissions and consultations***

15.98 Stakeholders expressed a range of concerns about the administration of the JSCI.<sup>64</sup> There were concerns about the conduct of the JSCI by telephone, which may lead to non-disclosure of family violence. This was also noted in the 2010 Report of the Independent Review into the Impacts of the New Job Seeker Compliance Framework, which commented that submissions to the Review ‘point to the barriers of understanding, communication and trust which are likely to affect a telephone

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<sup>60</sup> Ibid, 9.

<sup>61</sup> Advanced Personnel Management, *Submission to the Review of the Job Seeker Classification Instrument* (2008); AMES Research and Policy, *Submission to the Review of the Job Seeker Classification Instrument* (2008); BoysTown, *Submission to the Review of the Job Seeker Classification Instrument* (2008); Jobs Australia, *Submission to the Review of the Job Seeker Classification Instrument* (2008); National Employment Services Association, *Submission to the Review of the Job Seeker Classification Instrument* (2008); Sarina Russo Job Access (Australia), *Submission to the Review of the Job Seeker Classification Instrument* (2008).

<sup>62</sup> Department of Education, Employment and Workplace Relations, *Review of the Job Seeker Classification Instrument* (2009), 13.

<sup>63</sup> Ibid, 8.

<sup>64</sup> WEAVE, *Submission CFV 14*, 5 April 2011; M Winter, *Submission CFV 12*, 5 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011. This concern was also expressed in Australian Council of Social Service, *Submission to Minister for Employment Participation on the Future of Job Services Australia* (2011).

interview’.<sup>65</sup> This may have a particular impact on job seekers from non-English speaking backgrounds.

15.99 Stakeholders also emphasised that it was inappropriate for the JSCI to be conducted in a public place, or in the presence of a job seeker’s partner. For example, the ADFVC recommended that

any discussions about family violence issues be conducted in a private space wherever possible to encourage disclosure, protect client confidentiality and minimise the possibility that the perpetrator of the violence is in the vicinity of the client when the above questions are posed.<sup>66</sup>

15.100 WEAVE submitted that, in administering the JSCI,

staff routinely skip questions bundling several questions into one generic question such as ‘Is there anything else you’d like to tell us about, are there any other issues that impact on your ability to undertake employment?’ For many women, these questions are not sufficiently specific for them to disclose the existence of domestic violence and they will routinely answer no, having no understanding that such issues could be considered.<sup>67</sup>

15.101 However, DEEWR advised that:

The conduct of interviews by telephone is essential to ensuring the cost-effective deliver of Centrelink business and providing job seekers with convenience and speed of access to benefits and services. Around 65 per cent of First Contact Service Offers, which incorporate the initial administration of the JSCI, are conducted by telephone interview.<sup>68</sup>

15.102 DEEWR also emphasised that the result of independent testing by the Social Research Centre in 2007 and 2008 was that:

no significant difference was found in the consistency of Centrelink JSCIs irrespective of whether the JSCI was conducted face to face or by telephone. For Centrelink job seekers were allocated to the same service Stream between 90 to 94 per cent of occasions.<sup>69</sup>

15.103 Many stakeholders also emphasised the need for training of Centrelink staff administering the JSCI, however this issue is considered and dealt with in Chapter 7.

### ***ALRC’s views***

15.104 The ALRC is of the view that the administration of JSCI questionnaires over the phone may discourage job seekers from sharing sensitive information and that, where the JSCI is administered in person, this should not occur in a public area or in the presence of the job seeker’s partner.

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65 J Disney, A Buduls and P Grant, *Impacts of the new Job Seeker Compliance Framework: Report of the Independent Review* (2010) 23.

66 ADFVC, *Submission CFV 26*, 11 April 2011.

67 WEAVE, *Submission CFV 14*, 5 April 2011.

68 Department of Education, Employment and Workplace Relations, *Correspondence*, 15 June 2011.

69 Ibid.

15.105 The ALRC notes the testing highlighted by DEEWR, but this testing does not take account of the fact that administering the JSCI over the telephone may act as an additional barrier to disclosure of sensitive information.

15.106 While the administration of the JSCI by telephone is in part to enable cost-effective service delivery, the ALRC notes the apparent inconsistency between the *JSCI Guidelines*, which provide for the conduct of JSCIs in person unless there are 'Exceptional Circumstances', and the apparently high number of JSCIs administered over the phone.

15.107 The ALRC is of the view that, in some circumstances it may be appropriate to administer the JSCI over the telephone, for example where this will protect the safety of job seekers by ensuring they do not have to attend a Centrelink or JSA provider office, or in rural and remote areas.

15.108 However, the ALRC considers that, where possible, interviews should be conducted in person and solely with the job seeker, unless the job seeker requests the presence of another person—for example, a support person, case manager, interpreter or similar. The ALRC is of the view this may go some way to limit barriers to disclosure of family violence presented by administering the JSCI over the telephone, including those faced by CALD job seekers in particular, or which may arise as a result of the presence of a perpetrator or other family member.

**Proposal 15-4** As far as possible, or at the request of the job seeker, all Job Seeker Classification Instrument interviews should be conducted in:

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

### Content of the JSCI

15.109 The JSCI assesses 18 categories of information, or factors. Information about each of the factors is gathered from a number of sources including the job seekers record, a ESAt/JCA report (where available) and direct questioning of job seekers. The current factors include:

- age and gender;
- recency of work experience;
- vocational qualifications;
- Indigenous status;
- access to transport;
- disability/medical conditions;

- living circumstances;
- phone contactability;
- proximity to a labour market; and
- personal characteristics.<sup>70</sup>

15.110 Information about family violence is not collected as a separate category of information. However, as family violence may have an impact on any number of categories—for example on a job seeker’s living circumstances or access to transport—some of these existing factors may indirectly account for their experiences of family violence. In addition, family violence may be discussed as one aspect of a job seeker’s ‘personal characteristics’.

15.111 In the Employment Law Issues Paper, the ALRC asked a number of general questions about the operation of the JSCI in practice, in particular in relation to:

- how often applicants are asked about family violence;
- how questions about family violence are asked or phrased;
- how much discretion the JSCI administrator has in raising (or avoiding) the subject of family violence; and
- the practical effect of disclosing family violence in the JSCI interview.

#### ***Living circumstances category***

15.112 Under the living circumstances category, job seekers are asked whether they have been living in secure accommodation for the last 12 months or longer; whether they are staying in emergency or temporary accommodation; how often they have moved in the past year; and whether they live alone and/or have care-giving responsibilities.<sup>71</sup> The current focus of the question relating to ‘living circumstances’ for the purposes of the JSCI is on secure accommodation for a 12 month period, defined as a ‘reasonably fixed, regular and adequate place to stay’.<sup>72</sup>

15.113 However, the ALRC considers that there may be scope to expand this definition of secure accommodation to consider the impacts of family violence under this category. The ALRC invites stakeholder comment on whether DEEWR should amend the category of ‘living circumstances’, or the definitions relating to the category, under the JSCI to ensure it incorporates consideration of safety or other concerns arising from the job seeker’s experience of family violence.

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70 Department of Education, Employment and Workplace Relations, *Description of JSCI Factors and Points*, 1.

71 Department of Education, Employment and Workplace Relations, *Explanation of the Job Seeker Classification Instrument Questions Advice, Version 1.8* (2011), 16.

72 *Ibid*, 16.

***Personal characteristics category***

15.114 The personal characteristics category is intended to capture any other personal factor or characteristic that may affect the job seeker's ability to obtain or retain employment. The current question is 'are there any other factors which you think might affect your ability to work, obtain work or look for work that haven't already been discussed?' The question is voluntary and job seekers can choose not to answer, however administrators are told that they should encourage job seekers to 'fully disclose their circumstances to ensure they receive the most appropriate services'.<sup>73</sup>

15.115 The *Explanation of the JSCI Questions Advice* emphasises that factors recorded in response to this category must be relevant to the question and not to other questions in the JSCI and that, as a result, it may be necessary to review and change previous responses. It also notes that conditions such as depression or anxiety or other 'disability, health or medical issues', should be recorded under the work capacity category if they are expected to last three months or more.<sup>74</sup>

15.116 The ALRC notes stakeholder concerns that a single 'catch-all' question at the end of the JSCI may not be appropriate or encourage disclosure of family violence.<sup>75</sup> The ALRC also considers that the advice provided to those administering the JSCI in its current format may lead to the inclusion of family violence in respect of one factor under the JSCI where in reality it impacts on a number of factors. The ALRC is also concerned that it may contribute to the 'medicalisation' of family violence highlighted by stakeholders, that is the tendency to focus on isolated medical aspects of the job seekers' circumstances rather than consider family violence and its impact in a more holistic manner.<sup>76</sup> However, the ALRC is unsure in practice how often job seekers disclose family violence in response to this question and would like stakeholder feedback on its operation.

15.117 The ALRC considers that either amending the existing question or including an additional question, could ensure that JSCI incorporates consideration of family violence in assessing job seekers' personal characteristics but would welcome stakeholder feedback on this issue.

**Question 15–6** The Job Seeker Classification Instrument includes a number of factors, or categories, including 'living circumstances' and 'personal characteristics'. Should DEEWR amend those categories to ensure the Job Seeker Classification Instrument incorporates consideration of safety or other concerns arising from the job seeker's experience of family violence?

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<sup>73</sup> Ibid, 22.

<sup>74</sup> Ibid, 22, 23.

<sup>75</sup> See, eg, WEAVE, *Submission CFV 14*, 5 April 2011.

<sup>76</sup> See, eg, Ibid; M Winter, *Submission CFV 12*, 5 April 2011.



***New category for family violence***

15.118 Rather than relying on disclosure of family violence in the context of the ‘living circumstances’ or ‘personal characteristics’ categories, another possible approach to ensuring that the JSCI captures information about family violence, for the purposes of determining a job seeker’s barriers to work, may be to add a new category of family violence.

15.119 Where family violence is disclosed, ideally there should be automatic referral of the job seeker to a Centrelink social worker. However, the *JSCI Guidelines* provide that, where family violence is disclosed while the JSCI is being conducted, the JSA provider should complete and submit the JSCI. As a result, in addition to the need for the JSCI to consider all potentially significant barriers to work, this also underlines the importance of the JSCI being designed to consider family violence.

***Submissions and consultations***

15.120 Stakeholders expressed strong views about the need for the JSCI to consider family violence.<sup>77</sup> For example, the ADFVC expressed concern about the how information about family violence is sought in the JSCI and recommended the ‘introduction of standard questions for raising family violence issues with clients’.<sup>78</sup>

15.121 WEAVE suggested that the JSCI ‘should directly inquire with regard to family violence victimisation’ and should include an assessment of the circumstances of the people for whom the job seeker has caring responsibilities.<sup>79</sup>

15.122 A number of stakeholders outlined a range of information that should be considered under any new category relating to family violence, in particular: ‘ongoing trauma, the cost of child care and the need to attend appointments related to the abuse’.<sup>80</sup> The ADFVC suggested ‘these issues need to be given adequate weight in the assessment to ensure its accuracy’, emphasising that the result of its research indicated:

A considerable number of the women in the [ADFVC] study stated that they were unable to work because they were experiencing ongoing physical and mental health trauma from the abuse ... Women and workers spoken with in the study expressed a need for healing time for victims prior to taking up paid employment ... Some women also referred to their children not being emotionally ready to be left on their own or in child care (including older children who might access after school care), due to their own trauma from the abuse. These caring responsibilities prevented women from working ... A large number of [women] who were not working stated outright that childcare costs would equal or exceed any earnings gained from their employment ... Finally, women spoke of being required to attend multiple appointments associated with the abuse, such as: doctors and other health appointments for them and their

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77 ADFVC, *Submission CFV 26*, 11 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; M Winter, *Submission CFV 12*, 5 April 2011.

78 ADFVC, *Submission CFV 26*, 11 April 2011.

79 WEAVE, *Submission CFV 14*, 5 April 2011.

80 ADFVC, *Submission CFV 26*, 11 April 2011.

children, appointments with police and lawyers, domestic violence services, accommodation services and court appointments.<sup>81</sup>

### **ALRC's views**

15.123 The ALRC proposes that a new family violence category should be included in the JSCI. Ensuring that the JSCI captures all relevant information which may affect a job seeker's disadvantage in the labour market and barriers to work is important in order to ensure they are placed in an appropriate employment services stream and provided with the necessary support to gain and retain employment. To the extent that the JSCI is not currently designed in a way that elicits information about family violence, the ALRC considers it may be beneficial to add a new category.

15.124 The ALRC would like further input from stakeholders on the information that should be considered under the proposed category, for example: safety concerns; caring responsibilities for children, particularly those who have experienced or witnessed family violence; and the impact of family violence on a jobseeker's housing, transport and health.

15.125 However, the ALRC recognises that a key difficulty underlying any proposal to include a new category is the need to recognise the impact of family violence without necessarily resulting in the categorisation of job seekers into higher streams. While this may involve the provision of necessary services or support, the ALRC has some concern about this effectively resulting in job seekers experiencing family violence being placed into the 'too hard' basket and not being provided the necessary support or being a priority in terms of achieving employment outcomes.<sup>82</sup> While the ALRC considers that the question of weight/score attached to the new category should be left to DEEWR to consider in the context of the overall JSCI, the ALRC welcomes stakeholder comment on how to address this potential unintended consequence associated with the introduction of a new family violence category.

15.126 The ALRC notes that the introduction of a family violence category under the JSCI may affect the circumstances and manner in which a COCR should be conducted.

**Proposal 15-5** DEEWR should amend the Job Seeker Classification Instrument to include 'family violence' as a new and separate category of information.

81 Ibid. See also R Braaf and I Meyering, *Seeking Security: Promoting Women's Economic Wellbeing Following Domestic Violence* (2011).

82 This concern is linked in part to concerns expressed in relation to the JSA fee structure, however as outlined earlier in this chapter, the ALRC considers examination of this issue in any more detail extends beyond the scope of the Terms of Reference.

## Employment Services Assessments and Job Capacity Assessments

15.127 On 1 July 2011, new arrangements were introduced with respect to the JCA program, with the introduction of Employment Services Assessments (ESAt). A job seeker is referred to an ESAt or JCA where the results of the JSCI indicate ‘significant barriers to work’ and there is a potential need for intensive assistance.

15.128 Both an ESAt and a JCA can determine eligibility for employment services through a JSA or DES provider.<sup>83</sup> An ESAt is a streamlined assessment that focuses on identifying the type of employment service or other assistance that can best help a job seeker to prepare for, obtain or retain employment. A JCA involves the use of Impairment Tables and determines the impact of any medical conditions or disabilities a job seeker has on ability to work and whether the job seeker can benefit from employment assistance.<sup>84</sup>

15.129 An ESAt or JCA may be used for the purposes of employment services, or by Centrelink to inform decisions regarding income support payments and participation requirements.

15.130 JCAs were previously conducted by a range of private health and allied health professionals, such as registered psychologists or rehabilitation counsellors employed by Centrelink, CRS Australia, HSA Group and 15 non-government providers.<sup>85</sup> However, as of 1 July 2011, JCAs and the newly introduced ESAts will be conducted by health and allied health professionals ‘employed by a single Government Provider under the DHS portfolio’.<sup>86</sup>

### *Employment Services Assessments*

15.131 An ESAt is designed to recommend the most appropriate employment service assistance based on an assessment of a job seeker’s barriers to finding and maintaining employment and work capacity.<sup>87</sup>

15.132 There are two types of ESAt, both of which involve an assessment of the job seeker’s circumstances to determine the most appropriate service:

- Medical Condition ESAt—which also determines a job seeker’s work capacity, where one or more medical conditions are identified. ESAts are similar to the previous standard JCA for potentially highly disadvantaged job seekers with disability, injury or illness. In a Medical Condition ESAt the assessor must rely on the available medical evidence.

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<sup>83</sup> Department of Education, Employment and Workplace Relations, *Correspondence* 26 July 2011.

<sup>84</sup> Ibid. Centrelink, *Information about assessment services fact sheet* (2011).

<sup>85</sup> Department of Human Services, *Job Capacity Assessment Review: Summary Paper* (2008), 5, 33.

<sup>86</sup> Department of Education, Employment and Workplace Relations, *Employment Services Assessment* <<http://www.deewr.gov.au/Employment/Programs/Pages/ESAt.aspx>> at 14 July 2011.

<sup>87</sup> Work capacity is determined in bandwidths of a certain number of hours per week.

- Non-Medical Condition ESAt—where no medical condition is identified. A non-medical condition ESAt is normally less complex than an ESAt for a job seeker with disability, injury or illness, and will be streamlined to meet the individual's needs.

### **Job Capacity Assessments**

15.133 From 1 July 2011, JCAs are now largely used for Disability Support Pension claims and reviews and are not primarily employment services driven.<sup>88</sup> JCAs are not diagnostic in nature. The JCA assessor must rely on medical evidence available to assess the impacts of any medical condition or disability on the capacity of a job seeker to work and whether the job seeker can benefit from employment assistance.<sup>89</sup>

### **Issues arising**

15.134 In the Employment Law Issues Paper, the ALRC asked what, if any, improvements to the JCA referral process would provide better support to jobseekers experiencing family violence. In response, stakeholders criticised the way JCAs are conducted arguing, amongst other things, that there is a need for JCAs to better capture the needs of victims of family violence without treating only the medical manifestations of family violence.

15.135 In light of submissions, this section of the chapter considers:

- whether a 'significant barrier to work' under the JSCI should automatically trigger referral to an ESAt or JCA;
- ESAt and JCA assessors;
- ways in which an ESAt or JCA can consider the impact of family violence; and
- what recommendations an ESAt or JCA assessor can make in relation to stream placement or referral to DES to account for the needs of a job seeker experiencing family violence.

### **Referral to an ESAt or JCA**

15.136 A job seeker may be referred for an ESAt or JCA in a number of circumstances. The focus of this chapter is on circumstances triggering referral and in particular, whether family violence should trigger an automatic referral.<sup>90</sup>

15.137 Primarily, a job seeker will be referred to an ESAt or JCA where the JSCI indicates significant barriers to work. In this case, in addition to serving a stream placement role, the JSCI is intended to identify job seekers 'who have barriers that are so serious or complex that they may require additional assessment which, when appropriate to their needs, will result in referral to specialist employment services'.<sup>91</sup>

<sup>88</sup> Department of Education, Employment and Workplace Relations, *Correspondence* 26 July 2011.

<sup>89</sup> Department of Education, Employment and Workplace Relations, *Correspondence*, 15 June 2011.

<sup>90</sup> Referral in other circumstances is discussed in Ch 7.

<sup>91</sup> Department of Education, Employment and Workplace Relations, *Correspondence*, 15 June 2011.

15.138 Centrelink has primary responsibility for identifying and actioning referrals for an ESAt or JCA for job seekers in Streams 1–3.<sup>92</sup> However, a JSA provider may decide to refer a job seeker for an ESAt using the factors referred to in the *Referral for an ESAt Guidelines*.

15.139 A job seeker's disclosure of family violence may be—but apparently is not always—considered a significant barrier to work, automatically leading to a JCA.<sup>93</sup> Some stakeholders suggested that family violence should automatically constitute a significant barrier to work and therefore result in referral to a JCA.<sup>94</sup> Other stakeholders suggested that the JCA is 'inadequate' in dealing with job seekers who are experiencing family violence.<sup>95</sup>

15.140 Overall however, there is a need to balance the desire to ensure job seekers experiencing family violence receive appropriate support, which could potentially be provided through an ESAt or JCA, with the effect of 'tagging' all job seekers experiencing family violence as having significant barriers to work.

15.141 Other stakeholders commented more broadly about the purpose of referral to a JCA, suggesting it should 'form part of an informed consultation with the victim about their options'.<sup>96</sup>

#### ***ESAt and JCA assessors***

15.142 ESAts and JCAs will be conducted by health and allied health professionals, even in the case of a Non-Medical ESAt. In 2010, the report of the Independent Review commented that, in submissions, providers expressed concerns that JCAs 'are not necessarily conducted by a person with significant expertise in the key issues which need to be examined'. However, the report recognised that upcoming reforms (which have now been introduced) may address some of these problems.<sup>97</sup>

15.143 In submissions to this Inquiry, stakeholders expressed concerns about JCA assessors, in particular with respect to their lack of knowledge or understanding of family violence, and their tendency to focus on isolated medical aspects of the job seekers' circumstances rather than conduct the JCA in a more holistic manner.<sup>98</sup> In consultations, some stakeholders suggested that job seekers who disclose family violence should be referred to JCA (and by extension ESAt) assessors with specialist expertise or experience in family violence.

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92 Where a JSA provider wants to refer a job seeker in streams 1–3 for an ESAt they must complete a request for ESAt form for approval by DEEWR to proceed.

93 Department of Education, Employment and Workplace Relations, *Description of JSCI Factors and Points*, 13.

94 See, eg, WEAVE, *Submission CFV 14*, 5 April 2011.

95 M Winter, *Submission CFV 12*, 5 April 2011.

96 WEAVE, *Submission CFV 14*, 5 April 2011.

97 J Disney, A Buduls and P Grant, *Impacts of the new Job Seeker Compliance Framework: Report of the Independent Review* (2010), 24.

98 See, eg, M Winter, *Submission CFV 12*, 5 April 2011.

***ESAts, JCAs and family violence***

15.144 In identifying the most appropriate type of employment service or other assistance, or in determining the impact of any medical condition or disability on ability to work, the ESAt and JCA play a crucial role in the JSA and DES systems.

15.145 In response to the Employment Law Issues Paper, stakeholders expressed a range of concerns about the adequacy of JCAs (as ESAts were introduced following the release of the Issues Paper), in taking into account, or responding to, family violence. Concerns centred on the reliance of the JCA on medical verification which ‘medicalises’ family violence under the JCA system.<sup>99</sup>

15.146 For example, WEAVE highlighted that, in their experience, the usual process for a victim of family violence is that:

physical and mental illnesses arising from violence are recognised and the victim is treated as a medical case with referrals for a Job Capacity Assessment focusing on their health concerns. The process of leaving a violent [partner] who may be continuing to threaten, stalk, harass and abuse becomes reduced to an issue of the victim needing anti-depressants and anti-anxiety medications so they can jobsearch.<sup>100</sup>

15.147 Similarly, Myjenta Winter submitted that, on the basis of research she had conducted for her PhD:

the Job Capacity Assessment was inadequate in dealing with person that had experienced and were affected by violence. The job capacity assessment assesses a job seekers capacity to work. The assessment relies on medical verification, which in the case of domestic violence, apart from physical injuries, manifest in mental health conditions, such as posttraumatic stress disorder which is difficult to diagnose as it is often masked by depression and anxiety ... The job capacity assessment mainly assesses medical conditions and takes in account social issues such as drug and alcohol problems, but domestic violence has less significance.<sup>101</sup>

15.148 A range of other concerns were expressed in consultations, including the appropriateness of a JCA in circumstances of family violence, given the often fluctuating impact of family violence on a job seeker’s ability to work.

***ESAt and JCA outcomes***

15.149 There are a range of outcomes available as a result of an ESAt or JCA. For example, a job seeker may be referred to a specialist DES provider, to Stream 4, or (where they do not require referral to a specialist service) to JSA and allocated to services Streams 1, 2 or 3, as determined by their JSCI score.

15.150 The focus of this chapter is on these stream placement and DES outcomes. However, there are also a range of other outcomes, including recommendations about tailoring EPPs, the use of the EPF or access to services, which are considered in Chapter 7.

<sup>99</sup> Medicalises was a term used in the submission from WEAVE, *Submission CFV 14*, 5 April 2011.

<sup>100</sup> Ibid.

<sup>101</sup> M Winter, *Submission CFV 12*, 5 April 2011.

**ALRC's views**

15.151 The ALRC would be interested in stakeholder feedback about whether disclosure of family violence should automatically constitute a significant barrier to work and therefore result in referral to an ESAt or JCA, or whether there are other, more appropriate, ways to ensure job seekers receive the necessary support, for example as outlined earlier in this chapter in relation to JSA provider responses.

15.152 The ALRC considers the introduction of a Medical ESAt and a Non-Medical ESAt may be a positive development. On face value it appears that it may address some of the 'medicalisation' of family violence concerns raised by stakeholders in this Inquiry. However, given the ESAt system was introduced on 1 July 2011, the ALRC is unable to predict exactly how it will operate in practice.

15.153 With respect to concerns expressed about the expertise of assessors in understanding family violence and its impact on job seekers, the ALRC considers that referral of job seekers who disclose family violence to ESAt or JCA assessors with particular speciality or experience in family violence may address some of the concerns raised by stakeholders. However, such a move may require additional resources, increase delays and present difficulties in terms of access to those assessors, particularly in rural and remote areas. Education and training of all assessors, as proposed below, may assist in this respect.

15.154 The ALRC welcomes stakeholder feedback on the capacity of the ESAt and JCA to consider the impact of family violence on a job seeker's readiness to work. In particular, the ALRC would be interested in hearing whether the new ESAt will address some of the concerns addressed in submissions to this Inquiry, and if not, what changes could ensure that ESAts and JCAs capture, assess and address the circumstances of job seekers experiencing family violence.

15.155 Further, the ALRC would be interested in comment on whether, in practice, recommendations made by ESAt or JCA assessors account for the needs and experiences of job seeker's experiencing family violence, to the extent that they relate to stream placement or referral to DES.

**Question 15–7** A job seeker is referred to an ESAt or JCA where the results of the Job Seeker Classification Instrument indicate 'significant barriers to work'. Should the disclosure of family violence by a job seeker automatically constitute a 'significant barrier to work' and lead to referral for an ESAt or JCA?

**Question 15–8** Where a job seeker has disclosed family violence, should there be streaming of job seekers to ESAt and JCA assessors with specific qualifications or expertise with respect to family violence, where possible?

**Question 15–9** When conducting an ESAt or JCA, how do assessors consider the impact of family violence on a job seeker's readiness to work? What changes, if any, could ensure that ESAts and JCAs capture and assess the circumstances of job seekers experiencing family violence?

**Question 15–10** In practice, to what extent can, or do, recommendations made by ESAt or JCA assessors in relation to stream placement or referral to DES account for the needs and experiences of job seekers experiencing family violence?

## Training and education

15.156 A central theme that has emerged in the course of this Inquiry, including in the pre-employment context, is the need for effective education and training of individuals working in the JSA system—including DEEWR, Centrelink, JSA, DES and IEP providers and ESAt and JCA assessors. A proper appreciation and understanding of the nature, features and dynamics of family violence, and its potential impact on a job seeker’s ability to gain and retain employment, is fundamental to ensuring that the system is able to respond to the needs of job seekers experiencing family violence and, ultimately, can improve their safety.

15.157 Accordingly, this section of the chapter outlines the need for education and training of JSA, DES and IEP provider staff as well as ESAt and JCA assessors in relation to:

- the nature, features and dynamics of family violence; and
- the potential effect of family violence on work capacity and barriers to employment arising from family violence.

15.158 Training and education of Centrelink staff, including in relation to the administration of the JSCI, is discussed in Chapter 7.

### *Submissions and consultations*

15.159 A number of stakeholders emphasised the need for education and training for JSA providers. For example, WEAVE suggested the providers should be required to participate in such training

as part of their accreditation process so they can deal with the issue of family violence professionally. Such accreditation should be displayed so that clients know that the JSP staff has been trained in responding to family violence. This would increase client’s confidence to disclose.<sup>102</sup>

15.160 Similarly, Northern Rivers Community Legal Centre recommended training for JSA provider staff to ‘recognise signs that an individual may be or have been a victim of family violence and may be reluctant to disclose this’ and in relation to ‘appropriate response strategies to victims so the job service agency does not compound the impact on the victim of family violence’.<sup>103</sup>

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102 WEAVE, *Submission CFV 14*, 5 April 2011.

103 Northern Rivers Community Legal Centre, *Submission CFV 08*, 28 March 2011.



15.161 Stakeholders also expressed the view that JCA assessors should have compulsory training in relation to family violence.<sup>104</sup>

**ALRC's views**

15.162 The need for education and training of JSA, DES and IEP provider staff is vital to ensuring that the current system and, if modified in line with the proposals in this chapter, any new system, is able to respond to and protect job seekers experiencing family violence.

15.163 In the report, *Family Violence—A National Legal Response*, the Commissions considered that education on the nature, features and dynamics of family violence better enables those in the system to assist victims. To this end, the Commissions recommended that the Australian, state and territory governments, and educational, professional and service delivery bodies should ensure regular and consistent education and training for participants in the family law, family violence, and child protection systems, in relation to the nature and dynamics of family violence, including its impact on victims, in particular those from high risk or vulnerable groups.<sup>105</sup>

15.164 Similarly, the ALRC considers it is necessary and appropriate to propose that participants in the JSA and DES systems, in particular JSA, DES and IEP provider staff receive similar training, with a particular focus on the potential effect family violence may have on work capacity and barriers to employment.

15.165 The ALRC considers that a proper understanding of the nature, features and dynamics of family violence and its impact on victims, in particular those from high risk and vulnerable groups, and its potential impact on work capacity and barriers to employment, will better enable JSA, DES and IEP provider staff to support and assist job seekers.

15.166 As a result, the ALRC has formed the view that DEEWR should work with providers to ensure that all staff working for JSA, DES and IEP providers receive regular and consistent training in relation to:

- the nature, features and dynamics of family violence, and its impact on victims, in particular those from high risk and vulnerable groups;
- recognition of the impact of family violence on particular job seekers such as: Indigenous peoples; those from culturally and linguistically diverse backgrounds; those from lesbian, gay, bisexual, trans and intersex communities; children and young people; older persons, and people with disability;
- the potential impact of family violence on a job seeker's capacity to work and barriers to employment;

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<sup>104</sup> See, eg, WEAVE, *Submission CFV 14*, 5 April 2011; M Winter, *Submission CFV 12*, 5 April 2011.

<sup>105</sup> Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), Rec 31–1.

- appropriate referral processes; and
- the availability of support services.

15.167 Prior to 1 July 2011, the ALRC is aware that JCA assessors were required to complete online modules in order to be certified to conduct JCAs. However, in light of the nature of changes to the conduct of ESAts and JCAs, the ALRC is not aware how training and education will be conducted under the new system. The ALRC considers that, where it is not already envisaged, DHS should ensure regular and consistent training for all ESAt and JCA assessors in relation to:

- the nature, features and dynamics of family violence;
- its impact on capacity to work and barriers to work faced by job seekers experiencing family violence; and
- the availability of support services.

**Proposal 15–6** DEEWR and the Department of Human Services should require that all JSA, DES and IEP provider staff and ESAt and JCA assessors receive regular and consistent training in relation to:

- (a) the nature, features and dynamics of family violence, including: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is under-reported; and it has a detrimental impact on children;
- (b) recognition of the impact of family violence on particular job seekers such as:
  - Indigenous people;
  - those from culturally and linguistically diverse backgrounds;
  - those from lesbian, gay, bisexual, trans and intersex communities;
  - children and young people;
  - older persons; and
  - people with disability
- (c) the potential impact of family violence on a job seeker's capacity to work and barriers to employment;
- (d) appropriate referral processes; and
- (e) the availability of support services.

## Specific job seeker groups

### Indigenous job seekers

15.168 In the *Family Violence Report*, the ALRC documented the particular impact of family violence on Indigenous peoples and their communities.<sup>106</sup> This chapter has highlighted the wide-ranging impacts of family violence on work capacity and in imposing additional barriers to employment. In many cases, the additional issues which arise from being an Indigenous victim of family violence exacerbate these impacts, which further disadvantage Indigenous job seekers.

15.169 In recognition of the gap between Indigenous and non-Indigenous Australians with respect to economic participation and employment, and as a key element in meeting one of the Government's 'Close the Gap' targets in relation to economic participation—halving the employment gap between Indigenous and non-Indigenous Australians within a decade<sup>107</sup>—in December 2008, the Government announced reforms to the provision of Indigenous employment services.

15.170 Integrated Indigenous employment services are available through the JSA network, in conjunction with the IEP, and, in areas with poor labour markets, Community Development Employment Projects. Where appropriate, Indigenous job seekers are able to receive parallel servicing through JSA providers and the IEP, and in remote areas, the CDEP.<sup>108</sup>

15.171 The current IEP model, which began on 1 July 2009, is the largest provider of employment services for Indigenous people. The objective of the IEP is to increase Indigenous employment outcomes and participation in economic activities. Under the IEP, support is available for a range of activities which may increase economic opportunities and participation for Indigenous people. The IEP provides Indigenous job seekers with a range of assistance, largely through specific IEP projects, including (relevantly) in relation to pre-employment and employment training and mentoring support and support for Indigenous job seekers and workplaces.

15.172 The IEP operates through procurement of services by DEEWR from two panels (an Employment Panel and an Economic Development and Business Support Panel) or directly with groups to assist employers, Indigenous people and their communities. The two panels are a group of organisations from which DEEWR may procure IEP services. The Panels operate under a Deed of Standing Offer—for the period 2009–2012—and individual projects/services are then provided under a Contract/Official Order. The Deed of Standing Offer, Contract/Official Order and Guidelines for Panel Members for the contract for services purchased by DEEWR.

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106 Ibid.

107 Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap Targets* <<http://www.fahcsia.gov.au/sa/indigenous/progserv/ctg/Pages/targets.aspx>> at 24 July 2011.

108 The focus of this chapter is on employment services. As a result, initiatives and services such as the Community Support Service, the Australian Employment Covenant and the role played by Indigenous Business Australia are not discussed.

**ALRC's views**

15.173 To the extent that the ALRC can consider ways in which IEP projects provided through the panel arrangements could be revised to ensure they account for the needs of Indigenous job seekers experiencing family violence, the ALRC considers that the tender process in 2012 may provide an avenue through which the Government could consider this issue.

15.174 The ALRC welcomes stakeholder comment on whether the Government should include a requirement that IEP projects/services or panel providers demonstrate an understanding of and systems/policies to address the needs of Indigenous job seekers experiencing family violence in requests for tender and contracts for employment services, and if so how.

15.175 The focus of the ALRC in this area is on the pre-employment services and support provided to Indigenous job seekers through JSA, IEP and CDEP. A number of questions and proposals throughout this chapter refer specifically to Indigenous people or to the IEP. However, the ALRC welcomes stakeholder comment on the effectiveness of these systems to respond to the need of Indigenous job seekers who are experiencing family violence. The ALRC would also be interested in feedback on what changes, if any, could be made to the JSA, DES IEP or CDEP systems to assist Indigenous job seekers who are experiencing family violence.

**Question 15–11** In what ways, if any, should the Australian Government include a requirement in requests for tender and contracts for employment services that IEP projects and services, or panel providers, demonstrate an understanding of, and systems and policies to address, the needs of Indigenous job seekers experiencing family violence?

**Question 15–12** In what ways, if any, should the JSA, DES, IEP or CDEP systems be reformed to assist Indigenous job seekers who are experiencing family violence?

**CALD job seekers**

15.176 In some cases, job seekers from CALD communities may face additional barriers to employment that require different, or additional, support from JSA or DES providers. As outlined in Chapters 1, 4 and 14, people from CALD communities may face additional barriers to disclosure of family violence.

15.177 Where relevant throughout the chapter the ALRC has noted the particular impact administration or processes may have on job seekers from CALD communities. However, the ALRC would be interested in specific stakeholder comments on the effectiveness of the JSA and DES systems in responding to the needs of job seekers from CALD communities and on what changes if any, could be made to the JSA or DES systems to assist job seekers from CALD communities who are experiencing family violence.

**Question 15–13** In what ways, if any, should the JSA or DES systems be reformed to assist job seekers from culturally and linguistically diverse communities who are experiencing family violence?

### Job seekers with disability

15.178 On 1 March 2010, the Government introduced the new DES system. Eligibility for DES is largely determined by the outcome of the ESA<sup>109</sup> or JCA,<sup>109</sup> however DES is uncapped.

15.179 In some cases, a job seeker with a disability may register directly with DES. However, in these circumstances, where a potential DES participant does not have a valid ESA<sup>109</sup> or JCA or fall within a limited category of exceptions, the DES provider will refer the job seeker to an ESA<sup>109</sup> or JCA assessor to have their eligibility for DES assessed.

15.180 Otherwise, a job seeker may be referred to the DES provider network if they:

- have a disability which is permanent or likely to be permanent;
- have a reduced capacity for communication, learning or mobility;
- require support for more than six months after placement in employment; or
- require specialist assistance to build their work capacity.<sup>110</sup>

15.181 There are two separate programs within DES:

Disability Management Service is for job seekers with disability, injury or health condition who require the assistance of a Disability Employment Service but are not expected to need long-term support in the workplace.

Employment Support Service is for job seekers with permanent disability and with an assessed need for more long-term, regular support in the workplace.<sup>111</sup>

15.182 Where a job seeker under the DES system discloses family violence, the same procedures that apply under the JSA system apply—that is, they are immediately referred to a Centrelink social worker.<sup>112</sup>

15.183 Where relevant throughout the chapter, the ALRC has noted the particular impact administration or processes may have on people with a disability, and included

<sup>109</sup> Except where the job seeker is a Special Class Client or Eligible School Leaver or registers as a Job In Jeopardy: Department of Education, Employment and Workplace Relations, *Disability Employment Services: Referral for Job Capacity Assessment Guidelines*, 23 March 2010 (2010). The ALRC is advised that DEEWR is currently revising these Guidelines in light of the changes from 1 July 2011: Department of Education, Employment and Workplace Relations, *Correspondence* 26 July 2011.

<sup>110</sup> J Disney, A Buduls and P Grant, *Impacts of the new Job Seeker Compliance Framework: Report of the Independent Review* (2010), 13.

<sup>111</sup> Disability Employment Services, *Fact Sheet: DES: Flexible, Tailored Employment Assistance* (2011).

<sup>112</sup> See earlier in the chapter and Department of Education, Employment and Workplace Relations, *Disability Employment Services: Referral for Job Capacity Assessment Guidelines*, 23 March 2010 (2010).

reference to the DES. However, in some cases the ALRC requires further information about the structure and operation of the DES. In addition, the ALRC would be interested in specific stakeholder comments on the effectiveness of the JSA and DES systems in responding to the needs of job seekers with a disability and on what changes if any, could be made to the JSA or DES systems to assist job seekers with a disability who are experiencing family violence.

**Question 15–14** In what ways, if any, should the JSA or DES systems be reformed to assist job seekers with disability who are experiencing family violence?

### Job seekers in rural and remote areas

15.184 In 2010, the Independent Review commented that:

A number of employment service providers and welfare organisations have emphasised a range of special difficulties which can arise when trying to provide employment services for job seekers in remote locations.<sup>113</sup>

15.185 In addition, stakeholders in this Inquiry have highlighted that JSA and DES services in remote locations are less effective than non-remote services, due to the often limited labour markets, irregular servicing and the level of job seeker disadvantage.

15.186 In June 2011, the Government agreed to review the way services are delivered in remote locations and will commence consultations on possible new approaches for the delivery of remote services shortly.<sup>114</sup> On 16 August the Government released a Discussion Paper and are conducting consultation forums on the future of remote participation and employment services.

15.187 The ALRC welcomes stakeholder feedback on ways in which employment services delivered in rural and remote locations do, or could be appropriately reformed to ensure the safety of job seekers experiencing family violence.

**Question 15–15** In the context of the Australian Government review of new approaches for the delivery of rural and remote employment services, in what ways, if any, could any new approach incorporate measures to protect the safety of job seekers experiencing family violence?

113 J Disney, A Buduls and P Grant, *Impacts of the new Job Seeker Compliance Framework: Report of the Independent Review* (2010), 71.

114 Department of Education, Employment and Workplace Relations, *Job Services Australia Industry Information Paper* (2011).



## 16. Employment—The *Fair Work Act 2009* (Cth)

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### Summary

16.1 Chapters 16 and 17 focus on the *Fair Work Act 2009* (Cth). This chapter provides an overview of the *Fair Work Act* and examines possible options for reform to the Act, and the institutions created under the Act, to address the needs—and ultimately the safety—of employees experiencing family violence. The chapter examines the background, constitutional basis, coverage and objects of the *Fair Work Act*, as well as the role and processes of Fair Work Australia (FWA) and the Fair Work Ombudsman (FWO). The ALRC suggests ways in which those institutions or their processes do, or could, function to protect the safety of those experiencing family violence.

16.2 The key focus of the chapter however, is on the National Employment Standards (NES). The ALRC makes two key proposals—first, that family violence be included as a circumstance in which an employee should have a right to request flexible working arrangements and, secondly, that family violence-related leave be included as a minimum statutory entitlement under the NES.



## Overview of the *Fair Work Act 2009* (Cth)

16.3 The *Fair Work Act* is the key piece of Commonwealth legislation regulating employment and workplace relations. It provides for terms and conditions of employment and sets out the rights and responsibilities of employees, employers and employee organisations in relation to that employment.

16.4 The *Fair Work Act* establishes a safety net comprising: the NES, modern awards and national minimum wage orders; and a compliance and enforcement regime.<sup>1</sup> It also establishes an institutional framework for the administration of the system comprising FWA and the FWO. The Fair Work Divisions of the Federal Court and Federal Magistrates Court and, in some cases, state and territory courts, perform the judicial functions under the *Fair Work Act*.<sup>2</sup>

### Background

16.5 The *Fair Work Act* was introduced into the House of Representatives in November 2008 and was given Royal Assent on 7 April 2009. Most provisions of the Act took effect on 1 July 2009, replacing the *Workplace Relations Act 1996* (Cth).

16.6 The history surrounding the enactment of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), the Federal election campaign in 2007—including *Forward with Fairness*,<sup>3</sup> which preceded the *Fair Work Act*—and the introduction of the *Fair Work Act*, have been the subject of much debate and commentary.

16.7 The introduction of the *Fair Work Act* was the result of extensive consultation with stakeholders throughout the drafting process. There was also significant lobbying by various groups prior to its introduction, in particular unions and business groups, for changes to the proposed Act. The Government engaged in consultation with key non-government stakeholders, primarily through the:

- National Workplace Relations Consultative Council and sub-committees;<sup>4</sup>
- Business Advisory Group;<sup>5</sup>
- Workers Advisory Group;<sup>6</sup> and
- Small Business Working Group.<sup>7</sup>

1 Part 4–1 of *Fair Work Act 2009* (Cth) (Civil remedies).

2 Part 4–2 of *Ibid* (Jurisdiction and powers of courts).

3 See, eg, K Rudd and J Gillard, *Forward with Fairness: Policy Implementation Plan* (2007).

4 Established by the *National Workplace Relations Consultative Council Act 2002* (Cth). A tripartite body constituted by seven ACTU representatives and seven employer representatives which is chaired by the Deputy Prime Minister and meets every six months to consider workplace relations at a national level.

5 Established in 2008 and constituted by representatives from a range of industries and sectors to discuss the Fair Work Bill 2008 (Cth): Explanatory Memorandum, Fair Work Bill 2008 (Cth).

6 Established in 2008 and constituted by high-level union representatives to discuss the Fair Work Bill 2008 (Cth): Explanatory Memorandum, Fair Work Bill 2008 (Cth).

7 Established in 2008 and constituted by small businesses, including peak small business organisations to advise in relation to the development of the Fair Dismissal Code: Explanatory Memorandum, Fair Work Bill 2008 (Cth).

16.8 The Government also conducted a number of other specific consultations in relation to the NES.<sup>8</sup>

### Constitutional basis

16.9 Prior to 2006, the limitations inherent in the conciliation and arbitration power under s 51(xxxv) of the *Australian Constitution*, essentially led to a dual industrial relations system in Australia, in which the power to legislate with respect to industrial relations was one held by both Commonwealth and State governments.<sup>9</sup> According to Sir Anthony Mason, the limitations under s 51(xxxv) meant that there was a ‘dual (federal and state) system of arbitration and that it [had] unnecessary complexity and technicality’.<sup>10</sup>

16.10 However, the *Work Choices* legislation, and later the *Fair Work Act*, sought to rely on the corporations,<sup>11</sup> territory<sup>12</sup> and external affairs<sup>13</sup> powers under the *Australian Constitution* as well as a referral of power to the Commonwealth, in order to create, as far as possible, a new national industrial relations system.<sup>14</sup>

### Coverage

16.11 The *Fair Work Act* regulates ‘national system’ employers and employees.<sup>15</sup> From 1 January 2010, all states other than Western Australia referred their industrial relations powers to the Commonwealth, essentially creating a new national industrial relations system.<sup>16</sup> As a result, the national system covers the Commonwealth, Commonwealth authorities and constitutional corporations,<sup>17</sup> as well as all other:

- employment in Victoria, ACT and the Northern Territory;
- private sector employment in New South Wales, Queensland and South Australia; and

8 Ibid, vii, viii.

9 Section 51(xxxv) of the Constitution allows the Commonwealth to make laws with respect to ‘conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state’: *Australian Constitution* s 51(xxxv).

10 A Mason, ‘The Australian Constitution 1901–1988’ (1988) 62 *Australian Law Journal* 752, 759.

11 Section 51(xx) of the Constitution allows the Commonwealth to make laws with respect to foreign, trading or financial corporations: *Australian Constitution* s 51(xx).

12 Section 122 of the Constitution allows the Commonwealth to make laws with respect to territories: *Australian Constitution* s 122.

13 Section 51(xxix) of the Constitution allows the Commonwealth to make laws with respect to external affairs: *Australian Constitution* s 51(xxix).

14 Section 51(xxxvii) of the Constitution allows the Commonwealth to make laws with respect to ‘matters referred to the Parliament of the Commonwealth’ by any state: *Australian Constitution* s 51(xxxvii). The states challenged the constitutional validity of the *Work Choices* legislation, however it was upheld by the High Court in *New South Wales v Commonwealth* (2006) 219 CLR 1.

15 The definition of ‘national system employee’ and ‘national system employer’ are contained in ss 13 and 14 of the *Fair Work Act 2009* (Cth) and are extended by ss 30C, 30D, 30M and 30N to cover employers in referring states: *Fair Work Act 2009* (Cth) ss 13, 14, 30C, 30D, 30M and 30N.

16 In 1996 Victoria was the first state to refer key industrial relations powers to the Commonwealth.

17 Constitutional corporations are those to which the federal corporations power applies. The corporations power allows the Australian Parliament to make laws with respect to certain types of corporations: *Australian Constitution* s 51(xx).

- private sector and local government employment in Tasmania.

16.12 The system does not cover:

- state public sector or local government employment or employment by non-constitutional corporations in the private sector in Western Australia;
- state public sector and local government employment in NSW, Queensland and South Australia; or
- state public sector employment in Tasmania.

16.13 Employment that is not covered under the national industrial relations system remains regulated by the relevant state industrial relations systems. However, some entitlements under the *Fair Work Act* extend to non-national system employees.<sup>18</sup>

16.14 The *Fair Work Regulations 2009* (Cth) address matters of detail within the framework established by the *Fair Work Act*. For example, the Regulations provide additional definitions, explain the application of the Act and elaborate on certain terms and conditions of employment.

## Objects

16.15 Section 3 of the *Fair Work Act* contains the objects of the Act, as well as the manner in which the Act intends to achieve its specific objectives, which are to:

provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

- (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
- (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
- (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
- (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
- (e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and

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<sup>18</sup> For example, non-national system employees are entitled to unpaid parental leave, notice of termination, payment in lieu of notice and protection from unlawful termination of employment: *Fair Work Act 2009* (Cth) pts 6–3, 6–4.

- (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and
- (g) acknowledging the special circumstances of small and medium-sized businesses.<sup>19</sup>

16.16 The objects reflect, on the one hand, the need to provide a legislative framework which is flexible for businesses and promotes productivity and economic growth and, on the other, the desire to ensure the framework is fair and protects the rights of employees to a guaranteed safety net, flexible working arrangements and fairness and representation at work.

16.17 Of particular importance in the context of this Inquiry is the incorporation of both references to, and actual entitlements based on, the concept of social inclusion. For example, the extension of parental leave and the right to request flexible working arrangements appear to indicate a commitment

to provide an opportunity for federal employees to improve the balance between their work and family life and thus support the social inclusion policy objective.<sup>20</sup>

16.18 The need for a balanced legislative framework is the main challenge faced by the ALRC in considering what improvements could be made to the *Fair Work Act* to protect the safety of those experiencing family violence. In light of the need for balance, the ALRC also recognises the need, in the context of considering proposed amendments to the *Fair Work Act*, to protect the safety of those experiencing family violence while, at the same time, ensuring proposals are consistent with the objects of the Act.

### Review and amendment

16.19 In considering what improvements could be made to the *Fair Work Act* to protect employees experiencing family violence, the ALRC is of the view that some amendments to the *Fair Work Act* may be necessary.

16.20 However, in light of the relatively recent introduction of the *Fair Work Act* and the detailed consultation processes involved in enacting this legislation, in some areas the ALRC recognises there may be more appropriate processes and reviews into which the ALRC's discussion of the issues faced by employees experiencing family violence may be incorporated. This Inquiry therefore provides an opportunity to identify relevant areas for consideration and the responses of stakeholders.

16.21 For example, within two years of the full implementation of the *Fair Work Act*—by 1 January 2012—the Australian Government has committed to commencing a Post-Implementation Review (PIR) of the *Fair Work Act*. The PIR will report on the

<sup>19</sup> Ibid s 3.

<sup>20</sup> J Murray and R Owens, 'The Safety Net: Labour Standards in the New Era' in A Forsyth and A Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (2009) 40, 66.

regulatory impacts of the legislation and whether the Act is meeting its objectives.<sup>21</sup> The ALRC considers that many of the issues raised in this Discussion Paper could also be considered in the context of the PIR. In addition to the PIR, from 1 January 2012, there will be several reviews of modern awards, which will be discussed below.

## Fair Work Australia

16.22 Part 5–1 of the *Fair Work Act* establishes FWA as the national independent workplace relations tribunal. FWA is an independent statutory agency, with both administrative and judicial roles, carried out by separate independent divisions. It commenced operation on 1 July 2009, assuming the functions of the Australian Industrial Relations Commission (AIRC), the Australian Industrial Registry, the Australian Fair Pay Commission and some functions of the Workplace Authority.<sup>22</sup>

16.23 Under s 577 of the *Fair Work Act*, FWA is required to perform its functions and power in a manner which:

- (a) is fair and just; and
- (b) is quick, informal and avoids unnecessary technicalities; and
- (c) is open and transparent; and
- (d) promotes harmonious and cooperative workplace relations.

## Jurisdiction and appeals

16.24 FWA has its functions conferred by s 576 of the *Fair Work Act*, including the following subject areas of relevance to this Inquiry:

- the National Employment Standards (Part 2–2);
- modern awards (Part 2–3);
- enterprise agreements (Part 2–4);
- general protections (Part 3–1);
- unfair dismissal (Part 3–2);
- the extension of the National Employment Standards entitlements (Part 6–3); and
- unlawful termination protections (Part 6–4).

21 The Post-Implementation Review is consistent with the Government's objective of improving the effectiveness and efficiency of regulation. The PIR was referred to in Explanatory Memorandum, Fair Work Bill 2008 (Cth), 360; and Department of Education, Employment and Workplace Relations, *Agency Budget Statement 2011–2012* (2011) Outcome 5, 130.

22 There are three types of FWA members: Primary FWA members including the President, Deputy Presidents and Commissioners who are appointed until the age of 65 and are full-time; Minimum Wage Panel members who are appointed for a set period of not more than five years and are part-time; and Members of state industrial tribunals who hold also hold an appointment with FWA: Fair Work Australia, *Website* <<http://www.fwa.gov.au/index.cfm>> at 20 June 2011.

16.25 Decisions of FWA (other than decisions of the Full Bench or the Minimum Wage Panel) can be appealed upon application to FWA, provided the Full Bench has granted permission.<sup>23</sup>

### Options for reform

16.26 To examine what improvements could be made to the *Fair Work Act* to protect those experiencing family violence, any consideration of systemic reforms to the role or powers of FWA is beyond the scope of the Terms of Reference for this Inquiry. However, some of the changes to the *Fair Work Act* proposed by the ALRC in this chapter and Chapter 17 will necessarily have an impact on the work of FWA, for example by requiring FWA to:

- consider whether family violence clauses in enterprise agreements pass the ‘better-off-overall’ test;
- vary awards; and
- deal with disputes under the general protections provisions concerning any new family violence ground.

16.27 As a result, the ALRC is interested in stakeholder views on other ways FWA does, or could, function to protect the safety of those experiencing family violence. At this stage, two areas for reform have emerged in the course of the Inquiry—application fees, dealt with below, and data collection, dealt with in Chapter 14.

### Application fees

16.28 Waiver of application fees may be one area in which FWA processes could be improved in order to respond to the needs of employees experiencing family violence, and to increase the accessibility of the system. The *Fair Work Act* provides that the *Fair Work Regulations 2009* (Cth) may prescribe an application fee, a method for indexing the fee and the circumstances in which all or part of the fee may be waived or refunded.<sup>24</sup> Accordingly, the *Fair Work Regulations* set out matters relating to the payment of application fees.

16.29 In order to lodge an application with FWA under the unfair dismissal provisions, general protections or temporary absence provisions, applicants are currently required to pay an application fee of \$60.60.<sup>25</sup> However, the Regulations provide that an application fee may be waived if FWA is satisfied that the person making the application will suffer ‘serious hardship’ if they are required to pay the fee.<sup>26</sup>

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23 *Fair Work Act 2009* (Cth) pt 5–1, div 3.

24 See, eg, *Ibid* s 395.

25 *Fair Work Regulations 2009* (Cth) regs 3.02, 3.03, 3.07, 6.05. Note the fee is indexed according to a formula outlined in the Regulations: *Fair Work Regulations 2009* (Cth) regs 3.02(3), 3.03(3), 3.07(3), 6.05(3).

26 *Fair Work Regulations 2009* (Cth), regs 3.02(7), 3.03(7), 3.07(7), 6.05(7).

16.30 Some stakeholders commented, in response to the *Family Violence—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011) (Employment Law Issues Paper), that

the application fee may provide a disincentive to lodge for a woman already experiencing financial hardship after losing her income (even acknowledging capacity to have the fee waived).<sup>27</sup>

16.31 In its submission, the Australian Domestic Violence Clearinghouse (ADFVC) emphasised that:

The prescribed application fee may also serve as a disincentive to some of the most vulnerable victims of family violence seeking redress for unfair dismissal. Although FWA has the discretion to waive fees in the case of serious financial hardship, the Clearinghouse is aware of instances where community legal centres have been unable to obtain a fee waiver for welfare-dependent clients with no realisable assets. Accordingly, the Clearinghouse recommends that FWA reassess its internal guidelines on what circumstances constitute ‘serious hardship’ and ‘exceptional circumstances’ in the context of out of time applications to improve access to unfair dismissal remedies for victims of family violence.<sup>28</sup>

16.32 As a result, the ALRC would be interested comment about whether FWA application fees restrict people experiencing family violence from making applications and whether, in practice, there is difficulty in establishing ‘serious hardship’.

16.33 The FWA application ‘Waiver of Application Fee’ form currently requires general financial information and provides a space for ‘other comments’. The ALRC suggests there may be a need to provide a separate space for people to respond to a question about the impact of family violence on the applicant’s ability to pay the fee. For example, where family violence may affect access or control over his or her income or the partner’s income.

**Question 16–1** How do, or how could, Fair Work Australia’s role, functions or processes protect the safety of applicants experiencing family violence?

**Question 16–2** In making an application to Fair Work Australia, applicants are required to pay an application fee. Under the *Fair Work Regulations 2009* (Cth) an exception applies if an applicant can establish that he or she would suffer ‘serious hardship’ if required to pay the relevant fee. In practice, do people experiencing family violence face difficulty in establishing that they would suffer ‘serious hardship’? If so, how could this be addressed?

**Question 16–3** In applying for waiver of an application fee, referred to in Question 16–2, applicants must complete a ‘Waiver of Application Fee’ form. How could the form be amended to ensure issues of family violence affecting the ability to pay are brought to the attention of Fair Work Australia?

<sup>27</sup> National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011.

<sup>28</sup> ADFVC, *Submission CFV 26*, 11 April 2011.

## Fair Work Ombudsman

16.34 The FWO is an independent statutory office created by the *Fair Work Act*.<sup>29</sup> The primary aim of the FWO is to promote harmonious, productive and cooperative workplace relations as well as compliance, through education, assistance and advice. The FWO also plays a role in monitoring compliance, carrying out investigation, and in some cases, commencing proceedings or representing employees or outworkers in order to promote overall compliance.<sup>30</sup>

16.35 The key proposals that relate to the role of the FWO are overarching Proposal 14–1 in relation to privacy, and Proposals 17–1 and 17–3 in relation to developing guides to negotiating individual flexibility arrangements and family violence clauses in enterprise agreements. However, the ALRC is interested in comment about other ways, if any, the FWO’s role, function or processes could be amended to protect employees experiencing family violence.

**Question 16–4** In Proposals 14–1, 17–1 and 17–3 the role of the Fair Work Ombudsman is discussed. In what other ways, if any, could the Fair Work Ombudsman’s role, function or processes protect employees experiencing family violence?

## National Employment Standards

16.36 The National Employment Standards (NES) enshrine 10 minimum statutory requirements that apply to all national system employees.<sup>31</sup> Some NES have broader application, and as a result the NES will apply to most employees in Australia and any amendment would have a wide-ranging impact on entitlements.

16.37 The NES encompass areas such as working hours and arrangements, leave, and termination and redundancy pay. Relevantly for the purposes of this Inquiry, the NES set out key minimum conditions in relation to the right to request flexible working arrangements and the provision of, and access to, leave.

## Background

16.38 Prior to the introduction of the *Fair Work Act*, the statutory set of minimum conditions for all employees under the national industrial relationship system was included in the Australian Fair Pay and Conditions Standard (AFPCS).<sup>32</sup> Prior to 2005, Commonwealth law in Australia ‘had not previously sought to regulate employment conditions so directly outside the public sector’.<sup>33</sup>

29 *Fair Work Act 2009* (Cth) s 681.

30 *Ibid* s 682(1).

31 *Ibid*, ch 2, pt 2–2. Some NES have broader coverage: *Fair Work Act 2009* (Cth) pt 6–3.

32 Introduced by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) which amended the *Workplace Relations Act 1996* (Cth).

33 A Stewart and A Forsyth, ‘The Journey from Work Choices to Fair Work’ in, *Fair Work: The New Workplace Laws and the Work Choices Legacy* (2009) 1, 4.



16.39 The *Fair Work Act* replaced the AFPCS with the NES, incorporating new standards in relation to redundancy pay, community service leave and requests for flexible work arrangements. In many cases, the entitlements under the AFPCS and then NES arise from a long history of test cases before the AIRC. The NES came into effect from 1 January 2010.

16.40 Prior to the introduction of the NES, the Government published an Exposure Draft, in response to which it received 129 submissions from stakeholders as well as engaging in broader consultations. The proposed NES were subsequently released on 16 June 2008. The Act retains the substance of the Exposure Draft, with some amendments.

### **Interaction**

16.41 As outlined in the Explanatory Memorandum to the Fair Work Bill with respect to enterprise agreements and modern awards:

The NES is designed to ‘lock in’ to modern awards and enterprise agreements. It does this by including provisions that specifically allow awards and agreements to deal with specific issues. Modern awards and enterprise agreements can also ‘build on’ the NES by including terms that supplement, or are ancillary or incidental to, the NES. But, other than as expressly allowed, an award or agreement cannot be detrimental to an employee in any respect when compared to the NES.<sup>34</sup>

16.42 These rules governing the interaction of the NES, enterprise agreements and modern awards are outlined in s 55 of the *Fair Work Act*.

16.43 The NES are an absolute legislative safety net, which cannot be excluded or overridden by a less beneficial individual contract, enterprise agreement or modern award.<sup>35</sup> With respect to contracts, the Explanatory Memorandum to the Fair Work Bill explains that:

No specific rule is provided about the relationship between the NES and contracts of employment. That relationship is governed by well established principles (e.g., a term in the contract of employment that is less favourable than a statutory entitlement is not effective) and does not require additional legislative elaboration.<sup>36</sup>

### **The roles of the NES, government and business**

16.44 To provide a basis for the proposals in this chapter about access or amendment to the NES, the ALRC considers that it is appropriate to provide an outline of stakeholder perspectives—and ultimately to express a view—with respect to the role of the NES, as well the roles of government and business in addressing family violence as a workplace issue in a general sense.

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34 Explanatory Memorandum, Fair Work Bill 2008 (Cth), 233.

35 Enterprise agreements and modern awards are instruments which govern the terms and conditions of employment and are discussed in more detail below.

36 Explanatory Memorandum, Fair Work Bill 2008 (Cth), 207.

**The NES**

16.45 The NES play a fundamental role in providing minimum statutory entitlements as a safety net for all national system employees. The Explanatory Memorandum to the Fair Work Bill states that the Government's key objective in introducing the NES was to:

address public concern about the adequacy of the safety net under the [existing] workplace relations system by providing a safety net which is fair for employers and employees and supports productive workplaces.<sup>37</sup>

16.46 Accordingly, in order to remain consistent with the regulatory purpose of the NES, any proposed amendment to the NES must be fair to both employees and employers and support a productive workplace.

**Submissions and consultations**

16.47 In the Employment Law Issues Paper, the ALRC focused on access to entitlements under the NES. This prompted comments from stakeholders about the role and purpose of the NES. It is consistent with the approach taken throughout this Inquiry to consider the role and purpose of the NES, particularly in light of strong stakeholder views on this issue. It also provides background to other proposals made in relation to the NES and the employment law system more broadly, particularly given the safety net function of the NES.

16.48 The ALRC has heard differing views throughout this Inquiry as to the role of minimum statutory entitlements such as the NES in addressing family violence through the employment law system. For example, the Australian Domestic and Family Violence Clearinghouse (ADFVC) emphasised that minimum statutory entitlements are 'fundamental to achieving widespread change to address the impact of family violence in the workplace'.<sup>38</sup> Stakeholders also highlighted the role of the NES in avoiding fragmentation and ensuring consistency of entitlement and in employer decision-making.<sup>39</sup>

16.49 Stakeholders have also emphasised that policy or mechanisms other than minimum statutory entitlements alone are inadequate. For example, the Australian Human Rights Commission (AHRC) submitted that *Fair Work Act* amendments, to include domestic violence leave as an NES,

are preferable to this issue being left for parties to negotiate in collective workplace agreements. History has shown that clauses which primarily benefit women are slow to become common bargaining claims and be negotiated into workplace agreements.<sup>40</sup>

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37 Ibid, 25.

38 ADFVC, *Submission CFV 26*, 11 April 2011.

39 See, eg, Ibid; Women's Health Victoria, *Submission CFV 11*, 5 April 2011.

40 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011.

16.50 The AHRC cited the example of the provision of paid parental leave in support of its argument:

As far back as 1992, the ACTU was urging unions to negotiate with employers for paid parental leave. By 2007–09, paid parental leave was only included in 12.6 per cent of collective workplace agreements although approximately half of all employees were eligible for paid parental leave through an industrial instrument. The low incidence of paid parental leave in collective agreements shows that these provisions were either a low bargaining priority for unions and were not being negotiated, or were being negotiated and refused by employers.<sup>41</sup>

16.51 Other stakeholders have expressed concern about the use of the NES in this area, emphasising that ‘Industrial Tribunals and Parliaments have a long history of creating a limited number of minimum employment standards of general application’, and that there ‘must be recognition that one-size does not fit all’.<sup>42</sup>

### ***Government and business***

16.52 In discussing proposals that would potentially impose an additional financial burden on employers, the ALRC considers that it is important to recognise the history of debate about the particular roles of government and business in achieving public policy objectives and outcomes. As noted by the AHRC in their submission referred to above, this debate has most recently been raised in relation to the introduction of paid parental leave.

16.53 Some of the key objects underlying the introduction of paid parental leave were the promotion of labour market engagement and attachment, the promotion of work/life balance and gender equity.<sup>43</sup>

### ***Submissions and consultations***

16.54 In its submission to this Inquiry, the Australian Chamber of Commerce and Industry (ACCI) stated that ‘government should not expect business to carry the weight of their responsibilities’, but can assist individuals in other ways.<sup>44</sup>

16.55 Conversely, the Redfern Legal Centre expressed the view that minimum statutory entitlements, such as paid family violence leave, may highlight and underscore acknowledgement by government that ‘dealing with family violence is a community rather than just an individual responsibility’.<sup>45</sup>

### ***ALRC’s views***

16.56 The ALRC acknowledges that amendment to the NES would involve a significant change to the *Fair Work Act* framework, but considers that such changes are necessary to protect victims of family violence in an employment context and ultimately appropriately balance the needs of employees and employers.

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41 Ibid.

42 ACCI, *Submission CFV 19*, 8 April 2011.

43 J Murray and R Owens, ‘The Safety Net: Labour Standards in the New Era’ in A Forsyth and A Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (2009) 40, 48.

44 ACCI, *Submission CFV 19*, 8 April 2011.

45 Redfern Legal Centre, *Submission CFV 15*, 5 April 2011.

16.57 The ALRC considers that 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. Statutory entitlements also have a normative effect on the community.

16.58 The ALRC's view is that both government and business have a role to play in addressing family violence as a workplace issue. As a result, there is a need to balance the needs of employees with the economic and practical realities faced by businesses.

16.59 The stated objects of the *Fair Work Act*, the inclusion of the right to request flexible working arrangements, and the entitlement to a variety of forms of leave under the NES, all provide explicit recognition of the need for employees to balance their work with their personal lives and commitments, and the role of employers in allowing them to do so.

16.60 As outlined in detail in earlier chapters, family violence has enormous economic costs and may affect the productivity of individual employees and workplaces. While some of the ALRC's proposals may impose some additional cost on employers, in addressing family violence, they may also go some way to enhancing productivity in workplaces.

16.61 Given the prevalence and impact of family violence on employees, workplaces and productivity, the ALRC considers that the introduction of a statutory minimum entitlement to request flexible working arrangements and leave in circumstances related to family violence is necessary. Accordingly, the ALRC makes a range of proposals in relation to these below.

### **Flexible working arrangements**

16.62 Under the NES, an employee who satisfies the eligibility requirements—who is a parent or otherwise has responsibility for a child who is under school age, or who is under 18 and has a disability—may request that his or her employer change the employee's working arrangements to assist with the care of the child.<sup>46</sup>

16.63 In order to be eligible to request flexible work arrangements, the employee must have 12 months continuous service, or for a casual employee be a long-term casual employee with a reasonable expectation of continuing employment on a regular and systemic basis.<sup>47</sup>

16.64 An employer must respond to any request by an employee in writing within 21 days and, if refusing the request, must give reasons for doing so.<sup>48</sup>

16.65 Section 65(5) of the *Fair Work Act* provides that such a request may only be refused on 'reasonable business grounds'.<sup>49</sup> The Act does not identify what may, or

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46 *Fair Work Act 2009* (Cth) s 65(1), (2). The Note to s 65(1) states that examples of changes in working arrangements include changes in hours of work, patterns of work and location of work.

47 *Ibid* s 65.

48 *Ibid* ss 65(4), 65(5).

49 *Ibid* s 65(5).

may not, comprise ‘reasonable business grounds’. However, the Explanatory Memorandum to the Fair Work Bill 2008 (Cth) states:

The reasonableness of the grounds is to be assessed in the circumstances that apply when the request is made. Reasonable business grounds may include, for example:

- The effect on the workplace and the employer’s business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity and customer service;
- The inability to organise work among existing staff; or
- The inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee’s request.

It is envisaged that FWA will provide guidance on this issue.<sup>50</sup>

16.66 There has been no case law considering the interpretation of ‘reasonable business grounds’ since the introduction of the provision. However, there has been significant commentary regarding the meaning of the phrase, much of it critical of the lack of legislative guidance as to what might constitute such grounds.<sup>51</sup>

16.67 In the *Family Provisions Test Case*, decided prior to the introduction of the provision, the AIRC formulated an entitlement similar to the right to request flexible working arrangements.<sup>52</sup> The AIRC suggested that, where refusal could only be on ‘reasonable grounds related to the effect on the workplace or the employer’s business’ such grounds may include: cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service’.<sup>53</sup>

16.68 In the Employment Law Issues Paper, the ALRC considered whether experiencing family violence should be included as a basis upon which an employee should be entitled to request flexible working arrangements under the NES.<sup>54</sup> The ALRC noted that some overseas jurisdictions have enacted legislation that entitles victims of family violence to reduce or reorganise their working hours, change workplaces and make other flexible working arrangements.<sup>55</sup>

16.69 In the context of family violence, a victim of family violence may need to access flexible working arrangements in the form of, for example, changes to working times and patterns, changes to specific duties, redeployment or relocation. A change to

50 Explanatory Memorandum, Fair Work Bill 2008 (Cth), xii.

51 See, eg, J Wells, ‘Flexible Work in 2010: The impact of the Fair Work Act 2009 (Cth) on Employer Control of, and Employee Access to, Flexible Working Hours’ (Paper presented at Our Work, Our Lives National Conference on Women and Industrial Relations, Darwin, 12 August 2010) 5–7. See also: M Baird and W Williamson, ‘Women, Work and Industrial Relations in 2008’ (2008) 51 *Journal of Industrial Relations* 338, 340.

52 *Family Provisions Test Case* (2005) 143 IR 245. The decision was not incorporated into the AFPCS under *Work Choices*.

53 *Ibid*, 333.

54 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011), Question 8.

55 See, eg, *Employment Rights Act 1996* (UK) pt 8A; *Employment Relations Act 2000* (NZ) pt 6AA; *Organic Act on Integrated Protection Measures Against Gender Violence 2004* (Spain) art 21.

arrangements may be required to ensure the safety of the victim, for example through changes to working time or location or work contact details; to allow the victim to attend appointments or make arrangements outside of work; or to care for children also affected by family violence.

16.70 There are however, a number of concerns in relation to the current structure and operation of s 65 of the *Fair Work Act*. The concerns relate to eligibility requirements, the procedural nature of the provision and the limited availability of enforcement mechanisms. For example, women who have experienced family violence generally have a more disrupted work history,<sup>56</sup> while it may make it more difficult to satisfy eligibility requirements. Further, in its current form, the provision is procedural rather than substantive. It provides that an employee is entitled to request flexible working arrangements, receive a response and, if that request is refused, be provided with a written statement of reasons.<sup>57</sup>

16.71 The Discussion Paper released with the NES Exposure Draft in March 2008 explained the rationale behind the creation of a procedural rather than substantive provision. It indicated that a similar provision in the UK had demonstrated that:

Simply encouraging employers and employees to discuss options for flexible working arrangements has been very successful in promoting arrangements that work for both employers and employees.<sup>58</sup>

16.72 There are also limited enforcement mechanisms available where an employee considers a request has been unreasonably refused. Section 44 of the *Fair Work Act* provides that an order cannot be made under the civil remedies provisions in relation to contraventions of s 65(5). As a result, civil remedies for breaches of the flexible working arrangement NES do not apply if an employer refuses a request, other than on reasonable business grounds. In addition, s 739 of the *Fair Work Act* provides that FWA must not deal with a dispute about whether an employer had reasonable business grounds to decline a request for flexible working arrangements unless the clause is replicated in an enterprise agreement.<sup>59</sup>

### ***Submissions and consultations***

16.73 In the Employment Law Issues Paper, the ALRC invited stakeholder comment on whether experiencing family violence should be included as a basis upon which an employee should be entitled to request flexible working arrangements under the NES.<sup>60</sup>

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56 S Franzway, C Zufferey and D Chung, 'Domestic Violence and Women's Employment' (Paper presented at Our Work, Our Lives National Conference on Women and Industrial Relations, Adelaide, 21 September 2007); M Costello, D Chung and E Carson, 'Exploring Pathways Out of Poverty: Making Connections Between Domestic Violence and Employment Practices' (2005) 40 *Australian Journal of Social Issues* 253, 256.

57 *Fair Work Act 2009* (Cth) s 65.

58 Department of Education, Employment and Workplace Relations, *National Employment Standards Exposure Draft: Discussion Paper* (2008), 61.

59 *Fair Work Act 2009* (Cth) s 739.

60 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011), Question 8.

16.74 Overall, stakeholders who considered this issue strongly supported the inclusion of family violence as a ground upon which an employee should be entitled to request flexible working arrangements.<sup>61</sup>

16.75 Stakeholders expressed the view that the provision of flexible working arrangements would ‘enhance the participation and job security’ of employees experiencing family violence, while allowing employees to deal with issues arising from family violence which may impact on their ability to attend work, or work safely and productively.<sup>62</sup>

16.76 Whilst recognising that, in many workplaces, ‘employers and employees work through and deal with many challenging issues affecting workers in their professional and personal lives’,<sup>63</sup> including the impact of family violence, several submissions expressed the view that existing legislative provisions are insufficient, and that there is a need for a ‘more secure entitlement to access flexible working arrangements’.<sup>64</sup>

16.77 The educative and normative effect of the inclusion of family violence as a basis for requesting flexible working arrangements was noted by the Redfern Legal Centre.<sup>65</sup>

16.78 Submissions highlighted that the amendment would avoid, for instance, the need for victims of family violence to seek casual employment to achieve flexibility, or to rely solely on the ‘goodwill’ of their particular employer to access flexible working arrangements,<sup>66</sup> particularly as victims of family violence are often casual employees, and with little power to negotiate such changes.<sup>67</sup>

16.79 The Queensland Law Society also noted that this amendment may ‘enhance the capacity of the employer to support the employee and to respond appropriately’.<sup>68</sup>

16.80 However, two submissions, from Women’s Health Victoria and ACCI did not support amendment to s 65. Women’s Health Victoria suggested that s 65 ‘may not be the best place to promote flexible leave arrangements for victims of family violence’, noting it would require a shift in the focus of the provision. The submissions

61 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Women’s Legal Services NSW, *Submission CFV 28*, 11 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; Queensland Law Society, *Submission CFV 21*, 6 April 2011; National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 17*, 5 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011; Northern Rivers Community Legal Centre, *Submission CFV 08*, 28 March 2011.

62 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011.

63 ACCI, *Submission CFV 19*, 8 April 2011.

64 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

65 Redfern Legal Centre, *Submission CFV 15*, 5 April 2011.

66 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011. See also R Braaf and I Meyering, *Seeking Security: Promoting Women’s Economic Wellbeing Following Domestic Violence* (2011), 90.

67 National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011.

68 Queensland Law Society, *Submission CFV 21*, 6 April 2011.

highlighted that it is a relatively new provision and suggested there is a need to evaluate the current effectiveness of the provision prior to any amendment.<sup>69</sup> Women's Health Victoria did note, however, that if the provision were to be amended to include family violence,

it would send a strong message to employers and employees that family violence is a serious and widespread issue that impacts on the workplace. This could begin conversations about family violence within workplaces and would go some way to challenging violence supportive attitudes and behaviours in our community.<sup>70</sup>

16.81 In its submission, ACCI indicated that it would not support any changes to the *Fair Work Act* at this stage, but noted that 'this is not to say that ACCI believes that all of the laws currently operate as intended and will not require amendment in the future'.<sup>71</sup> In particular, ACCI expressed the view that:

Many employers already provide important support in the form of employment opportunities and income, access to confidential advice and counselling, time off for personal circumstances in line with employment legislation or on a needs basis.<sup>72</sup>

16.82 Instead, ACCI suggested that individual flexibility arrangements under enterprise agreements may be the most appropriate mechanism to address the needs of employees experiencing family violence.<sup>73</sup>

#### **Other issues**

16.83 A range of other issues, such as: the appropriate definition of family violence, verifying entitlement, and the need for confidentiality in relation to any information about family violence disclosed to employers are dealt with in Chapters 3 and 14.

16.84 Several stakeholders emphasised the importance of flexible working arrangements in ensuring employees with children are able to care for their children, particularly where they have been affected by family violence. For example, the National Network of Working Women's Centres (NNWWC) emphasised that family violence 'impacts on the whole family group or those living in the immediate domestic environment and that children may also have special needs at this time'.<sup>74</sup> On this basis, the NNWWC supported the amendment, as well as the need to ensure that the existing provision could be used by employees to care for children who are affected by family violence.

16.85 The Australian Council of Trade Unions (ACTU) argued that eligibility for the right to request flexible working arrangements should be extended 'to all employees who care for or support (or are expected to care for or support) a person who reasonably relies on the employee for care or support'. The ACTU suggested that this wording would

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69 Women's Health Victoria, *Submission CFV 11*, 5 April 2011.

70 Ibid.

71 ACCI, *Submission CFV 19*, 8 April 2011.

72 Ibid.

73 Ibid.

74 National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011.



accommodate employees who are victims of domestic violence with dependants, as well as employees on whom a person suffering domestic violence reasonably relies on for care or support.<sup>75</sup>

16.86 Finally, Women's Health Victoria emphasised the need to accompany any amendment with the provision of materials for employers and employees

explaining the reason for its inclusion, legal definitions of what constitutes family violence, situations in which the clause might be enlivened, and a list of family violence support services for victims.<sup>76</sup>

### *Limitations of current provision*

16.87 In the Employment Law Issues Paper, the ALRC outlined a number of concerns in relation to the current structure and operation of s 65. Stakeholders reiterated the concerns identified by the ALRC in relation to the procedural nature of the provision and the lack of appeal mechanisms. In addition, concerns were expressed with respect to eligibility and the timeframe within which an employer must respond to the request for flexible working arrangements.

16.88 With respect to the procedural nature of the provision, the NNWWC emphasised that 'there are limitations with only having a right to request and not an entrenched clear entitlement'.<sup>77</sup>

16.89 Two others expressed particular concern about the lack of enforcement mechanism or grievance procedure where an employee considers a request has been unreasonably refused.<sup>78</sup> In particular, the AHRC suggested that the 'same rights of redress applicable to the other nine NES be extended to the unreasonable refusal of a request for flexible work arrangements'.<sup>79</sup>

16.90 Similarly, the ACTU submitted that denial of appeal rights to FWA, except where specifically provided for in an enterprise agreement, raised issues of justice, stating that 'it is wholly inappropriate that such a basic right to procedural fairness be left to the vagaries of the bargaining framework'.<sup>80</sup> The ACTU also submitted that preventative measures should be taken to ensure employers cannot make unreasonable refusals in response to requests for flexible working arrangements. The ACTU suggested the provision should outline an employer's obligations to have 'properly considered' and 'reasonably endeavoured to accommodate the request'.<sup>81</sup> The ACTU proposed the inclusion of wording from s 14A of the *Equal Opportunity Act 1995* (Vic).<sup>82</sup>

<sup>75</sup> Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

<sup>76</sup> Women's Health Victoria, *Submission CFV 11*, 5 April 2011.

<sup>77</sup> National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011.

<sup>78</sup> Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

<sup>79</sup> Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011.

<sup>80</sup> Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

<sup>81</sup> *Ibid.*

<sup>82</sup> Section 14A of the *Equal Opportunity Act 1995* (Vic) provides that employer must demonstrate that they have considered all the relevant circumstances and provides a non-exhaustive list of the types of circumstances, including in relation to the employee's personal circumstances, the nature and size of the workplace and the consequences of making or not making an accommodation.

16.91 In addition to the concerns identified by the ALRC in the Employment Law Issues Paper, stakeholders such as the AHRC highlighted that:

Women constitute the majority of those experiencing domestic violence and many have broken labour market participation ... It may therefore be unrealistic to expect an employee in danger to fulfil the eligibility criteria before being formally able to request flexible working arrangements. The ALRC may therefore wish to consider whether eligibility requirements which restrict the categories of employees who can make a request for flexible working arrangements should be removed.<sup>83</sup>

16.92 Other stakeholders, such as the ADFVC, Domestic Violence Victoria and the Domestic Violence Resource Centre Victoria (DV Vic and DVRC Vic) and Women's Legal Services NSW (Women's Legal NSW), suggested that there be no qualifying period for eligibility to request flexible working arrangements. The ADFVC, in particular, argued that it is 'necessary to overcome the disadvantage faced by victims of family violence who are more likely to have disrupted employment as a result of the violence'.<sup>84</sup>

16.93 The NNWWC submitted that if family violence were included as a ground upon which an employee could request flexible working arrangements, 'the timeframes for making such a request would also have to be significantly less than those in the current s 65 (21 days) because of the unpredictable nature of domestic violence,' suggesting that a seven day period would be more appropriate.<sup>85</sup> The NNWWC also suggested that if a request is declined, the employee should be able to access alternative options, including leave.

#### ***ALRC's views***

16.94 In many cases, employers and employees will be able to negotiate flexible working arrangements to suit the needs of both parties in the particular employment context. Under existing arrangements, while employees are able to request flexible working arrangements outside the scope of the NES, they are not entitled to a response or reasons under the NES.

16.95 When granted, flexible working arrangements may assist employees to deal with issues arising as a result of family violence that may have an impact on their ability to attend work, or work safely and productively. Arrangements that may assist victims of family violence include: a change in shifts or working hours; changes to work contact details; and changes to work location—all of which are likely to contribute to the safety of the employee.

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83 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011.

84 ADFVC, *Submission CFV 26*, 11 April 2011. See also: Women's Legal Services NSW, *Submission CFV 28*, 11 April 2011 and Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011.

85 National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011.

16.96 While many of the provisions considered in this Discussion Paper are relatively new, and are the product of lengthy consultation processes, the ALRC considers that many are inadequate to deal with the particular impact of family violence on employees and workplaces, such as the flexible working arrangements provision.

16.97 Accordingly, the ALRC considers that the amendment of s 65 of the *Fair Work Act*, to provide employees experiencing family violence with the *right* to request flexible working arrangements, is a significant, but necessary, amendment.

16.98 In addition, the ALRC considers that the evaluation of the effectiveness of the current provision is necessary and could usefully form part of the Post-Implementation Review of the *Fair Work Act*. As a result, the ALRC does not intend to make any proposals in relation to concerns expressed about the operation of the current provision insofar as they reflect systemic issues—for example in relation to the procedural nature of the provision, or the limited appeal mechanisms, or general eligibility for access to flexible working arrangements.

16.99 However, in proposing that family violence be included as a ground upon which an employee should be entitled to request flexible working arrangements, there are two aspects of the current provision that are likely to be particularly restrictive for victims of family violence—eligibility and the employer response period. The ALRC therefore proposes that s 65 of the *Fair Work Act* be amended to provide that an employee who is experiencing family violence, or who is providing care or support to a member of the employee’s immediate family or household 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.

16.100 This formulation would provide employees with the right to request flexible working arrangements in order to deal with their own family violence-related issues, or to provide care or support to an immediate family member experiencing family violence. The ALRC considers that this would address the concern expressed in relation to employees who have children affected by family violence, but who are not eligible to request changes under s 65 as their children are over the school age.

16.101 The ALRC considers that the new provision should mirror the existing requirements in s 65, with two exceptions. First, the ALRC considers that, for the purposes of the new ground, there should be no eligibility requirements such as those required under s 65(2) of the *Fair Work Act*. The ALRC has formed this view in light of evidence about the often disrupted work history of victims of family violence that may preclude victims from requesting flexible working arrangements despite the need to do so. As the provision is procedural rather than substantive, providing employees with access to the right to request will not, in the ALRC’s view, impose a substantial additional burden on employers, as employers are still able to refuse requests on reasonable business grounds.

16.102 Secondly, the ALRC considers that the new provision should mirror s 65(4), except that it should provide that an employer must give the employee a written response to the request within *seven* days, stating whether the employer grants or refuses the request. In light of the unpredictable nature of family violence, employees

requesting flexible working arrangements are likely to require an immediate change to working arrangements, particularly where they are necessary to ensure the employee's safety. The ALRC would be interested in stakeholder views of the appropriateness of the proposed seven day response period.

16.103 As outlined above, several stakeholders made submissions in relation to the expansion of eligibility to the right to request flexible working arrangements. For example, the ACTU suggested an expansion to 'all employees who care for or support (or are expected to care for or support) a person who reasonably relies on the employee for care or support'.<sup>86</sup> While noting these concerns, the ALRC considers that expansion of eligibility to the right to request flexible working arrangements in the existing provision, where not directly related to family violence, extends beyond the Terms of Reference for this Inquiry.

**Proposal 16–1** Section 65 of the *Fair Work Act 2009* (Cth) should be amended to provide that an employee who is experiencing family violence, or who is providing care or support to a member of the employee's immediate family or household 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.

This additional ground should:

- (a) remove the requirement that an employee be employed for 12 months, or be a long-term casual and have a reasonable expectation of continuing employment on a regular and systemic basis, prior to making a request for flexible working arrangements; and
- (b) provide that the employer must give the employee a written response to the request within seven days, stating whether the employer grants or refuses the request.

### Family violence-related leave

16.104 Under the NES, employees are entitled to a range of types of paid and unpaid leave, including: parental leave; annual leave; personal/carer's leave; compassionate leave; community service leave; and long service leave.<sup>87</sup>

16.105 An employee who is a victim of family violence may use a range of combinations of leave entitlements in order to take time off work for purposes related to family violence. For example, an employee may access accrued annual or personal/carer's leave and, in some instances, discretionary miscellaneous leave, where he or she needs time, for example, to apply for a protection order or attend court proceedings, relocate, care for children or receive medical attention. However, this may

<sup>86</sup> Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

<sup>87</sup> *Fair Work Act 2009* (Cth) ch 2, pt 2–2, div 5–9.

mean that victims of family violence exhaust their leave entitlements, particularly where the family violence occurs over a prolonged period of time.

16.106 Section 107 of the *Fair Work Act* includes notice and evidence requirements in order to access leave under the NES:

- An employee must give his or her employer notice of the taking of leave as soon as practicable (which may be a time after the leave has started) and advise the employer of the expected period of the leave.<sup>88</sup>
- To access personal/carer's leave, an employee must, if required, give their employer, evidence that would satisfy a reasonable person that the leave is taken for the specified reason or permissible occasion.<sup>89</sup>

16.107 Contravention of the leave-related NES (other than unpaid parental leave) is prohibited under s 44 of the *Fair Work Act*, which is a civil remedy provision. Currently, if an employer breaches the NES, an employee, employee organisation or an inspector may make an application for orders in relation to that contravention and the employer may be liable to pay a civil penalty of a maximum of 60 penalty units for each contravention.<sup>90</sup>

16.108 As a preliminary matter, the considerations outlined earlier in this chapter with respect to the history, nature and role of the NES; the need to consider and balance the role played by government and business; and the introduction of entitlements on the basis of family violence (as opposed to some other circumstance or characteristic) discussed in Chapter 14, also apply in the context of discussions about family violence leave.

### ***Issues Paper***

16.109 In the Employment Law Issues Paper, the ALRC considered whether employees should be entitled to some form of family violence-related leave. Provision for such leave was discussed through possible amendments to the NES, inclusion in family violence clauses as part of enterprise agreements, and/or in the context of modern awards.<sup>91</sup>

16.110 With respect to the NES, the ALRC asked whether the NES should be amended to provide for an entitlement to family violence leave. In addition, the ALRC asked stakeholders to make submissions on the circumstances under which an employee should be entitled to take such leave, the amount of days an employee should be entitled to take, and whether such leave should be paid or unpaid.

16.111 The ALRC noted that a number of overseas jurisdictions have enacted legislation which entitles victims of family violence to take leave from work, including

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88 Ibid s 107.

89 Ibid s 107(3).

90 Ibid, pt 4–1, div 2.

91 Enterprise agreements and modern awards are discussed in Ch 17.

specifically identified family violence leave, or requirements to grant ‘reasonable and necessary leave’ for purposes related to experiencing family violence.<sup>92</sup>

16.112 The ALRC also commented that as at March 2011, when the Employment Law Issues Paper was released, entitlements to additional leave in Australia had been introduced under family violence clauses included in some enterprise agreements and through state awards. The number of enterprise agreements and awards including such provisions has since increased.<sup>93</sup>

### **Submissions and consultations**

16.113 Submissions received in relation to this issue were overwhelmingly supportive of the introduction of a minimum statutory entitlement to family violence leave.<sup>94</sup> The exception to this was the submission received from ACCI which is discussed below.

16.114 Many stakeholders expressed their support for family violence leave by reference to the need for a minimum statutory entitlement. The AHRC emphasised that:

Existing leave provisions in the FWA may not be adequate for employees affected by domestic violence, as there are no provisions which specifically aim to assist such employees ... The Commission notes the inadequacy of the leave provisions contained in the FWA and supports further consideration of the FWA being amended to specifically provide paid domestic/family violence leave.<sup>95</sup>

16.115 In its submission, the Redfern Legal Centre highlighted the need for family violence leave by way of a case study.<sup>96</sup>

92 For example, entitlements in some US jurisdictions range from three days to 12 weeks, or ‘reasonable and necessary’ leave: *Victims Economic Security and Safety Act* 820 Illinois Compiled Statutes 180 (US) § 20; *Maine Revised Statutes* 26 § 850 (US); *Revised Code of Washington* 49 § 4976 (US); *Hawaii Revised Statutes* 21 § 378–72 (US).

93 See, eg, Australian Domestic and Family Violence Clearinghouse, *Domestic Violence and Workplace Rights and Entitlements Project* <[www.austdvclearinghouse.unsw.edu.au/workplace\\_whats\\_new.htm](http://www.austdvclearinghouse.unsw.edu.au/workplace_whats_new.htm)> at 28 July 2011.

94 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Women’s Legal Services NSW, *Submission CFV 28*, 11 April 2011; Confidential, *Submission CFV 27*, 11 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; Queensland Law Society, *Submission CFV 21*, 6 April 2011; National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 17*, 5 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Women’s Health Victoria, *Submission CFV 11*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011; Northern Rivers Community Legal Centre, *Submission CFV 08*, 28 March 2011.

95 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011.

96 Redfern Legal Centre, *Submission CFV 15*, 5 April 2011.

### Case Study

Jenny is a very experienced accountant whose employment with a large commercial firm was initially undermined when her abusive partner, Paul, began phoning her workplace to speak to her work colleagues about his failing relationship with Jenny. When Jenny was badly assaulted by Paul in front of her two children, she and the children moved into her mother's small unit. Police charged Paul with assault and over the following months, Jenny was required on numerous occasions to take time off work to attend both the local court for the assault charges and related Apprehended Violence Order and the Family Court for parenting orders. Jenny also needed to take time off work to have maxillary surgery as a result of the injuries she sustained in the assault. During the court process, Jenny described herself as desperate to attend counselling with her children, but was afraid to ask for any more time off work. When Jenny did request a day's leave to organise alternative accommodation, she was called to a formal meeting at her workplace and was accused by colleagues of not pulling her weight. Jenny resigned and now has casual employment as a bookkeeper, and as a result has not been able to afford to move out of her mother's small unit.

16.116 Amongst those submissions that supported the introduction of family violence leave there was some variation of views with respect to the way any such leave should operate. Submissions reflected broad consensus around the need for leave to be:

- a minimum statutory entitlement under the NES;<sup>97</sup>
- introduced in the context of a range of initiatives aimed at addressing family violence in the workplace;<sup>98</sup>
- accessible in a range of circumstances arising from family violence, including for example, to: attend appointments with support services; receive medical attention; receive legal advice or attend court; arrange or undertake child care; arrange accommodation or relocate; or attend to other immediate safety issues;<sup>99</sup>

97 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Women's Legal Services NSW, *Submission CFV 28*, 11 April 2011; Confidential, *Submission CFV 27*, 11 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; Queensland Law Society, *Submission CFV 21*, 6 April 2011; National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 17*, 5 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Women's Health Victoria, *Submission CFV 11*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011; Northern Rivers Community Legal Centre, *Submission CFV 08*, 28 March 2011.

98 Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 17*, 5 April 2011; Women's Health Victoria, *Submission CFV 11*, 5 April 2011.

99 Women's Legal Services NSW, *Submission CFV 28*, 11 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; Queensland Law Society, *Submission CFV 21*, 6 April 2011; Women's Health Victoria, *Submission CFV 11*, 5 April 2011.

- paid;<sup>100</sup>
- accessible as consecutive or single days, or as a fraction of a day;<sup>101</sup>
- not subject to a minimum employment or qualifying period, or need to be accrued in advance;<sup>102</sup> and
- subject to verification of entitlement.<sup>103</sup>

16.117 However, there were two issues in relation to which stakeholders who supported the introduction in a general sense differed to a varying degree—whether family violence leave should be an additional category or form part of personal/carer’s leave, and the appropriate period of leave.

16.118 Broadly, issues arising in relation to support for minimum statutory entitlements related to employee experiences of family violence and the need for initiatives to be introduced in the context of a national campaign have been discussed above and in Chapter 14. Issues raised in relation to the privacy and confidentiality of any information disclosed to employers are also discussed in Chapter 14.

#### ***Minimum statutory entitlement to leave***

16.119 As outlined above, stakeholders expressed strong views about the need for a minimum statutory entitlement to family violence leave in order to provide a universal approach to, and understanding of, family violence as a workplace issue.<sup>104</sup>

100 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Women’s Legal Services NSW, *Submission CFV 28*, 11 April 2011; Confidential, *Submission CFV 27*, 11 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Women’s Health Victoria, *Submission CFV 11*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

101 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

102 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Women’s Legal Services NSW, *Submission CFV 28*, 11 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011.

103 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; Queensland Law Society, *Submission CFV 21*, 6 April 2011; Office of the Australian Information Commissioner, *Submission CFV 18*, 6 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Women’s Health Victoria, *Submission CFV 11*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

104 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Women’s Legal Services NSW, *Submission CFV 28*, 11 April 2011; Confidential, *Submission CFV 27*, 11 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; Queensland Law Society, *Submission CFV 21*, 6 April 2011; National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 17*, 5 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Women’s Health Victoria, *Submission CFV 11*, 5 April 2011; Australian Services



16.120 In addition to general arguments about the need for minimum statutory entitlements outlined earlier in the chapter, the ADFVC argued:

The inclusion of a statutory entitlement to family violence leave in the NES is necessary to demonstrate a clear commitment to reducing the economic impact of family violence and supporting victims of family violence to remain in the labour market ... This type of leave is too important to be left to develop through the bargaining process alone, as demonstrated through the example of paid parental leave: despite several decades of bargaining, success was incremental at best and ultimately, real change has only eventuated through the recently-adopted federal legislative Paid Parental Leave scheme.<sup>105</sup>

16.121 A joint submission from DV Vic and DVRC Vic strongly supported the inclusion, stating:

Adoption in the NES of such a universal entitlement would send a clear message (coupled with a communication campaign) to employers and to the Australian community that family violence has a significant impact on the Australian economy, and that preventing and responding to it is a whole of community responsibility.<sup>106</sup>

16.122 The educative effect of a minimum statutory family leave provision was also noted by the NNWWC.<sup>107</sup>

16.123 The ACTU also favoured the introduction of family violence leave under the NES, in addition to making provision for the inclusion under other mechanisms such as enterprise agreements. In particular, the ACTU supported the inclusion ‘to ensure all employees have access to the leave regardless of their capacity to bargain for workplace agreements’.<sup>108</sup>

16.124 Conversely, ACCI submitted that it was not appropriate to amend the NES to provide for family violence leave, emphasising that ‘businesses are not homogenous and any regulatory proposal must be acutely aware of these differences’.<sup>109</sup> ACCI argued that:

employers often provide paid and unpaid leave where employees need to take time off work for a variety of personal reasons. The reason to take leave doesn’t necessarily involve issues such as domestic violence, but often can ... These issues are dealt with every day across hundreds of thousands of workplaces in Australia and in the absence of a dedicated law or regulation.<sup>110</sup>

16.125 ACCI cautioned that employers are unlikely to ‘accept being forced to take on additional obligations above and beyond what is currently required by existing laws unless a strong case is made out for doing so’.<sup>111</sup>

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Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011; Northern Rivers Community Legal Centre, *Submission CFV 08*, 28 March 2011.

105 ADFVC, *Submission CFV 26*, 11 April 2011.

106 Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011.

107 National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011.

108 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

109 ACCI, *Submission CFV 19*, 8 April 2011.

110 Ibid.

111 Ibid.

***Paid leave***

16.126 Many stakeholders expressed the view that any entitlement to family violence leave must provide for paid leave, or a combination of paid and unpaid leave, or else risk further disadvantaging victims of family violence and failing to achieve the objects underlying its introduction.<sup>112</sup> For example, the ASU argued:

A person experiencing family violence is already subjected to tremendous emotional, psychological and physical stress without the need to further compound pressure due to a loss of income. Further, paid leave enables the person experiencing family violence to maintain economic independence at a critical time when income security is vital to maintaining suitable housing, ensure future safety and on the ability to secure on-going family stability for them and their children.<sup>113</sup>

16.127 These sentiments were echoed in the submission from the ADFVC:

We do not support a hollow entitlement to take unpaid leave as it is likely to further disadvantage victims of family violence who may be less likely to be in a financial position to afford to take unpaid leave. An entitlement to take unpaid leave undermines financial security: conversations with stakeholders indicate that employees are unlikely to take the leave that they need where it is unpaid due to financial hardship. Therefore, any entitlement to leave must be to paid leave to provide genuine assistance for victims of family violence.<sup>114</sup>

16.128 Other submissions emphasised that victims of family violence are predominantly women, and as a result, family violence leave must be paid, in recognition of

the fact that it is largely women, who, as a result of the violence, have broken employment histories, are in low paid jobs and can least afford to take unpaid leave at a time where financial security is critical.<sup>115</sup>

***Entitlement to leave by others***

16.129 Some stakeholders expressed the view that access to family violence leave should not be restricted to employees who are themselves direct victims of family violence. This issue was reiterated in the context of access to other forms of leave, including carer's leave, discussed in more detail below. For example, the AHRC suggested:

Friends, relatives, household members and others who are able to assist employees affected by domestic violence may also benefit from flexible working arrangements and leave to enable them to provide this support. The ALRC may wish to consider whether domestic violence provisions not be limited only to those directly

112 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Women's Legal Services NSW, *Submission CFV 28*, 11 April 2011; Confidential, *Submission CFV 27*, 11 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Women's Health Victoria, *Submission CFV 11*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

113 Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

114 ADFVC, *Submission CFV 26*, 11 April 2011.

115 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

experiencing the violence and its aftermath, but also be available to those who are assisting and supporting employees who are affected by domestic violence.<sup>116</sup>

16.130 The NNWWC noted that family violence ‘impacts on the whole family group or those living in the immediate domestic environment and that children may also have special needs at this time’.<sup>117</sup>

16.131 Further, several stakeholders emphasised the need to ensure that any entitlement to family violence leave is not subject to a minimum employment or qualifying period or need to be accrued in advance to be accessed.<sup>118</sup> For example, the ADFVC argued:

A qualifying period would undermine the beneficial nature of this type of leave and potentially exclude the employees most likely to be adversely affected by family violence: given the link between family violence and interrupted employment, some victims may not have been in their employment long enough to meet other Fair Work Act leave qualifying periods.<sup>119</sup>

16.132 Another entitlement issue raised in submissions was whether both victims and perpetrators of family violence should be entitled to access family violence leave. The Queensland Law Society stated:

An employer should not be required to determine who is a victim and who is a perpetrator of domestic violence. It may often be impossible for the employer to do so and such a determination would require an unwarranted intrusion into the employee’s personal life ... To ensure access to justice for all parties, these circumstances should apply to both the applicant and the respondent of any family violence action.<sup>120</sup>

#### *Separate or additional family violence leave?*

16.133 While broadly supporting the introduction of some form of family violence leave, stakeholders expressed differing views as to whether:

- a new statutory minimum entitlement to ‘family violence’ leave should be incorporated into the NES; or
- additional leave for family violence purposes should be incorporated as a subset of personal/carer’s leave under the NES.

16.134 In consultations, stakeholders in favour of a new form of family violence leave expressed the view that it was necessary to label it as separate family violence leave in order to draw attention to the issue and its impact on employees and the workplace in order to highlight it as an issue requiring attention.

116 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011.

117 National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011.

118 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Women’s Legal Services NSW, *Submission CFV 28*, 11 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011.

119 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

120 Queensland Law Society, *Submission CFV 21*, 6 April 2011.

16.135 The AHRC commented that, in circumstances where employees already have caring responsibilities, those employees in particular would benefit from ‘additional, specific domestic violence leave’ through a ‘separate entitlement to carer’s leave in the NES’.<sup>121</sup>

16.136 On the other hand, stakeholders who submitted that leave should be incorporated as a subset of existing personal/carer’s leave, expressed particular concern about labelling of leave as family violence leave having the effect of exacerbating barriers to disclosure already faced by employees discussed in Chapter 14.

### *Period of leave*

16.137 Submissions received in response to the issue of family violence leave were mixed with respect to the appropriate period. Stakeholders suggested:

- no more than two days per occasion;<sup>122</sup>
- five days paid plus access to other forms of leave;<sup>123</sup> and
- 20 days, in line with existing family violence leave entitlements under enterprise agreements;<sup>124</sup>

16.138 Several submissions referred to the Surf Coast Shire *Enterprise Agreement 2010–2013*, which provides for 20 days of paid family violence leave, as providing an appropriate period of leave.<sup>125</sup>

16.139 It was also suggested that further analysis of the actual periods of leave taken and potential costs to businesses is required before determining an appropriate quantum.<sup>126</sup> In addition, the NNWWC submitted:

Before making specific recommendations about the period of leave that an employee may be entitled to, specific to domestic violence, a meta analysis of available research should be conducted to discover average or median periods of the duration of the most significant impacts of domestic violence.<sup>127</sup>

### *Verification of entitlement*

16.140 While submissions overwhelmingly supported the introduction of family violence leave, many recognised the need to ensure that employees accessing such

121 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011.

122 Queensland Law Society, *Submission CFV 21*, 6 April 2011.

123 Redfern Legal Centre, *Submission CFV 15*, 5 April 2011.

124 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; Women’s Health Victoria, *Submission CFV 11*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

125 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; Women’s Health Victoria, *Submission CFV 11*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

126 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011.

127 National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011.

leave are able to demonstrate their entitlement or experience of family violence in a way that maintains the integrity of the leave system and does not place an undue administrative burden on employers.

16.141 The Queensland Law Society noted that ‘some employers may be concerned about potential abuse of an additional category of leave entitlements’ but suggested this could be mitigated by reference to documentary verification, or referral to an ‘employee assistance scheme, where one exists’.<sup>128</sup>

16.142 Other stakeholders echoed this approach, suggesting that a number of forms of documentary verification may be appropriate to demonstrate an entitlement to family violence leave. These include a document issued by a:

- police officer;
- court;
- health professional, including doctor, nurse or psychiatrist/psychologist;
- lawyer;
- family violence service or refuge worker; and/or
- the employee, in the form of a signed statutory declaration.<sup>129</sup>

16.143 In addition to general comments about the need for confidentiality of information disclosed, discussed primarily in Chapter 14, the Office of the Australian Information Commissioner (OAIC) also noted:

Where there is more than one acceptable way of demonstrating an entitlement it is often better practice to offer alternatives and give individuals the choice as to the personal information they provide. Providing choice as to the source of information enables individuals to exercise a level of control over their personal information and may assist in minimising barriers to disclosure.<sup>130</sup>

### *Access to other forms of leave*

16.144 Many stakeholders argued that, in addition to some form of family violence leave (whether as a separate category or as a subset of personal/carer’s leave), employees should also be able to access other forms of existing leave for circumstances arising from family violence.<sup>131</sup> The Queensland Law Society commented that:

<sup>128</sup> Queensland Law Society, *Submission CFV 21*, 6 April 2011.

<sup>129</sup> Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; Queensland Law Society, *Submission CFV 21*, 6 April 2011; Office of the Australian Information Commissioner, *Submission CFV 18*, 6 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Women’s Health Victoria, *Submission CFV 11*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

<sup>130</sup> Office of the Australian Information Commissioner, *Submission CFV 18*, 6 April 2011.

<sup>131</sup> ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; Queensland Law Society, *Submission CFV 21*, 6 April 2011; National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011.

It would be appropriate to add an entitlement to leave to deal with family violence to the existing provisions in place for employees to take leave, including annual leave, long service leave and personal/carer's leave ... If an employee was subject to family violence, the employee should have the option of taking leave in one of the existing categories or in a new category of family violence leave.<sup>132</sup>

16.145 Other stakeholders supported this view, noting that access to other forms of leave would be particularly important where any family violence leave had been exhausted.<sup>133</sup> In some cases this may already be possible, for example where an employee experiences injury or illness arising from family violence they may already access personal leave. However, stakeholders also expressed the view that employees experiencing family violence should be able to access carer's leave in order to care for, support or make necessary arrangements for a person experiencing family violence.<sup>134</sup>

### ***ALRC's views***

16.146 As is the case with flexible working arrangements, the ALRC recognises that, in many cases, employers will grant employees access to forms of existing leave in circumstances where it may be required as a result of family violence. However, evidence suggests that, in many cases of family violence, victims exhaust their existing leave entitlements. In addition, there is currently a discretionary element associated with the granting of leave in cases of family violence, particularly in such circumstances.

16.147 In light of this, the ALRC considers existing leave provisions provided for in the NES may not be adequate to provide for the needs of employees experiencing family violence. As a result, the ALRC has formed the preliminary view that amending the NES to provide for some form of family violence leave is a necessary change to provide employees with a minimum statutory entitlement to such leave.

16.148 In proposing this amendment, the ALRC reiterates its comments made earlier in this chapter in relation to the role of governments and business in responding to family violence as well as in relation to issues surrounding the need for minimum statutory entitlements.

### ***Minimum statutory entitlement***

16.149 As outlined above, the ALRC has formed the view that it may be appropriate for the government to amend the *Fair Work Act* to provide for a minimum statutory entitlement to family violence-related leave. While recognising the important role played by other forms of regulation in this area, such as enterprise agreements, the

132 Queensland Law Society, *Submission CFV 21*, 6 April 2011.

133 ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011. See also, National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011.

134 ADFVC, *Submission CFV 26*, 11 April 2011. See also, Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011. The ACTU advocated for the wholesale expansion and extension of personal/carer's leave, which would also accommodate the needs of employees who care for or support a person experiencing family violence.

ALRC considers a minimum statutory entitlement is necessary and is likely to serve a number of purposes as follows.

16.150 First, it would ensure a universal entitlement to leave for employees experiencing family violence. This is consistent with the themes identified in the conceptual framework for this Inquiry. This would ensure all national system employees would have access to the leave. In light of evidence that it is predominantly women who experience family violence at higher rates than men, and who are not covered by enterprise agreements, the ALRC considers that access to family violence leave through bargaining and enterprise agreements may not be sufficient to protect the safety of employees experiencing family violence.

16.151 Secondly, the ALRC considers the introduction of family violence leave as part of the minimum safety net under the NES is likely to play an educative role. It gives express recognition to family violence as a national issue that has a significant impact on the Australian economy and that both the government and workplaces have a responsibility to address family violence. This would build on the work already undertaken by the government under the National Plan to Reduce Violence Against Women and Their Children and similar initiatives noted in Chapter 1.

16.152 The ALRC also notes the importance of the availability of enforcement mechanisms with respect to any entitlement to family violence leave through the application of civil remedy provisions.

***Basic requirements***

16.153 The ALRC heard a range of views about the most appropriate form of family violence leave. The ALRC considers that there should be a core of basic requirements with respect to family violence leave, including that it is paid, flexible and easily accessible where necessary, whilst containing sufficient safeguards to maintain the integrity of the leave system. The ALRC considers there is a need for any family violence leave introduced under the NES to be:

- introduced in the context of a range of initiatives aimed at addressing family violence in the workplace;
- accessible in a range of circumstances arising from family violence;
- accessible as consecutive or single days, or as a fraction of a day;
- available to employees who are victims of family violence as well employee's who need to access such leave to provide care or support to a member of the employee's immediate family or household who is experiencing family violence;
- not be subject to a minimum employment or qualifying period, or to be accrued in advance;
- paid; and
- subject to verification of entitlement.

***Complementary initiatives***

16.154 The ALRC considers that there is a need to introduce a range of initiatives to address family violence as a workplace issue. Recognising the need for a holistic approach to addressing family violence and its impact on Australian workplaces, the ALRC has made a number of overarching proposals such as Proposal 14–2 with respect to the need for a national education campaign, and other initiatives.

***Paid leave***

16.155 Stakeholders made strong arguments in favour of the need for paid family violence leave to avoid provision of a ‘hollow’ entitlement. In light of the focus of this aspect of the Inquiry on ensuring the economic security and independence of employees experiencing family violence, and in light of stakeholder concerns about the possible compounding effect unpaid family violence leave may have, the ALRC has formed the view that any entitlement to family violence leave should provide for a combination of paid and unpaid leave.

***Accessibility***

16.156 The ALRC is aware that employees may need to access family violence leave in a range of circumstances. Accordingly, the ALRC suggests that any provision under the NES be broadly formulated to enable an employee to deal with a range of circumstances arising from family violence, including for example, to attend appointments with support services; receive medical attention; receive legal advice or attend court; arrange or undertake child care; arrange accommodation or relocate; or attend to other immediate safety issues.

16.157 In order to facilitate the taking of leave in a diverse range of circumstances, the ALRC considers it would be appropriate to allow the taking of family violence leave to be accessible as consecutive or single days, or as a fraction of a day.

***Entitlement***

16.158 Several stakeholders, including the AHRC, highlighted the impact that family violence often has on the victim themselves, as well as friends, relatives and other household members and suggested the ALRC consider the extension of family violence leave to those assisting and supporting employees affected by family violence.

16.159 In light of these submissions, the ALRC considers an employee who is themselves experiencing family violence, or who is required to provide care or support to a member of their immediate family or household who is experiencing family violence, should be entitled to family violence leave.

16.160 The ALRC suggests any definition of member of immediate family or household should recognise kinship and family relationships of Indigenous people as well as people from CALD communities and those in same-sex relationships.

16.161 Under s 96 of the *Fair Work Act*, personal/carer’s leave under the NES accrues on the basis of 10 days paid personal/carer’s leave per year of service. The entitlement accrues progressively during a year of service according to the employee’s



ordinary hours of work, and accumulates from year to year.<sup>135</sup> However, the ALRC considers that the nature of family violence itself, and the often interrupted work history of victims of family violence, are such that family violence leave should not be subject to a minimum employment or qualifying period, or need to be accrued in advance.

16.162 As outlined above, the notice requirements under s 107 of the *Fair Work Act* provide that an employee must give his or her employer notice of the taking of leave as soon as practicable (which may be a time after the leave has started) and advise the employer of the expected period of the leave.<sup>136</sup> While the ALRC considers that in some cases it may be difficult for a victim to notify their employer in advance, s 107 appears to strike a balance between the needs of an employee to take leave, often at short notice, with the need for employers to be informed as soon as practicable in order to make appropriate arrangements where an employee will not be attending work. As a result, the ALRC considers the notice requirements under s 107 of the *Fair Work Act* relating to personal/carer's leave should be mirrored in any provision relating to family violence leave.

#### ***Period of leave***

16.163 The ALRC has heard a range of views as to the most appropriate period of any family violence leave. Many stakeholders submitted that 20 days of paid leave would be appropriate. However, while the ALRC considers this period may be appropriate in the context of an enterprise agreement negotiated to take into account the circumstances of an individual employer, it may not be appropriate as a statutory minimum.

16.164 Other stakeholders supported an entitlement of up to two days of leave per occasion. This approach would be in line with the enterprise agreement negotiated at UNSW. However, the ALRC considers that in circumstances of ongoing family violence, this entitlement is likely to result in an employee being entitled to a potentially unlimited amount of leave in any year. Further, conscious of the concerns expressed by employers, the ALRC considers the need to process applications on this basis is likely to impose an unnecessary burden on employers.

16.165 Two submissions expressed the view that the best approach may be to undertake further analysis of actual periods of leave taken and the projected cost to business before determining an appropriate quantum. The introduction of any additional leave will undoubtedly result in increased costs to business, particularly small business. Amongst other factors, the ALRC is required, under the *Australian Law Reform Commission Act 1996* (Cth), to consider the cost implications of any proposal. The ALRC has formed the view that analysis of actual periods of leave taken would provide a useful pool of data upon which future policy decisions could be made. However, the ALRC considers any such analysis could usefully be conducted following the introduction of the provision, or form part of the PIR.

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135 *Fair Work Act 2009* (Cth) s 96.

136 *Ibid* s 107.

16.166 Overall, the ALRC is conscious of the need to balance the needs, rights and responsibilities of employees and employers. Accordingly, the ALRC has formed the view that, in line with the leave periods provided for other forms of leave under the NES, family violence leave under the NES should be for a period of 10 days per year.

***Verification of entitlement***

16.167 In order to preserve the integrity of the leave system, the ALRC recognises there is a need to ensure that employees accessing family violence leave are subject to the same requirements to demonstrate their entitlement to the leave as other forms of leave. That said, stakeholders have clearly indicated that the types of verification that a victim of family violence may be able to provide to an employer upon request are varied and may include documentation from a range of professionals and support services.

16.168 The ALRC considers that the existing, generally expressed, evidence requirements provided for under s 107 that apply to personal/carer's leave should also apply to any family violence leave.

16.169 Further, providing employers information about what might constitute appropriate verification could form part of the national education campaign referred to in Proposal 14–2.

***Access to other forms of leave***

16.170 The ALRC considers it is appropriate to provide that employees experiencing family violence are able to access other forms of existing leave for circumstances arising from family violence, particularly where they have exhausted any entitlement to family violence leave. The ALRC considers that it is already possible to do so in relation to the forms of leave where it is not necessary to demonstrate an entitlement, such as annual leave. However, in light of submissions the ALRC considers it is appropriate to allow employees to access both existing personal/carer's leave for purposes arising from family violence, as well as any additional family violence leave.

16.171 Under s 97 of the *Fair Work Act* an employee may take paid personal/carer's leave if the leave is taken where the employee is not fit for work because of a personal illness, or personal injury, affecting the employee; or to provide care or support to a member of the employee's immediate family, or a member of the employee's household who requires care or support because of personal illness/injury or an unexpected emergency. The ALRC proposes that s 97 be amended to allow for the taking of leave for circumstances arising as a result of family violence.

***Options for reform***

16.172 Building on the core of basic requirements outlined above, that the ALRC considers should be part of any family violence leave under the NES, the ALRC considers there are two key models for reform in order to introduce family violence leave under the NES.

16.173 The first model, Proposal 16–2, provides a new minimum statutory entitlement to 10 days family violence leave. The second model, Proposals 16–3 and 16–4, provides for the inclusion of an additional 10 days leave, accessible for family violence purposes, as a subset of the existing personal/carer’s leave provided for under the NES.

16.174 The ALRC is interested in stakeholder views on the alternate proposals as well as the issues raised with respect to the basic requirements, including the provision of paid leave as well as accessibility, entitlement, verification of entitlement and period of leave.

**OPTION ONE: Proposal 16–2**

**Proposal 16–2** The Australian Government should amend the National Employment Standards under the *Fair Work Act 2009* (Cth) to provide for a new minimum statutory entitlement to 10 days paid family violence leave. An employee should be entitled to access such leave for purposes arising from the employee’s experience of family violence, or to provide care or support to a member of the employee’s immediate family or household who is experiencing family violence.

**OPTION TWO: Proposals 16–3 and 16–4**

**Proposal 16–3** The Australian Government should amend the National Employment Standards under the *Fair Work Act 2009* (Cth) to provide for a minimum statutory entitlement to an additional 10 days paid personal/carer’s leave. An employee should be entitled to access the additional leave solely for purposes arising from the employee’s experience of family violence, or to provide care or support to a member of the employee’s immediate family or household who is experiencing family violence.

**Proposal 16–4** The Australian Government should amend the National Employment Standards under the *Fair Work Act 2009* (Cth) to provide that an employee may access the additional personal/carer’s leave referred to in Proposal 16–3:

- (a) because the employee is not fit for work because of a circumstance arising from the employee’s experience of family violence; or
- (b) to provide care or support to a member of the employee’s immediate family, or a member of the employee’s household, who requires care or support as a result of their experience of family violence.

## 17. Employment—The *Fair Work Act 2009* (Cth) Continued

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### Summary

17.1 Chapters 16 and 17 provide an overview of the *Fair Work Act 2009* (Cth) and examine possible options for reform to the Act, as well as agreements and instruments made under the Act, to address the needs—and ultimately the safety—of employees experiencing family violence. In particular, this chapter examines:

- family violence clauses in enterprise agreements—the ALRC concludes that the Australian Government should encourage the inclusion of family violence clauses, that such clauses should include a range of minimum requirements and proposes that the Fair Work Ombudsman should develop a guide to negotiating such clauses in agreements;
- 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 proposes that the Fair Work Ombudsman should develop a guide to negotiating IFAs in such circumstances;

- modern awards—the ALRC considers ways in which modern awards might incorporate family violence-related provisions and suggests this should be considered in the course of Fair Work Australia’s reviews in 2012 and 2014;
- unfair dismissal—acknowledging the broad formulation of ‘harsh, unjust and unreasonable’, the ALRC suggests consideration of family violence in determining whether ‘exceptional circumstances exist’ for the purposes of granting an extension of time in which to make an application; and
- the general protections provisions under the *Fair Work Act*—the ALRC suggests that discrimination on family-violence related grounds under those provisions could be considered in the context of the post-implementation review and by the Australian Human Rights Commission.

## Enterprise agreements

17.2 The law of employment, as it relates to the relationship between an individual employer and employee, has its basis in the common law, specifically the law of contract. The rights and obligations of an employer and an employee are generally governed by, and arise from, the terms of a contract of employment.

17.3 However, rights and obligations also arise from a range of other sources, including under legislation, the terms of which may prevail over the contract of employment. One such source is the *Fair Work Act*, which provides that there are several types of agreements, referred to as enterprise agreements, that can prevail over contracts of employment.<sup>1</sup>

17.4 The objects of Part 2–4 of the *Fair Work Act* which deals with enterprise agreements are to:

provide a simple, flexible and fair framework that enable collective bargaining in good faith, particularly at an enterprise level, for enterprise agreements that deliver productivity benefits; and to enable [Fair Work Australia] to facilitate good faith bargaining and the making of enterprise agreements.<sup>2</sup>

17.5 There are three types of enterprise agreements:

- single-enterprise agreements, involving a single employer or one or more employers cooperating in what is essentially a single enterprise;
- multi-enterprise agreements, involving two or more employers that are not all single-interest employers; and
- greenfields agreements, involving a genuinely new enterprise that has not yet employed employees.<sup>3</sup>

1 ‘Enterprise agreement’ was a term introduced as of 1 January 2010 under the *Fair Work Act 2009* (Cth). Previously, under the *Workplace Relations Act 1996* (Cth), agreements were referred to as ‘certified agreements’ (until 27 March 2006) and ‘collective agreements’.

2 *Fair Work Act 2009* (Cth) s 171.

3 *Ibid* s 172.

17.6 Enterprise agreements govern the terms and conditions of employment and can be made between one or more employers and either their employees, or one or more employee organisations. However, a large proportion of the workforce in Australia is not covered by an enterprise agreement.<sup>4</sup>

17.7 The *Fair Work Act* lists several categories of matters that may, must, or must not, be included in enterprise agreements:

- ‘permitted’ matters that *may* be included in an enterprise agreement—for example, terms about matters pertaining to the relationship between an employer and their employees or employee organisation, as well as deductions from wages and the operation of the agreement;<sup>5</sup>
- ‘mandatory’ terms that *must* be included in an agreement—for example, terms in relation to individual flexibility and consultation;<sup>6</sup> and
- ‘unlawful terms’ that *cannot* be included in an agreement or that are of no effect, such as terms that are discriminatory.<sup>7</sup>

17.8 There are a number of requirements in order for an enterprise agreement to be approved by Fair Work Australia (FWA), one of which is that it must pass the ‘better off overall’ test (BOOT). That is, FWA must be satisfied that employees are better off overall under the enterprise agreement as opposed to the conditions under the relevant modern award.<sup>8</sup>

17.9 The *Fair Work Act* also contains a range of requirements with respect to the enterprise agreement bargaining process, for example, a requirement that parties bargain in good faith, as well as detailed provisions in relation to representation during bargaining.<sup>9</sup>

### Individual flexibility arrangements

17.10 Section 202 of the *Fair Work Act* requires that an enterprise agreement must include a ‘flexibility term’. A flexibility term allows an employer and an employee to make a specific ‘individual flexibility arrangement’ (IFA) that would vary the effect of the enterprise agreement to account for the employee’s particular circumstances in order to meet the genuine needs of the employee and employer.<sup>10</sup>

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4 There are approximately 11.5 million Australian employees, however only approximately 2.6 million Australian employees are covered by an enterprise agreement: Australian Bureau of Statistics, *Labour Force, Australia* (2011); Department of Education, Employment and Workplace Relations, *Trends in Federal Enterprise Bargaining, December Quarter 2010* (2010).

5 *Fair Work Act 2009* (Cth) s 172(1).

6 *Ibid* ss 202, 205.

7 *Ibid* ss 194, 195, 253.

8 *Ibid* s 193.

9 See, eg, *Ibid* Ch 2, Part 2–4, Div 3.

10 *Ibid* s 202. Further, particular requirements must be met for an IFA to be enforced, including genuine agreement between the parties and that the employee is better off overall under the IFA: *Fair Work Act 2009* (Cth) s 203.

17.11 An IFA must meet a range of requirements. In particular, the IFA must be genuinely agreed to by the employer and the employee and there is a requirement that the employee be better off overall than if no IFA had been agreed to.<sup>11</sup>

17.12 If an enterprise agreement does not include a flexibility term, the model flexibility term (prescribed under the *Fair Work Regulations 2009* (Cth)) is taken to be a term of the agreement.<sup>12</sup>

17.13 As a result, there is provision for employees who are covered by an enterprise agreement and who are experiencing family violence to negotiate an IFA with their employer, for example, to vary work arrangements to account for their experiences of family violence.

17.14 In *Family Violence—Employment and Superannuation Law*, Issues Paper 36 (2010) (Employment Law Issues Paper), the ALRC asked what steps could be taken to ensure that employees who are experiencing family violence are better able to access IFAs made under s 202 of the *Fair Work Act*.

17.15 However, the ALRC also outlined concerns expressed in relation to flexibility terms in the context of family violence. In particular, the ALRC noted that as IFAs are negotiated on an individual basis, some victims of family violence may not be in a position to negotiate an effective or useful IFA, specifically where victims fear disclosure of family violence or where their experiences have undermined their independence and confidence.

### ***Submissions and consultations***

17.16 Stakeholders expressed divergent views on the role and appropriateness of IFAs in the context of family violence.

17.17 The submission from the Australian Chamber of Commerce and Industry (ACCI) expressed support for IFAs as an instrument able to

deliver a level of individual flexibility [which] could accommodate employees with tailored conditions. IFAs have sufficient safeguards, can be terminated at short notice and an employer cannot force an employee to sign one or make it a condition of employment.<sup>13</sup>

17.18 Other stakeholders expressed the view that IFAs are not appropriate to deal with family violence and emphasised that the introduction of other measures, such as family violence clauses in enterprise agreements, was preferable.<sup>14</sup>

17.19 Stakeholders also emphasised that if family violence clauses were included in enterprise agreements, it would supplant the need to negotiate an IFA to deal with

<sup>11</sup> *Fair Work Act 2009* (Cth) s 203.

<sup>12</sup> *Ibid* ss 202(4), 202(5). See *Fair Work Regulations 2009* (Cth), sch 2.2, reg 2.08.

<sup>13</sup> ACCI, *Submission CFV 19*, 8 April 2011.

<sup>14</sup> Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

circumstances arising from an employee's experience of family violence.<sup>15</sup> For example, the Australian Council of Trade Unions (ACTU) stated:

The ACTU has consistently voiced concerns over IFAs in relation to the inherent unequal bargaining power between an individual employee and their employer. We have concerns that employees in vulnerable situations, such as those relating to domestic violence, may be placed in an even more unequal and unfair negotiating position if IFAs are the only mechanism for entitlements to leave or flexible work arrangements in family or domestic violence situations.<sup>16</sup>

17.20 Many stakeholders reiterated concerns about bargaining power and the limited likelihood of victims of family violence negotiating IFAs.<sup>17</sup> For example, the Australian Human Rights Commission (AHRC) submitted that:

research has shown that generally women are less likely than male employees to engage in individual negotiations with an employer. Low paid, low skilled employees, and those employed part-time or casually—all characteristics of women's employment—have been found to have less bargaining power compared to full-time, higher paid, higher skilled employees.<sup>18</sup>

17.21 In addition to general opposition to the use of IFAs in the context of family violence, stakeholders voiced specific concerns, including that:

- many employees are 'unaware of what regulates the terms and conditions of their employment' and 'the level of knowledge and negotiation skills required to access IFAs is high';<sup>19</sup>
- 'for many employees, the prospect of negotiating an IFA could be daunting as it is likely to involve some degree of disclosure of their changed circumstances, with no guarantee of a positive outcome';<sup>20</sup>
- employees experiencing family violence often require immediate flexibility or altered arrangements in order to deal with unforeseen circumstances arising from family violence and 'IFAs do not really take these emergencies that require flexibility into account' even where employers may be willing to negotiate an IFA;<sup>21</sup>
- the process for the application and determination of the BOOT is 'vague, entered into privately between the employer and employee and such agreements do not need pre-approval by Fair Work Australia';<sup>22</sup>

15 Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

16 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

17 National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011; Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011. See also, Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

18 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011.

19 National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011.

20 ADFVC, *Submission CFV 26*, 11 April 2011.

21 National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

22 National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011.



- difficulty in monitoring and enforcing IFAs;<sup>23</sup> and
- the scope of an IFA is limited by the flexibility term in the enterprise agreement itself.<sup>24</sup>

17.22 Stakeholders also noted that IFAs must meet the genuine needs of both the employee and the employer. The National Network of Working Women's Centres (NNWWC) indicated that, in their experience, 'most employers ... [do not] see an employee's need to attend to anything to do with family violence as their issue'.<sup>25</sup> The Australian Domestic and Family Violence Clearinghouse (ADFVC) agreed, commenting that in practice,

employers are unlikely to consent to an IFA unless it offers some operational benefit, limiting their practical usefulness to employees with greater bargaining power, those employees whose skills are in demand or harder to replace.<sup>26</sup>

17.23 Few stakeholders favoured the use of IFAs as the most appropriate mechanism through which to address family violence. However some stakeholders expressed support for access to IFAs, in workplaces not covered by an enterprise agreement containing a family violence clause.<sup>27</sup> For example, the ADFVC suggested:

Where a workplace is not covered by an enterprise agreement containing a specific family violence clause, an IFA may be negotiated in order to seek temporary changes to working patterns, such as shorter or alternative hours or the ability to work from home to care for children.<sup>28</sup>

17.24 The AHRC considered that IFAs may be useful for employees who are in a position to negotiate and who 'recognise the value of negotiating domestic violence provisions to vary their terms and conditions of employment'.<sup>29</sup>

17.25 ACCI expressed concerns in relation to the current use and limitations on use of IFAs by unions. In particular, ACCI emphasised that female employees may be prejudiced by 'industrial tactics' such as limiting the use of IFAs, and utilising union IFA clauses that 'require a majority of the workforce to agree to changing the application of certain conditions in an agreement'. ACCI submitted:

It is not fair or equitable for female workers in a workplace dominated by male workers to be locked out of agreeing with their employer on individual matters such as leave and when work is performed. In relation to this issue, female workers may need to start or finish work at different times, in order to deal with personal matters, such as attend counselling, seek advice from advisors, pick up a child from school. There may be reasons associated with relevant court orders regarding them or their children. These are sensitive matters best dealt with through individual mechanisms and not, on a collective basis.<sup>30</sup>

23 Ibid; ADFVC, *Submission CFV 26*, 11 April 2011; Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

24 National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011.

25 Ibid.

26 ADFVC, *Submission CFV 26*, 11 April 2011.

27 Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011.

28 ADFVC, *Submission CFV 26*, 11 April 2011.

29 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011.

30 ACCI, *Submission CFV 19*, 8 April 2011.

17.26 Consequently, ACCI suggested amendments to the *Fair Work Act* to require, at a minimum, ‘that the terms in an IFA are no less favourable as compared to the model modern award clause/regulation’. ACCI emphasised that ‘this is not creating a new right, but is giving effect to an existing law which is not working as the Government, nor Parliament, had intended’.<sup>31</sup>

### ***Education and awareness***

17.27 A number of stakeholders also emphasised that, while IFAs are not preferable, there may nonetheless be a need for an awareness-raising campaign to draw attention to the fact that IFAs may be negotiated to accommodate the needs of employees experiencing family violence. Women’s Health Victoria noted an education campaign should draw attention to the possible use of IFAs and be directed at both employees and employers.<sup>32</sup>

17.28 Submissions also emphasised the need for the provision of information about negotiating IFAs. For example, Domestic Violence Victoria (DV Victoria) and the Domestic Violence Resource Centre Victoria (DVRC Victoria) emphasised the role for unions, employer organisations and FWA in ‘promoting and informing employees about their rights to negotiate individual flexibility arrangements in order to ensure equitable access’.<sup>33</sup>

17.29 Similarly, the AHRC recommended that ‘information be produced to raise awareness ... about how individual flexibility arrangements can be used to assist employees affected by domestic violence’.<sup>34</sup>

17.30 Some stakeholders also supported the development and availability of sample or model IFAs. Women’s Health Victoria suggested such model IFAs could ‘show both employers and employees what an individual flexibility arrangement looks like, and could act as a template’.<sup>35</sup>

17.31 The ADFVC indicated that FWA and the Fair Work InfoLine could provide resources and information, suggesting the development of ‘a Guide for Employees Experiencing Family Violence, including a section on IFAs that could be downloaded from the FWA (and/or FWO) website or distributed in hardcopy form via other services would potentially be useful’.<sup>36</sup>

17.32 Similarly, ACCI noted that the Fair Work Ombudsman publishes

Best Practice Guides (and often consults with industry and unions) on various topics and could include information on types of clauses which may be considered by employers and employees. Whilst no one-size fits all clause is appropriate, ACCI would support additional information to be published by the FWO for the benefit of employers and employees when considering bargaining or formulating policies.<sup>37</sup>

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31 Ibid.

32 Women’s Health Victoria, *Submission CFV 11*, 5 April 2011.

33 Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011.

34 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011.

35 Women’s Health Victoria, *Submission CFV 11*, 5 April 2011.

36 ADFVC, *Submission CFV 26*, 11 April 2011.

37 ACCI, *Submission CFV 19*, 8 April 2011.

17.33 Finally, Women Everywhere Advocating Violence Elimination (WEAVE) suggested that there

should be a vulnerable employees advocacy service as part of the Fair Work Office in every state whereby vulnerable employees (these might include domestic violence targets, people with disabilities or chronic illness, people with a first language other than English) could apply for support in negotiating flexibility arrangements with their employer appropriate to their circumstances.<sup>38</sup>

***ALRC's views***

17.34 The ALRC notes comments made by unions and employer organisations with respect to the approaches taken to IFAs by the other, and in relation to the differing views expressed on the merits of collective as opposed to individual bargaining. In addition, the ALRC recognises that there are differing views held by stakeholders as to the usefulness and appropriateness of IFAs in the context of family violence.

17.35 The ALRC considers that there is a need to ensure that workplace responses to family violence are consistent, but also sufficiently flexible to allow an employee and employer the opportunity to tailor specific working arrangements to meet the needs of both parties. As a result, the ALRC acknowledges the potential role IFAs may play in the context of family violence.

17.36 However, the ALRC also notes potential limitations on the usability and effectiveness of IFAs in cases involving family violence. For example, the ALRC is concerned that many employees, including those experiencing family violence, may not have the level of confidence, knowledge or skill required to negotiate an effective IFA. In addition, given the nature of family violence, an employee's circumstances may change abruptly and frequently. Therefore the ALRC considers that the circumstances in which IFAs could help protect employees experiencing family violence may be limited.

17.37 Overall, the ALRC considers that while IFAs may act as one mechanism through which the *Fair Work Act* could account for the needs of employees experiencing family violence, they may not necessarily be the most appropriate in the family violence context. In any event, the ALRC does not consider that any changes could usefully be made to the legislation with respect to IFAs to protect the safety of employees experiencing family violence.

17.38 However, the ALRC does consider that the FWO should develop a guide to negotiating IFAs to respond to the needs of employees experiencing family violence, in consultation with unions and employer organisations. The guide should include information on IFAs tailored to meet the needs of particular employees experiencing family violence and examples of IFA clauses which can be adapted for these purposes.

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38 WEAVE, *Submission CFV 14*, 5 April 2011.

**Proposal 17–1** The Fair Work Ombudsman should develop a guide to negotiating individual flexibility arrangements to respond to the needs of employees experiencing family violence, in consultation with the Australian Council of Trade Unions and employer organisations.

### Family violence clauses

17.39 Increasingly there have been moves—led by bodies such as the ADFVC and unions—to include family violence clauses in enterprise agreements. There are currently a range of family violence clauses that are either included, or are being negotiated for inclusion, in enterprise agreements around Australia.<sup>39</sup> Such clauses are intended to recognise and address the impact of family violence on employees and workplaces, to provide a flexible way employees and employers can negotiate workplace responses to family violence, and to provide enforceable entitlements.

17.40 Key concerns about the inclusion of family violence clauses in enterprise agreements largely mirror the concerns raised in relation to the inclusion of other statutory or workplace entitlements. In addition, as noted above, enterprise agreements do not apply to a large proportion of the Australian workforce and may be insufficient to respond to the needs of employees experiencing family violence. To support the effective operation of such clauses, there may be a need for a range of complementary workplace policies and procedures.

### Existing clauses

17.41 There are currently a range of family violence clauses that have either been included, or are being negotiated for inclusion, in enterprise agreements around Australia.

17.42 In 2010 the first family violence clauses were included in the enterprise agreements for the Surf Coast Shire and the University of New South Wales (UNSW) professional staff. Both agreements were subsequently approved by FWA.<sup>40</sup> The Australian Services Union (ASU) clause was included in the Surf Coast Shire, agreement and is reproduced below.<sup>41</sup>

39 Family violence clauses have been included in: University of New South Wales (Professional Staff), *Enterprise Agreement 2010*; Surf Coast Shire, *Enterprise Agreement 2010–2013*; TransGrid Employees Agreement 2010 (NSW); Brimbank City Council Enterprise Agreement 6 2010 (Vic); Moyne Shire Council Enterprise Bargaining Agreement No 6 2010 (Vic). They have been logged in: The City of Greater Geelong, St Luke's Family Services Bendigo, Coliban Water Victoria, NSW State Government including Transport Accident Commission, Thoroughbred Racing SA. The Maritime Union of Australia is trialling clauses with DP World Stevedores: Australian Domestic and Family Violence Clearinghouse, *Domestic Violence and Workplace Rights and Entitlements Project* <[www.austdvclearinghouse.unsw.edu.au/workplace\\_whats\\_new.htm](http://www.austdvclearinghouse.unsw.edu.au/workplace_whats_new.htm)> at 28 July 2011.

40 An enterprise agreement only comes into operation after approval by FWA: *Fair Work Act 2009* (Cth) s 54. In addition to ensuring several pre-approval steps have been undertaken by the employer, FWA must be satisfied as to a number of things, including that certain content requirements are met, there are no unlawful terms and that the agreement passes the 'better off overall' test: See *Fair Work Act 2009* (Cth) ss 186–188, 193, 196–200.

41 Surf Coast Shire, *Enterprise Agreement 2010–2013*.

**ASU Victorian Authorities and Services Branch Family Violence Clause****FAMILY VIOLENCE****1 General Principle**

- (a) This Council/shire recognises that employees sometimes face situations of violence or abuse in their personal life that may affect their attendance or performance at work. Therefore, the Council/shire is committed to providing support to staff that experience family violence.

**2 Definition of Family Violence**

- (a) This Council/shire accepts the definition of Family violence as stipulated in the Family Violence Protection Act 2008 (Vic). And the definition of family violence includes physical, sexual, financial, verbal or emotional abuse by a family member.

**3 General Measures**

- (a) Proof of family violence may be required and can be in the form an agreed document issued by the Police Service, a Court, a Doctor, district nurse, maternal and child health care nurse a Family Violence Support Service or Lawyer.
- (b) All personal information concerning family violence will be kept confidential in line with Council/shire Policy and relevant legislation. No information will be kept on an employee's personnel file without their express written permission.
- (c) No adverse action will be taken against an employee if their attendance or performance at work suffers as a result of experiencing family violence.
- (e) The council/shire will identify a contact in Human Resources who will be trained in family violence and privacy issues for example training in family violence risk assessment and risk management. The council/shire will advertise the name of the contact within the Council/shire.
- (f) An employee experiencing family violence may raise the issue with their immediate supervisor or the Human Resources contact. The supervisor may seek advice from Human Resources if the employee chooses not to see the Human Resources contact.
- (g) Where requested by an employee, the Human Resources contact will liaise with the employee's supervisor on the employee's behalf, and will make a recommendation on the most appropriate form of support to provide in accordance with sub clauses 4 and 5.
- (h) The Council/shire will develop guidelines to supplement this clause and which details the appropriate action to be taken in the event that an employee reports family violence.

**4 Leave**

- (a) An employee experiencing family violence will have access to 20 days per year of paid special leave for medical appointments, legal proceedings and other activities related to family violence. This leave will be in addition to existing leave entitlements and may be taken as consecutive or single days or as a fraction of a day and can be taken without prior approval.
- (b) An employee who supports a person experiencing family violence may take carer's leave to accompany them to court, to hospital, or to mind children.

**5 Individual Support**

- (a) In order to provide support to an employee experiencing family violence and to provide a safe work environment to all employees, the Council/Shire will approve any reasonable request from an employee experiencing family violence for:
- (i) changes to their span of hours or pattern or hours and/or shift patterns;
  - (ii) job redesign or changes to duties;
  - (iii) relocation to suitable employment within the Council/shire;
  - (iv) a change to their telephone number or email address to avoid harassing contact;
  - (v) any other appropriate measure including those available under existing provisions for family friendly and flexible work arrangements.
- (b) An employee experiencing family violence will be referred to the Employee Assistance Program (EAP) and/or other local resources. The EAP shall include professionals trained specifically in family violence. An employee that discloses to HR or their supervisor that they are experience family violence will be given a resource pack of information regarding support services.

17.43 The UNSW clause is more limited, providing a right to request:

- access to sick, carer's and compassionate leave for family violence-related purposes;
- flexible working arrangements, including changes to working hours consistent with the needs of the work unit; and
- changes to work location, telephone number or email address.<sup>42</sup>

17.44 The clause also states that 'proof' of domestic violence may be required in the form of an agreed document issued by the police service, a court, a medical practitioner, a domestic violence support service or lawyer, or a counselling professional.<sup>43</sup>

17.45 While enterprise agreements covering Commonwealth agencies do not currently include family violence clauses, the Government has expressed support for enterprise bargaining on family violence clauses in Commonwealth agency agreements. The Hon Kate Ellis, Minister for the Status of Women stated:

The government supports enterprise bargaining on domestic violence clauses in Commonwealth Government agency agreements. The Australian Government Bargaining Framework (AGEBF) sets out Australian Government policy as it applies to workplace relations arrangements in Australian Government employment consistent with legislative requirements. Australian Public Service (APS) agencies are required to apply the AGEBF when bargaining and non-APS bodies are encouraged to apply the AGEBF. While there are no specific provisions outlining a relationship between personal leave and its utilisation for domestic violence, Section 4.1 of the AGEBF states that workplace agreements are to include terms and

<sup>42</sup> University of New South Wales (Professional Staff), *Enterprise Agreement 2010*.

<sup>43</sup> Ibid.

conditions which assist employees in maintaining a healthy work-life balance. In that regard, at the agency level, employers and employees are allowed to bargain on a wide range of matters and develop specific policies including on the use of personal/miscellaneous leave provisions above the statutory minimums.<sup>44</sup>

### ***Submissions and consultations***

17.46 In the Employment Law Issues Paper, the ALRC asked whether the inclusion of family violence clauses in enterprise agreements should be encouraged and if so, what provisions such clauses should contain.

17.47 Many stakeholders supported the inclusion of family violence clauses in enterprise agreements.<sup>45</sup> However, many indicated that other approaches, such as amendment of the NES, are preferable.

17.48 Stakeholders also emphasised that, at times, bargaining items that benefit vulnerable employees, such as family violence leave, may be excluded from mainstream bargaining processes. For example, the AHRC submitted that:

Competing needs of different workplace constituencies can result in bargaining items which specifically benefit women being excluded from bargaining agendas, or if they are included, being traded off for wages or conditions which benefit both male and female employees. Academics have examined bargaining outcomes and concluded that the interests of the majority, based on a male, full-time breadwinner ideal, are often negotiated instead of entitlements which meet women's industrial needs.

Leaving the provision of domestic violence leave to enterprise bargaining runs the risk that this issue will be slow to be negotiated, and where it is, that only higher paid workforces which have more bargaining power will be able to negotiate this provision.<sup>46</sup>

17.49 Similarly, the ACTU highlighted:

The considerable differences in bargaining power of groups of employees limits the capacity to deliver entitlements equally to workers through workplace bargaining alone. Women generally, and in particular, those employed in low paid sectors and those employed on a part-time or casual basis have the lowest bargaining power. It is for this reason that the Government has legislated a paid parental scheme. Victims of family violence are likely to have a history of disrupted work patterns, be on lower incomes and more often be employed in casual and part-time employment and therefore least likely to have access to domestic violence related provisions delivered through the bargaining process.<sup>47</sup>

44 G Marcus, 'Interview with Hon Kate Ellis, Federal Minister for Status of Women' (2011) 44 *Australian Domestic and Family Violence Clearinghouse Newsletter* 12.

45 Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011; Women's Health Victoria, *Submission CFV 11*, 5 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011; National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011.

46 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011.

47 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

17.50 Despite these concerns, as outlined above, many stakeholders expressed the view that the inclusion of family violence clauses in enterprise agreements is a ‘positive move to protect the safety and industrial rights of women who have experienced family violence, which has resulted in a negative impact on their work entitlements’.<sup>48</sup>

17.51 Overall, there was a general consensus amongst most stakeholders about the nature and content of the family violence clauses. In particular, many supported the adoption of the provisions included in the ASU family violence clause outlined above as a model,<sup>49</sup> noting that the clause is ‘seen as best practice and world leading at this stage’.<sup>50</sup>

17.52 Women’s Health Victoria noted that family violence clauses may serve a ‘dual purpose of acting as a support mechanism for employees experiencing violence, and an educative tool for the organisation as a whole’.<sup>51</sup>

17.53 The ACTU submitted that:

workplaces and workplace bargaining priorities vary, and that individual unions are best placed to determine the extent to which provisions designed to protect and support employees who are victims of domestic violence are appropriate and / or achievable in particular workplace bargaining situations.<sup>52</sup>

17.54 Similarly, ACCI submitted that ‘whilst not discounting the importance of such clauses, it must be acknowledged that they have not been seen as a priority for the majority of workplaces in Australia’.<sup>53</sup>

17.55 ACCI emphasised that ‘one-size does not fit all’ and that ‘these types of clauses are negotiated with employees on a voluntary basis’ and ‘where an employer agrees to such clauses, it is because it meets the specific needs of its staff, which may not be true for other workplaces’.<sup>54</sup> Accordingly, ACCI stated that it would not support a mandatory family violence clause in enterprise agreements providing a ‘suite of new entitlements that was not negotiated between employers and employees in a particular workplace’.<sup>55</sup>

17.56 ACCI also commented that neither the Surf Coast Shire nor the UNSW family violence clauses should be considered ‘a “model clause” for inclusion in all agreements’.<sup>56</sup>

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48 National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011.

49 ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

50 National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011.

51 Women’s Health Victoria, *Submission CFV 11*, 5 April 2011.

52 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

53 ACCI, *Submission CFV 19*, 8 April 2011.

54 Ibid.

55 Ibid.

56 Ibid.



17.57 ACCI suggested that the most appropriate approach to addressing family violence in this context is through workplace policies and practices, rather than through mandatory inclusion of family violence clauses in formalised enterprise agreements.

17.58 The Queensland Law Society opposed the inclusion of family violence clauses in enterprise agreements on the basis that ‘the relevant legislation is sufficient to protect these rights’.<sup>57</sup>

***Education, training and awareness raising***

17.59 Most stakeholders also emphasised the need for family violence clauses to be underpinned by an education campaign.<sup>58</sup> For example, Women’s Health Victoria expressed the view that:

Education should include training and awareness raising about the reasons for including a family violence clause, how a workplace can support employees who might be experiencing family violence, and how employees can support their colleagues that are experiencing family violence.

Without a wider training and awareness raising program, the inclusion of family violence clauses in enterprise agreements has the potential to do harm, particularly in workplaces that are not safe, respectful or supportive of gender equity.<sup>59</sup>

17.60 Several stakeholders supported the development of complementary policies, guidelines and other material.<sup>60</sup> For example, both ACCI and the AHRC suggested the development of a guide in relation to family violence clauses in enterprise agreements. ACCI noted that:

The Fair Work Ombudsman (FWO) publishes Best Practice Guides (and often consults with industry and unions) on various topics and could include information on types of clauses which may be considered by employers and employees. Whilst no one-size fits all clause is appropriate, ACCI would support additional information to be published by the FWO for the benefit of employers and employees when considering bargaining or formulating policies.<sup>61</sup>

17.61 Similarly, the AHRC recommended that such a guide could include existing and model clauses and could be drafted by FWA, in consultation with the ACTU, peak employer bodies, and experts in the field of family violence.<sup>62</sup>

17.62 In consultations, the ADFVC indicated that as part of the Domestic Violence Workplace Rights and Entitlements Project it is developing, with unions and employer organisations, a set of model workplace information and training resources for staff, human resources personnel, union delegates and supervisors.

<sup>57</sup> Queensland Law Society, *Submission CFV 21*, 6 April 2011.

<sup>58</sup> Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; Women’s Health Victoria, *Submission CFV 11*, 5 April 2011. Other suggestions with respect to training, education and raising awareness are dealt with in the context of the national education campaign discussed in Ch 14.

<sup>59</sup> Ibid.

<sup>60</sup> Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; ACCI, *Submission CFV 19*, 8 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

<sup>61</sup> ACCI, *Submission CFV 19*, 8 April 2011.

<sup>62</sup> Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011.

***ALRC's views***

17.63 The ALRC expressed its view in relation to the appropriateness of amending the NES to provide for minimum statutory entitlements in Chapter 16. The ALRC's reasoning with respect to amendments to the NES was reinforced by several of the submissions made in response to the issue of family violence clauses in enterprise agreements, in particular those noting the effect of leaving the provision of family violence-related entitlements to enterprise bargaining.

17.64 In addition, in light of the relatively low proportion of the workforce covered by enterprise agreements, the ALRC notes the limited effect family violence clauses in enterprise agreements may have on a substantial number of employees.

17.65 However, in addition to amendments to the NES, or in the event that the NES are not amended to provide for flexible working arrangements and family violence leave, the ALRC considers that family violence clauses in enterprise agreements are likely to serve an important function and to increase the safety of employees experiencing family violence. Including family violence clauses in enterprise agreements would recognise and address the impact of family violence on employees and workplaces, provide a basis upon which employer and employees can work together and provide enforceable entitlements.

17.66 While the ALRC recognises the potential limits of leaving the negotiation of family violence clauses to enterprise bargaining, the ALRC also acknowledges the benefits of such agreements as, given they are negotiated at an individual workplace level, the inclusion of a family violence clause will necessarily be the product of agreement between the employer and employees (or employee organisations) as to the nature and content of the clause, in light of the specific circumstances of the workplace.

***Minimum requirements***

17.67 The ALRC considers that there are several basic requirements family violence clauses should contain but considers other matters may be more appropriately decided by the Government, unions, employer organisations and employees/employers. The basic requirements should include provisions in relation to:

- verification of family violence;
- confidentiality;
- reporting, roles and responsibilities;
- flexible work arrangements; and
- some form of paid leave.

17.68 The ALRC does not consider that the *Fair Work Act* should be amended to provide that it is mandatory for a family violence clause to be included in enterprise agreements. However, the ALRC does consider that the Government, unions and employer organisations should encourage the inclusion of family violence clauses in

enterprise agreements and that agreements should, at a minimum, provide for the requirements outlined above.

***Education, awareness and guidance***

17.69 The ALRC acknowledges that no one family violence clause will be appropriate to suit all workplaces. While such entitlements need to be clear and enforceable, clauses must also be sufficiently flexible to allow businesses to meet their particular needs. Therefore the ALRC suggests the development of a number of model family violence clauses.

17.70 The ALRC also suggests that the Government should provide ongoing funding to bodies such as the ADFVC to continue to improve the knowledge and capacity of unions and employer organisations to support employees experiencing family violence, including through provision of training and resources as well as the development of model family violence clauses appropriate in a range of businesses and industries.

17.71 In addition, the ALRC proposes that the FWO should develop a guide to negotiating family violence clauses in enterprise agreements, in consultation with the ADFVC, the ACTU and employer organisations. The guide should include information about where and how a clause could be included in an enterprise agreement, what it could encompass and how it could interact with existing workplace policies and initiatives. Importantly, education and training with respect to family violence clauses in enterprise agreements should form part of the national education campaign recommended in Chapter 14.

**Proposal 17–2** The Australian Government should encourage the inclusion of family violence clauses in enterprise agreements. Agreements should, at a minimum:

- (a) recognise that verification of family violence may be required;
- (b) ensure the confidentiality of any personal information disclosed;
- (c) establish lines of communication for employees;
- (d) set out relevant roles and responsibilities;
- (e) provide for flexible working arrangements; and
- (f) provide access to paid leave.

**Proposal 17–3** 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, the Australian Council of Trade Unions and employer organisations.

## Awards

17.72 An award is an industrial instrument that sets out minimum terms and conditions in a particular industry or occupation, in addition to any statutory minimum required. Under the national industrial relations system there are currently two main types of awards:

- modern awards; and
- award-based transitional instruments (including former federal and state awards) which are currently being reviewed.

17.73 Beginning in 2008, the Australian Industrial Relations Commission, replaced by FWA, conducted an award modernisation process aimed at reviewing and rationalising existing awards to create a system of ‘modern awards’.<sup>63</sup> As a result of this process, there are now 122 industry and occupation modern awards that commenced on 1 January 2010, many of which include transitional provisions.

17.74 FWA is currently reviewing remaining award-based transitional instruments that apply to a single enterprise and where the employer is a constitutional corporation, including federal awards created before 27 March 2006 and former state awards now incorporated under the national system (which became notional agreements preserving state awards).<sup>64</sup>

17.75 In light of the ongoing award modernisation process, and the fact that most national system employees are now covered by modern awards, the focus of this Discussion Paper is on modern awards.

## Modern awards

17.76 Under the *Fair Work Act*, a national system employee who is not covered by an enterprise agreement<sup>65</sup> and is not a ‘high income employee’<sup>66</sup> may be covered by a modern award.<sup>67</sup> Evidence suggests that women are likely to be more award-reliant than men.<sup>68</sup>

17.77 A modern award is an industrial instrument that sets out minimum terms and conditions for a particular industry or occupation in addition to the statutory minimum outlined by the NES. A modern award cannot exclude any provisions of the NES but

63 *Workplace Relations Act 1996* (Cth) pt 10A came into operation on 27 March 2008 and provided for the modernisation of the federal award system according to specific criteria in pt 10A itself, as well as award modernisation requests from the Minister for Employment and Workplace Relations: *Workplace Relations Act 1996* (Cth) s 576C. See also: Fair Work Australia, *About Award Modernisation* <<http://www.fwa.gov.au/index.cfm>> at 10 January 2011.

64 On application, FWA may make a modern award. Such applications can be made under sch 6 of *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) from 1 July 2009 to 31 December 2013.

65 *Fair Work Act 2009* (Cth) s 57.

66 *Ibid* s 47(2).

67 There is an obligation to comply with a modern award: *Ibid* s 45.

68 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 25.

can provide additional detail in relation to the operation of an NES entitlement. In general, a modern award applies to employees in a particular industry or occupation and is used as the benchmark for assessing enterprise agreements before they are approved by FWA.

17.78 The *Fair Work Act* draws a distinction between where a modern award *covers* an employee, employer, or organisation—where it is expressed to cover them—and where it *applies*—if it actually imposes obligations or grants entitlements.<sup>69</sup>

17.79 The *Fair Work Act* prescribes matters which must, must not, and may, be included under a modern award.<sup>70</sup> In a family violence context, the matters of relevance that are usually included in a modern award include:

- type of employment—for example, full-time, part-time or casual,<sup>71</sup> as well as ‘terms about the facilitation of flexible working arrangements, particularly for employees with family responsibilities’;<sup>72</sup>
- arrangements for when work is performed—for example, variations to hours of work, rostering, notice periods and working hours;<sup>73</sup>
- leave;<sup>74</sup>
- procedures for consultation, representation and dispute settlement;<sup>75</sup> and
- flexibility—although IFAs may only be made to vary the effect of modern award terms including arrangements for when work is performed, rates, allowances and leave loading.<sup>76</sup>

17.80 Under the current allowable matters there is some scope for a modern award to recognise and accommodate the needs of victims of family violence.

### ***Modern award objectives***

17.81 Section 134 of the *Fair Work Act* contains the modern awards objective that applies to the performance or exercise of FWA’s modern award powers. Under the objective, FWA must ensure that modern awards, together with the NES:

provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid; and
- (b) the need to encourage collective bargaining; and

<sup>69</sup> *Fair Work Act 2009* (Cth) ss 46–48.

<sup>70</sup> See *Ibid* ch 2, pt 2–3, div 3.

<sup>71</sup> *Ibid* s 139(1)(b).

<sup>72</sup> The Explanatory Memorandum to the Fair Work Bill states that modern awards may include terms about the facilitation of flexible working arrangements: Explanatory Memorandum, Fair Work Bill 2008 (Cth) [531].

<sup>73</sup> *Fair Work Act 2009* (Cth) s 139(1)(c).

<sup>74</sup> *Ibid* s 139(1)(h).

<sup>75</sup> *Ibid* ss 139(1)(j), 146.

<sup>76</sup> *Ibid* s 144. Note, there are certain requirements under s 144(4).

- (c) the need to promote social inclusion through increased workforce participation; and
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (e) the principle of equal remuneration for work of equal or comparable value; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.<sup>77</sup>

17.82 Further, the Explanatory Memorandum to the Fair Work Bill provides, in relation to modern awards, that:

In ensuring the minimum safety net of terms and conditions is relevant, it is anticipated that FWA will take account of changes in community standards and expectations, and that the terms and conditions will be tailored (as appropriate) to the specific industry or occupation covered by the award.<sup>78</sup>

### ***Existing award provisions in other jurisdictions***

17.83 The key Australian precedent for the recognition of family violence in awards is the *Crown Employees (Public Service Conditions of Employment) Award 2009* (NSW), amended in 2011, under which NSW public servants are entitled to five days special leave and use of other forms of leave for the purposes of responding to family violence, as well as flexible working arrangements.

17.84 While this award is a state award, the provision provides a useful guide as to the way an award may incorporate a family violence provision. The provision is reproduced below.<sup>79</sup>

**Crown Employees (Public Service Conditions of Employment) Award 2009 (NSW)**

**84A. Leave for Matters Arising from Domestic Violence**

84A.1 The definition of domestic violence is found in clause 3.71 of this award.

84A.2 Leave entitlements provided for in clause 71, Family and Community Service Leave, clause 79, Sick Leave and clause 81, Sick Leave to Care for a Family Member, may be used by staff members experiencing domestic violence.

84A.3 Where the leave entitlements referred to in subclause 84A.2 are exhausted, Department Heads shall grant Special Leave as per clause 84.11.

<sup>77</sup> Ibid s 134.

<sup>78</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth) [518].

<sup>79</sup> *Crown Employees (Public Service Conditions of Employment) Award 2009* (NSW).

84A.4 The Department Head will need to be satisfied, on reasonable grounds, that domestic violence has occurred and may require proof presented in the form of an agreed document issued by the Police Force, a Court, a Doctor, a Domestic Violence Support Service or Lawyer.

84A.5 Personal information concerning domestic violence will be kept confidential by the agency.

84A.6 The Department Head, where appropriate, may facilitate flexible working arrangements subject to operational requirements, including changes to working times and changes to work location, telephone number and email address.

17.85 The award was also varied to incorporate a definition of ‘domestic violence’ as defined in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) and to provide that, where an employee’s leave for matters arising from domestic violence has been exhausted,

the Department Head shall grant up to five days per calendar year to be used for absences from the workplace to attend to matters arising from domestic violence situations.<sup>80</sup>

17.86 There are a range of other NSW awards which have now been varied to include family violence provisions.<sup>81</sup>

### Variation and review of modern awards

17.87 Under the *Fair Work (Transitional Provisions and Consequential Amendments Act 2009* (Cth), FWA is required to undertake an initial review of modern awards to be conducted from 1 January 2012.<sup>82</sup> The scope of the review is limited to FWA considering whether modern awards achieve the modern awards objectives and are operating effectively, without anomalies or technical problems arising from the award modernisation process.

<sup>80</sup> Ibid.

<sup>81</sup> *NSW Public Health System Nurses’ & Midwives’ (State) Award 2011* (NSW); *Crown Employees (Public Service Conditions of Employment) Award 2009* (NSW); *Crown Employees (Independent Pricing and Regulatory Tribunal 2009) Award 2009* (NSW); *Crown Employees (Independent Transport Safety and Reliability Regulator) Award 2009* (NSW); *Crown Employees (Institute Managers in TAFE) Salaries and Conditions Award 2006* (NSW); *Crown Employees (NSW TAFE Commission—Administrative and Support Staff Conditions of Employment) Award 2005* (NSW); *Crown Employees (Home Care Service of New South Wales—Administrative Staff) Award 2004* (NSW); *Casino Control Authority—Casino Inspectors (Transferred from Department of Gaming and Racing) Award 2004* (NSW); *Crown Employees (Parliament House Conditions of Employment 2004) Award*; *Crown Employees (School Administrative and Support Staff) Award* (NSW); *Crown Employees (Trades Assistants) Award* (NSW); *Zoological Parks Board of New South Wales Employees (State) Award* (NSW); *Crown Employees (Roads and Traffic Authority of New South Wales—Salaried Staff) Award* (NSW); *Independent Commission Against Corruption Award* (NSW); *Crown Employees (Parliamentary Electorate Officers) Award* (NSW); *Crown Employees (Tipstaves to Justices) Award* (NSW); *Livestock Health and Pest Authorities Salaries and Conditions Award* (NSW). The ALRC understands the following awards will be varied in the near future: *Crown Employees (NSW Police Force Administrative Officers and Temporary Employees) Award 2009* (NSW); *Crown Employees (NSW Police Special Constables) (Police Band) Award* (NSW); *Crown Employees (NSW Police Special Constables (Security)) Award* (NSW).

<sup>82</sup> *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) sch 5, s 6.

17.88 In addition, s 156 of the *Fair Work Act* provides for review of each modern award every four years. The first review of this kind must commence as soon as practicable after 1 January 2014. The Explanatory Memorandum to the Fair Work Bill states that ‘these reviews are the principal way in which a modern award is maintained as a fair and relevant safety net of terms and conditions’.<sup>83</sup>

17.89 In the course of the reviews, FWA may make determinations varying modern awards, making additional modern awards or revoking existing modern awards. FWA may also vary or revoke a modern award outside of the four-yearly review process if necessary to meet the modern award objectives.<sup>84</sup>

### Submissions and consultations

17.90 In the Employment Law Issues Paper, the ALRC asked whether existing terms in modern awards are sufficient to respond to the needs of employees experiencing family violence.

17.91 In addition, the ALRC considered ways in which modern awards might incorporate family-violence related provisions, whether through the use of flexibility terms or whether a new allowable matter may be required under modern awards. In particular, the ALRC asked for stakeholder comment on whether s 139(1) of the *Fair Work Act* should be amended to include an additional allowable matter dealing with family violence.

17.92 The majority of stakeholders who addressed this issue expressed the view that existing terms in modern awards are not sufficient to respond to the needs of employees experiencing family violence.<sup>85</sup> Many stakeholders expressed the same views underlying support for amendment to the NES and the inclusion of family violence clauses in enterprise agreements.

17.93 Several stakeholders also emphasised that ‘at the outset it should be noted that women are both more likely to be award-reliant than men, and more likely to experience family violence’.<sup>86</sup> Some also specifically suggested that modern awards be amended in line with the NSW public sector awards containing ‘effective and specific family violence clauses’.<sup>87</sup>

17.94 Stakeholders argued that the current IFA and leave provisions in modern awards are inadequate and are not broad enough to allow employees experiencing family violence to take time off work or reorganise work arrangements to attend

83 Explanatory Memorandum, Fair Work Bill 2008 (Cth) [600].

84 *Fair Work Act 2009* (Cth) s 157.

85 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Explanatory Memorandum, Fair Work Bill 2008 (Cth); National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

86 ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011.

87 See, eg, ADFVC, *Submission CFV 26*, 11 April 2011.



appointments, access services and care for children.<sup>88</sup> Similarly, according to the Redfern Legal Centre,

there appears to be wide variation in the use of flexible working arrangements depending on which industry, the status and role of the employee, and the views of individual managers. Relying on the flexibility provisions alone will not assist all workers dealing with family violence.<sup>89</sup>

17.95 The ADFVC submitted:

Although the *Fair Work Act* states that modern awards may provide for averaging of hours of work over a certain period, suggesting scope for temporary variation of regular hours, this merely provides a mechanism for the employer to allow scheduling changes where they are mutually agreeable. It does not provide a right or entitlement to temporary (or ongoing) rearrangement of shifts, hours or spans for employees who need time off for court or other appointments, or simply cannot work their regular scheduled hours due to the emotional impact of the violence on their work capacity.<sup>90</sup>

17.96 With respect to considering the ways in which modern awards might better protect victims of family violence, stakeholder views were mixed about incorporating a reference to family violence as an allowable matter under s 139(1) of the *Fair Work Act*, or whether the provision was already sufficiently broad to allow the inclusion of family violence provisions in modern awards.

17.97 A number of stakeholders submitted that it is necessary to amend s 139(1) to include a new allowable matter and/or make specific reference to family violence in the allowable matters.<sup>91</sup> Specifically, stakeholders suggested the amendment would allow the inclusion of clauses in relation to family violence and act as a safeguard for victims of family violence covered solely by an award.<sup>92</sup>

17.98 For example, the AHRC stated:

Amending s 139(1) of the FWA to enable modern awards to expressly include the facilitation of flexible working arrangements for employees affected by domestic violence would provide these vulnerable employees with an important and useful condition.<sup>93</sup>

17.99 The ADFVC suggested that s 139(1)(b) of the *Fair Work Act* be amended to include an additional sentence—‘particularly for employees with family responsibilities and employees experiencing family violence’.<sup>94</sup>

88 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

89 Redfern Legal Centre, *Submission CFV 15*, 5 April 2011.

90 ADFVC, *Submission CFV 26*, 11 April 2011.

91 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; Queensland Law Society, *Submission CFV 21*, 6 April 2011; National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Confidential, *Submission CFV 13*, 5 April 2011; Women’s Health Victoria, *Submission CFV 11*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

92 See, eg, ADFVC, *Submission CFV 26*, 11 April 2011.

93 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011.

94 ADFVC, *Submission CFV 26*, 11 April 2011.

17.100 Conversely, several stakeholders indicated that the terms of s 139(1) are already sufficiently broad. For example, the ACTU expressed the view that:

Section 139(1) of the *Fair Work Act 2009* includes provisions for, inter alia: (b) the facilitation of flexible working arrangements, particularly for employees with family responsibilities; (c) variations to working hours; and (h) leave, leave loadings and arrangements for taking leave. As such, s 139 (1) should not impede the capacity of modern awards to include terms for flexible work and leave arrangements for family or domestic violence purposes ... [Although] specific referral to family or domestic violence in s.139(1) would further clarify the rights of employees experiencing family or domestic violence.<sup>95</sup>

17.101 Similarly, ACCI submitted that:

FWA is able to insert provisions which are more beneficial than the NES and there is no reason why unions or employees could not make an application under the *Fair Work Act 2009* and for FWA to consider that application. Therefore, there is no legislative imperative to create a new allowable award matter, given the availability to deal with such terms within the existing provisions.<sup>96</sup>

17.102 As was the case in response to other proposed amendments, stakeholders emphasised that moves to address family violence in modern awards need to be accompanied by the provision of additional information for both employees and employers and form part of a sustained education and awareness campaign.<sup>97</sup>

17.103 Finally, in consultations and submissions the ALRC received numerous comments about the upcoming FWA reviews of modern awards. For example, in its submission, ACCI noted:

The creation of new modern awards was the result of an extensive and some would say, exhaustive, consultation process before the AIRC during 2008 to 2009 ... Whilst the process has concluded with the creation of 122 new awards, the process is ongoing with applications by unions and employers, to vary modern awards still occurring. Employers would consider that the ink is barely dry on modern awards and it would be unfair for all parties to be required to embark on a new modernisation process because of the inclusion of a new allowable award matter in the legislation. There is a two yearly review coming up in 2012 which will review all modern awards in any event.<sup>98</sup>

### ALRC's views

17.104 The ALRC considers that s 139(1) of the *Fair Work Act* is sufficiently broad to allow scope for the inclusion of family violence-related clauses in modern awards. For example, it provides for the inclusion of terms about: type of employment; arrangements for when work is performed; leave; and flexibility. However, at a Commonwealth level such clauses have not been included to date and, as a result, existing terms in modern awards are insufficient to respond to the needs of employees experiencing family violence.

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<sup>95</sup> Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

<sup>96</sup> ACCI, *Submission CFV 19*, 8 April 2011.

<sup>97</sup> See, eg, Women's Health Victoria, *Submission CFV 11*, 5 April 2011.

<sup>98</sup> ACCI, *Submission CFV 19*, 8 April 2011.

17.105 The ALRC considers the inclusion of such clauses is consistent with the modern awards objective of promoting social inclusion through increased workforce participation—primarily by ensuring employees experiencing family violence can make flexible working arrangements or access leave to deal with circumstances arising from family violence, which increases the likelihood of them retaining their employment.

17.106 The tension between the need to ensure that modern awards are relevant and take account of changes in community standards and expectations, on the one hand, with the need to ensure a simple and stable modern award system, on the other, appears to be resolved in part by the requirement that FWA conduct reviews of the modern award system. FWA will undertake reviews of modern awards in 2012 and 2014 and in the course of those reviews FWA may make determinations varying modern awards.

17.107 Accordingly, the ALRC considers that, rather than proposing the inclusion of a new allowable matter (which is probably unnecessary in any event), or outlining the form in which family violence-related clauses may be incorporated into modern awards, it is more appropriate to defer consideration of these issues as part of the FWA reviews in 2012 and 2014. Therefore, the ALRC proposes that FWA should, in the course of its 2012 and 2014 reviews of modern awards, consider the way in which family violence may be incorporated into modern awards. The provision in the *Crown Employees (Public Service Conditions of Employment) Awards 2009* (NSW) provides a useful example.

**Proposal 17–4** In the course of its 2012 review of modern awards, Fair Work Australia should consider the ways in which family violence may be incorporated into awards in keeping with the modern award objectives.

**Proposal 17–5** In the course of its first four-yearly review of modern awards, beginning in 2014, Fair Work Australia should consider the inclusion of a model family violence clause.

## Unfair dismissal

17.108 Under the unfair dismissal provisions of the *Fair Work Act*, a person is dismissed if their employment has been terminated on the employer’s initiative.<sup>99</sup> An employee is unfairly dismissed if the dismissal was ‘harsh, unjust or unreasonable’, was not consistent with the Small Business Fair Dismissal Code (if it applies), or was not a case of genuine redundancy.<sup>100</sup>

99 This provision is intended to capture the case law on this issue: *Mohazab v Dick Smith Electronics Pty Ltd* (1995) 62 IR 200. Dismissal includes circumstances where an employee’s employment is terminated by their employer or in the case of constructive dismissal. Constructive dismissal includes a range of circumstance where a person is forced to resign as a result of conduct engaged in by their employer, for example threatened dismissal, or in circumstances where the employee has no choice but to resign. See *Fair Work Act 2009* (Cth) s 386.

100 *Fair Work Act 2009* (Cth) s 385.

17.109 Not all employees have access to unfair dismissal remedies under the *Fair Work Act*. Unfair dismissal is available to employees who have completed a 12-month or six-month period of employment with an employer,<sup>101</sup> and who are covered by a modern award, enterprise agreement or earn less than the ‘high income threshold’.<sup>102</sup> Casual employees may only access unfair dismissal remedies if they were employed on a regular and systematic basis and had a reasonable expectation of continuing employment.<sup>103</sup>

17.110 The Explanatory Memorandum to the Fair Work Bill provides that the requirement that an employee serve a minimum employment period before having access to an unfair dismissal remedy enables employers to

have a period of time to assess the capacity and conduct of a new employee without being subject to an unfair dismissal claim if they dismiss the employee during this period.<sup>104</sup>

17.111 However, in light of the disrupted work history of many victims of family violence and the casualised nature of the victim labour force, there are concerns that existing unfair dismissal provisions may offer limited protection to many victims of family violence, given the qualifying requirements.

17.112 An application for unfair dismissal must be lodged with FWA within 14 days of the dismissal.<sup>105</sup> The Explanatory Memorandum to the Fair Work Bill indicates that the aim of the reduced application time is to ‘promote quick resolution of claims and increase the feasibility of reinstatement as an option’.<sup>106</sup>

17.113 However, in ‘exceptional circumstances’, FWA may grant a further period within which to make an application.<sup>107</sup> In determining whether there are exceptional circumstances, FWA must take into account:

- (a) the reason for the delay; and
- (b) whether the person first became aware of the dismissal after it had taken effect; and
- (c) any action taken by the person to dispute the dismissal; and
- (d) prejudice to the employer (including prejudice caused by the delay); and
- (e) the merits of the application; and
- (f) fairness as between the person and other persons in a similar position.<sup>108</sup>

101 Twelve months if the employer is a ‘small business employer’, that is employs fewer than 15 employees, or six months in other cases: *Ibid* ss 382, 383.

102 Currently indexed at \$108,300.

103 *Fair Work Act 2009* (Cth) s 384(2)(a).

104 Explanatory Memorandum, Fair Work Bill 2008 (Cth) [1512].

105 Under Work Choices the time limit was 21 days. In the Fair Work Bill the time limit was initially 7 days.

106 Explanatory Memorandum, Fair Work Bill 2008 (Cth) [r 222].

107 *Fair Work Act 2009* (Cth) ss 729, 394. The exceptional circumstances factors are largely based on the principles outlined in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298.

108 *Fair Work Act 2009* (Cth) s 394(3).

17.114 The Explanatory Memorandum to the Fair Work Bill states that the principal aim of the unfair dismissal framework is ‘balancing the needs of business and employees’ and the object is to ‘provide a quick, flexible and informal process for the resolution of unfair dismissal’.<sup>109</sup>

17.115 In considering whether an individual dismissal is harsh, unjust or unreasonable, FWA must consider a range of factors, and may consider any other matter it deems relevant.<sup>110</sup>

17.116 There are very few matters in which family violence has been raised before industrial tribunals in Australia.<sup>111</sup> It is likely this arises in part due to the reluctance and barriers to disclosure discussed in Chapters 4 and 14. It may also arise as termination of employment occurs on the basis of other factors, the underlying cause of which may be family violence (of which the employer is often unaware). For example, where family violence has an impact on performance.

17.117 However, as the majority of unfair dismissal matters settle at conciliation, there is limited publicly available data on the basis for applications and, as a result, it is difficult to gauge the frequency with which family violence is a factor in unfair dismissal.<sup>112</sup> Data collection issues with respect to unfair dismissal are discussed in chapter 14.

### Submissions and consultations

17.118 In the Employment Law Issues Paper, the ALRC noted that the terms of s 387 of the *Fair Work Act* may already be broad enough to cover consideration of family violence but expressed interest in submissions on the extent to which an employee’s experience of family violence is or could be considered in unfair dismissal cases as part of the ‘harsh, unjust or unreasonable’ formulation in practice.

17.119 The ALRC also noted several concerns with respect to access to unfair dismissal for those experiencing family violence, primarily in relation to the requirement that an employee serve a minimum employment period before having access to an unfair dismissal remedy.

17.120 Most stakeholders indicated that family violence is rarely raised in unfair dismissal matters, for a range of reasons arising from:

- reluctance to disclose family violence due to fear, or concern about responses to the disclosure;

109 Explanatory Memorandum, Fair Work Bill 2008 (Cth) [1507] and [1508].

110 *Fair Work Act 2009* (Cth) s 387.

111 There are several cases in which family violence has been raised, including: *Tamara Jones v Q-Comp* (Unreported, Queensland Industrial Relations Commission, Fisher C, 15 April 2011); Explanatory Memorandum, Fair Work Bill 2008 (Cth); *Morley v Qantas Holidays Ltd* (Unreported, Australian Industrial Relations Tribunal, Hamberger SDP, 31 August 2006); *Swaran Lata Kumar v Macquarie Partnership Lawyers* [2005] NSWIRComm 202; *G Young v G W Closter & Sons Pty Ltd* (Unreported, Australian Industrial Relations Tribunal, Watson SDP, 12 May 1999).

112 During the 2009–10 period, 93 percent of termination of employment applications to Fair Work Australia (including general protections applications involving dismissal) were finalised at or prior to conciliation: Fair Work Australia, *Annual Report 2009–2010*, 12.

- lack of time or emotional energy to pursue a claim; and
- concern about the way in which the matter will be handled.<sup>113</sup>

17.121 ACCI expressed the view that:

It is unclear why unfair dismissal laws would impact directly on workers experiencing domestic violence, as distinct from a worker experiencing, as but one example, being a victim of crime generally. ACCI is unaware of any case whereby an employee has been dismissed because they are experiencing domestic violence (even if that were to be an employer who also happened to be a spouse or parent). In saying that, FWA is able to take into account all circumstances leading up to the termination of employment, including whether there was a valid reason for termination.<sup>114</sup>

17.122 Stakeholders also emphasised that, in many cases, termination of employment occurs on the basis of other factors, the underlying cause of which may be family violence, and as a result the application focuses on the manifestations without necessarily involving disclosure of the existence of family violence.<sup>115</sup> For example, the NNWWC commented:

Where there are other factors present to argue a dismissal has been harsh, unjust or unreasonable our advocates would most likely stick to these but this does not address the power of silencing the issue of family violence and prevents it from ever gaining legitimacy as a genuine consideration when a woman experiencing family violence is terminated.<sup>116</sup>

17.123 Some stakeholders expressed the view that the harsh, unjust or unreasonable formulation is already sufficiently broad to allow consideration of an employee's experience of family violence in an unfair dismissal matter if it were raised.<sup>117</sup>

17.124 Several stakeholders emphasised that victims of family violence often have a disrupted work history and, as a result, are often precluded from making an unfair dismissal application not having satisfied the minimum employment period requirement.<sup>118</sup> The ADFVC suggested this potentially excludes 'the most vulnerable workers' and recommended that the 'current qualifying periods and requirement of regular and continuous service with respect to casuals should be removed with respect to victims of family violence'.<sup>119</sup>

17.125 The 14 day time limit within which an application for unfair dismissal must be lodged, except in 'exceptional circumstances', was also raised by stakeholders as a concern. For example, the ADFVC expressed the view that the time limit is particularly onerous for people experiencing family violence:

For some victims, unfair dismissal proceedings take a back seat to concurrent legal proceedings for family law, criminal charges against the perpetrator, or a protection

113 National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

114 ACCI, *Submission CFV 19*, 8 April 2011.

115 Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011.

116 National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011.

117 Redfern Legal Centre, *Submission CFV 15*, 5 April 2011.

118 National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011.

119 ADFVC, *Submission CFV 26*, 11 April 2011.

order. This difficulty is compounded by the very short timeframe ... the 14 day cut-off period is extremely onerous for applicants generally, and FWA has taken a strict approach in defining the circumstances in which an out of time application may be accepted, leaving many applicants without a remedy under the Act. In instances where victims of family violence are also dealing with other legal proceedings and under intense emotional strain, 14 days is unlikely to be enough time to seek legal advice and make an application.<sup>120</sup>

17.126 As a result of these concerns, stakeholders suggested that family violence should be one of the factors to be considered by FWA in determining whether exceptional circumstances exist.<sup>121</sup>

### **ALRC's views**

17.127 The ALRC considers that the 'harsh, unjust or unreasonable' formulation and the terms of s 387 of the *Fair Work Act* are sufficiently broad to allow consideration of an applicant's experience of family violence if it were raised in the context of an unfair dismissal application.

17.128 While there is limited publicly available data on the basis for unfair dismissal applications, clearly there are a range of issues, in addition to general barriers to disclosure, adversely impacting on the willingness of applicant's to raise family violence in the context of unfair dismissal applications.

17.129 A number of proposals in this Discussion Paper—to the extent that they assist in raising recognition and awareness of family violence as a workplace issue—may assist in ensuring unfair dismissal is increasingly seen and utilised as a means of recourse for victims of family violence who have their employment terminated unfairly. In addition, the ALRC considers that increased employer awareness, and family violence provisions that provide access to flexible working arrangements and leave, may in turn play a role in preventing dismissal in circumstances where the grounds for termination relate to workplace manifestations of family violence.

### ***Eligibility requirements***

17.130 The ALRC considers that the eligibility requirements for unfair dismissal applications, in particular in relation to the minimum employment period, may adversely affect victims of family violence, to the extent that they are more likely to have a disrupted work history. However, the ALRC also acknowledges the need for employers to have a period of time to assess the capacity and conduct of new employees without necessarily facing an unfair dismissal claim should they decide to terminate the employee's employment.

17.131 While the ALRC proposes the removal of eligibility requirements in relation to requesting flexible working arrangements under the NES, it does so only in relation to requests made on the basis of experiencing family violence. The ALRC does not consider it is appropriate to propose a two-tiered system of eligibility for unfair dismissal. As a result, the ALRC does not intend to make any proposals in relation to

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120 Ibid.

121 See, eg, Redfern Legal Centre, *Submission CFV 15*, 5 April 2011.

the current minimum employment periods, or requirements in relation to casual employees, which govern eligibility to make an application for unfair dismissal.

### ***Time limit for applications***

17.132 The ALRC considers that the current 14 day time limit for unfair dismissal applications is likely to be particularly onerous for victims of family violence. However, the ALRC considers that FWA's power to allow a further period for application in exceptional circumstances is likely to provide a mechanism through which victims of family violence may be granted additional time to make an application.

17.133 While the matters FWA must take into account in deciding whether exceptional circumstances exist appear to be sufficiently broad to allow consideration of family violence as contributing to the 'reason for the delay', the ALRC would be interested in stakeholder comments on the way in which FWA currently considers family violence-related matters in the course of determining whether there are exceptional circumstances.

17.134 To the extent that FWA takes a strict approach, as suggested by some stakeholders, the ALRC suggests that appropriate training of FWA members may assist to ensure that, where appropriate, family violence is considered in determining whether exceptional circumstances exist. The ALRC welcomes input from stakeholders as to the nature and content of any such training.

**Proposal 17–6** Fair Work Australia members should be provided with training to ensure that the existence of family violence is adequately considered in deciding whether there are 'exceptional circumstances' under s 394(3) of the *Fair Work Act 2009* (Cth) that would warrant the granting of a further period within which to make an application for unfair dismissal.

## **General protections**

17.135 Under the *Fair Work Act*, national system employees are entitled to a range of general workplace protections. Specifically, the Act:

- protects workplace rights, and the exercise of those rights;
- protects freedom of association and involvement in lawful industrial activities; and
- provides other protections, including protection from discrimination.<sup>122</sup>

17.136 Part 3–1 of the *Fair Work Act* contains these general protections which, among other things, prohibit an employer from taking 'adverse action' against an employee or prospective employee on the basis of the employee having, exercising or

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<sup>122</sup> *Fair Work Act 2009* (Cth) ch 3, pt 3–1.



not exercising, or proposing to exercise or not exercise, a ‘workplace right’, or to prevent the exercise of a ‘workplace right’.

17.137 Measures that may constitute ‘adverse action’ taken by an employer against an employee include dismissal, injury or discrimination, or, in the case of a prospective employee, refusing to employ or discriminating in the terms or conditions of offer,<sup>123</sup> and threatening any of the above.<sup>124</sup>

17.138 A ‘workplace right’ exists where a person:

- is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument (such as an award or agreement) or an order made by an industrial body;
- is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or
- has the capacity under a workplace law to make a complaint or inquiry to a person or body to seek compliance with that workplace law or instrument, or in the case of an employee, in relation to their employment.<sup>125</sup>

## Discrimination

17.139 Section 351(1) of the *Fair Work Act* prohibits specific forms of ‘adverse action’ being taken for discriminatory reasons:

An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person’s race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.<sup>126</sup>

17.140 Similarly, s 772(1)(f), which extends coverage to non-national system employees, prohibits termination of an employee’s employment on the basis of the same discriminatory grounds. Section 772(1)(f) is more limited than s 351(1) as it only applies to termination of employment, rather than ‘adverse action’ more generally.

17.141 However, employees experiencing family violence may face difficulties in relying on these grounds. As a result, an issue in the context of this Inquiry is whether ss 351(1) and 772(1)(f) of the *Fair Work Act* should be amended to include the ‘status of an actual or perceived victim of family violence’ as a ground of discrimination. There are difficulties associated with such a change because, for the purposes of s 351(1), s 351(2) only prohibits employer action on grounds that are defined in ‘any anti-discrimination law in force in the place where the action is taken’. Consequently, in order to include family violence as a separate ground under s 351(1), either s 351(2)

<sup>123</sup> Ibid s 342(1).

<sup>124</sup> An employee cannot make a general protections dismissal application at the same time as an unfair dismissal application: Ibid s 725.

<sup>125</sup> Ibid s 341. Section 341(2) outlines examples of processes and proceedings under a workplace law or instrument.

<sup>126</sup> Ibid s 351(1).

would need to be amended, or family violence would need to be included as a ground under other anti-discrimination law.

17.142 The question of whether family violence should be included as a separate ground of discrimination under anti-discrimination laws falls outside the Terms of Reference for this Inquiry. The consolidation and harmonisation of federal anti-discrimination laws is one of the initiatives proposed in Australia's Human Rights Framework and forms the basis of a project being undertaken by the Australian Government that commenced in 2010.<sup>127</sup>

17.143 It is instructive to note that several overseas jurisdictions have enacted legislation that prohibits employers from terminating an employee's employment or otherwise discriminating against them where the employee is, or is perceived to be, a victim of family violence, or where they take time off work, for example, to testify in a criminal proceeding, seek a protection order or seek medical attention related to experiences of family violence.<sup>128</sup>

### ***Submissions and consultations***

17.144 In the Employment Law Issues Paper the ALRC asked about the effectiveness of the current grounds under ss 351(1) and 772(1)(f) of the *Fair Work Act 2009* (Cth), where an employee has been discriminated against for reasons arising from their experiences of family violence, and whether family violence should be inserted as a separate ground of discrimination.<sup>129</sup>

17.145 Overall, stakeholders expressed the view that employees experiencing family violence are 'subject to direct and indirect adverse treatment in the work place, as a result of their experience of' family violence. The AHRC submitted that 'most commonly the adverse treatment manifests as being denied access to leave, flexible work arrangements or their employment being terminated'.<sup>130</sup>

127 In April 2010, the Australian Government announced its intention to streamline federal anti-discrimination legislation—*Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); and *Age Discrimination Act 2004* (Cth)—into one piece of legislation to address current inconsistencies and make the system more user-friendly by clarifying relevant rights and obligations. The project is to be delivered through a Better Regulation Ministerial Partnership and will form the basis for the development of harmonised anti-discrimination laws at a state and territory level—a project which is currently being progressed through the Standing Committee of Attorneys-General.

128 *California Labor Code* (US) §§ 230, 230.1; *Victims Economic Security and Safety Act* 820 Illinois Compiled Statutes 180 (US) § 30; *New York State Executive Law* (US) §§ 296-1(a); *New York City Administrative Code* (US) § 8-107.1; *Revised Code of Washington* 49 § 4976 (US) § 49.76; *Unlawful Action Against Employees Seeking Protection* 2007 Fla Stat §741–313 (US) § 741.313.

129 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011), Questions 18, 19.

130 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011.

**Protection provided by current provisions**

17.146 Some stakeholders emphasised the limited protection ss 351(1) and 772(1)(f) currently provide for employees who are discriminated against on the basis that they are experiencing family violence.<sup>131</sup>

17.147 In particular, stakeholders expressed the view that it is difficult for a victim of family violence to prove a ‘causal nexus between the discrimination and an attribute that is currently covered’ by the *Fair Work Act*, for example family responsibilities, disability or sex.<sup>132</sup> The AHRC noted:

It may not always be possible for an employee to link adverse action or a dismissal which is in truth based on domestic violence to a ground of discrimination covered by FWA. For example, an individual who is discriminated against because she or he requires time off work to attend court or to relocate to escape violence may be unable to make a claim under any ground covered by the FWA.<sup>133</sup>

17.148 The NNWWC illustrated the limited protection afforded by the current provisions through a case study.<sup>134</sup>

**Case Study**

Anne was in an abusive relationship and subject to domestic violence. She was employed as a casual employee. After her employer became aware of the situation the organisation indicated it was prepared to relocate her providing she left the partner. If she failed to provide a written statement indicating she had left, the transfer would be withdrawn. This adverse treatment could not be addressed through current anti-discrimination measures provided for in the *Fair Work Act*. If domestic violence victim status were a stand-alone attribute, the law may have protected Anne.

17.149 Victoria Legal Aid emphasised that

these limitations could also compound feelings of powerlessness on the part of a victim/survivor of family violence, if the focus is moved to, for example, injury or illness, rather than family violence itself.<sup>135</sup>

17.150 The ADFVC also noted the limited coverage of the general protections provisions, which do not cover contract workers and highlighted that ‘to date there have been few decisions in this area’ and that as the majority of complaints ‘settle at conciliation there is little publicly available data on the grounds of individual complaints’.<sup>136</sup>

17.151 Finally, several stakeholders highlighted the difficulty raised by s 351(2), but expressed mixed views as to the meaning and effect of the subsection. Some expressed

131 Ibid; Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

132 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011. See also: ADFVC, *Submission CFV 26*, 11 April 2011.

133 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011.

134 National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011.

135 Victoria Legal Aid, *Submission CFV 25*, 7 April 2011.

136 ADFVC, *Submission CFV 26*, 11 April 2011.

the view that the protection does not apply to action that is not unlawful under any anti-discrimination law in force in the place where the action is taken. In this case, in order for family violence to be included as a separate ground under s 351(1) of the *Fair Work Act*, they suggested it would also need to be incorporated under federal, state or territory anti-discrimination laws; or s 351(2) would need to be amended to remove the requirement that the action also be unlawful under anti-discrimination law.<sup>137</sup>

17.152 The other view expressed, with some support in the Explanatory Memorandum to the Fair Work Bill 2008, is that s 351(2) covers action which is covered by federal, state or territory anti-discrimination law but is not unlawful because an exemption or defence applies under that law:

On this view, the prohibition on adverse action contained in the FWA will not apply where an action that would otherwise be unlawful under an anti-discrimination law falls within an existing exemption or defence, making it ‘not unlawful’.<sup>138</sup>

### ***New ground of discrimination?***

17.153 The proposed insertion of family violence into sections 351(1) and 772(1)(f) of the *Fair Work Act* as a separate ground of discrimination received widespread support from stakeholders.<sup>139</sup>

17.154 DV Victoria and DVRC Victoria submitted the inclusion would ‘align with the objects of the *Fair Work Act* and would provide a significant safeguard to victims of family violence and support their capacity to remain in employment’.<sup>140</sup> Similarly, the ADFVC submitted that:

express protection of family violence under these provisions accords with the underlying objects of the Fair Work Act which include: enabling fairness and representation at work and the prevention of discrimination by ... protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms.<sup>141</sup>

17.155 In part, stakeholders expressed support on the basis that it ‘should not be necessary for victims of family violence to engage in complex legal analysis to demonstrate discrimination under’ the existing grounds.<sup>142</sup>

<sup>137</sup> Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Victoria Legal Aid, *Submission CFV 25*, 7 April 2011.

<sup>138</sup> Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011. See also Explanatory Memorandum, Fair Work Bill 2008 (Cth).

<sup>139</sup> Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Women's Legal Services NSW, *Submission CFV 28*, 11 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Victoria Legal Aid, *Submission CFV 25*, 7 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Confidential, *Submission CFV 13*, 5 April 2011; Women's Health Victoria, *Submission CFV 11*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011; Northern Rivers Community Legal Centre, *Submission CFV 08*, 28 March 2011. Queensland Law Society, *Submission CFV 21*, 6 April 2011 also expressed the view that the insertion would have ‘some merit’.

<sup>140</sup> Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011.

<sup>141</sup> ADFVC, *Submission CFV 26*, 11 April 2011.

<sup>142</sup> Redfern Legal Centre, *Submission CFV 15*, 5 April 2011.

17.156 In addition, submissions also highlighted that the inclusion would be likely to provide additional compliance incentives for employers, including in light of the FWO's role in investigating discrimination,<sup>143</sup> the applicability of civil penalty provisions<sup>144</sup> and the availability of injunctions to prevent adverse action or unlawful termination.<sup>145</sup>

17.157 The Redfern Legal Centre noted that some of the amendments proposed in this Discussion Paper, primarily in relation to family violence leave and flexible working arrangements, 'would expand the workplace rights on which an adverse action claim under Part 3-1 could be based'.<sup>146</sup>

17.158 Victoria Legal Aid and the ADFVC highlighted that several overseas jurisdictions have incorporated protection for victims of family violence under anti-discrimination legislation and suggested that 'Australia should follow international best practice in this area'.<sup>147</sup>

17.159 Some stakeholders expressed the view that the inclusion of any new ground must be accompanied by an education campaign in relation to family violence as a workplace issue.<sup>148</sup>

17.160 As a related matter, and in some views as a precondition, a number of stakeholders also expressed support for the inclusion of family violence as a protected attribute under Commonwealth, state and territory anti-discrimination legislation.<sup>149</sup>

17.161 Finally, ACCI expressed the view that:

The existing laws have gone through an extensive consultation process and do provide appropriate protections for employees. The general protections provisions have removed the 'dominant purpose' test which make it easier on an aggrieved person to make a complaint, with the onus on the employer to prove that they did not take 'adverse action' for a proscribed reason. ACCI is unaware of any case whereby a person has relied upon family or domestic violence grounds under the former legislation or the *Fair Work Act 2009*.<sup>150</sup>

### ***ALRC's views***

17.162 The ALRC acknowledges that some victims of family violence are subject to discrimination and adverse treatment in the workplace as a result of their experiences of family violence and that current general protections provisions under the *Fair Work Act* offer victims limited protection.

<sup>143</sup> The FWO can investigate discrimination against employees and investigate on its own initiative.

<sup>144</sup> Sections 351(1) and 772(1)(f) of the *Fair Work Act 2009* (Cth) attract civil penalty provisions under Part 4-1, allowing employees, unions and FWO to commence penalty order proceedings against employers who contravene the general protections provisions.

<sup>145</sup> ADFVC, *Submission CFV 26*, 11 April 2011.

<sup>146</sup> Redfern Legal Centre, *Submission CFV 15*, 5 April 2011.

<sup>147</sup> ADFVC, *Submission CFV 26*, 11 April 2011. Victoria Legal Aid, *Submission CFV 25*, 7 April 2011 highlighted legislation in several states in the US, Philippines and Spain.

<sup>148</sup> See, eg, Women's Health Victoria, *Submission CFV 11*, 5 April 2011.

<sup>149</sup> Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Victoria Legal Aid, *Submission CFV 25*, 7 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011.

<sup>150</sup> ACCI, *Submission CFV 19*, 8 April 2011.

17.163 However, the general protections provisions under the *Fair Work Act* do not operate in isolation and are necessarily linked to Commonwealth, state and territory anti-discrimination legislation.

17.164 The Australian Government is currently consolidating and harmonising Commonwealth anti-discrimination laws, as well as considering the inclusion of new grounds. The ALRC is aware of the important role played by the AHRC in informing this process, and in providing an evidence base upon which the Government can consider the inclusion of new grounds.<sup>151</sup>

17.165 The question of whether family violence should be included as a separate ground of discrimination under anti-discrimination laws falls outside the Terms of Reference for this Inquiry. However, the ALRC suggests that, in light of the above, the AHRC may wish to consider examining the possible basis upon which status as an ‘actual or perceived victim of family violence’ should be included as a ground under Commonwealth anti-discrimination law in the future.

17.166 In addition, as outlined above, the Government has undertaken to conduct a post-implementation review of the *Fair Work Act* by January 2012. The ALRC is conscious of the role played by the general protections provisions and the objects underlying their introduction and considers review of the general protections provisions is a systemic issue best conducted in the course of this review.

17.167 Consequently, in light of these processes, and conscious of the need for the ALRC to consider proposals to promote consistency, uniformity and complementary Commonwealth, state and territory laws,<sup>152</sup> rather than making a proposal about the inclusion of a family violence-related ground in the general protections provisions of the *Fair Work Act*, the ALRC considers it may be more appropriate for this issue to be considered in the course of the post-implementation review as well as in the context of new developments in Commonwealth, state and territory anti-discrimination law.

### **Temporary absence due to illness or injury**

17.168 Section 352 of the *Fair Work Act* prohibits employers from dismissing an employee because they are temporarily absent from work due to illness or injury of a kind prescribed by the *Fair Work Regulations*.

17.169 A prescribed illness or injury exists if the employee:

- provides a doctor’s certificate or statutory declaration for the illness or injury within 24 hours, or within a reasonable period in the circumstances; or

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151 This was illustrated by the work of the AHRC in relation to the inclusion of sexual orientation and gender identity as a ground under anti-discrimination legislation. The consultation report, Australian Human Rights Commission, *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination* (2011), ‘aims to instruct and assist the implementation of the national Human Rights Framework and strengthen human rights safeguards for all Australians’: Australian Human Rights Commission, *Website* <[www.hreoc.gov.au/human\\_rights/lgbti/lgbticonsult/index.html](http://www.hreoc.gov.au/human_rights/lgbti/lgbticonsult/index.html)> at 28 July 2011.

152 As required by the *Australian Law Reform Commission Act 1996* (Cth).

- is required by the terms of a workplace instrument to notify their employer of an absence from work and to substantiate the reason for the absence, and has complied with those terms; or
- has provided the employer with evidence that would satisfy a reasonable person that the leave is taken for a reason specified in s 97 of the *Fair Work Act* for the taking of paid personal/carer's leave for a personal illness or injury.<sup>153</sup>

17.170 An illness or injury is not a prescribed kind of illness or injury if:

- the employee's absence extends for more than three months, or the total absences of the employee amount to more than three months within a 12-month period; and
- the employee is not on paid personal/carer's leave for a purpose mentioned in s 97(1) of the *Fair Work Act* for the duration of the absence.<sup>154</sup>

17.171 Similarly, s 772(1)(a) of the *Fair Work Act* prohibits employers from terminating the employment of non-national system employees for reasons including temporary absence from work because of illness or injury of a kind prescribed by the *Fair Work Regulations*.<sup>155</sup> The temporary absence provisions under ss 352 and 772(1)(a) of the *Fair Work Act* only apply in situations involving termination of employment and are both civil remedy provisions.

17.172 For the purposes of the temporary absence provisions, the type of evidence an employee may provide to substantiate the reason for their absence includes: a medical certificate; statutory declaration; and other forms of evidence that would satisfy a reasonable person that the leave is taken for the reasons requested or specified.

### ***Submissions and consultations***

17.173 In the Employment Law Issues Paper, the ALRC expressed the view that where an employee was temporarily absent from work due to a family violence-related illness or injury, the evidentiary requirements appear to be sufficiently broad to ensure that victims of family violence could provide evidence of their family violence-related illness or injury to satisfy the requirements.

17.174 The ALRC also outlined that under ss 352 and 772(1) of the *Fair Work Act*, victims of family violence who have their employment terminated while they are absent from work as a result of a family violence-related illness or injury are entitled to make an application to FWA to deal with a general protections or unlawful termination dispute. The ALRC invited stakeholder comment on whether, in practice, these

<sup>153</sup> *Fair Work Regulations 2009* (Cth) reg 3.01.

<sup>154</sup> *Ibid* reg 3.01.

<sup>155</sup> As outlined above, some entitlements under the *Fair Work Act* extend to non-national system employees: *Fair Work Act 2009* (Cth) pts 6–3, 6–4. Note, if the NES were amended to provide for some form of paid family violence leave, reg 3.01 of the *Fair Work Regulations 2009* (Cth) would need to be amended to reflect the change.

sections are used and whether they provide a sufficient basis for victims to make such applications.<sup>156</sup>

17.175 While a limited number of stakeholders responded to this issue, those who did expressed the view that the temporary absence provisions are not sufficient to protect employees who are experiencing family violence as they

do not provide an explicit statement protecting the rights of victims of family violence, nor are they broad enough to encompass all eventualities that may arise in relation to family violence.<sup>157</sup>

17.176 The ADFVC, DV Victoria and DVRC Victoria submissions emphasised that the current provisions do not make provision for the ‘non-health related elements of family violence’.<sup>158</sup> Throughout the Inquiry, stakeholders have also expressed concern about the tendency to ‘pathologise’ family violence.<sup>159</sup>

### ***ALRC’s views***

17.177 If Proposals 16–3 and 16–4 are adopted, reg 3.01 of the *Fair Work Regulations* would need to be amended to ensure that family violence leave (as a subset of personal/carer’s leave) is considered for the purposes of determining whether a prescribed illness or injury exists or does not exist.

17.178 If proposal 16–2 is adopted, creating a separate category of leave, the ALRC suggests that the Government would need to consider whether amendment to the *Fair Work Regulations* would be appropriate in those circumstances.

17.179 The ALRC would be interested in stakeholder comments on any other ways in which the temporary absence provisions could be used or amended to protect employees who are victims of family violence.

**Question 17–1** Section 352 of the *Fair Work Act 2009* (Cth) prohibits employers from dismissing an employee because they are temporarily absent from work due to illness or injury. Regulation 3.01 of the *Fair Work Regulations 2009* (Cth) prescribes kinds of illness or injury and outlines a range of other requirements. In what ways, if any, could the temporary absence provisions be amended to protect employees experiencing family violence?

<sup>156</sup> Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011), Question 20.

<sup>157</sup> Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

<sup>158</sup> Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011.

<sup>159</sup> See, eg, M Winter, *Submission CFV 12*, 5 April 2011.





## 18. Occupational Health and Safety Law

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### Summary

18.1 This chapter examines ways in which the Commonwealth occupational health and safety (OHS) system, in the context of moves to harmonise OHS law across Australia, might be improved to protect employees experiencing family violence. In particular it examines: legislative duties—specifically, duties of care and the duty to report notifiable incidents; the nature and role of regulatory guidance; the importance of education and training, and measures to raise awareness about family violence as a work health and safety issue; as well as issues associated with data collection.

18.2 The central premise underlying the chapter is that, where family violence becomes an OHS issue for employees, they should be given the highest level of protection reasonably practicable, and employers should introduce measures to address family violence in such circumstances. This reflects one of the principles underlying the Model Work Health and Safety Bill developed by Safe Work Australia.

18.3 The ALRC concludes that legislative or regulatory obligations may not be the most appropriate means by which to address family violence in the OHS context. The ALRC considers that significant amendments to the OHS system, due to come into

effect on 1 January 2012, existing legislative and regulatory duties appear to be sufficiently broad to encompass family violence. Rather, it is lack of awareness or consideration of family violence as an OHS issue that should be the focus of reforms. Accordingly, the ALRC makes a range of proposals focused on: increasing awareness of family violence as a 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.

### Disclosure and privacy

18.4 In making proposals for reform to the OHS system, the introduction of these measures in many cases may increase the disclosure of family violence in the context of OHS. Care needs to be taken to ensure that where family violence is disclosed, any disclosure is responded to sensitively and appropriately, and employers do not take the view that it is ‘too hard’ to take measures to protect an employee experiencing family violence and therefore terminate their employment. For example, while stakeholders have indicated some employers take proactive steps and are supportive, others have indicated that ‘what appears to be a common response to raising an issue of family violence...[is] termination’ of employment.<sup>1</sup>

18.5 Issues related to disclosure of family violence in an employment context as well as privacy and confidentiality arising from disclosure are discussed in Chapter 14.

### Terminology

18.6 The Model Work Health and Safety Bill (Model Bill) developed by Safe Work Australia and the Work Health and Safety Bill 2011 (Cth), discussed in this chapter, move away from the use of ‘employer’ to a more inclusive view of the primary duty holder, using the term ‘person conducting a business or undertaking’ (PCBU).<sup>2</sup> However, the term PCBU is not yet used in Commonwealth legislation. Due to the implications of such an expanded definition, and to make the traditional distinction between employers and employees clear, the terms ‘employer’, and occasionally ‘duty holder’ when referring specifically to a duty of care, are used.

18.7 Similarly, the terms ‘employee’ and ‘worker’ are used interchangeably throughout the chapter. Employee is generally used when discussing the distinction between employees and employers as classes of people, and ‘worker’ for the purposes of OHS legislation, recognising that the Model Bill adopts a broad definition of ‘worker’ instead of ‘employee’ due to the changing nature of work relationships.<sup>3</sup> Specifically, ‘worker’ is defined as a person who carries out work in any capacity for

1 National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011.

2 The principal duty holder under the Model Bill is a person conducting a business or undertaking, defined in cl 5: Safe Work Australia, *Model Work Health and Safety Bill*, Revised Draft, 23 June 2011 cl 5.

3 Safe Work Australia, *Explanatory Memorandum—Model Work Health and Safety Act* (2010), [38].

an employer, including in any of the capacities listed, such as employee, contractor or subcontractor, outworker, apprentice, student or volunteer.<sup>4</sup>

18.8 This chapter uses the term ‘workplace’ when referring to the place where work is carried out. Under the Model Bill and Work Health and Safety Bill, the duty of care is tied to work activities and there is no place of work restriction. Workplace is defined broadly to include any place where work is carried out or where a worker goes, or is likely to be, while at work.<sup>5</sup>

## Overview of OHS system

18.9 Employers’ duties to address OHS risks that arise as a result of family violence, like other OHS duties, are governed by common law duties and Commonwealth, state and territory legislation and regulations.

18.10 In line with the general practice in most comparable jurisdictions, Australia’s OHS legislation avoids detailed requirements in favour of broadly-formulated duties that allow employers discretion as to how to achieve compliance.<sup>6</sup>

18.11 Regulations and Codes of Practice supplement these general duties by providing detail relevant to particular topics such as: specific settings—for example, construction sites; specific hazards—for example, asbestos; and procedures related to unions or licensing.

18.12 The key elements of the Commonwealth framework governing OHS are:

- *Occupational Health and Safety Act 1991* (Cth) (*OHS Act*);
- *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth) (*OHS Maritime Industry Act*);
- *Safe Work Australia Act 2008* (Cth) (*SWA Act*);
- *Occupational Health and Safety (Safety Arrangements) Regulations 1991* (Cth) (*OHS Regulations 1991*);
- *Occupational Health and Safety (Safety Standards) Regulations 1994* (Cth) (*OHS Regulations 1994*); and
- *Occupational Health and Safety Code of Practice 2008* (Cth) (*OHS Code*).

18.13 The OHS Regulations outline processes and outcomes that duty holders must follow or achieve to meet their duties under the *OHS Act*. Unlike the *OHS Act* and OHS Regulations, the OHS Code does not stipulate mandatory obligations but rather provides practical guidance on safe work practices and risk assessment. The *OHS Code*

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4 Safe Work Australia, *Model Work Health and Safety Bill*, Revised Draft, 23 June 2011 cl 7.

5 Ibid cl 8. Note also there is no requirement for an immediate temporal connection between the place or premises and the work to be performed: Safe Work Australia, *Explanatory Memorandum—Model Work Health and Safety Act* (2010), [48–50].

6 C Maxwell, *Occupational Health and Safety Review* (2004). The breadth of the duty of care under the Model Bill and Work Health and Safety Bill is discussed later in this chapter.

may be used in court as evidence of the standards of health and safety that employers should achieve.<sup>7</sup>

18.14 The *Safety, Rehabilitation and Compensation Act 1988* (Cth) outlines a workers' compensation scheme and establishes two bodies responsible for its implementation and maintenance—Comcare and the Safety, Rehabilitation and Compensation Commission (the SRCC).<sup>8</sup> The *OHS Act* also charges these bodies with ensuring compliance with OHS standards, advising employers and employees on health and safety matters, and formulating policies related to OHS.<sup>9</sup> In addition, Comcare and the SRCC publish supplementary guidance material.

### National OHS Strategy 2002–2012

18.15 In addition, in 2002, all Australian governments, the Australian Chamber of Commerce and Industry (ACCI) and the Australian Council of Trade Unions (ACTU) agreed to the *National OHS Strategy 2002–2012* (National Strategy).<sup>10</sup> The National Strategy was reviewed by the Workplace Relations Ministers Council (WRMC) in 2004–2005. The five priorities identified by the National Strategy are to:

- reduce the impact of risks at work;
- improve the capacity of business operators and workers to manage OHS effectively;
- prevent occupational disease more effectively;
- eliminate hazards at the design state; and
- strengthen the capacity of government to influence OHS outcomes.

18.16 One of the functions of Safe Work Australia (SWA) is to revise and further develop the National Strategy.<sup>11</sup> One area of attention in 2011–2012 is developing a National Work Health and Safety Strategy to replace the current National Strategy.<sup>12</sup>

### Review and harmonisation of OHS law

#### Background

18.17 Since 2008, occupational health and safety law in Australia has been the focus of significant legislative and policy developments. In July 2011 the Australian

<sup>7</sup> *Occupational Health and Safety Code of Practice 2008* (Cth), 18.

<sup>8</sup> *Safety, Rehabilitation and Compensation Act 1988* (Cth) pt VII. The ALRC is not examining workers' compensation in this Inquiry. However, compensation is available for injuries sustained while the employee is at the employee's place of work, suggesting that employees injured by family violence at work would be eligible for compensation: *Safety, Rehabilitation and Compensation Act 1988* (Cth) ss 5A, 6, 14.

<sup>9</sup> *Occupational Health and Safety Act 1991* (Cth) ss 12, 12A, 38A, 41, 75A, 77.

<sup>10</sup> Safe Work Australia, *National OHS Strategy 2002–2012*.

<sup>11</sup> *Safe Work Australia Act 2008* (Cth) s 6.

<sup>12</sup> Safe Work Australia, *Agency Budget Statement 2011–2012* (2011), 372.

Government introduced the Work Health and Safety Bill 2011 (Cth) as part of a harmonisation process to introduce model OHS legislation across Australia.<sup>13</sup>

18.18 By way of background, national uniformity in OHS laws arose as an issue on the Council of Australian Governments' (COAG) reform agenda and, in 2008, the WRMC 'agreed that the use of model legislation is the most effective way to achieve harmonisation of OHS laws'.<sup>14</sup> Subsequently, the Commonwealth, states and territories signed the Intergovernmental Agreement for Regulatory and Operational Reform in OHS (IGA). Under the IGA, the Commonwealth, along with states and territories, committed to establishing a national independent body (which became SWA) and adoption and implementation of model legislation in each jurisdiction by December 2011.<sup>15</sup>

18.19 The National Review into Model Occupational Health and Safety Laws (National OHS Review) was completed in January 2009. It made a range of recommendations with respect to the development of model legislation aimed at improving safety outcomes, reducing compliance costs and improving regulatory efficiency.<sup>16</sup>

18.20 In response to the recommendations made in the context of the National OHS Review, the WRMC requested that SWA develop model legislation. In September 2009, SWA released an exposure draft of the Model Bill and the WRMC agreed to the provisions of the Model Bill in December 2009. The model legislation, regulations and codes of practice include:

- the Model Bill;<sup>17</sup>
- Model Work Health and Safety Regulations (Model Regulations);<sup>18</sup> and
- Model Codes of Practice, relevantly including 'How to Manage Work Health and Safety Risks', 'How to Consult on Work Health and Safety' and 'Managing the Work Environment and Facilities'.<sup>19</sup>

18.21 However, the Model Bill does not contain all detailed provisions required to give effect to legislation of this kind, leaving some matters to the relevant jurisdiction.

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13 The Bill was introduced on 6 July 2011 and the following day the Bill was referred to the Senate Education, Employment and Workplace Relations Committee which is due to report on 26 August 2011. The harmonisation process has COAG support: Council of Australian Governments, *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (2008) ss 5.2.5, 5.3.3, 5.4.4. Mirror legislation has been passed, for example, in NSW and Queensland: *Work Health and Safety Act 2011* (NSW); *Work Health and Safety Act 2011* (NSW).

14 Explanatory Memorandum, Work Health and Safety Bill 2011 (Cth), 1.

15 Council of Australian Governments, *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (2008) ss 5.2.5, 5.3.3, 5.4.4.

16 Safe Work Australia, *Explanatory Memorandum—Model Work Health and Safety Act* (2010), 1.

17 Endorsed by WRMC on 11 December 2009 and last revised on 23 June 2011.

18 Released by SWA for public comment between 7 December 2010–4 April 2011.

19 Released by SWA for public comment between 7 December 2010–4 April 2011. The ALRC understands SWA will be publishing a Code of Practice on workplace bullying.

18.22 The Terms of Reference require the ALRC to review current Commonwealth law.<sup>20</sup> However, as the Model Bill, Model Regulations and Model Codes of Practice form the basis for the legislation to be enacted in each jurisdiction, and have Commonwealth, state and territory support,<sup>21</sup> the discussion below focuses on the content of the model provisions.

### ***Safe Work Australia***

18.23 Safe Work Australia was established in 2009 as a statutory agency to ‘improve occupational health and safety outcomes and workers’ compensation arrangements in Australia’.<sup>22</sup> The functions of SWA include coordinating and developing national policy relating to OHS and workers’ compensation; developing model OHS legislation and codes of practice; undertaking research, and collecting, analysing and publishing data. SWA also plays a role in the development and promotion of strategies to raise awareness of OHS and workers’ compensation.<sup>23</sup>

### **Purposes of the OHS system**

18.24 The objects of the *OHS Act* are:

- (a) to secure the health, safety and welfare at work of employees of the Commonwealth, of Commonwealth authorities and of non-Commonwealth licensees; and
- (b) to protect persons at or near workplaces from risks to health and safety arising out of the activities of such employees at work; and
- (c) to ensure that expert advice is available on occupational health and safety matters affecting employers, employees and contractors; and
- (d) to promote an occupational environment for such employees at work that is adapted to their needs relating to health and safety; and
- (e) to foster a co-operative consultative relationship between employers and employees on the health, safety and welfare of such employees at work; and
- (f) to encourage and assist employers, employees and other persons on whom obligations are imposed under the Act to observe those obligations; and
- (g) to provide for effective remedies if obligations are not met, through the use of civil remedies and, in serious cases, criminal sanctions.<sup>24</sup>

18.25 The main object of the Model Bill is to ‘provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces’ by, among other things:

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20 The Terms of Reference are set out at the front of this Discussion Paper and on the ALRC’s website: [www.alrc.gov.au](http://www.alrc.gov.au).

21 Council of Australian Governments, *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (2008) ss 5.2.5, 5.3.3, 5.4.4.

22 *Safe Work Australia Act 2008* (Cth) s 3.

23 *Ibid* s 6.

24 *Occupational Health and Safety Act 1991* (Cth) s 3.

- 1(a) protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work [or from specified types of substances or plant]; and
  - ...
  - (c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment; and
  - (d) promoting the provision of advice, information, education and training in relation to work health and safety; and
  - ...
  - (g) providing a framework for continuous improvement and progressively higher standards of work health and safety; and
  - (h) maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in this jurisdiction.
- 2 In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work [or from specified types of substances or plant] as is reasonably practicable.<sup>25</sup>

18.26 Implicit in the objects of both the *OHS Act* and the Model Bill is the preventative focus of the OHS system.

18.27 Significantly, the purposes of the OHS system in protecting workers and other persons against harm to their health, safety and welfare, mirror the focus of the ALRC's Terms of Reference to reform legal frameworks to protect the safety of victims of family violence. Accordingly, to the extent that the OHS system is achieving its purposes, this should be synonymous with the protection of workers experiencing family violence where it poses a risk to their health, safety or welfare in a work context. Further, the ALRC considers that the reforms proposed in this chapter align with the objective of the Model Bill to provide a framework for continuous improvement and progressively higher standards of work health and safety.

## Family violence and OHS law

18.28 Family violence may pose a risk to the physical and psychological health and safety, not only of employees who are victims of the violence, but also of co-workers and other third parties. Examples of ways in which family violence may pose an OHS issue or risk include:

- physical or verbal abuse between partners employed at the same workplace;

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<sup>25</sup> Safe Work Australia, *Model Work Health and Safety Bill*, Revised Draft, 23 June 2011 cl 3.



- causing employees to be distracted or inattentive, leading to reduced ability to operate equipment safely or concentrate on tasks, increasing the risk of accidents;
- threatening a partner or the partner's co-workers;
- stalking a partner at the partner's workplace—for example, 29% of victims who were stalked by their previous partner reported that the person using family violence loitered outside their workplace;<sup>26</sup>
- harassing or attacking a partner or the partner's co-workers at the partner's workplace, either in person or through phone calls and emails; and
- in the most extreme cases, family violence-related homicide at the workplace.<sup>27</sup>

18.29 Family violence as an OHS issue raises a number of important questions about the point at which family violence becomes an OHS issue in the workplace, as opposed to a 'private' issue, or one which is more appropriately dealt with as a criminal matter. According to the National Network of Working Women's Centres (NNWWC):

unfortunately, instances where family violence has intruded into the workplace in our experience are not dealt with well, are seen as 'private matters' and too often result in serious injury or death, often witnessed by workmates.<sup>28</sup>

18.30 Where an employer is aware of family violence, and where that family violence is having an impact on the welfare or safety of an employee (with sufficient connection to their work or workplace), their co-workers, or the workplace itself, it becomes an OHS matter. This in turn raises further questions about employee responsibility for playing a role in managing OHS risks and, where appropriate, informing employers of such risks or incidents.

18.31 Throughout this Inquiry, stakeholders have expressed mixed views about family violence as an OHS issue. While some stakeholders acknowledged that family violence may in some cases become an OHS issue, they emphasised that there are a range of issues yet to be included under the OHS 'umbrella' and that family violence is just one issue which is not yet the subject of legislation, Codes of Practice or guidelines.<sup>29</sup>

18.32 ACCI, for example, submitted that no recommendations should be made in relation to changing existing model OHS laws, regulations, codes or guidance material, 'given the comprehensive consultations in respect of the model OHS laws'.<sup>30</sup>

18.33 Other stakeholders stressed the role played by OHS law in protecting those experiencing family violence, emphasising that lack of knowledge, rather than inadequacies in formal definitions represent the greatest challenge in recognising

26 Australian Bureau of Statistics, *Women's Safety Survey*, Catalogue No 4128.0. (1996).

27 See, eg, Women's Health Victoria, *Submission CFV 11*, 5 April 2011.

28 National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011.

29 This sentiment was expressed particularly in relation to occupation stress and other similar psychosocial hazards.

30 ACCI, *Submission CFV 19*, 8 April 2011.

family violence-related incidents in the work context. For example, the NNWWC suggested that the obligations are

not widely recognised by many workplaces. More needs to be done to ensure that workplaces understand the magnitude of the threat of family violence as a workplace issue at all levels.<sup>31</sup>

### **Duties under OHS legislation**

18.34 There are a range of duties owed by both employers and employees under OHS legislation. Of particular relevance are the duties of care owed by both employers and employees and the duty to report OHS incidents, defined as ‘notifiable incidents’.

#### ***Duty of care***

18.35 Employers have a range of obligations in respect of all employees—in particular, employers owe their employees a duty of care both at common law and under legislation. The primary focus of this chapter is the legislative duty of care.

18.36 Under the *OHS Act*, ‘[a]n employer must take all reasonably practicable steps to protect the health and safety at work of the employer’s employees’.<sup>32</sup>

18.37 The Model Bill provides that a PCBU must ensure, so far as is reasonably practicable:

- the health and safety of workers engaged, or caused to be engaged by the person while the workers are at work in the business or undertaking;
- the health and safety of workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking;
- the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking;
- the provision and maintenance of a work environment without risks to health and safety; and
- a range of other requirements, including to provide information and training to protect all persons from risks to their health and safety and monitoring of the health of workers for the purposes of preventing illness or injury arising from the conduct of the business or undertaking.<sup>33</sup>

31 National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011.

32 *Occupational Health and Safety Act 1991* (Cth) s 16. Under the *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth) an ‘operator of a prescribed ship or prescribed unit’ is required to take ‘reasonable steps’: *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth) s 11.

33 Safe Work Australia, *Model Work Health and Safety Bill*, Revised Draft, 23 June 2011 cl 19(1)–(3). Employees also have a duty to care for their own safety and comply and cooperate with reasonable policies and instructions from the employer: Safe Work Australia, *Model Work Health and Safety Bill*, Revised Draft, 23 June 2011 cl 28.

18.38 As outlined above, the Model Bill provides that the primary duty holder is a PCBU and expands the class of persons to whom a duty is owed to ‘workers’, defined to include, among others, employees, subcontractors, outworkers, apprentices, students and volunteers.<sup>34</sup>

18.39 While at work, employees also have a duty to take reasonable care for their own health and safety, including to take care that their acts or omissions do not adversely affect the health and safety of others and to comply and cooperate with reasonable policies and instructions given by the employer. These duties also apply to a person at a workplace.<sup>35</sup>

18.40 The Explanatory Memorandum to the Model Bill explains that ‘the standard of reasonably practicable has been generally accepted for many decades as an appropriate qualifier of the duties of care in most Australian jurisdictions’.<sup>36</sup> It requires an employer to do what can reasonably be done in the circumstances, considering:

- the likelihood of the hazard or risk occurring;
- the degree of harm that might result;
- what the person knew, or ought to have known, about the hazard or risk and ways of eliminating or minimising it; and
- the availability and suitability of ways to eliminate or minimise the hazard or risk.<sup>37</sup>

18.41 In combination with the broader category of the primary duty holder (PCBU) and the category of people to whom the duty is owed (workers), the primary duty of care is tied to work activities wherever they occur. The definition of ‘workplace’ under the Model Bill as any place where work is carried out or where a worker goes, or is likely to be, while at work, significantly expands OHS duties.<sup>38</sup> As a result, where a worker is working from home or carrying out work in a person’s home—for example, in the case of a tradesperson, nanny or gardener—and family violence exists, this engages OHS duties in a way possibly not envisaged under existing legislation.

18.42 In any event, as one commentator has noted, ‘the broad formulation of the general duty provisions clearly covers hazards hitherto unregulated, such as ergonomic and psychosocial hazards’.<sup>39</sup> By extension, the broad formulation is also likely to cover health and safety risks arising as a result of family violence, provided there is sufficient connection to work.

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34 Both definitions expand existing definitions of ‘employer’ and ‘employee’: Safe Work Australia, *Model Work Health and Safety Bill*, Revised Draft, 23 June 2011 cl 7.

35 Note, officers also have a range of duties: *Ibid* cls 27, 28, 29.

36 Safe Work Australia, *Explanatory Memorandum—Model Work Health and Safety Act* (2010), [70].

37 *Ibid*, [71].

38 Safe Work Australia, *Model Work Health and Safety Bill*, Revised Draft, 23 June 2011 cl 8.

39 R Johnstone, M Quinlan and M McNamara, *OHS Inspectors and Psychosocial Risk Factors: Evidence from Australia* (2008), prepared for the National Research Centre for OHS Regulation, 7.

18.43 As an alternative to a broad duty of care, some overseas jurisdictions have incorporated a specific duty of care with respect to family violence. For example, in Ontario, the *Occupational Health and Safety Act 1990* RSO c 01 (Ontario) provides:

Domestic violence

32.0.4 If an employer becomes aware, or ought reasonably to be aware, that domestic violence that would likely expose a worker to physical injury may occur in the workplace, the employer shall take every precaution reasonable in the circumstances for the protection of the worker. 2009, c. 23, s. 3.

Duties re violence

32.0.5 (1) For greater certainty, the employer duties set out in section 25, the supervisor duties set out in section 27, and the worker duties set out in section 28 apply, as appropriate, with respect to workplace violence. 2009, c. 23, s. 3.<sup>40</sup>

***Submissions and consultations***

18.44 In *Family Violence—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011) (Employment Law Issues Paper), the ALRC outlined a suggestion to amend OHS legislation to make explicit employers' duties related to workplace risks caused by family violence.<sup>41</sup> The ALRC noted that such an amendment may conflict with the practice of relying on broadly-formulated duties in legislation, and noted that a range of other options may be available to achieve the same purpose—the protection of victims of family violence. As a result, the ALRC signalled that it was not considering proposals to amend OHS legislation on this issue. However, the ALRC asked how employers view the duty of care and their obligations related to workplace risks involving family violence.<sup>42</sup>

18.45 A limited number of submissions directly addressed this issue. Most focused on whether the legislative duty of care should be amended specifically to account for family violence, rather than on how employers view that duty of care or their obligations in respect of it.

18.46 Primarily, stakeholders indicated that existing legislation is sufficiently broad to ensure that employers owe a duty of care in circumstances where family violence is adequately connected to the workplace and those to whom the employer owes a duty of care.<sup>43</sup> For example, ACCI submitted that:

Employers must take reasonable precautions to prevent workplace related harm to workers and the public, including the possibility of harm to employee from nonemployees. There should not be any specific law dealing with specific situations, such as family violence, given that the existing legal framework already covers this situation as part of the general duties.<sup>44</sup>

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40 *Occupational Health and Safety Act 1990* RSO c O1 (Ontario) ss 32.0.4, 32.0.5.

41 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011), [131].

42 Ibid, Question 21.

43 See, eg, ACCI, *Submission CFV 19*, 8 April 2011.

44 Ibid.

18.47 Other stakeholders, however, supported the specific inclusion of family violence in OHS legislation, suggesting that it would

require duty holders to take appropriate actions when they become aware (or ought to be reasonably aware) of family violence that could be a risk to a worker in the workplace. A statutory measure would provide support to duty holders with specific guidance when dealing with the impacts of family violence in the workplace.<sup>45</sup>

18.48 In consultations, stakeholders also highlighted the duties owed by employees. In particular, SWA emphasised that it would be difficult for an employer to take steps where a worker has not disclosed the existence of, or the risk posed by, family violence. Apart from the duty that an employer has to protect the health and safety of their workers, employees also have a duty to take reasonable care for their own safety at work and that their own acts or omissions do not adversely affect the health and safety of other persons.<sup>46</sup>

#### ***ALRC's views***

18.49 The ALRC considers that an employer owes a duty of care where family violence has an impact on the health and safety of workers while they are at work—recognising that the primary duty of care under the Model Bill is tied to work activities wherever they occur—and that employers must take reasonably practicable steps to protect worker safety in this regard. Employer responses and what constitutes reasonably practicable steps are discussed later in this chapter.

18.50 The duty of care owed by employers under OHS legislation is sufficiently broad to account for risks or incidents involving family violence related to work. This is particularly so given the formulation of duties under the Model Bill. As a result, the ALRC makes no proposals with respect to amending the duty of care under the *OHS Act* or Model Bill.

18.51 However, the ALRC is of the view that, in many cases, employers are not aware of the breadth of their duty of care, nor do they consider the risks associated with family violence to be a work issue. This is particularly likely to be the case from 1 January 2012 due to the expanded definitions and concepts of PCBU, worker and workplace under the Model Bill. Similarly, while workers may have legitimate reasons for not wishing to disclose family violence, they also need to be aware of their duties to take reasonable care for their own health and safety and ensure family violence does not adversely impact on others. Accordingly, the ALRC makes a range of proposals in relation to the need for guidance, education, training and appropriate employer responses later in this chapter.

#### ***Duty to report notifiable incidents***

18.52 The other duty considered in this chapter is the duty to report. OHS laws across Australian jurisdictions currently require reporting of all workplace deaths as well as certain workplace incidents to the relevant authority, such as Comcare or the SRCC.

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<sup>45</sup> Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011.

<sup>46</sup> Safe Work Australia, *Consultation*, by telephone, 17 January 2011.

The primary purpose of this requirement ‘is to allow regulators to investigate incidents and potential OHS breaches in a timely manner’.<sup>47</sup>

18.53 Under the *OHS Act*, employers must notify the regulator of accidents that cause the death or serious injury of any person, the incapacitation of an employee, or that are ‘dangerous occurrence[s]’.<sup>48</sup> The *OHS Regulations 1991* define a ‘dangerous occurrence’ as one ‘result[ing] from operations that arose from the undertaking conducted by an employer’ that could have caused death or serious injury to any person or incapacitation to an employee, but did not actually do so.<sup>49</sup> However, in light of the alternative requirements under the Model Bill, the focus of this chapter is on the ‘notifiable incident’ system under the Model Bill.

18.54 Part 3 of the Model Bill provides for analogous requirements with respect to incident notification, including ‘notifiable incidents’ and ‘dangerous incidents’. A notifiable incident is defined to include deaths, serious injuries or illnesses, or any of a set of listed dangerous incidents.<sup>50</sup> The definition of serious injury or illness requires a person to have immediate medical treatment for a range of serious injuries including, for example, amputation, head injuries, burns, or the loss of a bodily function.<sup>51</sup> The definition of dangerous incident is one that exposed a worker or other person to, among other things, a serious risk from immediate or imminent exposure to an uncontrolled leakage, explosion or collapse.<sup>52</sup>

18.55 Employers have a duty to report notifiable incidents to regulators in line with the requirements in cl 38 of the Model Bill and to keep records of such incidents for at least five years.<sup>53</sup>

18.56 In the context of this system of reporting, it is possible that acts of family violence resulting in death or serious injury could be considered notifiable incidents. The Model Bill allows for other categories of incidents to be included as ‘notifiable incidents’ under the regulations, but no incidents relevant to family violence are currently included in the Model Regulations.

### **Issues Paper**

18.57 In the Employment Law Issues Paper, the ALRC noted that several submissions in response to the 2009 exposure draft of the Model Bill expressed the view that the definition of ‘notifiable incident’ should include acts of violence directed toward workers or threats of such acts and that many or most incidents of family violence would likely fall within the bounds of such a definition, making it mandatory to report them.

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47 R Stewart-Crompton, S Mayman and B Sherriff, *National Review into Model Occupational Health and Safety Laws: Second Report* (2009), prepared for Workplace Relations Ministers’ Council, [33.8].

48 *Occupational Health and Safety Act 1991* (Cth) s 68.

49 *Occupational Health and Safety (Safety Arrangements) Regulations 1991* (Cth) reg 3(1).

50 Safe Work Australia, *Model Work Health and Safety Bill*, Revised Draft, 23 June 2011 cl 35.

51 *Ibid* cl 36.

52 *Ibid* cl 37.

53 *Ibid* cl 38.

18.58 The ALRC expressed the view that mandatory reporting provisions through the notifiable incident scheme would be likely to raise the visibility of family violence as a work health and safety issue, underscore the gravity of such incidents and eliminate employer discretion in reporting of incidents. The ALRC also suggested that the notifications may serve a data collection purpose. This issue is considered later in this chapter.

18.59 However, the ALRC also acknowledged that some uncertainty may arise with respect to which incidents would be required to be reported and about the practical effect of amending the definition, in part because there may be ‘shortcomings in the level of reporting of incidents’ generally.<sup>54</sup>

18.60 The ALRC subsequently asked for comment on the possible effects of amending the definition of ‘notifiable incident’ to explicitly require employers to report acts of violence, including family violence.<sup>55</sup>

### ***Submissions and consultations***

18.61 In consultations, SWA expressed the view that the current definition of notifiable incident is sufficient to capture any death or serious injury arising from family violence that occurs in the workplace, but not such threats in such circumstances.<sup>56</sup> However, most submissions supported amending the definition of notifiable incident in the Model Bill to include acts or threats of family violence directed at those to whom employers owe a duty of care.<sup>57</sup> Stakeholders such as the ADFVC submitted that ‘failure to do so perpetuates the invisibility of domestic violence as a workplace issue’.<sup>58</sup>

18.62 The NNWWC emphasised the importance of including acts or threats of violence, including family violence, as notifiable incidents under the legislation ‘to ensure they are taken more seriously in a preventative environment’ and to provide for a regulatory and compliance response.<sup>59</sup>

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54 A Clayton, R Johnstone and S Sceats, *The Legal Concept of Work-Related Injury and Disease in Australian OHS and Workers’ Compensation Systems* (2002), National Research Centre for OHS Regulation, 34.

55 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011), Question 22.

56 Safe Work Australia, *Consultation*, by telephone, 17 January 2011.

57 Although stakeholders varied slightly on the specific formulation or definition of what should be reported: Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Women’s Legal Services NSW, *Submission CFV 28*, 11 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Confidential, *Submission CFV 13*, 5 April 2011; Women’s Health Victoria, *Submission CFV 11*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

58 ADFVC, *Submission CFV 26*, 11 April 2011.

59 National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011.

18.63 The ADFVC supported the amendment, suggesting it could be implemented through

amendment to s 35(1) of the Model Bill to include an express reference to an act of family violence as a notifiable incident or by including an act of family violence in the Regulations which set out circumstances giving rise to the section 35(1)(c) definition of dangerous incident.<sup>60</sup>

18.64 In addition, several stakeholders indicated that if any amendment were introduced, thought would need to be given to the privacy consequences arising from such amendment.<sup>61</sup>

18.65 Conversely, several stakeholders opposed any amendment to the definition of notifiable incident on the basis that it would not fit with the purpose of the system as well as highlighting the practical difficulties which would arise from any amended definition. For example, ACCI submitted that a definition of notifiable incident which included acts or threats of violence including family violence

would largely rely on a subjective assessment by the employer, manager or supervisor, rather than an objective standard and would involve uncertainty for the employer (ie How would an employer know that the three major elements were present, which would require them to notify the authorities: a 'threat' of 'family violence' which was 'directed towards workers'?).<sup>62</sup>

18.66 ACCI acknowledged that, while clear actions of violence 'with witnesses in a workplace' would already be covered under the definition, it expressed concern about employers determining the point at which notification should occur. The Queensland Law Society reiterated these concerns, stating that 'if an obligation to report is placed on an employer the extent of the employer's responsibility should be clarified', given that the definition of family violence is broad.<sup>63</sup>

18.67 Academics from the National Research Centre for OHS Regulation noted that the purpose underlying the reporting system and the definition of notifiable incidents is to provide a basis for dedicated investigation and that, in practice, to have a wider definition would be unworkable.<sup>64</sup>

#### ***ALRC's views***

18.68 Acts of family violence in the workplace which cause death or serious injury are likely to constitute a notifiable incident under the Model Bill. This is not the case in relation to threats. The ALRC acknowledges stakeholder support for the inclusion of acts or threats of violence, including family violence, as notifiable incidents under the Model Bill. However, to the extent that the ALRC could propose that acts or threats of

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<sup>60</sup> ADFVC, *Submission CFV 26*, 11 April 2011. This approach was also supported by Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011 and Women's Legal Services NSW, *Submission CFV 28*, 11 April 2011.

<sup>61</sup> National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011; Women's Health Victoria, *Submission CFV 11*, 5 April 2011.

<sup>62</sup> ACCI, *Submission CFV 19*, 8 April 2011.

<sup>63</sup> Queensland Law Society, *Submission CFV 21*, 6 April 2011.

<sup>64</sup> R Johnstone and L Bluff, *Consultation*, by telephone, 5 May 2011.



family violence occurring in the workplace be explicitly included as notifiable incidents, the ALRC's preliminary view is that this is not appropriate, particularly in relation to threats, for a number of reasons.

18.69 First, the purpose of the notifiable incident system is to enable investigation of serious incidents and potential contraventions of OHS obligations in a timely manner, with a view to imposing sanctions and potentially addressing issues with respect to the physical workplace or workplace systems to prevent future occurrences. While not always the case, incidents involving family violence will generally involve the unpredictable behaviour of a third party over whom employers have limited control, rather than a breakdown in workplace systems or precautions. As a result, assuming employers have in place appropriate safety precautions and safety plans which take account of possible risks arising from family violence, discussed in detail later in this chapter, investigation and sanction by the regulator does not appear to be the most appropriate response in this context.

18.70 Secondly, the ALRC acknowledges concerns about uncertainty on the behalf of employers in determining whether to report an act or threat of family violence. Any amendment would also raise questions about the lengths to which an employer would need to go to determine whether their employees are receiving threats (for example, monitoring of emails or telephone calls).

18.71 An additional concern is the administrative load associated with expanding the definition of notifiable incident. The ALRC considers it is likely that employers would err on the side of caution, reporting all acts or threats of which they are aware and that this would contribute significantly to demands placed on OHS regulators. If, in addition to current reporting requirements, all acts or threats of family violence (or violence generally) were included as notifiable incidents the ALRC considers the workplace investigatory system would be unworkable without significant additional resources for regulators.

18.72 In addition, the ALRC considers that the aim underlying moves to amend the definition can be achieved by other means proposed in this chapter. The ALRC therefore does not propose to amend the definition of notifiable incident in the Model Bill explicitly to include acts or threats of family violence.

## **Guidance**

18.73 Throughout this Inquiry it has become clear that there is a need for increased recognition and understanding that family violence may constitute a work health and safety issue. There are a range of mechanisms through which this could be achieved. However, as outlined above, the ALRC does not consider that amendment to OHS legislation is necessarily the most appropriate approach. In the next section of this chapter the ALRC considers:

- the appropriate type of formal guidance about family violence as an OHS issue, with a particular focus on Regulations, Codes of Practice or other formal guidelines;

- the substance of such formal guidance, including defining family violence as an OHS issue and identifying and responding to family violence in this context; and
- the related need for education, training and measures aimed at raising awareness.

### Forms of guidance

18.74 In addition to OHS legislation, there is a range of guidance provided to employers and employees about OHS matters in the form of Regulations, Codes of Practice and other material produced by SWA, Comcare and similar bodies.

#### Regulations

18.75 The *OHS Regulations 1991* and *OHS Regulations 1994* do not address any type of violence as a health and safety risk, although the *OHS Regulations 1994* address the general topic of hazard identification and risk assessment. Similarly, the Model Regulations do not address violence. The role of these regulations is to set out mandatory obligations on specific matters and provide processes or outcomes that duty holders must follow or achieve to meet their general duties under legislation.

#### Codes of Practice

18.76 While the *OHS Code* includes a section on risk assessment it makes no mention of violence of any type.<sup>65</sup> The Model Codes of Practice developed by SWA include 'How to Manage Work Health and Safety Risks', 'How to Consult on Work Health and Safety', and 'Managing the Work Environment and Facilities'.<sup>66</sup> The ALRC understands that SWA is also developing a Code of Practice on workplace bullying. None of these identify or consider responses to family violence as an OHS risk.

18.77 Codes of Practice do not impose mandatory legal obligations. However, they are admissible in evidence before a court as proof of the standards of health and safety that should be achieved by a duty holder to comply with the relevant legislation and regulations. If, for example, the *OHS Code* is used as evidence in this way, it reverses the burden of proof to the duty holder. Accordingly, where the Code of Practice has not been followed, the duty holder would be required to prove that they complied with their duties by other means (equivalent or better to the Code of Practice).<sup>67</sup>

#### Other material

18.78 A range of guidance material supplementing the *OHS Regulations* and the *OHS Code* has been published by various organisations, such as Comcare and SWA.<sup>68</sup> These materials are often industry-specific. In other cases, materials may be useful across

<sup>65</sup> Other than a section discussing the procedures for transporting cash or valuables.

<sup>66</sup> Safe Work Australia, *Draft Code of Practice: How to Manage Work Health and Safety Risks* (2010); Safe Work Australia, *Draft Code of Practice: How to Consult on Work Health and Safety* (2010); Safe Work Australia, *Draft Code of Practice: Managing the Work Environment and Facilities* (2010).

<sup>67</sup> *Occupational Health and Safety Code of Practice 2008* (Cth), 18.

<sup>68</sup> See Safe Work Australia, *Safe Work Australia Publications* <<http://www.safeworkaustralia.gov.au/AboutSafeWorkAustralia/WhatWeDo/Publications>> at 9 February 2011.

industries—for example, sample assessment forms for controlling risks related to manual tasks like bending or twisting. No existing material addresses family violence.

18.79 The SWA Agency Budget Statement indicates that one of the focuses of SWA in 2011–2012 will be on developing the continued development of model Codes of Practice and national guidance material.<sup>69</sup>

### *Issues Paper*

18.80 In the Employment Law Issues Paper, the ALRC asked whether family violence as an OHS risk should be addressed in the regulations, a Code of Practice or in guidance material. The ALRC also asked how inclusion in any of these types of guidance would affect the likelihood that employers would be aware of, and responsive to, the OHS risk posed by family violence.<sup>70</sup>

18.81 The ALRC noted that including discussion of family violence in a Code of Practice or guidance material would not necessarily change employers' legal obligations, but explicit recognition that family violence can affect the workplace could raise both employers' and employees' awareness of family violence as a potential work health and safety issue and provide useful guidance to employers on how to respond appropriately.

### *Submissions and consultations*

18.82 While stakeholders supported the provision of some form of additional guidance with respect to family violence as an OHS issue, they were divided as to where this additional material should be provided: OHS legislation; Codes of Practice; or other forms of guidance material.<sup>71</sup> Stakeholders such as the ACTU suggested that family violence should be within the scope of matters addressed by regulation, and that Codes of Practice and guidance material should provide detail with respect to the duties that arise.<sup>72</sup>

18.83 Other stakeholders, including the Australian Services Union (ASU), expressed the view that

consideration should be given to the creation of stand alone guidance material that specifically deals with the implications of family violence in the workplace and an

<sup>69</sup> Safe Work Australia, *Agency Budget Statement 2011–2012* (2011), Overview and Resources, 372.

<sup>70</sup> Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011), Question 23.

<sup>71</sup> Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Women's Legal Services NSW, *Submission CFV 28*, 11 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Queensland Law Society, *Submission CFV 21*, 6 April 2011; National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011; ACCI, *Submission CFV 19*, 8 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Women's Health Victoria, *Submission CFV 11*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011; R Johnstone and L Bluff, *Consultation*, by telephone, 5 May 2011.

<sup>72</sup> Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011. The Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011 and Women's Health Victoria, *Submission CFV 11*, 5 April 2011 expressed a similar view, stating that family violence should be included in OHS legislation or regulations.

employer's obligations in relation to protecting their employees from manifestations of family violence at the workplace.<sup>73</sup>

18.84 This was echoed by the Queensland Law Society, which submitted that the introduction of non-statutory guidelines outlining both employer and employee obligations would be useful.<sup>74</sup>

18.85 However, most stakeholders suggested that Codes of Practice were the most appropriate place to include consideration of family violence as an OHS issue.<sup>75</sup> For example, the ADFVC recommended that SWA and the ADFVC collaborate to create a specific Code of Practice for family violence-related workplace safety risks, emphasising that

Codes of practice are an important touchstone for duty holders in relation to workplace safety issues as code of practice obligations are admissible as evidence in OHS legal proceedings and can assist in demonstrating compliance with general safety duties. Therefore, it is imperative that a Code of Practice be developed to provide duty holders with necessary guidance in relation to identifying and responding to family violence related workplace risks. Further, a Code of Practice would assist in raising recognition of family violence as a workplace issue.<sup>76</sup>

18.86 In consultations, the ALRC heard that the Code of Practice with respect to workplace bullying and harassment being developed by SWA or in risk assessment-related Codes of Practice would be the most appropriate locations for material about family violence.

### Substance of guidance

18.87 There are a range of issues that Codes of Practice or other guidance material could cover in attempting to explain, and raise awareness about, family violence as a work health and safety issue. In addition to general information about the nature, features and dynamics of family violence, such material should ultimately assist employers and employees to identify, and respond to, family violence in the work context.

18.88 The development of guidance, whether in the form of a Code of Practice, or other guidance material should be distinguished from general education, training and measures aimed at increasing the visibility and understanding of family violence as an OHS issue. The ALRC discusses education, training, and measures aimed at raising awareness later in the chapter.

18.89 In the Employment Law Issues Paper, the ALRC suggested that guidance could encompass issues such as definitions of family violence in an OHS context as well as identifying, and responding to, family violence in the workplace. The ALRC asked

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73 Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

74 Queensland Law Society, *Submission CFV 21*, 6 April 2011.

75 Women's Legal Services NSW, *Submission CFV 28*, 11 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

76 ADFVC, *Submission CFV 26*, 11 April 2011.

what requirements, suggestions or information should be included in regulations, Codes of Practice or guidance material addressing family violence as an OHS risk.<sup>77</sup>

***Defining family violence as a work health and safety issue***

18.90 In the Employment Law Issues Paper, the ALRC outlined Ontario's Health and Safety Guidelines which provide an example of how family violence may be identified as a potential source of workplace violence. These guidelines include 'domestic violence' as a 'key concept', recognising:

A person who has a personal relationship with a worker—such as a spouse or former spouse, current or former intimate partner or a family member—may physically harm, or attempt or threaten to physically harm, that worker at work. In these situations, domestic violence is considered workplace violence.<sup>78</sup>

18.91 An additional issue of relevance to clarify family violence as an OHS issue, is an appropriate definition of family violence. In Chapter 3, the ALRC makes a proposal about the appropriate definition of family violence for the purposes of Codes of Practice and other material.

***Identifying family violence***

18.92 Employers should not be required to conduct potentially intrusive examinations into their employees' private lives, nor should they be allowed to ignore their responsibilities for the health and safety of their employees. Such a balance may already be implicit in relevant Australian legislation, but more explicit discussion in the context of workplace risks posed by family violence may be helpful.

18.93 In the Employment Law Issues Paper, the ALRC outlined the approach in the Ontario *Occupational Health and Safety Act* which does not require employers to assess the risk of family violence occurring in the workplace, instead it requires that an employer take precautions only if an employer 'becomes aware, or ought reasonably to be aware that domestic violence that would likely expose a worker to physical injury may occur in the workplace'.<sup>79</sup> The ALRC suggested that this formulation may strike a useful balance in an area where it is difficult to distinguish clearly between workplace and personal responsibilities.

18.94 In identifying family violence in the workplace the ALRC also highlighted that suggestions from Codes of Practice discussing bullying, psychosocial hazards, and general violence may also be of assistance, outlining approaches including:

- reviewing absenteeism records;
- checking injury records;

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77 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011), Question 25.

78 Occupational Health and Safety Branch, Ontario Ministry of Labour, *Workplace Violence and Harassment: Understanding the Law* (2010), [1.3].

79 *Occupational Health and Safety Act 1990* RSO c O1 (Ontario) s 32.0.4. See also Occupational Health and Safety Branch, Ontario Ministry of Labour, *Workplace Violence and Harassment: Understanding the Law* (2010), [2.7].

- conducting confidential surveys to identify possible sources of violence; and
- encouraging workers to communicate about workplace violence.<sup>80</sup>

18.95 In light of the expanded concept of workplace under the Model Bill, with no place of work restriction, employers may require specific guidance on identifying family violence in non-traditional workplace settings where work is conducted.

### ***Responding to family violence***

18.96 In the Employment Law Issues Paper, the ALRC also suggested that guidance may also usefully provide information about how employers should respond to and minimise risks associated with family violence. This is in line with the objects of OHS legislation to assist observance with obligations and ultimately to protect the safety of workers to the highest level reasonably practicable.

18.97 In some cases, employers will already have mechanisms and processes in place which can be utilised to minimise the risk posed by family violence in the work context. Employer and workplace approaches and responses can be multifaceted and there is no ‘one size fits all’. However, risk assessment frameworks and safety plans have emerged as the key way in which employers can respond to the risk posed by family violence as an OHS issue. This section considers general responses as well as providing some discussion of the ways in which risk assessment frameworks and safety plans in particular can be used by employers, and outlines what such frameworks and plans could include.

### ***General employer responses***

18.98 Family violence training modules have traditionally used the ‘three Rs approach’—recognise, respond and refer. In responding to family violence, a model employer response should include several components, including legal compliance, policies and procedures, victim safety and support, and education and training.

18.99 As part of the Domestic Violence Workplace Rights and Entitlements Project, the ADFVC is currently developing national resources designed to assist employers in assessing and responding to risks in the workplace, associated with family violence. For example, the ADFVC has developed a draft workplace guide to developing an effective safety plan. The guide allows employers to tailor the safety plan to the specific working environment and business needs and includes a range of tips in developing a safety plan. It also emphasises that workers should be involved in the development of the plan. The guide includes a number of steps which should be taken to assess the workplace and develop the safety plan as well as suggested actions to support safety in relation to each step, including:

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80 See, eg, *Violence, Aggression and Bullying at Work: A Code of Practice for Prevention and Management 2006* (Vic) s 3.3.1; *Code of Practice: Violence, Aggression and Bullying at Work 2010* (WA) s 3.3.1; ACT Public Service, *Reducing Occupational Violence* (1993) [4.1]; Safe Work Australia, *Draft Code of Practice: How to Manage Work Health and Safety Risks* (2010), [2.1].

**Step 1: Assess the nature of the workplace**

Every workplace is different. Safety plans need to reflect the general safety measures that can be introduced as well as the specific plans tailored to the needs of individual staff who disclose, according to the nature of the workplace and the work patterns of individuals. Is work office based, retail, service industry, or manufacturing? Do rosters expose staff to potentially hazardous times such as late at night, early in the morning or at very quiet times of day? Do staff work alone, off site, or beyond mobile range?

**Step 2: Assess the workplace for security**

Is public access to the workplace restricted? Are security guards on site? Are employees working in remote or isolated locations within the building? Is car parking safe?

**Step 3: When an employee discloses**

A tailored plan to protect the employee needs to be developed with her and with her consent. The plan needs to reflect her work patterns. Does the employee work at times of greater vulnerability to harassment or attack? Does [he or] she work alone? Is she required to work outside the workplace? Is [he or] she within mobile range? How does [he or] she get to and from work? Note that high risk times for exposure to acts of domestic violence are during pregnancy and post-separation. Increase vigilance and support during these times.

**Step 4: Assess with the vulnerable staff member, the use of appropriate screening measures**

The most common form of domestic violence that employees report experiencing at work is abusive phone calls. How can you prevent the abuser gaining access to the vulnerable staff member? How can this be done without affecting the work performance of the employee? Can you collect evidence of stalking and harassment so that police can follow up concerns? Is there a domestic violence court protection order in place so that you can report breaches? Are you aware of escalating risk?

**Step 5: Assess the capacity of the workplace to respond to emergencies**

Are you prepared for a crisis situation?

**Step 6: Assess the need for a safe area**

This is a place where someone under threat can retreat to escape the violence. It may be a room, an enclosed outdoor area or an adjoining business.<sup>81</sup>

***‘Reasonably practicable’***

18.100 As outlined above, in fulfilling their duty of care, employers must consider what is ‘reasonably practicable’. This involves considering a range of matters including the likelihood of the hazard/risk; the degree of harm; and knowledge, availability and suitability of ways to eliminate or minimise the hazard or risk.<sup>82</sup>

18.101 In the Employment Law Issues Paper, the ALRC suggested that guidance—whether in a regulatory provision, a Code of Practice, or a less formal form—may help

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81 ADFVC, *Workplace Guide: Domestic Violence Safety Plan*.

82 Safe Work Australia, *Explanatory Memorandum—Model Work Health and Safety Act* (2010), [71].

employers attempting to determine a ‘reasonably practicable’ response to family violence as a work health and safety risk.<sup>83</sup> Models from state codes of practice and other jurisdictions—in particular, recent legislation and accompanying guidelines from Ontario, Canada—provide examples of what subjects such guidance could discuss.

### ***Submissions and consultations***

18.102 Most stakeholders considered the need for increased education in a general sense about the matters considered in this chapter, rather than addressing the substance of specific guidance that may be required. Many related submissions on this point are outlined later in this chapter.

18.103 Some stakeholders expressed views as to the range of areas Codes of Practice or guidance material could address, with respect to family violence as an OHS issue. For example, the Queensland Law Society expressed the view that any such guidance

would need to provide numerous examples of how to deal with situations and be gender neutral, given that both women and men are victims of family violence, with a referral to trained professionals if the situation requires.<sup>84</sup>

18.104 Women’s Health Victoria suggested:

Introductory information about what family violence is, prevalence, who is affected, and the impact it has on the community should also be included. It should also cover some of the common myths of family violence. The guidance could also recommend the exploration by an organisation (not just at leadership level) of the principles of a family violence free organisation. All employees have a right to feel safe at work and to be treated respectfully. Employees could explore what this means for them.<sup>85</sup>

18.105 Women’s Health Victoria also suggested that information should contain messages about proactive OHS measures and safety risk management strategies, and the need to ‘recognise, respond and refer’.<sup>86</sup>

18.106 Women Everywhere Advocating Violence Elimination (WEAVE) suggested that the information needs to include:

- Prevalence and gender profiles of family violence perpetration and victimisation
- The costs and impacts of family violence to individuals, families, businesses and communities
- The dynamics and behaviours of family violence perpetration and victimisation; differentiated responses to perpetrators and victims
- How employers can help.<sup>87</sup>

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83 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011), [146] ff.

84 Queensland Law Society, *Submission CFV 21*, 6 April 2011.

85 Women’s Health Victoria, *Submission CFV 11*, 5 April 2011.

86 Ibid.

87 WEAVE, *Submission CFV 14*, 5 April 2011.



***Responding to family violence***

18.107 As a preliminary point, most stakeholders acknowledged that, in order for employers to be prepared to address the risks associated with family violence in the work context, they must be aware that a worker is experiencing family violence that is likely to result in an OHS hazard or incident. Many stakeholders therefore suggested that ‘for this to happen the employer needs to have in place structures that encourage employees to disclose family violence problems they may be experiencing’ where they are likely to result in an OHS hazard or incident.<sup>88</sup>

18.108 Women’s Health Victoria highlighted the importance of leadership, commenting that ‘organisational leaders can set the tone for a workplace culture that is safe, respectful and supportive—one that sends an unambiguous message that family violence is not tolerated’.<sup>89</sup>

18.109 The ADFVC emphasised that employers ‘need only respond to family violence issues where they impact on workplace performance and safety’. The ADFVC also outlined a number of risk management strategies including:

- encouraging employees to obtain protection orders specifically listing their work address;
- creating and implementing general and individualised safety plans tailored to the individual business or undertaking and needs of workers experiencing family violence; and
- compulsory training for OHS officers, union delegates and human resources staff on family violence issues in the workplace incorporated into training modules which focus on workplace violence.<sup>90</sup>

18.110 Several stakeholders supported the use of workplace safety plans in addressing the threat of harm to workers experiencing family violence, as well as co-workers.<sup>91</sup> A range of models were suggested, including the ADFVC guide outlined above.<sup>92</sup>

18.111 In addition, Women’s Health Victoria suggested other issues to consider when drafting a safety plan include:

- where possible, consider requesting a change of work schedule, work location, or work telephone numbers if practicable;
- if an absence is agreed to, ensure the employee is clear about the plan to return to work. While absent, the employee should maintain contact with the appropriate manager;

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88 Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

89 Women’s Health Victoria, *Submission CFV 11*, 5 April 2011.

90 ADFVC, *Submission CFV 26*, 11 April 2011. Similar strategies were supported by WEAVE who also submitted that there is a need for employer safety audits: WEAVE, *Submission CFV 14*, 5 April 2011.

91 Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

92 ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011.

- consider getting the employee to identify an emergency contact person should the employer be unable to contact the victim;
- if possible, obtain a restraining order that includes the workplace, and keep a copy on hand at all times. The employee may consider providing a copy to her or his supervisor and reception along with a photo of the perpetrator; and
- reviewing safety of parking arrangements and making changes as necessary.<sup>93</sup>

18.112 Women's Health Victoria also suggested the need for a workplace team to identify safety risks; the team to include managers, security, human resource representatives or other relevant employee service staff. Women's Health Victoria emphasised 'the need for a robust system of policies across a range of issues within the workplace':

Auditing existing policies, examining values and mission statements, and considering the effects of organisational culture is one way of doing this. Policies and guidance for managers should also be in place about performance management for employees who are experiencing family violence.<sup>94</sup>

18.113 Redfern Legal Centre upported the development of workplace policies and procedures that 'will protect workers from external harassment or intimidation' and noted that security arrangements should be 'sufficiently robust to prevent and protect from malicious intervention by the perpetrator of family violence'.<sup>95</sup>

18.114 The ASU commented that in many cases, workplace responses could build on existing measures or procedures, such as those 'adopted in relation to customer service staff (who often deal with abusive customers) or other workers at risk of harm or violence'.<sup>96</sup>

18.115 In consultations, SWA expressed the view that workplace responses can realistically only be focussed on the risks arising from the business or undertaking and what is reasonably practicable for the employer to do in the circumstances.<sup>97</sup>

18.116 ACCI emphasised that,

given that each situation and circumstance may be different, it is not expected that workplaces will be sufficiently equipped to deal with all possible internal or external threats, particularly if they are due to unforeseen and unpredictable criminal acts of violence or aggression. Whilst businesses can play a role in ensuring its workforce is isn't exposed to internal or external sources of harm, law enforcement authorities are the responsible bodies to deal with specific instances of possible or actual criminal activities.<sup>98</sup>

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<sup>93</sup> Women's Health Victoria, *Submission CFV 11*, 5 April 2011.

<sup>94</sup> Ibid.

<sup>95</sup> Redfern Legal Centre, *Submission CFV 15*, 5 April 2011.

<sup>96</sup> Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

<sup>97</sup> Safe Work Australia, *Consultation*, by telephone, 17 January 2011.

<sup>98</sup> ACCI, *Submission CFV 19*, 8 April 2011.

18.117 Several stakeholders also supported the development of an overarching workplace family violence policy which encompassed OHS.<sup>99</sup>

### **ALRC's views**

#### ***Type of guidance***

18.118 The ALRC does not consider it is necessary to make amendments to OHS legislation to expand the broadly formulated duties of care. Similarly, in light of stakeholder views, and to the extent that the *OHS Regulations* set out mandatory obligations and provide detail with respect to meeting general legislative duties, the ALRC does not consider it is necessary to amend the *OHS Regulations* to protect the safety of victims of family violence.

18.119 Codes of Practice provide practical guidance on safe work practices and risk management. As discussed above, while Codes of Practice do not impose mandatory legal obligations, they are admissible in evidence before a court as proof of the standards of health and safety that should be achieved by a duty holder to comply with the relevant legislation and regulations. More importantly, the *OHS Code*, for example, if relied on as evidence in legal proceedings reverses the burden of proof to the duty holder.

18.120 Guidance provided by way of a Code of Practice appears to strike the balance between ensuring employers are aware of the health and safety standards expected of them, while still allowing individual employers sufficient flexibility to tailor their responses according to the nature of the business or enterprise. Consequently, the ALRC considers that the inclusion of information on family violence as a work health and safety issue should at a minimum, be included in Codes of Practice.

18.121 The ALRC is interested in stakeholder feedback on whether it is appropriate to include such information in existing Codes of Practice, for example those developed by SWA, or whether a separate Code of Practice should be developed. The ALRC's preliminary view is that inclusion in existing Codes of Practice would ensure current risk assessments and employer planning could be adapted to account for the risk posed by family violence.

18.122 However, the ALRC recognises the important role played by other forms of guidance material and suggests that bodies such as SWA, Comcare and the Fair Work Ombudsman should be involved in provision of additional information. This issue is considered in further detail below.

#### ***Substance of guidance***

18.123 The ALRC welcomes further feedback on the substance of Codes of Practice, but considers that the Codes should include:

- a definition of family violence—in line with that suggested in Chapter 3;

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99 This issue is discussed in the context of national initiatives in Ch 14.

- information about the nature, features and dynamics of family violence;
- possible ways to identify family violence in a work context;
- responsibilities and obligations of employers and employees;
- examples of how family violence may constitute a work health and safety risk; and
- possible employer and workplace responses to the risk posed by family violence.

#### *Identifying family violence*

18.124 So far as is reasonably practicable, employers must ensure, the health and safety of employees and others. In determining what is reasonably practicable, consideration is required of what the employer knew, or should reasonably have known, about the hazard or risk and ways of eliminating or minimising that risk. The ALRC considers that guidance could be provided for employers in order to assist them to put in place measures to ensure they are able to identify family violence in the workplace. This is likely to be particularly important under the Model Bill, given the expanded range of potential ‘workplaces’. However, guidance should make clear the distinction between work-related and personal responsibilities.

#### *Responding to family violence*

18.125 The ALRC acknowledges the need for workplace responses that are tailored to meet the individual needs of businesses, and of employees within those businesses. A precondition for responding appropriately is to ensure adequate structures are in place for disclosure and reporting of family violence.

18.126 The ALRC considers that, in addition to family violence policies (which include relevant disclosure and reporting structures), risk assessment frameworks and safety plans are vital to protecting the safety of those experiencing family violence in a work context.

18.127 The ALRC considers the risk assessment components currently contained in the Model Codes of Practice could be amended to account for the risk posed by family violence. However, the ALRC welcomes stakeholder feedback on other ways in which the Australian Government can assist workplaces to integrate good risk management practices in relation to family violence into day-to-day business operations.

18.128 The ALRC acknowledges the work done in this area by the ADFVC. However, in addition to the general guide produced by ADFVC with respect to developing a safety plan, the ALRC considers that SWA should develop model safety plans which include measures to minimise the risk posed by family violence in the workplace for use by all Australian workplaces, in consultation with the ADFVC, unions and employer organisations. It may be necessary to develop a number of model safety plans to suit businesses of varying sizes across a range of industries. The ALRC considers that the involvement of unions and employer organisations is important and in line with the object of the framework created by the Model Bill to encourage unions and employer organisations to take a constructive role in promoting improvements in

work health and safety practices and assisting employers and employees to achieve healthier and safer working environments.

**Proposal 18–1** Safe Work Australia should include information on family violence as a 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’; and
- (c) any other code that Safe Work Australia may develop in relation to other topics, such as bullying and harassment or family violence.

**Proposal 18–2** Safe Work Australia should develop model safety plans which include measures to minimise the risk posed by family violence in the work context for use by all Australian employers, in consultation with unions, employer organisations, and bodies such as the Australian Domestic and Family Violence Clearinghouse.

## Education, training and awareness

18.129 In *Family Violence—A National Legal Response*, the ALRC and the New South Wales Law Reform Commission (the Commissions) recommended that the Australian, state and territory governments, and educational, professional and service delivery bodies should ensure regular and consistent education and training for participants in the family law, family violence, and child protection systems, in relation to the nature and dynamics of family violence, including its impact on victims, in particular those from high risk or vulnerable groups.<sup>100</sup>

18.130 In Chapter 14 of this Discussion Paper the ALRC proposes that the Australian Government should initiate a national education and awareness campaign around family violence as a work issue. The ALRC indicates that one component of the national campaign should focus on family violence as an OHS issue.

## Submissions and consultations

18.131 As outlined above, in the Employment Law Issues Paper the ALRC asked what requirements, suggestions or information should be included in regulations, Codes of Practice or guidance material addressing family violence as an OHS risk.<sup>101</sup> This question, as well as a more general question about any other ways OHS law could be improved to protect the safety of those experiencing family violence,<sup>102</sup> elicited a

<sup>100</sup> Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), Rec 31–1.

<sup>101</sup> Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011), Question 25.

<sup>102</sup> Ibid, Question 32.

range of responses from stakeholders related to education, training and measures aimed at raising awareness.

18.132 Stakeholders supported a national approach to this issue (in line with proposals made in Chapter 14) as well as recognising the particular role to be played by bodies such as SWA, the Fair Work Ombudsman (FWO) and state and territory OHS regulatory bodies as well as employer organisations.<sup>103</sup>

18.133 The ADFVC recommended that work safety agencies and employer organisations should provide duty holders and members with educational resources and other guidance material. The ADFVC recognised ‘the important role that employer organisations play in educating members on OHS issues in some industry sectors’, and considered that ‘ideally, any education initiatives should also be driven by the private sector’.<sup>104</sup>

18.134 The ADFVC emphasised that education and training ‘will equip duty holders with the tools they need to identify potential risks and respond appropriately by developing measures to eliminate risk’. The ADFVC also emphasised the need for the development of resources for employees experiencing family violence, and co-workers of those experiencing family violence, citing an example developed by the Occupational Health & Safety Council of Ontario.<sup>105</sup>

18.135 The ASU suggested that

the relevant health and safety regulator in each jurisdiction [should] conduct an education campaign, so that employers have no doubt that if an incident connected to domestic violence was to occur on the worksite, the employer is still responsible for providing a safe workplace.<sup>106</sup>

18.136 ACCI submitted that ‘any educative materials should be provided by the OHS regulator(s) at first instance’,

but could also be provided by the FWO in their educative material (including Best Practice Guides) on reasonable precautions or protocols that workplaces could implement where there is a possibility that an employee or co-worker may be harmed by a spouse at a workplace.<sup>107</sup>

18.137 The Queensland Law Society indicated it favours the introduction of education campaigns over statutory guidelines in order to address family violence as an OHS issue.<sup>108</sup>

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103 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Queensland Law Society, *Submission CFV 21*, 6 April 2011; National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011; ACCI, *Submission CFV 19*, 8 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 17*, 5 April 2011; Women’s Health Victoria, *Submission CFV 11*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

104 ADFVC, *Submission CFV 26*, 11 April 2011

105 Ibid.

106 Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

107 ACCI, *Submission CFV 19*, 8 April 2011.

108 Queensland Law Society, *Submission CFV 21*, 6 April 2011.

18.138 The ACTU supported a multifaceted approach, including:

- Publication of material issued jointly by health and safety regulatory agencies with police and/or domestic violence agencies, union and employer associations; and
- Training of advisory and inspectorate branches of regulators in identifying and addressing the issue.<sup>109</sup>

18.139 With respect to training, the Australian Association of Social Workers (Qld) emphasised that '[a]ppropriate training in relation to domestic and family violence and specific information on how to support victims within the context of the work environment', must go 'hand in hand' with any changes to regulations, codes of practice or guidance material.<sup>110</sup>

18.140 The NNWWC suggested the inclusion of modules on family violence in OHS qualifications and Health and Safety Representative training as well as training for OHS inspectors 'on family violence and its potential risk to workplaces' and 'training on positive ways to address and prevent the impact of family violence on workplaces'.<sup>111</sup>

### ALRC's views

18.141 One of the objects of the Model Bill involves the promotion of the provision of advice, information, education and training in relation to OHS. In light of the ALRC's proposals, and in line with this object, the ALRC considers there is a specific need for education, training and increased awareness about family violence as an OHS issue which builds on the obligations contained in OHS legislation and regulations, and guidance provided in Codes of Practice and other guidance material.

18.142 In light of concerns expressed throughout this Inquiry, particularly by employer organisations, any such education and training must be provided in a range of forums, and should be targeted to meet the needs of particular business and workplace types and sizes. The ALRC reinforces the views expressed by the Commissions in *Family Violence—A National Legal Response*, that education and training on the nature and dynamics of family violence—in this case for employers, employees and related organisations—will assist in protecting the safety of victims of family violence. The ALRC considers that if a definition of family violence is included in Codes of Practice and other SWA material, which is consistent across legal frameworks, this will provide for a common understanding of family violence on which education, training and information dissemination can be based.

18.143 The ALRC also considers that the national education campaign proposed in Chapter 14 will provide an important basis for education, training and awareness raising in relation to family violence as an OHS issue. The ALRC proposes that SWA should develop and provide education and training in relation to family violence as an

<sup>109</sup> Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

<sup>110</sup> Australian Association of Social Workers (Qld), *Submission CFV 17*, 5 April 2011.

<sup>111</sup> National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011.

OHS issue, in consultation with unions, employer organisations, state and territory OHS regulators and other relevant bodies. The ALRC considers that such information should be provided through a range of mediums, and be tailored to suit specific industries or workplaces and provided in a culturally appropriate manner.

18.144 The ALRC also considers that provision of education should be complemented by appropriate training of employees, employers, Health and Safety Representatives and committees as well as OHS regulators. The ALRC is interested in stakeholder views about the most appropriate mechanism through which such training could be provided.

**Proposal 18–3** Safe Work Australia should develop and provide education and training in relation to family violence as a work health and safety issue in consultation with unions, employer organisations and state and territory OHS regulators.

## Data collection

18.145 The National OHS Strategy refers to the need to improve data collection and analysis with respect to OHS issues.<sup>112</sup> Despite this, there is a lack of publicly available data about the incidence of family violence-related OHS hazards or incidents.

18.146 In the Employment Law Issues Paper, the ALRC suggested that data collected as a result of such notifications arising from notifiable incidents may be helpful in establishing the scope and frequency with which family violence arises as a work health and safety risk. Stakeholders largely agreed.<sup>113</sup> For example, the ADFVC emphasised the importance of mandatory reporting (through the notifiable incident system) as it would ‘allow the collection of statistics about family violence at work, and assist in enhancing recognition of family violence as a workplace issue’.<sup>114</sup>

18.147 In other areas, stakeholders also suggested changes with respect to data surrounding work-related fatalities and the use of workers’ compensation data. For example, some stakeholders expressed support for amending the reporting mechanisms and recording of workplace fatality statistics to more clearly outline the cause of the injury or death, in particular where it involves family violence.<sup>115</sup>

18.148 In some cases it may be difficult to determine where family violence has played a role in an accident caused by an employee’s lack of concentration or fatigue, which may stem from family violence. In instances where there are verbal or physical threats or abuse in the workplace, it may be less difficult. The ALRC considers that

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112 Safe Work Australia, *National OHS Strategy 2002–2012*.

113 See, eg, Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; Women’s Legal NSW; Women’s Health Victoria, *Submission CFV 11*, 5 April 2011.

114 ADFVC, *Submission CFV 26*, 11 April 2011.

115 Ibid; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.



SWA is the most appropriate body to collect information about family violence as an OHS issue as it has sections dedicated to research and evaluation, and data analysis.<sup>116</sup> In addition, one of the focuses for SWA in 2011–12 will be the development of a comprehensive Research and Data strategy.<sup>117</sup> The ALRC considers this may provide the most appropriate opportunity to consider this issue. However, the ALRC is interested in stakeholder feedback and comment on other possible ways to address this issue of data collection.

**Proposal 18–4** Safe Work Australia should, in developing its Research and Data Strategy:

- (a) identify family violence and work health and safety as a research priority; and
- (b) consider ways to extend and improve data coverage, collection and analysis in relation to family violence as a work health and safety issue.

## Other issues

18.149 One of the focuses of SWA in 2011–2012 is on developing a National Work Health and Safety Strategy to replace the current National Strategy.<sup>118</sup> Under the existing National Strategy, the top five priorities include reducing the impact of risks at work and improving the capacity of business operators and workers to manage OHS effectively. The ALRC is interested in comment on whether it is appropriate to incorporate consideration of family violence as an OHS issue under any similar priorities in the new National Work Health and Safety Strategy. The ALRC would also welcome submissions on any other ways not outlined in this chapter in which occupational health and safety law could be improved to better protect the safety of those experiencing family violence.

**Question 18–1** What reforms, if any, are needed to occupational health and safety law to provide better protection for those experiencing family violence? For example, should family violence be included in the National Work Health and Safety Strategy?

116 For example, SWA currently maintains the National Online Statistics Interactive (NOSI) system in relation to workers' compensation claims.

117 Safe Work Australia, *Agency Budget Statement 2011–2012* (2011), Overview and Resources, 372.

118 Ibid.

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## Part F— Superannuation

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### Chapter

#### 19. Superannuation Law

### Proposals and Questions in this Part

#### 19. Superannuation Law

**Question 19–1** The ALRC is not proposing that a trustee should have an express obligation to consider whether an application for superannuation splitting is being made as a result of coercion. Are there any other ways a trustee or another body could consider this issue? If so, what if any steps could they take to limit or ameliorate the effect of that on a victim of family violence?

**Proposal 19–1** In *Family Violence—A National Legal Response* (ALRC Report 114) 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.

**Question 19–2** What changes, if any, are required to ensure that the Australian Tax Office considers family violence in determining appropriate compliance action in relation to trustees of SMSFs who fail to comply with superannuation or taxation law, where that action may affect a trustee who is:

- (a) a victim of family violence; and
- (b) not the subject of compliance action?

**Question 19–3** What changes, if any, to guidance material produced by the Australian Tax Office may assist in protecting people experiencing family violence who are members or trustees of a SMSF?

**Question 19–4** What approaches or mechanisms should be established to provide protection to people experiencing family violence in the context of SMSFs?

**Proposal 19–2** Regulation 6.01(5)(a) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) should be amended 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.

**Question 19–5** Are there any difficulties for a person experiencing family violence in meeting the requirements under reg 6.01(5)(b) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) as part of satisfying the ground of ‘severe financial hardship’? If so, what changes are necessary to respond to such difficulties?

**Question 19–6** Should the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to allow recipients of Austudy, Youth Allowance and CDEP Scheme payments to access early release of superannuation on the basis of ‘severe financial hardship’?

**Question 19–7** Should reg 6.01(5)(a) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to provide that applicants must either be in receipt of Commonwealth income support payments or some other forms of payment—for example, workers’ compensation, transport accident or personal income protection payments because of disabilities?

**Question 19–8** Should APRA Superannuation Circular No I.C.2, *Payment Standards for Regulated Superannuation*, be amended to provide guidance for trustees in relation to:

- (a) what constitutes 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?

**Question 19–9** As an alternative to Question 19–8 above, should APRA work with the Australian Institute of Superannuation Trustees, the Association of Superannuation Funds of Australia and other relevant bodies to develop guidance for trustees in relation to early release of superannuation on the basis of ‘severe financial hardship’, including information in relation to:

- (a) what constitutes 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?

**Question 19–10** In practice, how long do superannuation funds take to process applications for early release of superannuation on the basis of ‘severe financial hardship’? What procedural steps may be taken to facilitate the prompt processing of applications in circumstances involving family violence?

**Question 19–11** In practice, how long does APRA take to process applications for early release of superannuation on compassionate grounds? What procedural steps may be taken to facilitate the prompt processing of applications in circumstances involving family violence?

**Proposal 19–3** APRA should amend the *Guidelines for Early Release of Superannuation Benefits on Compassionate Grounds* to include information about family violence, including 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.

**Question 19–12** Should reg 6.19A of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to provide that a person may apply for early release of superannuation on compassionate grounds where the release is required to pay for expenses associated with the person’s experience of family violence?

**Question 19–13** Should the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to provide for a new ground for early release of superannuation for victims of family violence? If so, how should it operate? For example:

- (a) which body should be responsible for administering the new ground;
- (b) what criteria should apply;
- (c) what evidence should be required;
- (d) if individual funds administer the new ground, should there be common rules for granting early release on the new ground; and
- (e) what appeal mechanisms should be established?

**Question 19–14** What amendments, if any, should be made to application forms for early release of superannuation to provide for disclosure of family violence where it is relevant to the application?

**Question 19–15** What training is provided to superannuation fund staff and APRA staff who are assessing applications for early release of superannuation? Should family violence and its impact on the circumstances of an applicant be included as a specific component of any training?

**Question 19–16** In practice, how do superannuation funds and APRA contact members or those who have made an application for early release of superannuation? Is there, or should there be, some mechanism or process in place in relation to applications involving family violence to deal with safety concerns associated with:

- (a) contacting the member or applicant; or
- (b) the disclosure of information about the application?

**Question 19–17** Should the 90 day period for a superannuation fund to respond to a complaint by a member be reduced to 30 days?

**Question 19–18** Should there be central data collection in relation to applications for early release of superannuation in order to identify:

- (a) the extent to which funds are being accessed early on the basis of any new family violence ground, including numbers of applications and success rates; and
- (b) whether there are multiple claims on the same or different funds?

If so, which body should collect that information, and how?

**Question 19–19** Are there any other ways in which superannuation law could be improved to protect those experiencing family violence?

## 19. Superannuation Law

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### Summary

19.1 In this chapter the ALRC examines ways in which the Australian superannuation system does, or could, respond to protect those people experiencing family violence. In doing so, the ALRC acknowledges the specific role 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.

19.2 The chapter consist of two main parts. The first part deals with circumstances in which a victim of family violence may have been coerced into taking action in respect of their superannuation. It considers superannuation agreements, spousal contributions and self-managed superannuation funds (SMSFs). The ALRC concludes that the treatment of superannuation should be considered in the context of an inquiry into how family violence should be dealt with in respect of property proceedings under the *Family Law Act 1975* (Cth) and considers changes to the regulation of, and guidance material with respect to, SMSFs.

19.3 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 the purposes of, for example, leaving a violent relationship. In considering early release on the basis of severe financial hardship, the ALRC proposes amendments to the eligibility requirements for making an application and to guidance material for decision makers in granting early release. The ALRC also considers whether compassionate grounds could be amended to account for family violence, or whether a new ground of early release on the basis of family violence should be introduced. The part also outlines a range of other issues relevant to early release, including in relation to application forms, training, applicant safety measures, time limits and data collection and systems integrity measures.

### **Terminology**

19.4 As outlined in Chapter 2, the concept of safety in the course of this Inquiry is a broadly constructed one, and as a result, for the purposes of this chapter safety primarily refers to the safety arising from economic security and independence.

19.5 Family violence in this context is defined according to the definition recommended in Proposal 3–2, which the ALRC suggests should be inserted into the *Superannuation Industry (Supervision) Regulations 1994* and, where appropriate, in all Australian Prudential Regulation Authority, Australian Taxation Office and superannuation trustee material.

### **Matters outside this Inquiry**

19.6 As outlined in Chapter 1, detailed consideration of, or proposals with respect to amending, the *Family Law Act 1975* (Cth) is beyond the Terms of Reference for this Inquiry.<sup>1</sup> To a certain extent, some of the issues raised in relation to superannuation and family violence were addressed in *Family Violence—A National Legal Response* (ALRC Report 114). Accordingly, where appropriate the ALRC refers to recommendations made in *Family Violence—A National Legal Response*.

19.7 There are also a number of systemic matters which have arisen in the course of the Inquiry which the ALRC considers are beyond the Terms of Reference. These primarily relate to early access to superannuation and include whether:

- the administration of all claims for early release of superannuation benefits should be the responsibility of one agency;
- the current monetary limits on the amount of superannuation able to be released early are appropriate; and
- one external review body or mechanism should be established to review decisions on early release of superannuation applications.

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1 The full Terms of Reference are set out at the front of this Discussion Paper and are available on the ALRC's website at [www.alrc.gov.au](http://www.alrc.gov.au).

19.8 Many of these issues were considered in 2002 by the Senate Select Committee on Superannuation and Financial Services.<sup>2</sup>

19.9 In addition, in 2009, the Australian Government commissioned a review into the governance, efficiency, structure and operation of Australia's superannuation system. The final report by the Super System Review Panel was released on 5 July 2010. The Government's response to the Review, *Stronger Super*, introduced a range of reforms to the superannuation system including MySuper and SuperStream.<sup>3</sup> The reforms introduced as part of *Stronger Super* are wide-ranging, but few appear to respond to, or account for circumstances involving family violence. Accordingly, these reforms will not be considered in the course of this Inquiry, other than with respect to data collection issues outlined towards the end of this chapter.

## Superannuation policy

### Superannuation principles

19.10 In the course of the Super System Review, the Panel formulated ten superannuation principles to be the 'guiding principles by which policy is developed in relation to superannuation generally'. The principles of relevance to this Inquiry include:

- Superannuation must always be for the benefit of members.
- The superannuation system needs to be well-regulated to address prudential and other risks so that members can have the confidence to invest their retirement savings for their long-term financial benefit.
- Individual choices for members should be available and respected, but members must recognise and accept the increased responsibility that comes with making those choices.
- The superannuation system must be supported by high quality research and data, as well as by intermediaries with high professional standards.
- Superannuation is a large and complex system with an increasingly important social and macroeconomic dimension. It must be regulated and administered coherently and rule changes, including to taxation rules, should be made sparingly and in a way that engenders member confidence.
- The system must have sufficient flexibility to accommodate its inherent growth path and should strive for continual improvement, rather than abrupt changes. Where possible, government and trustee decisions about superannuation should be taken with a long-term perspective.<sup>4</sup>

19.11 These principles provide a useful touchstone for this chapter, in addition to the key themes articulated in Chapter 2.

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2 Senate Select Committee on Superannuation and Financial Services—Parliament of Australia, *Early Access to Superannuation Benefits* (2002).

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

4 J Cooper and others, *Super System Review Final Report: Part One—Overview and Recommendations* (2010), Overview, 4.



**Purposes of superannuation**

19.12 The primary aim of the superannuation system is to ‘deliver private income to enhance the living standards of retired Australians’:

Successive governments have committed to the ‘three pillar’ framework as the underpinning of Australia’s retirement incomes policy, blending near-universal employee participation in the superannuation system with an adequate social security safety net and incentives for discretionary savings by individuals beyond the employer-mandated levels.<sup>5</sup>

19.13 In the course of this Inquiry, two of these pillars are considered—this chapter focuses on superannuation and Chapters 5–8 consider family violence in the context of social security. However, to the extent that some of the issues raised in this chapter relate to provision of early access to superannuation, essentially as a form of supplementary income support, early access should be considered in the broader context of the adequacy of current social security measures and should be seen as a last resort for those experiencing financial difficulties.

19.14 Key stakeholders in this Inquiry have also consistently emphasised the policy aims underlying the superannuation system, expressing the view that, for example:

Permitting individuals to use superannuation savings for other purposes ... would be poor public policy and contrary to the government’s retirement incomes policy and the intent for which tax concessions are given to superannuation savings.<sup>6</sup>

19.15 The two key policy tensions that have emerged in the course of this Inquiry with respect to family violence and superannuation relate to the two parts of this chapter—the first relates to superannuation and coercion, the second to early access to superannuation.

19.16 First, superannuation is generally provided through a trust structure where trustees hold the superannuation on behalf of members. As a result, trustees owe members a fiduciary duty to act in the best interests of members while managing the superannuation fund. However, in the context of family violence, a question arises as to the extent of the obligation owed by trustees to members and as to how any such obligation should operate in practice. For example, should a trustee be obliged to inquire as to the motivation behind superannuation-related decisions, in the event that, for example, they are the result of coercion arising from family violence? The tension here is between the duty to act in the best interests of members, and the limits imposed by resources, experience and expertise of trustees.

19.17 The second key policy tension arises between the need to preserve superannuation benefits until retirement and the need, in limited circumstances, to allow early access to superannuation funds. This tension is discussed in more detail in the second part of this chapter.

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5 Ibid, Overview, 15.

6 Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011.

## Overview of the superannuation system

19.18 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>7</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.<sup>8</sup>

### Superannuation legislation

19.19 There are a number of pieces of legislation and subordinate legislation that govern the operation of the superannuation system. For the purposes of examining ways in which the superannuation system as a legal framework could be improved to protect the safety of victims of family violence, the key pieces of legislation and subordinate legislation of relevance are:

- *Superannuation Act 1976* (Cth)—specifically, the provisions with respect to early access to superannuation;
- *Superannuation (Resolution of Complaints) Act 1993* (Cth) (SRC Act)—which establishes the Superannuation Complaints Tribunal;
- *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act)—which makes provision for the prudent management of certain superannuation funds and supervision by Australian Prudential Regulatory Authority (APRA), the Australian Securities and Investments Commission (ASIC) and the Commissioner of Taxation;<sup>9</sup> and
- *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SIS Regulations)—which articulate the grounds for early access to superannuation.

19.20 Two other pieces of legislation are also relevant for the purposes of specific issues within this chapter. First, the *Family Law Act* is relevant to the extent that it provides that parties may make a superannuation agreement and family court property proceedings provide a means by which court orders about spouse entitlements to superannuation may be made.

19.21 Secondly, the *Financial Services Reform Act 2001* (Cth) (FSR Act) is designed to provide standardisation within the financial services industry. It is governed and administered by ASIC. Also relevant, is ASIC Regulatory Guideline 146, which provides for minimum training standards for people who provide financial product advice to retail clients.<sup>10</sup>

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

8 By 2050, almost one in four Australians will have reached retirement age, compared to one in seven today: *Ibid.*

9 *Superannuation Industry (Supervision) Act 1993* (Cth) s 3(1).

10 Australian Securities and Investments Commission, *Regulatory Guide 146: Licensing: Training of Financial Product Advisers* (2009).

### Superannuation Complaints Tribunal

19.22 The Superannuation Complaints Tribunal (SCT) was established under the *Superannuation (Resolution of Complaints) Act 1993* (Cth) to deal with complaints about superannuation—specifically in the areas of regulated Superannuation Funds, annuities and deferred annuities, and Retirement Savings Accounts. The Tribunal’s jurisdiction does not, however, extend to complaints concerning self-managed superannuation funds (SMSF).

### Regulatory bodies

19.23 The superannuation system is regulated by three key government agencies:

- the Australian Taxation Office (ATO)—which administers the relevant legislation for SMSFs and assists SMSF trustees to comply with their obligations;
- ASIC—which regulates financial services to protect consumers, including monitoring compliance with the *FSR Act*; and
- APRA—the prudential regulator that regulates superannuation funds other than SMSFs, reviews compliance with the *SIS Act* and plays a role in early release of superannuation entitlements.<sup>11</sup>

19.24 Individual superannuation funds also have internal regulatory mechanisms and there are a number of superannuation peak bodies which, while not necessarily serving a regulatory function, provide funds with guidance and training.<sup>12</sup>

### Superannuation and coercion

19.25 A victim of family violence may be coerced into taking action that relinquishes some control over, or access to, his or her superannuation. This could potentially leave the victim facing a financially difficult retirement, or deprive them of assets to which they have contributed during a partnership. Such situations may involve:

- superannuation agreements made under pt VIIIAB of the *Family Law Act*;
- contributions under reg 6.44 of the *SIS Regulations*; or
- self-managed superannuation funds.

### Superannuation agreements

19.26 Parties to a marriage or to a de facto relationship (contemplated or actual) may make a binding agreement in respect of how their property or financial resources are to

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11 The Financial System Inquiry Report of 1997 recommended, amongst other things, the establishment of a new category of small superannuation fund to be regulated by the ATO as well as the establishment of ASIC and APRA: S Wallis and others, *Financial System Inquiry: Final Report* (1997).

12 Eg, the Association of Superannuation Funds of Australia and the Australian Institute of Superannuation Trustees.

be dealt with, or other matters.<sup>13</sup> Under the *Family Law Act*, such an agreement is known as a ‘financial agreement’—if it concerns a marriage; and as a ‘pt VIIIAB financial agreement’—if it concerns a de facto relationship.

19.27 When the agreement, or any component of it, deals with either or both spouse parties’ superannuation interests (existing or not yet in existence) as if those interests were ‘property’, the agreement, or that part of it, is known as a ‘superannuation agreement’.<sup>14</sup> A superannuation agreement is of no effect unless and until the spouse parties marry or enter into the de facto relationship (whichever was contemplated).<sup>15</sup>

19.28 To be enforceable, the financial agreement or pt VIIIAB financial agreement, of which the superannuation agreement is a component, must have been made in accordance with the formal requirements set out in ss 90G or 90UJ respectively of the *Family Law Act*.<sup>16</sup> Sections 90G and 90UJ require that:

- the agreement has been signed by all parties;
- each party has, before signing the agreement, been provided with independent legal advice from a legal practitioner about the effect of the agreement on that spouse’s rights and the advantages and disadvantages to them of making the agreement at that point in time;
- either before or after signing the agreement, the legal practitioner who has provided independent legal advice provides a signed statement to their client spouse party that attests to having given that advice;
- a copy of that signed statement has been given to the other party or that other party’s legal practitioner; and
- the agreement has not been terminated and has not been set aside by a court.

19.29 A court may, on application by a party to the agreement, order that the agreement is binding on the parties notwithstanding a failure to satisfy some of the requirements set down in ss 90G or 90UJ if it is satisfied that it would be unjust or inequitable if the agreement were not binding on the spouse parties.<sup>17</sup>

19.30 A court may set aside a financial agreement or a termination agreement (an agreement terminating a financial agreement) if it is satisfied that any of the factors in s 90K(1) are established, or, in the case of a pt VIIIAB financial agreement or a pt VIIIAB termination agreement, it is satisfied that any of the largely similar provisions in s 90UM(1) of the *Family Law Act* are met.<sup>18</sup>

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13 *Family Law Act 1975* (Cth) pts VIIIA, VIIIAB div 4. The former concerns marriages and the latter de facto relationships.

14 *Ibid* ss 90MH(1)–(2), 90MHA(1)–(2).

15 *Ibid* ss 90MH(4), 90MHA(4).

16 *Ibid* s 90MG(1)–(2).

17 A court may only do so where the agreement has been signed by both parties and has not been terminated or otherwise set aside by a court: *Ibid* ss 90G(1A), 90G(1B); 90UJ(1A); 90UJ(1B).

18 *Ibid* ss 90K(1), 90UM(1).

19.31 Sections 90K(1) and 90UM(1) provide that, among other things, a court may make an order setting aside an agreement if the court is satisfied that:

- the agreement is void, voidable or unenforceable;<sup>19</sup>
- in the circumstances that have arisen since the agreement was made it is impracticable for the agreement, or a part of the agreement, to be carried out;<sup>20</sup>
- since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the marriage/de facto relationship) and as a result of the change, the child or—if the applicant has ‘caring responsibility’ for the child—a party to the agreement will suffer hardship if the court does not set the agreement aside;<sup>21</sup> or
- in respect of the making of a financial agreement or pt VIIIAB financial agreement—a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable.<sup>22</sup>

19.32 With respect to whether the agreement is void, voidable or unenforceable, the Further Revised Explanatory Memorandum to the Family Law Bill 2000 explains that:

These grounds reflect the principles of common law and equity, under which an agreement would fail because of lack of certainty, lack of intention to enter legal relations, or because the agreement is affected by duress, undue influence, unconscionability, misrepresentation or operative mistake. The inclusion of unconscionability as a separate ground is simply to make it clear that this ground is included within the grounds for setting aside an agreement.<sup>23</sup>

19.33 Sections 90KA and 90UN of the *Family Law Act* direct a court to determine the validity, enforceability and effect of financial agreements and termination agreements according to the applicable principles of law and equity concerning contracts and purported contracts. Section 90MR(2) provides an equivalent provision for the enforcement of superannuation agreements.

19.34 Family violence has been held to constitute unconscionable conduct sufficient to set aside an agreement. For example, the decision of the Federal Magistrates Court in *Moreno v Moreno* is an example of a victim succeeding in having a financial agreement set aside under s 90K of the *Family Law Act*.<sup>24</sup>

19 Ibid ss 90K(1)(b), 90UM(1)(e).

20 Ibid ss 90K(1)(c), 90UM(1)(f).

21 Ibid ss 90K(1)(d), 90UM(1)(g).

22 Ibid ss 90K(1)(e), 90UM(1)(h).

23 Further Revised Explanatory Memorandum, Family Law Bill 2000 (Cth), [160].

24 *Moreno & Moreno* [2009] FMCAfam 1109. In that case Ms Moreno, who had limited proficiency in English, had come to Australia from Russia in order to marry Mr Moreno. She was physically and verbally abused by her husband, and signed a financial agreement that was very unfavourable to her on the understanding that, if she did not sign, the marriage and her visa would end. After separation from her husband, she sought to overturn this agreement on the grounds of unconscionability. The court held that these circumstances constituted duress significant enough to amount to unconscionable conduct under s 90K of the *Family Law Act* and the agreement was set aside.

19.35 The somewhat limited scope for courts to set aside financial agreements (and therefore superannuation agreements) has been justified on the basis that parties will have obtained prior independent legal advice.<sup>25</sup>

### ***Submissions and consultations***

19.36 In *Family Violence and Commonwealth Law—Employment and Superannuation Laws*, Issues Paper 36 (2011) (Superannuation Law Issues Paper), the ALRC asked whether the Family Court’s powers to set aside a superannuation agreement—whether a financial agreement or a pt VIIIAB financial agreement—under the *Family Law Act* are adequate to protect people experiencing family violence.<sup>26</sup>

19.37 While there were limited submissions made by stakeholders in response to this issue, responses were mixed.

19.38 One submission advocated the inclusion of family violence as an additional ground for setting aside superannuation agreements under ss 90K(1) and 90UM(1) of the *Family Law Act*.<sup>27</sup> Overall however, stakeholders submitted that the conditions required to be met before entering into a superannuation agreement—including the requirement that both parties obtain independent legal advice—offer sufficient protection to minimise the risk of coercion prior to a party entering into an agreement.<sup>28</sup>

19.39 An additional protection emphasised in submissions is the power of the court to set aside agreements where unconscionable conduct has occurred. The Law Council of Australia (Law Council) suggested that this offers an adequate remedy where a person experiencing family violence has been coerced into entering a superannuation agreement.<sup>29</sup>

19.40 Finally, the Law Council also noted the need to consider implications for third parties where that third party has taken action in reliance upon a superannuation agreement that is subsequently set aside. The Law Council suggested that

the court’s powers may need to be extended and further protection will need to be provided to superannuation trustees which act upon an order setting aside a previous superannuation agreement.<sup>30</sup>

### ***ALRC’s views***

19.41 The ALRC’s preliminary view is that the requirements under ss 90G and 90UJ of the *Family Law Act* already go some way to protecting the interests of people experiencing family violence. In particular, the requirement that parties seek independent legal advice provides some assurance that the parties have had explained

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25 Explanatory Memorandum, Family Law Legislation Amendment (Superannuation) Bill 2000 (Cth), 2.

26 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011) Question 26.

27 WEAVE, *Submission CFV 14*, 5 April 2011.

28 See, eg, Law Council of Australia, *Submission CFV 23*, 5 April 2011.

29 Ibid.

30 Ibid.

to them the consequence of signing a superannuation agreement. The ALRC also considers that, while somewhat limited, the powers of the court to set aside an agreement under ss 90K(1) and 90UM(1), specifically on the basis that the agreement is void, voidable or unenforceable, are likely to cover many situations involving family violence.

19.42 The provisions are broadly drafted and it would be difficult, given the nature and dynamics of family violence, to propose an amendment that would account for all situations in which one partner was intent on coercing or controlling the other into signing a superannuation agreement.

19.43 In any event, any proposal expanding the powers of the Family Court to set aside superannuation agreements would involve amendments to the *Family Law Act* that extend beyond the Terms of Reference. In addition, the ALRC has formed the view that any proposal aimed at amending the requirements in ss 90G and 90UJ of the *Family Law Act* would have systemic consequences, with an impact on parties to marriages and de facto relationships not involving family violence. Accordingly, the ALRC does not intend to make a proposal with respect to this issue.

### Spousal contributions

19.44 Since 1 January 2006, eligible superannuation members have been able to request that their superannuation contributions be split with their ‘spouse’. The term spouse is defined to include:

- a person to whom the member is legally married;
- a person that the member is in a relationship with that is registered under certain state and territory laws (including registered same-sex relationships); and
- a person, of the same or different sex, who lives with the member on a genuine domestic basis in a couple relationship.<sup>31</sup>

19.45 The payment of the split contributions to a member’s spouse is known as a ‘contributions-splitting superannuation benefit’.<sup>32</sup> Maximum limits apply to the amount of superannuation that may be split in each financial year.<sup>33</sup>

19.46 The *SIS Regulations* provide that superannuation trustees are not required to offer their members the option to split their superannuation contributions.<sup>34</sup> If a superannuation fund does permit members the option to split superannuation contributions, a member may request that the superannuation trustee roll-over, transfer or allot an amount of the member’s superannuation benefits to a spouse.<sup>35</sup>

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31 *Superannuation Industry (Supervision) Act 1993* (Cth) s 10.

32 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.40.

33 The ‘maximum splittable amount’ is defined in *Ibid* reg 6.40.

34 *Ibid* reg 6.45.

35 *Ibid* div 6.7, reg 6.44. An application may be accepted provided certain requirements are met: *Superannuation Industry (Supervision) Regulations 1994* (Cth) regs 6.44, 6.45.

19.47 In circumstances where family violence exists, it may be possible for one spouse to coerce the other into splitting their superannuation contributions under the superannuation contribution splitting regime. For example, this may occur where both parties are under preservation age and one spouse forces the other to split their contributions so that the superannuation is in the controlling spouse's superannuation account. As a result of the possibility of such circumstances arising, in the Superannuation Law Issues Paper, the ALRC proposed two possible mechanisms by which to limit or ameliorate such coercion—providing that a trustee should consider whether member's requests are done voluntarily; and, where the split has already occurred, some form of claw-back mechanism to recoup the coerced contributions.

***Trustee obligations to consider coercion***

19.48 Superannuation trustees have a range of duties and obligations and are subject to regulation at a number of levels.<sup>36</sup>

19.49 In considering applications for contributions-splitting superannuation benefits, trustees are not currently required to consider whether the member's request to transfer any benefits to the receiving spouse was done voluntarily or as a result of coercion. Consequently, in the Superannuation Law Issues Paper, the ALRC asked if a trustee should have an obligation to consider whether an application to transfer an amount to a spouse under the superannuation contribution splitting regime is being made as a result of coercion.<sup>37</sup>

***Submissions and consultations***

19.50 Overwhelmingly, submissions in response to this question opposed the expansion of trustee obligations to consider the possibility of coercion in superannuation contribution splitting applications.<sup>38</sup> Stakeholders opposed this expansion on the basis that it would not be appropriate to place this obligation on trustees as:

- it would be administratively burdensome;
- trustees lack the resources and expertise to make such determinations; and
- it may leave a decision on contribution-splitting applications open to legal challenge.<sup>39</sup>

19.51 For example, the Law Council and the Association of Superannuation Funds of Australia (ASFA) opposed the introduction of any obligation on the trustee to consider

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36 Including under common law and legislation such as the *Superannuation Industry (Supervision) Act 1993* (Cth) and *Corporations Act 2001* (Cth).

37 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011) Question 27.

38 Law Council of Australia, *Submission CFV 23*, 5 April 2011; Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011; Australian Institute of Superannuation Trustees, *Consultation*, by telephone, 13 May 2011.

39 Law Council of Australia, *Submission CFV 23*, 5 April 2011; Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011.



coercion, suggesting that such investigations would be beyond the capacity, resources and expertise of the trustee.<sup>40</sup> The Law Council submitted that:

It would not be appropriate for a trustee of a superannuation fund in receipt of a contributions splitting application to determine whether the request was made as a result of coercion. Beyond requiring a declaration from the applicant member, it is unclear how a trustee (other than the trustee of a self-managed superannuation fund) could identify a contributions splitting request which was made as a result of coercion.<sup>41</sup>

19.52 ASFA argued that:

The fund trustee should not be expected or required to consider competing arguments between the spouses. This is not their role, and investigating the bona fides of both arguments raises the significant question of who should meet the costs of such enquiries. ASFA is also concerned that by making a decision in such a dispute the trustee opens itself up to potential legal action by one or both parties.<sup>42</sup>

19.53 However, ASFA noted that should a trustee become aware that the splitting application was made as a result of coercion, the trustee should consider this as part of implementing its decision about the splitting application.<sup>43</sup>

19.54 Conversely, two submissions did support the introduction of an obligation on trustees to consider if applications for superannuation splitting were being made as a result of coercion.<sup>44</sup>

#### ***ALRC's views***

19.55 Superannuation trustees possess a number of duties and obligations and are subject to a range of regulatory requirements. In carrying out their fiduciary duty to act in the best interests of the member, it may be difficult for a trustee to determine whether granting a member's application is in the member's best interests, or to make enquiries about the motives and circumstances in which the application was made and, where it involves family violence, refuse the application. This is made particularly difficult given both granting the application (in terms of the concerns outlined about the depletion of superannuation entitlements) or refusing the application (where that may result in the member not having the financial resources to leave the relationship or take safety measures) may affect the member's safety.

19.56 The ALRC acknowledges concerns about the practical difficulties that an obligation to consider the possibility of coercion in superannuation splitting applications would create in terms of administrative burden and additional cost, the lack of trustee expertise to determine such matters and the possibility that this may

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40 Law Council of Australia, *Submission CFV 23*, 5 April 2011; Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011; Australian Institute of Superannuation Trustees, *Consultation*, by telephone, 13 May 2011.

41 Law Council of Australia, *Submission CFV 23*, 5 April 2011.

42 Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011.

43 *Ibid.*

44 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011.

expose decisions to legal challenge. Accordingly, the ALRC's preliminary view is that it would be inappropriate for trustees to be obliged to consider the motives behind a member's application for contribution splitting.

19.57 However, the ALRC would be interested in hearing from stakeholders whether there are any other mechanisms through which trustees, or another body, could consider whether an application for superannuation splitting is being made as a result of coercion and take some steps to limit or ameliorate the effect of that on victims of family violence.

### ***Claw-back provision***

19.58 Where benefits have been transferred under a superannuation contribution-splitting regime as a result of coercion, a question arises as to whether, and by what means, the benefits could be recovered by the spouse who has been coerced.

19.59 As a result, in the Superannuation Law Issues Paper, the ALRC invited comment about whether a person experiencing family violence should be entitled to 'claw-back' benefits they have been coerced into transferring to a spouse under the superannuation contribution-splitting regime.<sup>45</sup>

19.60 In practice, the primary means by which victims of family violence may be able to recover their superannuation entitlement where it has been transferred to their spouse, is through property proceedings in federal family courts regarding the distribution of assets following the breakdown of their marriage or de-facto relationship.

19.61 The *Family Law Act* permits federal family courts to make orders about the distribution of the property of parties to a marriage or de facto relationship upon the breakdown of that relationship.<sup>46</sup> In making such orders, superannuation benefits transferred under the superannuation contribution-splitting regime as a result of coercion cannot be 'clawed back' as such, but may be taken into account in considering the contributions of the parties and ultimately in the distribution of assets between the parties.

19.62 In determining how property should be distributed, courts:

- identify the property, liabilities and financial resources of the parties—there is conflicting judicial opinion as to whether superannuation should be listed and valued along with all other property at this stage (a 'global' approach); or whether superannuation interests should be valued separately from other items of property (a 'two pools' approach);<sup>47</sup>

<sup>45</sup> Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011) Question 28.

<sup>46</sup> *Family Law Act 1975* (Cth) s 79 (marriage), s 90SM (de facto relationships).

<sup>47</sup> The Full Court of the Family Court in *Hickey and Hickey and Attorney-General (Cth)* (2003) 30 FamLR 355 took the former approach, while the Full Court of the Family Court in *In the Marriage of Coghlan* (2005) 33 Fam LR 414 preferred the latter. The distinction turns on the interpretation to be given to the s 90MC(1) of the *Family Law Act*: 'A superannuation interest is to be treated as property for the purposes of paragraph (ca) of the definition of matrimonial cause in section 4'.

- identify and assess the contributions that the parties have made to the property, including financial and non-financial contributions and contributions to the welfare of the family;<sup>48</sup>
- identify and assess the earning capacity, needs and child support obligations of each party;<sup>49</sup> and
- make an order that is just and equitable in all the circumstances.<sup>50</sup>

19.63 In making an order in relation to the distribution of property interests, a court is entitled to make orders in relation to superannuation interests.<sup>51</sup> In particular, a court may direct that a superannuation interest be split between the parties.<sup>52</sup>

19.64 An overarching issue arising out of the way in which superannuation should be considered by the court, both in assessing contributions, and ultimately, in the distribution of assets between the parties, is the extent to which family violence can be taken into account.

19.65 In the case of *In the Marriage of Kennon* the Family Court held that, when assessing a party's contributions, the court can take into account a course of violent conduct by one party towards the other that has had a significant adverse impact on that party's contribution or has made his or her contributions significantly more arduous than they ought to have been.<sup>53</sup>

19.66 In addition, when considering the future needs of a party, the consequences of family violence—for example its effect on the state of the victim's health, or physical and mental capacity to gain appropriate employment—can be taken into account.

19.67 In *Family Violence—A National Legal Response*, the ALRC and the NSW Law Reform Commission reviewed the current approach to dealing with evidence of family violence in property proceedings and subsequently recommended that the Australian Government should initiate an inquiry into how family violence should be dealt with in respect to property proceedings under the *Family Law Act*.<sup>54</sup>

### ***Submissions and consultations***

19.68 Stakeholders were largely supportive of the introduction of some form of claw-back provision.<sup>55</sup> Most submissions that expressed a view on the operation of a claw-

48 *Family Law Act 1975* (Cth) ss 79(4)(a)–(c); 90SM(4)(a)–(c).

49 *Ibid* ss 79(4)(d); 90SM(4)(d); 79(4)(e); 75(2); 90SM(4)(e); 90SF(3); 79(4)(f); 90SM(4)(f); 79(4)(g); 90SM(4)(g).

50 *Ibid* ss 79(2); 90SM(3).

51 *Ibid* s 90MS.

52 In accordance with s 90MS a court may make one of three types of splitting orders in relation to superannuation interests. See *Ibid* s 90MT(1).

53 *In the Marriage of Kennon* (1997) 139 FLR 118, 140.

54 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010) Recommendation 17–2.

55 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Australian Institute of Superannuation Trustees, *Consultation*, by telephone, 13 May 2011.

back mechanism indicated a preference for it to be effected by way of court order.<sup>56</sup> For example, ASFA submitted that:

such a provision should operate in a similar manner to Family law orders where the requirement on the trustee is merely to follow a lawful direction given by an appropriately constituted and authorised body.<sup>57</sup>

19.69 However, stakeholders expressed uncertainty as to how a court order would operate in practice, with a concern about establishing precisely the circumstances in which a court would make such an order.

19.70 Stakeholders indicated there would be a range of issues to consider with respect to the practical operation of a claw-back provision. For example, one issue is in relation to the trustee's responsibility for any appreciation or depreciation of the funds in the period between the transfer of a benefit under the superannuation contribution-splitting regime and the claw-back of that benefit. In particular, the Australian Institute of Superannuation Trustees (AIST) submitted that the trustee should not bear responsibility for any change in value of a benefit in that period.<sup>58</sup>

19.71 Stakeholders also expressed concern about the adequacy of current processes to track benefits transferred to a spouse under the superannuation contribution-splitting regime. If a person who has split superannuation benefits as a result of coercion is to be able to 'claw-back' that amount, records of the amount of benefit that has been split must be accessible.

19.72 In consultations the ALRC heard that the current record keeping in relation to superannuation contributions splitting may not be adequate to allow these contributions to be tracked, particularly if a party's superannuation benefit is later rolled over or transferred between superannuation funds.

#### ***ALRC's views***

19.73 While the ALRC considers that victims of family violence should be able to recover superannuation transferred under a superannuation contribution-splitting regime in circumstances of family violence, it is clear that any such mechanism would need to be provided for under the *Family Law Act*.

19.74 As outlined above, detailed consideration of, and proposals to amend, the *Family Law Act* go beyond the Terms of Reference for this Inquiry. The ALRC therefore considers the most appropriate approach to this issue is to propose, as recommended in the *Family Violence—A National Legal Response*, that the Australian Government should initiate an inquiry into the manner in which federal family courts consider family violence in property proceedings. The inquiry could consider, for example:

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56 Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011; Australian Institute of Superannuation Trustees, *Consultation*, by telephone, 13 May 2011.

57 Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011.

58 Australian Institute of Superannuation Trustees, *Consultation*, by telephone, 13 May 2011.

whether the Family Law Act should refer expressly to the impact of violence on past contributions and on future needs; the form that any such legislative provisions should take; and the definition of family violence that should apply for the purposes of the property proceedings under the Family Law Act.<sup>59</sup>

19.75 In particular, the ALRC proposes that any such inquiry should include consideration of the treatment of superannuation in property proceedings involving family violence.

**Question 19–1** The ALRC is not proposing that a trustee should have an express obligation to consider whether an application for superannuation splitting is being made as a result of coercion. Are there any other ways a trustee or another body could consider this issue? If so, what if any steps could they take to limit or ameliorate the effect of that on a victim of family violence?

**Proposal 19–1** In *Family Violence—A National Legal Response* (ALRC Report 114) 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.

### Self-managed superannuation funds

19.76 Self-managed superannuation funds (SMSFs) are funds where the trustees are the only members of the fund. That is, all members are natural persons who are trustees or directors of a body corporate trustee. However, most SMSFs do not have a corporate trustee.<sup>60</sup> SMSFs are restricted to a maximum of four members.

19.77 The majority of SMSFs—more than 90%—are funds with two members.<sup>61</sup> SMSFs constitute the largest sector within Australia’s superannuation sector by both number of assets and asset size.<sup>62</sup> At 30 March 2010, there were approximately 423,000 SMSFs, representing 99% of all superannuation funds, and comprising over 30% of total superannuation assets.<sup>63</sup> The SMSF sector has grown rapidly: in the five years to 30 June 2009, it has experienced an annualised growth rate of 20%.<sup>64</sup>

59 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010) ch 17.

60 J Cooper and others, *Super System Review Final Report: Part One—Overview and Recommendations* (2010), 223.

61 Ibid, 222.

62 Ibid, 218.

63 Ibid.

64 Ibid.

19.78 The Super System Review concluded that ‘the SMSF sector is largely a successful and well-functioning part of the system’.<sup>65</sup>

### **Regulation and compliance**

19.79 SMSFs are regulated by the ATO. The ATO publishes a range of guidance in relation to SMSFs.<sup>66</sup> However, SMSFs are subject to a less onerous regulatory regime than some other forms of superannuation funds, because all members are considered to be directly involved in the management of the fund and are therefore considered to be able to protect their own interests sufficiently.<sup>67</sup>

19.80 Accordingly, in circumstances of family violence involving the trustees/members of a SMSF, there is greater potential for one partner or family member to coerce another into making decisions or managing the SMSF in a certain way, and less external regulatory involvement or oversight to prevent that from occurring.

19.81 For example, the following ATO example outlines an example of where a dispute may arise between trustees and the negative financial consequences that may follow from such a dispute.<sup>68</sup>

#### **Example**

Bernard and Cathy are married and are the members and trustees of the Ber-Cat Super Fund. The fund held \$200,000 worth of assets in an interest-bearing cash account. Both members had \$100,000 in retirement savings in the fund.

Over time, Bernard and Cathy developed relationship problems and ceased communicating as trustees. Bernard withdrew \$150,000 from the fund and spent the money on personal items and holidays. Due to this, Cathy lost 50% of her retirement savings in the fund. Bernard failed to comply with the requirements of the super laws as he had withdrawn the money without meeting a condition of release.

The ATO was notified of Bernard’s actions and his income tax return was amended to include the \$150,000 that was taxed at his marginal rate plus penalties. In reviewing this case the ATO took into account all the circumstances surrounding the breaches. After considering the compliance options available, including making the fund non-complying and taking civil prosecution action against Bernard, the ATO decided to disqualify him as trustee. This prevented him from becoming a trustee of any super fund. This was in addition to the tax penalty imposed on his individual return. To make the fund non-complying would have penalised Cathy as she would lose half of her remaining assets in the fund.

Cathy approached the Superannuation Complaints Tribunal and was informed they could not assist in any SMSF dispute resolution. She then contacted the ATO. The ATO advised they could not help her recover her money and she could not obtain compensation from the government under the super laws (an option available for APRA funds). However she could seek legal advice to pursue the matter.

<sup>65</sup> Ibid, Overview, 16.

<sup>66</sup> Australian Taxation Office, *Self-managed Superannuation Funds* <<http://www.ato.gov.au/superfunds/>> at 1 July 2011.

<sup>67</sup> Australian Prudential Regulation Authority, ‘A Recent History of Superannuation in Australia’ (2007) 2 *APRA Insight* 3, 8.

<sup>68</sup> Australian Taxation Office, *How Your Self-Managed Super Fund is Regulated* (2011).

After speaking with her SMSF professional, she concluded her options were to:

- carry on her SMSF as a single member fund by appointing either another individual trustee or a corporate trustee, or
- wind up the Ber-Cat Super fund and roll the remaining funds into a large fund.

If she decides to continue with the fund, she will make sure any new trustees sign the trustee declaration and use safeguards, such as joint bank account signatories, to protect the fund's assets. She now understands the importance of taking an active role in managing her fund.

19.82 As foreshadowed above, there are a range of enforcement and compliance actions available to the ATO, including:

- accepting an undertaking to rectify the breach;
- making the fund a non-complying fund;
- disqualification of trustees; and
- in serious cases, civil prosecution of trustees.<sup>69</sup>

### ***SMSF professionals***

19.83 There is no formal requirement to be a licensed SMSF adviser. There are a range of registration and licensing arrangements which apply to the professionals involved in advising on the establishment and management of SMSFs, including accountants, tax agents, fund administrators, lawyers and financial advisers.<sup>70</sup> Developments such as the Future of Financial Advice reforms, amongst others, will be important in reviewing existing professional standards and training requirements as well as licensing exemptions.<sup>71</sup>

<sup>69</sup> See, eg, *Superannuation Industry (Supervision) Act 1993* (Cth) ss 262A (undertakings), 298 (causing civil proceedings to begin). See also: Australian Taxation Office, *How Your Self-Managed Super Fund is Regulated* (2011).

<sup>70</sup> For example, tax agents must be registered under the *Income Tax Assessment Act 1936* (Cth) and complaints can be referred to the Tax Practitioners Board. Accountants are often also tax agents. Accountants were historically exempted from holding an Australian Financial Services License, however see discussion below of the Future of Financial Advice Reforms. Lawyers must hold a practising certificate and complaints can be referred to the relevant law society. Under the *Corporations Act 2001* (Cth) other professionals who provide financial services must hold an Australian Financial Services License. Those who provide financial product advice are also subject to training requirements under Australian Securities and Investments Commission, *Regulatory Guide 146: Licensing: Training of Financial Product Advisers* (2009).

<sup>71</sup> The Future of Financial Advice Reforms form the basis of the Government's response to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into financial products and services in 2009. The package includes a range of reforms including the establishment of an advisory panel on standards and ethics for financial advisers and the announcement that the existing exemption for accountants from holding an Australian Financial Services License will be removed: Australian Treasury, *The Future of Financial Advice* <<http://futureofadvice.treasury.gov.au/content/Content.aspx?doc=faq.htm>> at 4 July 2011.

**Issues Paper**

19.84 In the Superannuation Law Issues Paper, the ALRC suggested that, in light of the large and increasing share of the superannuation landscape now occupied by SMSFs, it is important to consider the potential for misuse of SMSFs in situations of family violence, particularly where economic abuse is a component of this violence.<sup>72</sup>

19.85 In particular, the ALRC asked what mechanism might be introduced to better protect people experiencing family violence from financial abuse in the context of SMSFs and suggested that one mechanism might be the expansion of the SCT to hear complaints concerning SMSFs.<sup>73</sup>

**Submissions and consultations**

19.86 Stakeholders responding to this question overwhelmingly opposed the extension of the jurisdiction of the SCT to complaints concerning SMSFs.<sup>74</sup> Stakeholders who opposed the extension of the Tribunal's jurisdiction expressed concern about funding and resource implications any extension would involve. In particular, they noted that the SCT is not resourced appropriately to cope with the increased workload that would be associated with dealing with complaints about the operation of SMSFs.<sup>75</sup>

19.87 The nature and role of the SCT also formed the basis for opposition from stakeholders to the SCT dealing with complaints concerning SMSFs. Stakeholders emphasised that the administrative nature of the SCT makes it an inappropriate forum for dealing with family violence issues. For example, ASFA submitted that family violence in the context of a SMSF is more appropriately dealt with by courts with criminal and family law jurisdiction.<sup>76</sup>

19.88 Further, the Law Council noted that:

The Superannuation Complaints Tribunal was established to resolve complaints about the decisions of trustees in superannuation funds. When the trustee is the trustee of an SMSF, the trustee will also be a member and a relative of the complainant. Any complaint about the trustee's decision, particularly where family violence is in issue, will, very rarely be limited to its decision or conduct as trustee. It is very likely that any such complaint or dispute will also raise matters which would generally be dealt with by the criminal or family courts.<sup>77</sup>

19.89 One submission, however, supported the extension of the SCT's jurisdiction.<sup>78</sup>

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<sup>72</sup> See chapter 3 for discussion of the definition of family violence.

<sup>73</sup> Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011) Question 29.

<sup>74</sup> Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011; Law Council of Australia, *Submission CFV 23*, 5 April 2011; Australian Institute of Superannuation Trustees, *Consultation*, by telephone, 13 May 2011.

<sup>75</sup> See, eg. Australian Institute of Superannuation Trustees, *Consultation*, by telephone, 13 May 2011.

<sup>76</sup> Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011; Law Council of Australia, *Submission CFV 23*, 5 April 2011; Australian Institute of Superannuation Trustees, *Consultation*, by telephone, 13 May 2011.

<sup>77</sup> Law Council of Australia, *Submission CFV 23*, 5 April 2011.

<sup>78</sup> WEAVE, *Submission CFV 14*, 5 April 2011.



19.90 In consultations the ALRC heard that advice regarding the establishment and operation of SMSFs received from accountants, tax agents, fund administrators, lawyers and financial advisers is inconsistent and in some cases may not adequately explain the full implications of membership of such a fund, or the procedures involved in exiting a SMSF. Some stakeholders suggested that requiring these professionals to provide additional information to individuals establishing a SMSF may go some way to protecting trustees/members experiencing family violence.

19.91 Submissions received in response to the Superannuation Law Issues Paper did not canvas other mechanisms that might be introduced to better protect people experiencing family violence from financial abuse in the context of SMSFs.

***ALRC's views***

19.92 The ALRC is of the view that family violence that arises in the context of an SMSF is better dealt with by courts with criminal and/or family law jurisdiction rather than the SCT, as in many cases it is likely the trustee will also be a family member and any complaint is unlikely to be limited to their decision or conduct as a trustee. In light of this and the role and resources of the SCT, the ALRC does not intend to make a proposal to expand the jurisdiction of the SCT to cover SMSFs.

19.93 The ALRC is conscious that many of the possible amendments to the regulation of the SMSF sector would involve sector-wide amendment and have a more systemic impact than just on victims of family violence. Consideration of the adequacy of regulation or guidance more broadly, or the obligations owed by professionals in the financial services sector are systemic issues and the ALRC considers that they are beyond the Terms of Reference for this Inquiry. The ALRC notes that, in line with the guiding principles articulated earlier in the chapter, systemic changes of this nature must be the product of coherent regulation and flexible and continual improvement focused on long-term change.

19.94 The ALRC recognises the importance of individual choice, as outlined in Chapter 2 and in the guiding principles for this chapter. This individual choice includes, for example, the choice to become a trustee in a SMSF. While with such choice comes increased responsibility for the consequence of these choices, the ALRC considers that family violence, in many cases, creates an exception to this principle and that victims of family violence who are also trustees of SMSF require additional protection.

19.95 As a result, there are a number of possible areas of reform to the regulation and operation of SMSFs to protect the safety of victims of family violence about which the ALRC would be interested in stakeholder comment, including in relation to ATO compliance decisions and provision of information.

19.96 For example, in light of the case study outlined above, the ALRC would be interested in stakeholder views on the ATO's compliance options. In particular, the ALRC would be interested in hearing about the extent to which the ATO does, or could, consider family violence in determining the most appropriate compliance action in relation to SMSF trustees who fail to comply with superannuation or taxation law

where that action may exacerbate the harm or disadvantage suffered by the member/trustee who is not the subject of compliance action.

19.97 The ALRC considers that ensuring individuals establishing SMSFs are provided with sufficient information about a range of matters may go some way to protecting people experiencing family violence. These matters include:

- setting up a SMSF—including creating appropriate safeguards;
- managing a SMSF—the importance of being actively involved in managing investments, accepting contributions as well as reporting and record keeping;
- trustee obligations, including compliance with relevant laws as well as possible compliance action by the ATO; and
- winding up a SMSF.

19.98 As a result, the ALRC would be interested in stakeholder submissions on the adequacy of material currently provided by the ATO in relation to these issues, and whether any amendment to existing material, or the provision of additional material or guidance, may assist SMSF trustees experiencing family violence.

19.99 The ALRC also suggests that the Australian Government (including the ATO, ASIC, and Treasury) and relevant professional bodies should consider the extent to which SMSF adviser and professional obligations or training could be amended, where possible and appropriate, to protect individuals experiencing family violence. This may be most appropriate in the context of the Future of Financial Advice reforms.

19.100 Finally, the ALRC would also be interested in submissions which more broadly address possible approaches or mechanisms through which people experiencing family violence may be protected in the context of SMSFs.

**Question 19–2** What changes, if any, are required to ensure that the Australian Tax Office considers family violence in determining appropriate compliance action in relation to trustees of SMSFs who fail to comply with superannuation or taxation law, where that action may affect a trustee who is:

- (a) a victim of family violence; and
- (b) not the subject of compliance action?

**Question 19–3** What changes, if any, to guidance material produced by the Australian Tax Office may assist in protecting people experiencing family violence who are members or trustees of a SMSF?

**Question 19–4** What approaches or mechanisms should be established to provide protection to people experiencing family violence in the context of SMSFs?

## Gaining early access to superannuation

19.101 There are three key forms of superannuation benefits:

- Preserved benefits—which must be retained in superannuation until ‘preservation age’;<sup>79</sup>
- Restricted non-preserved benefits—which cannot be accessed until an employee meets a condition of release; and
- Unrestricted non-preserved benefits—which do not require an employee to meet a condition of release and may be accessed upon request.

19.102 Generally, superannuation funds cannot be accessed before the member reaches the required ‘preservation age’. However, s 79B of the *Superannuation Act* provides limited grounds for the early release of preserved or restricted non-preserved benefits, on the basis of severe financial hardship or compassionate grounds. These grounds are defined in the *SIS Regulations*.<sup>80</sup>

19.103 The grounds for early release are limited in order to reflect the policy balance sought: on the one hand, the overriding policy objective that superannuation benefits are to be preserved to provide income for retirement, and on the other, the recognition that certain exceptional circumstances may justify the early release of benefits to a member.

19.104 In the context of family violence, there are a number of additional tensions with respect to early release. For example, in the course of this Inquiry, many stakeholders have emphasised the need to consider the impact of family violence on the financial independence and security, and ultimately safety, of victims.

19.105 The Australian Domestic and Family Violence Clearinghouse (ADFVC) noted that, in their research on the impact of family violence on women’s financial security, the overwhelming majority of women were experiencing financial hardship as a result of the abuse, and that for women who were unable to stabilise their financial situation, the consequence was a downward spiral of debt and poverty.<sup>81</sup>

19.106 The ADFVC also stressed that financial hardship in turn impacts on the safety of victims of family violence. For example, it affects their

decisions to leave the relationship, their capacity to take up safety measures (like locks, alarms, or to relocate), to seek treatment for recovery (e.g. physiotherapy, psychiatric treatment, operations, dental or optical treatment/surgery). Some women spoke about returning to partners because of being unable to support themselves (and their children) on their own.<sup>82</sup>

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79 Preservation age ranges from 55 to 60 depending on date of birth.

80 *Superannuation Act 1976* (Cth) s 79B; *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.01.

81 ADFVC, *Submission CFV 26*, 11 April 2011.

82 *Ibid.*

19.107 In light of concerns about the impact of family violence and financial hardship on victims, it may be appropriate for a victim of family violence to gain early access to superannuation, for example to leave a violent relationship or take measures to ensure their safety.

19.108 Ideally however, as outlined at the beginning of this chapter, social security should be the system through which victims of family violence are able to access immediate financial support.<sup>83</sup>

19.109 For example, Women's Legal Services NSW argued that victims of family violence should be entitled to early access to superannuation:

only as a last resort. Instead, access to adequate financial support should be improved by addressing issues with social security, employment and victims' compensation, including access to legal services that can be necessary to access these funds.<sup>84</sup>

19.110 In its submission, ASFA emphasised that it was:

supportive of the need for the Australian community to more broadly support means by which impacted individuals can obtain relief and escape the circumstances of domestic violence. These other means should emerge from the social security framework where urgent and immediate funding could be provided to victims.<sup>85</sup>

19.111 In addition, other concerns include that:

- the purpose of early release of superannuation to victims of family violence—namely increasing safety through improved financial independence and security—may be frustrated if the funds released were accessed at the instigation of, or by, the perpetrator of violence. In particular, in such circumstances early release may deplete a victim's retirement funds, which may otherwise have been the only source of funds a victim could protect; and
- women, in particular, are already significantly disadvantaged in the accumulation of adequate superannuation by virtue of the gender pay gap and broken and casual employment histories.<sup>86</sup> In light of this disadvantage, and given that women experience family violence at higher rates than men, early access to superannuation risks compounding the inadequacy of a female victim's superannuation benefits on retirement.<sup>87</sup>

19.112 With these tensions in mind, in determining what changes can be made to the superannuation legal framework to protect the safety of victims of family violence, the ALRC is considering possible circumstances in which victims may be able to gain early access to superannuation. In particular, the ALRC is considering the extent to which people experiencing family violence can access the existing grounds for early

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83 See chapters 5–8 of the Discussion Paper.

84 Women's Legal Services NSW, *Submission CFV 28*, 11 April 2011.

85 Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011.

86 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

87 See, eg, Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994).

release, and whether an additional ground specifically designed for victims of family violence should be created.

### Severe financial hardship

19.113 The *Superannuation Act* and *SIS Regulations* provide for early release of superannuation benefits on the grounds of severe financial hardship. Different conditions for early release apply depending on the age of the member, in particular whether the member is under or over ‘preservation age’.<sup>88</sup>

19.114 To satisfy the ground of ‘severe financial hardship’ under regs 6.01(5)(a) and 6.01(5A) of the *SIS Regulations*, applicants (if under preservation age) must prove:

- they have been receiving ‘Commonwealth income support payments’ continuously for the past 26 weeks;<sup>89</sup>
- they were still in receipt of those payments at the date of the written evidence provided in support of the application (which must not be more than 21 days prior to the application); and
- they are unable to meet reasonable and immediate family living expenses.<sup>90</sup>

19.115 If these requirements are satisfied, the trustee may release a lump sum of between \$1,000 and \$10,000.<sup>91</sup>

19.116 To satisfy the ground of ‘severe financial hardship’ under reg 6.01(5)(b) of the *SIS Regulations*, applicants (if they have reached preservation age plus 39 weeks) must prove:

- they have been receiving ‘Commonwealth income support payments’ for a cumulative period of 39 weeks after they reached their preservation age; and
- they were not ‘gainfully employed on a full-time, or part-time, basis on the date of the application for cashing of his or her benefits, or restricted non-preserved benefits, in the entity’.<sup>92</sup>

19.117 Where a person satisfies these requirements, there is no limit on the amount that can be released.<sup>93</sup>

19.118 The definition of ‘Commonwealth income support payments’ is the same with respect to the requirements for applicants under and over the preservation age. The definition includes income support payments, supplements and pensions, but excludes: Austudy, Youth Allowance paid to a person who is undertaking full-time study, payments made under the Community Development Employment Projects

88 *Superannuation Act 1976* (Cth) s 79B; *Superannuation Industry (Supervision) Regulations 1994* (Cth) sch 1, reg 6.01(5).

89 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.01(2).

90 *Ibid* reg 6.01(5), (5A).

91 *Ibid* sch 1, pt 1.

92 *Ibid* reg 6.01(5)(b).

93 *Ibid* sch 1, pt 1.

Scheme (CDEP Scheme) and certain drought relief and farm income support payments.<sup>94</sup> The ALRC understands that these payments were excluded on the basis that they were designed to assist in meeting study and other costs, the intention was not to provide full financial support and, where it involves a study related cost, individuals chose to undertake a course of study having regard to the financial consequences of doing so.

19.119 The definition also excludes other forms of payment including workers' compensation and transport accident and personal income protection payments due to disabilities. In 2002, the Senate Select Committee on Superannuation and Financial Services identified the potential need for people on these types of payments to be eligible to apply for early access on the basis of severe financial hardship.<sup>95</sup>

19.120 The trustees of a superannuation fund are responsible for determining the release of benefits on the basis of severe financial hardship. APRA provides guidance to trustees in applying the severe financial hardship ground requirements in the form of Superannuation Circular No I.C.2 *Payment Standards for Regulated Superannuation Funds*.<sup>96</sup> The Circular does not provide any direction for trustees in determining whether, for example, an applicant is unable to meet reasonable and immediate family living expenses.<sup>97</sup>

19.121 There is no prescribed time limit within which funds must process applications for early release on the ground of severe financial hardship.

### ***Issues Paper***

19.122 In the Superannuation Law Issues Paper, the ALRC noted that victims of family violence may face difficulty in accessing early release of superannuation on grounds of severe financial hardship.

19.123 The ALRC focused attention on the requirements in relation to applicants under the preservation age. In particular, the ALRC outlined concerns expressed in relation to the requirement under reg 6.01(5) of the *SIS Regulations* that an applicant must have been receiving Commonwealth income support payments continuously for the 26 weeks prior to making the application for early release. For example, the ALRC outlined that where victims were not previously eligible for social security payments due to income or assets tests, they may only be eligible to receive them once they are no longer considered to be a 'member of a couple' and their income and assets are no longer pooled. Accordingly, victims may have to wait at least 26 weeks to become

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94 Ibid reg 6.01(2). The ALRC understands that from 1 July 2009, CDEP participants were required to apply for other income support payments but that CDEP participants who were earning CDEP wages at 30 June 2009 can continue to receive wages until at least 1 April 2012, as long as they remain eligible: Centrelink, *Community Development Employment Projects* <[www.centrelink.gov.au/internet/internet.nsf/services/cdep.htm](http://www.centrelink.gov.au/internet/internet.nsf/services/cdep.htm)> at 5 July 2011.

95 Senate Select Committee on Superannuation and Financial Services—Parliament of Australia, *Early Access to Superannuation Benefits* (2002).

96 Australian Prudential Regulation Authority, *Superannuation Circular No I.C.2: Payment Standards for Regulated Superannuation Funds* (2006).

97 Ibid.

eligible for early access to superannuation. The ALRC noted that this may be the period when they are suffering the most severe financial hardship.

19.124 In 2002, the Senate Select Committee on Superannuation and Financial Services recommended that the Australian Government should consider extending the criteria that govern early access to superannuation. It expressed the opinion that there was merit in the suggestion of increasing the flexibility of the current requirement for 26 weeks continuous receipt of income support payments to 26 out of a possible 40 weeks.<sup>98</sup> In line with that recommendation, in the Superannuation Law Issues Paper the ALRC asked if the *SIS Regulations* should be amended 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, rather than the current requirement of continuous receipt of payment for 26 weeks.<sup>99</sup>

### ***Submissions and consultations***

19.125 As the ALRC only raised issues with respect to applicants under the preservation age in the Superannuation Law Issues Paper, stakeholder responses focused on this issue.

19.126 As a preliminary point, a number of submissions noted that eligibility for early access to superannuation benefits on the basis of severe financial hardship is limited to those who are already in receipt of income support payments.<sup>100</sup>

19.127 The Commonwealth Ombudsman expressed support for the suggested amendment of the 26-week test to 26 out of a possible 40 weeks, stating that:

The suggested amendment would mean that a more consistent and sensitive approach is taken to assist people, including those subject to family violence, to gain early access to their superannuation.<sup>101</sup>

19.128 Similarly, several stakeholders criticised the inflexibility of the 26-week test under reg 6.01(5) of the *SIS Regulations*, submitting that it may be difficult for victims of family violence to demonstrate continuous receipt for 26 weeks where payments have been stopped or suspended for a range of reasons.<sup>102</sup>

19.129 The Ombudsman’s submission provided a number of examples of cases where a person may experience severe financial hardship but fail the 26-week test, including the following case study.<sup>103</sup>

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98 Senate Select Committee on Superannuation and Financial Services—Parliament of Australia, *Early Access to Superannuation Benefits* (2002), [4.36]–[4.40].

99 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011) Question 30.

100 See, eg, Commonwealth Ombudsman, *Submission CFV 16*, 6 April 2011.

101 Ibid.

102 Welfare Rights Centre NSW, *Submission CFV 70*, 9 May 2011; Commonwealth Ombudsman, *Submission CFV 16*, 6 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Northern Rivers Community Legal Centre, *Submission CFV 08*, 28 March 2011; Australian Institute of Superannuation Trustees, *Consultation*, by telephone, 13 May 2011.

103 Commonwealth Ombudsman, *Submission CFV 16*, 6 April 2011.

**Case Study**

Ms B was employed and also received a Parenting Payment Single from Centrelink. The rate of her payment was affected by her fluctuating employment hardship—in some weeks she did not receive any payment although she remained qualified to receive it. In 2009 she lost her job and the bills began to mount up. She applied to have some of her superannuation released on the grounds of serious financial hardship and requested a Q230 letter [evidencing the receipt of Centrelink payments] from Centrelink. However in the preceding 26 weeks, she had not received continuous payments, therefore Centrelink could not issue the Q230 ...The test did not have the flexibility to take into account the fact that, if averaged over the period, Ms B's fluctuating income was low enough to receive a payment.

19.130 A fuller discussion of the reasons as to why an income support payment may have been stopped or suspended, the effect of a partner's income on income support payments, the provision of evidence as to receipt of income support, and submissions in relation to those issues is included in chapters 5 and 7.

19.131 The Ombudsman also expressed concern that the policy intent of the 26-week test—requiring evidence of a person's dependence on welfare payments to support a claim of severe financial hardship—was not achieved where people whose payments have been interrupted, but were in no better financial position than those in continuous receipt of income support, were denied access to their superannuation benefits.<sup>104</sup>

19.132 However, in acknowledging the competing policy objectives, the Ombudsman expressed the view that:

I recognise the public interest in the policy intention of preservation of superannuation to fund retirements and believe that this may be accommodated through an appropriate restriction on the amount a person can access.<sup>105</sup>

19.133 Submissions opposing amendment to the 26-week test argued that doing so would potentially increase the ease with which superannuation may be accessed early, thereby eroding the overarching goal of preservation of superannuation benefits. For example, ASFA submitted that the appropriate balance between the need to preserve a superannuation benefit with the recognition of limited appropriate circumstances for the grant of early access had already been achieved. It expressed concern that an alteration of this test may allow 'a person to qualify for early release where they are currently in employment'.<sup>106</sup>

***ALRC's views******Qualifying period***

19.134 The ALRC considers that the current requirement that applicants under the preservation age, have been receiving a Commonwealth income support payment for

104 Ibid.

105 Ibid.

106 Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011.



26 weeks as part of satisfying the ground of ‘severe financial hardship’, under reg 6.01(5)(a) of the *SIS Regulations* is unnecessarily restrictive.

19.135 In light of the particular issues faced by victims of family violence in obtaining and remaining on continuous income support, many of which are discussed in more detail in Chapters 6 and 7, the ALRC is concerned that the current formulation may operate to exclude victims of family violence from accessing early release on this ground.

19.136 The ALRC is also of the view that the policy intention underlying the test—requiring evidence of a person’s dependence on welfare payments to support a claim of severe financial hardship—is not achieved where people, whose payments have been interrupted but were in no better financial position than those in continuous receipt of income support, are denied early access to their superannuation benefits.

19.137 Accordingly, and in line with the recommendation made by the Senate Select Committee on Superannuation and Financial Services, the ALRC proposes that reg 6.01(5)(a) of the *SIS Regulations* should be amended 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.

19.138 In relation to the requirements where an applicant is over the preservation age, the ALRC would be interested in hearing from stakeholders whether there any particular difficulties for a person experiencing family violence in meeting the requirements under reg 6.01(5)(b) of the *SIS Regulations* as part of satisfying the ground of severe financial hardship.

#### ***Definition of Commonwealth income support payments***

19.139 The policy underlying exclusion of certain payments such as Austudy, Youth Allowance and CDEP Scheme payments from the definition of Commonwealth income support payments was, in part, that these payments were designed to assist in meeting study and other costs, and not to provide full financial support, and the view that individuals choosing to undertake a course of study must have regard to the financial consequences of doing so.

19.140 However, the ALRC has formed the preliminary view that in order to recognise the need of people—and in particular those experiencing family violence—to re-skill or re-enter the workforce and to ensure that someone in receipt of these payments does not need to withdraw from study in order to qualify for a different form of income support, the *SIS Regulations* may need be amended so as not to preclude an applicant, who may otherwise be able to satisfy the requirements for early release, from applying for access to superannuation.

19.141 In particular, the ALRC would be interested in stakeholder comment on whether Austudy, Youth Allowance and CDEP Scheme payments should be considered Commonwealth income support payments for the purposes of early access on the grounds of severe financial hardship.

19.142 The ALRC welcomes stakeholder feedback on whether the other forms of payment should be included in the determination of Commonwealth income support payments, for example: drought or farm-related payments; workers' compensation; transport accident; or personal income protection payments due to disability.

#### ***APRA guidance***

19.143 As outlined above, the trustees of a superannuation fund are responsible for determining the release of benefits on the basis of severe financial hardship. APRA provides very limited guidance to trustees in determining whether an applicant satisfies the ground of severe financial hardship. In particular, as noted above, Superannuation Circular No I.C.2 *Payment Standards for Regulated Superannuation Funds*, provides no guidance on determining whether an applicant is unable to meet reasonable and immediate family living expenses.

19.144 The ALRC is interested in feedback from stakeholders as to whether it would be appropriate for APRA to amend the Circular in order to provide guidance to trustees in determining what constitutes a reasonable and immediate family living expense for the purposes of the second part of the severe financial hardship test; and the impact family violence may have on determining whether an applicant is unable to meet reasonable and immediate family living expenses.

19.145 In the alternative, the ALRC considers that APRA could work cooperatively with AIST, ASFA and other relevant bodies to develop guidance for superannuation trustees in the form of model guidelines which include information on, for example, what constitutes reasonable and immediate family living expenses.

19.146 Whether included in the Circular or as a separate publication, the ALRC considers such guidance could:

- contain a definition of family violence;<sup>107</sup>
- explain the nature, features and dynamics of family violence;
- indicate that it may not be appropriate to consider a family's combined resources and outgoings in determining whether an applicant is suffering severe financial hardship in circumstances of family violence;<sup>108</sup> and
- indicate that what constitutes a reasonable and immediate living expense may differ in cases involving family violence, for example, where an applicant needs to flee their home.

#### ***Time limit***

19.147 An application for early release of superannuation made by a victim of family violence is likely only to be made in extreme cases. As a result, the period of time before the victim can access the funds (if early release is approved) should be as

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<sup>107</sup> As recommended in proposal 3–2 of this Discussion Paper.

<sup>108</sup> This is linked to the issue of separation under one roof in the context of social security considered in chapter 6.

short as possible. This issue is also discussed below with respect to time limits for processing of applications for early release on compassionate grounds.

19.148 There is currently no time limit within which funds must process applications for early release on the basis of severe financial hardship. As a result, the ALRC would be interested in stakeholder experiences in relation to the length of time taken in practice to process applications for early release on the basis of severe financial hardship and, if necessary, what procedural steps could be taken to facilitate the prompt processing of claims, particularly in circumstances involving family violence.

19.149 In saying this, the ALRC is cautious about suggesting procedural steps or imposing time limits with respect to applications involving family violence where this would create a two-tier system, or where it may provide an incentive to disclose family violence as a means to obtain early access to superannuation funds more quickly. The ALRC also acknowledges stakeholder concerns about imposing additional obligations on trustees, in particular requiring them to make decisions about the existence of family violence.

**Proposal 19–2** Regulation 6.01(5)(a) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) should be amended 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.

**Question 19–5** Are there any difficulties for a person experiencing family violence in meeting the requirements under reg 6.01(5)(b) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) as part of satisfying the ground of ‘severe financial hardship’? If so, what changes are necessary to respond to such difficulties?

**Question 19–6** Should the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to allow recipients of Austudy, Youth Allowance and CDEP Scheme payments to access early release of superannuation on the basis of ‘severe financial hardship’?

**Question 19–7** Should reg 6.01(5)(a) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to provide that applicants must either be in receipt of Commonwealth income support payments or some other forms of payment—for example, workers’ compensation, transport accident or personal income protection payments because of disabilities?

**Question 19–8** Should APRA Superannuation Circular No I.C.2, *Payment Standards for Regulated Superannuation*, be amended to provide guidance for trustees in relation to:

- (a) what constitutes 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?

**Question 19–9** As an alternative to Question 19–8 above, should APRA work with the Australian Institute of Superannuation Trustees, the Association of Superannuation Funds of Australia and other relevant bodies to develop guidance for trustees in relation to early release of superannuation on the basis of ‘severe financial hardship’, including information in relation to:

- (a) what constitutes 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?

**Question 19–10** In practice, how long do superannuation funds take to process applications for early release of superannuation on the basis of ‘severe financial hardship’? What procedural steps may be taken to facilitate the prompt processing of applications in circumstances involving family violence?

### Compassionate grounds

19.150 The *SIS Act* and *SIS Regulations* provide—in addition to severe financial hardship—for the early release of preserved benefits and restricted non-preserved benefits on specified compassionate grounds.<sup>109</sup>

19.151 A person may apply to APRA for early access on compassionate grounds where the benefits are required for a category of narrowly defined expenses. A person may apply for the release of benefits where these are required for:

- medical treatment costs or medical transport costs (in either case, of the person or a dependant);
- mortgage assistance to prevent the foreclosure or sale of the person’s principal place of residence;
- costs associated with modifying the person’s principal place of residence, or vehicle, to accommodate the person’s special needs relating to a severe disability (of the person or a dependant);
- costs associated with palliative care;
- costs associated with a dependant’s palliative care, death, funeral, or burial; or
- expenses in other cases where APRA has determined that the release is consistent with one of the foregoing grounds.<sup>110</sup>

<sup>109</sup> *Superannuation Act 1976* (Cth) s 79B; *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.19A(1).

19.152 APRA determines applications for early release on compassionate grounds. APRA (or more specifically, the assessor) must be satisfied that the applicant's circumstances fit into one of the specified grounds outlined above and, also, that the applicant lacks the financial capacity to meet the expenses without a release of benefits.<sup>111</sup>

19.153 The *SIS Regulations* also require an assessor to have regard to certain other matters before they can be satisfied that a release is required on the medical treatment, medical transport or mortgage grounds outlined above.<sup>112</sup>

19.154 If a person satisfies the requirements, APRA may release a single lump sum which APRA is satisfied is an amount reasonably required, taking account of the ground upon which the application was made and the applicant's financial capacity.<sup>113</sup>

19.155 APRA's *Guidelines for Early Release of Superannuation Benefits on Compassionate Grounds* (Guidelines) provide guidance to APRA assessors.<sup>114</sup> The Guidelines do not currently refer to the impact family violence may have, for example, on whether an applicant lacks the financial capacity to meet the relevant expenses without a release of benefits. The Guidelines provide that an assessor is required to assess this in light of the evidence provided by the applicant, that assessors may require further information from the applicant and that the evidence should be 'sufficient to satisfy a reasonable person that the person has met the conditions for release'.<sup>115</sup>

### **Time limits**

19.156 The Guidelines provide that 'given the nature of the applications, assessors should keep in mind that applicants have a reasonable expectation that APRA will make decisions promptly'.<sup>116</sup>

19.157 APRA's material for applicants requesting early release on compassionate grounds indicates they aim to process applications within 14 working days (5 days for initial letter and 10 days for application) but it could be up to 30 working days in busy periods. Currently applications can be made using postal mail, fax or email.<sup>117</sup>

110 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.19A(1). In *Flanagan v APRA* [2004] FCA 1321 1321, Sackville J explored the meaning of 'consistent with' and concluded it was necessary to find out the purpose or objective underpinning the other grounds for release and then the assessor must identify the essential criteria under the new/proposed ground to determine whether they are met. The Guidelines also contain examples of permissible and non-permissible releases under the final ground: Australian Prudential Regulation Authority, *Guidelines for Early Release of Superannuation Benefits on Compassionate Grounds* (2010) 52-65.

111 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.19A(2).

112 See *Ibid* reg 6.19A(2)-(5).

113 The sum must not exceed an amount determined by the Regulator being an amount that: a) taking account of the ground and of the person's financial capacity, is reasonably required; and b) in the case of the mortgage ground, does not exceed an amount equal to the sum of 3 months' repayments and 12 months' interest on the outstanding balance of the loan: *Ibid* column 3, pt 1, sch 1.

114 Australian Prudential Regulation Authority, *Guidelines for Early Release of Superannuation Benefits on Compassionate Grounds* (2010).

115 *Ibid*, 8.

116 *Ibid*, 12.

117 Australian Prudential Regulation Authority, *Website* <<http://www.apra.gov.au/>> at 4 July 2011.

### ***Submissions and consultations***

19.158 In the Superannuation Law Issues Paper, the ALRC asked whether the *SIS Regulations* should be amended to provide a specific compassionate ground to enable the early release of superannuation benefits to a victim of family violence. The ALRC envisaged that this would involve amendment to the purposes for which a person may apply for the release of benefits on compassionate grounds to allow early access where required for family violence-related purposes.

19.159 Stakeholders were broadly supportive of the inclusion of family violence for the purposes of early access to superannuation. However, it was unclear whether stakeholders supported the inclusion of family violence as a purpose for which early access to superannuation on compassionate grounds may be required, or the establishment of an entirely new and separate ground of family violence which, because of its nature, would be considered a compassionate ground for early release.

### ***Overarching issues and policy tensions***

19.160 The overarching issues and policy tensions in relation to early access to superannuation highlighted by stakeholders were discussed earlier in this chapter. Stakeholders reiterated two key points in the context of early release.

19.161 First, stakeholders emphasised that early access to superannuation should be considered as a last resort;<sup>118</sup> and that, as a first priority, the social security system should be strengthened to allow for the provision of urgent and immediate financial assistance to victims of family violence.<sup>119</sup>

19.162 Secondly, submissions stressed the need to consider this issue in the broader context of the financial position of women generally at retirement, as well as the particular economic situation of victims in situations of family violence.<sup>120</sup>

### ***Family violence and early release***

19.163 Broadly speaking, many stakeholders were supportive of the inclusion of family violence as an additional ground for early release of superannuation benefits on compassionate grounds, emphasising the importance of early access to financial resources to enable people experiencing family violence to remove themselves from situations of harm.<sup>121</sup>

19.164 On the other hand, some stakeholders reiterated the overarching policy concerns as the basis for opposing the inclusion of an additional ground, emphasising

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118 Women's Legal Services NSW, *Submission CFV 28*, 11 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

119 Women's Legal Services NSW, *Submission CFV 28*, 11 April 2011; Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011.

120 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011. This issue is discussed in more detail earlier in the chapter.

121 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Women's Legal Services NSW, *Submission CFV 28*, 11 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Australian Institute of Superannuation Trustees, *Consultation*, by telephone, 13 May 2011.

the importance of preservation of superannuation benefits until retirement, and argued that this policy objective should prevail over expanding grounds for early release.<sup>122</sup>

19.165 However, in considering the potential for any new ground of release, stakeholders emphasised that the eligibility criteria and evidentiary requirements for release would require careful consideration.<sup>123</sup> For example, the ACTU supported making any additional ground for early release ‘subject to the same eligibility criteria as the existing compassionate grounds covered by the Act’.<sup>124</sup> The Ombudsman submitted that careful consideration of the types of information applicants might reasonably be required to provide to the regulator in support of their application was required and that any evidentiary requirements introduced

should take into account the difficulties that people experiencing family violence may have in disclosing this fact and the types of evidence that might realistically be available to them in the situation.<sup>125</sup>

### ***ALRC’s views***

19.166 The ALRC considers that there are two key areas in relation to which it is necessary to make comment. The first is the current operation of the compassionate grounds, and the second relates to options for reform of the compassionate grounds, specifically to account for early release for purposes related to family violence.

#### ***Current administration of compassionate grounds***

19.167 At the outset, the ALRC acknowledges that the purposes for which an applicant may seek early release on compassionate grounds are narrow and involve the exercise of very limited discretion by APRA. That said, where a compassionate ground may otherwise be made out, the ALRC considers that the Guidelines and time limits may be two areas in which the administration of compassionate grounds may be amended to account for applicants experiencing family violence.

19.168 As outlined above with respect to early release on the basis of severe financial hardship, an application for early release of superannuation made by a victim of family violence is likely to be made only in extreme cases. As a result, the period of time before the victim can have access to the funds—if early release is approved—should be as short as possible. While the Guidelines remind APRA assessors that applicants have a reasonable expectation that their application will be dealt with promptly, the ALRC considers that up to 30 working days, even in busy periods, is a long period for processing applications where this may compromise the ability of applicants to take measures to protect their safety.

19.169 In saying this, the ALRC is cautious about suggesting procedural steps or imposing time limits with respect to applications involving family violence, where this would create a two-tier system or where it may ‘incentivise’ disclosure of family

122 Association of Superannuation Funds of Australia, *Submission CFV 24*, 8 April 2011.

123 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Commonwealth Ombudsman, *Submission CFV 16*, 6 April 2011.

124 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

125 Commonwealth Ombudsman, *Submission CFV 16*, 6 April 2011.

violence as a means to obtain access to superannuation funds more quickly. The ALRC also acknowledges potential concerns about imposing additional obligations on APRA assessors: in particular, requiring them to make decisions about the existence of family violence.

19.170 Accordingly, the ALRC would be interested in stakeholder experiences in relation to the length of time taken in practice to process applications for early release on compassionate grounds, and comments on what procedural steps could be taken to facilitate the prompt processing of claims, particularly in circumstances involving family violence.

19.171 The second issue arising in relation to the current administration of the compassionate grounds relates to the content of the Guidelines. The Guidelines do not currently make any reference to the impact that family violence may have, for example, on whether an applicant lacks the financial capacity to meet their expenses without an early release of benefits. The ALRC considers APRA should amend the Guidelines to ensure that they:

- contain a definition of family violence;<sup>126</sup>
- explain the nature, features and dynamics of family violence; and
- indicate that it may not be appropriate to consider a family's combined resources and outgoings in determining whether an applicant lacks the financial capacity to meet the expenses without a release of benefits in circumstances of family violence.<sup>127</sup>

19.172 The ALRC notes that the inclusion of such information would necessarily result in a need for additional training of APRA assessors in considering family violence-related information.

### ***Options for reform***

19.173 The ALRC considers there are two possible approaches to achieve the suggested inclusion of family violence as a ground upon which an applicant may seek early release. These are: to include family violence as a purpose for which an applicant may apply for early access on compassionate grounds; or the creation of a new ground of early release on the basis of family violence.

19.174 If reg 6.19A of the *SIS Regulations* were to be amended to add family violence to the existing list of purposes for which an applicant may apply for early release on compassionate grounds, the ALRC considers that it should be subject to the same eligibility criteria as the existing purposes. The ALRC would be interested in stakeholder comments on how any such amendment should operate in practice, including the types of:

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126 As recommended in Proposal 3–1 of this Discussion Paper.

127 This is linked to the issue of separation under one roof in the context of social security considered in Chapter 6.



- family violence-related costs that should be included under the new purpose; and
- evidence an applicant may be required to provide in support of their application.

19.175 Another approach may be to establish a new separate ground of early release. While the ALRC considers that the inclusion of a new ground may supplement the limited existing provisions for early release, the ALRC has several concerns with respect to establishing a new ground, including in relation to:

- the overarching policy tensions referred to above; and
- the impact an additional early release ground may have on superannuation funds, if they were to administer the new ground, though it appears that APRA would be the most appropriate body within the current system to administer any new ground.

19.176 The ALRC welcomes submissions on whether a new ground of release is appropriate and, if so, how any such ground would operate in practice. For example:

- which body should be responsible for administering the new ground—APRA, individual funds or some other body;
- what criteria should apply;
- what evidence should be required;
- if individual funds administer the new ground, should there be common rules for granting early release on the new ground; and
- what appeal mechanisms should be established—for example, should appeals and/or complaints go to the SCT or the Ombudsman?

**Question 19–11** In practice, how long does APRA take to process applications for early release of superannuation on compassionate grounds? What procedural steps may be taken to facilitate the prompt processing of applications in circumstances involving family violence?

**Proposal 19–3** APRA should amend the *Guidelines for Early Release of Superannuation Benefits on Compassionate Grounds* to include information about family violence, including 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.

**Question 19–12** Should reg 6.19A of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to provide that a person may apply for early release of superannuation on compassionate grounds where the release is required to pay for expenses associated with the person's experience of family violence?

**Question 19–13** Should the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to provide for a new ground for early release of superannuation for victims of family violence? If so, how should it operate? For example:

- (a) which body should be responsible for administering the new ground;
- (b) what criteria should apply;
- (c) what evidence should be required;
- (d) if individual funds administer the new ground, should there be common rules for granting early release on the new ground; and
- (e) what appeal mechanisms should be established?

### Other issues

19.177 In addition to the issues and proposals outlined above, there are a range of other areas of more general application in relation to which amendments may further protect the financial independence and security of victims of family violence. These include:

- application forms for early release;
- training and education in the context of applications for early release;
- appropriate ways of contacting applicants for early release who have disclosed family violence;
- time limits for funds to respond to complaints about applications for early release; and
- data collection and system integrity measures.

### *Application forms for early release*

19.178 In light of many of the questions and proposals outlined above with respect to early access to superannuation, the question arises as to what is the most appropriate way to make provision for applicants to disclose family violence where they consider it is relevant to their application for early release. For example, in demonstrating severe financial hardship, or that they lack the financial capacity to meet particular expenses, an applicant may need to indicate that their partner's income should not be considered. One such way may be through amendment to application forms for early release. The ALRC would be interested in stakeholder feedback on whether application forms for early release currently include some area, box or similar under which an applicant could disclose family violence where it is relevant to the application for early release. If they do not, should they do so, and if so, how?

**Training**

19.179 Throughout this Inquiry, stakeholders have consistently emphasised the need to complement proposals for reform with appropriate education and training. In light of some of the questions and proposals outlined above, which would necessarily result in APRA (and possibly superannuation fund) staff having to consider issues of family violence in determining whether to grant early release, it is necessary to consider the training needs of those staff.

19.180 As a result, the ALRC would be interested in stakeholder feedback on what training is currently provided to APRA and superannuation fund staff, and whether family violence and its impact on the circumstances of an applicant could be included, either as a specific component of existing training, or as a separate type of training.

**Contacting applicants**

19.181 In situations involving family violence, an applicant victim may have made an application for early release of superannuation for the purposes of, preparing to leave a violent relationship. In such circumstances the safety of the victim may be jeopardised in circumstances where the superannuation fund or APRA contacts the victim in relation to their application.

19.182 For example, the Guidelines provide that when additional information is required in relation to an application, it should be sought ‘as quickly as possible, usually by telephone’.<sup>128</sup>

19.183 The ALRC would be interested in hearing about:

- ways superannuation funds and APRA currently contact applicants; and
- whether there is, or should be, some mechanism or process in relation to applications involving family violence that would ensure the safety of victims. For example, inclusion of a ‘safety flag’ on a member or applicant’s file that would alert anyone accessing the file to be conscious of the need to ensure information about any early release application is only disclosed to the applicant, and in a safe and appropriate manner.

19.184 The ALRC is conscious that the release of information is already governed in part by the *Privacy Act 1988* (Cth).

**Time limits for fund responses to complaints**

19.185 Where the trustee of a superannuation fund has made a decision, for example, to deny an application for early access, an applicant may make a complaint to the SCT that the decision is or was unfair or unreasonable.<sup>129</sup>

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128 Australian Prudential Regulation Authority, *Guidelines for Early Release of Superannuation Benefits on Compassionate Grounds* (2010), 12.

129 *Superannuation (Resolution of Complaints) Act 1993* (Cth) ss 14, 15. Section 15 outlines who may make such a complaint.

19.186 However, under s 19 of the *SRC Act*, the SCT can only deal with a complaint under s 14 if:

- (a) a complaint about the same subject matter was previously made to an appropriate person under arrangements for dealing with such complaints made under section 101 of the [*SIS Act*]; and
- (b) the complaint so made was not settled to the satisfaction of the complainant within 90 days or such longer period as the Tribunal allows.<sup>130</sup>

19.187 Section 101 of the *SIS Act* provides that trustees have a duty to establish arrangements for dealing with inquiries or complaints and that an inquiry or complaint will be dealt with within 90 days after it was made.<sup>131</sup>

19.188 Where a complaint about a fund not granting an application for early release is made by a victim of family violence, it is likely the application was made in circumstances where time is of the essence. A three month waiting period for a response, prior to being able to make an application to the SCT, appears to restrict access by individuals to a review mechanism in circumstances where they require urgent consideration of their complaint.

19.189 While the ALRC acknowledges the administrative considerations involved in imposing a shorter timeframe, and the view that urgent payments may be more appropriately made available through the social security system,<sup>132</sup> the ALRC would be interested in feedback from stakeholders as to the impact of the 90 day period on applicants who are experiencing family violence and whether a 30 day period may address any concern about the length of the waiting period.

### ***Data collection and systems integrity***

19.190 As outlined in Chapter 2, systems integrity is an important theme underlying this Inquiry. The early release of superannuation benefits is currently allowed in certain limited circumstances outlined above. If a new ground for early release of superannuation on the basis of family violence were introduced (and potentially, in any event) the ALRC considers it would be useful to introduce some data collection mechanism to:

- ensure system integrity—that is, to avoid applicants making multiple applications for early release on different grounds or from different funds; and
- provide comprehensive data, the availability of which would provide a sound evidence base upon which the government could make policy in this area.

19.191 This is consistent with the guiding principles developed in the course of the Super System Review with respect to the need for high quality research and data.<sup>133</sup>

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130 Ibid s 19.

131 *Superannuation Industry (Supervision) Act 1993* (Cth) s 101.

132 For example, through a crisis payment. For discussion of social security measures see chapters 5–8.

133 J Cooper and others, *Super System Review Final Report: Part One—Overview and Recommendations* (2010), Overview 4.

19.192 The ALRC welcomes feedback on how such data should be collected, particularly in light of *Super Stream* reforms and standard business reporting, whether APRA is the most appropriate body to collect any such data and how it should be available.

**Other issues**

19.193 Finally, the ALRC welcomes comment on any other issues of relevance to the treatment of family violence in Commonwealth superannuation law.

**Question 19–14** What amendments, if any, should be made to application forms for early release of superannuation to provide for disclosure of family violence where it is relevant to the application?

**Question 19–15** What training is provided to superannuation fund staff and APRA staff who are assessing applications for early release of superannuation? Should family violence and its impact on the circumstances of an applicant be included as a specific component of any training?

**Question 19–16** In practice, how do superannuation funds and APRA contact members or those who have made an application for early release of superannuation? Is there, or should there be, some mechanism or process in place in relation to applications involving family violence to deal with safety concerns associated with:

- (a) contacting the member or applicant; or
- (b) the disclosure of information about the application?

**Question 19–17** Should the 90 day period for a superannuation fund to respond to a complaint by a member be reduced to 30 days?

**Question 19–18** Should there be central data collection in relation to applications for early release of superannuation in order to identify:

- (a) the extent to which funds are being accessed early on the basis of any new family violence ground, including numbers of applications and success rates; and
- (b) whether there are multiple claims on the same or different funds?

If so, which body should collect that information, and how?

Are there any other ways in which superannuation law could be improved to protect those experiencing family violence.

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## Part G— Migration

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### Chapters

- 20. Migration Law—Overarching Issues
- 21. The Family Violence Exception—Evidentiary Requirements
- 22. Refugee Law

### Proposals and Questions in this Part

#### 20. Migration Law—Overarching Issues

**Question 20–1** From 1 July 2011 the Migration Review Tribunal will lose the power to waive the review application fee in its totality for review applicants who are suffering severe financial hardship. In practice, will those experiencing family violence face difficulties in accessing merits review if they are required to pay a reduced application fee? If so, how could this be addressed?

**Proposal 20–1** The *Migration Regulations 1994* (Cth) should be amended to provide that the family violence exception applies to all secondary applicants for all onshore permanent visas. The family violence exception should apply:

- (a) as a ‘time of application’ and a ‘time of decision’ criterion for visa subclasses where there is a pathway from temporary to permanent residence; and
- (b) as a ‘time of decision’ criterion, in all other cases.

**Question 20–2** Given that a secondary visa applicant, who has applied for and been refused a protection visa, is barred by s 48A of the *Migration Act 1958* (Cth) from making a further protection visa application onshore:

- (a) In practice, how is the ministerial discretion under s 48B—to waive the s 48A bar to making a further application for a protection visa onshore—working in relation to those who experience family violence?

- (b) Should s 48A of the *Migration Act 1958* (Cth) be amended to allow secondary visa applicants who are experiencing family violence, to make a further protection visa application onshore? If so, how?

**Question 20–3** Section 351 of the *Migration Act 1958* (Cth) allows the Minister for Immigration and Citizenship to substitute a decision for the decision of the Migration Review Tribunal if the Minister thinks that it is in the public interest to do so:

- (a) Should s 351 of the *Migration Act 1958* (Cth) be amended to allow victims of family violence who hold temporary visas to apply for ministerial intervention in circumstances where a decision to refuse a visa application has not been made by the Migration Review Tribunal?
- (b) If temporary visa holders can apply for ministerial intervention under s 351 of the *Migration Act 1958* (Cth), what factors should influence whether or not a victim of family violence should be granted permanent residence?

*The next proposals are presented as alternate options: Proposal 20–2 OR Proposal 20–3*

**OPTION ONE: Proposal 20–2**

**Proposal 20–2** The *Migration Regulations 1994* (Cth) should be amended to allow a former or current Prospective Marriage (Subclass 300) visa holder to access the family violence exception when applying for a temporary partner visa in circumstances where he or she has not married the Australian sponsor.

**OPTION TWO: Proposal 20–3**

**Proposal 20–3** Holders of a Prospective Marriage (Subclass 300) visa who are victims of family violence but who have not married their Australian sponsor, should be allowed to apply for:

- (a) a temporary visa, in order make arrangements to leave Australia; or
- (b) a different class of visa.

**Question 20–4** If Prospective Marriage (Subclass 300) visa holders are granted access to the family violence exception, what amendments, if any, are necessary to the *Migration Regulations 1994* (Cth) to ensure the integrity of the visa system?

**Question 20–5** Should the Prospective Marriage (Subclass 300) visa be abolished, and instead, allow persons who wish to enter Australia to marry an Australian sponsor to do so on a special class of visitor visa, similar to that in place in New Zealand?

**Question 20–6** Should the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth) be amended to provide that sponsorship is a separate and reviewable criterion for the grant of partner visas?

**Proposal 20–4** The Australian Government should ensure consistent and regular education and training in relation to the nature, features and dynamics of family

violence, including its impact on victims, for visa decision makers, competent persons and independent experts, in the migration context.

**Proposal 20–5** The Australian Government should ensure that information about legal rights, family violence support services, and the family violence exception are provided to visa applicants prior to and upon arrival in Australia. Such information should be provided in a culturally appropriate and sensitive manner.

**Proposal 21–1** The Department of Immigration and Citizenship’s *Procedures Advice Manual 3* should provide that, in considering judicially-determined claims, family violence orders made post-separation can be considered.

**Question 21–1** Where an application for a family violence protection order has been made, should the migration decision-making process be suspended until finalisation of the court process?

**Proposal 21–2** The requirement in reg 1.23 of the *Migration Regulations 1994* (Cth) 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 spouse or de facto partner of the alleged perpetrator should be repealed.

**Question 21–2** If the requirement in reg 1.23 is not repealed, what other measures should be taken to improve the safety of victims of family violence, where the violence occurs after separation?

*The next proposals are presented as alternate options: Proposal 21–3 OR Proposals 21–4 to 21–8*

**OPTION ONE: Proposal 21–3**

**Proposal 21–3** The process for non-judicially determined claims of family violence in reg 1.25 the *Migration Regulations 1994* (Cth) should be replaced with an independent expert panel.

**OPTION TWO: Proposals 21–4 to 21–8**

**Proposal 21–4** The *Migration Regulations 1994* (Cth) should be amended to provide that competent persons should not be required to give an opinion as to who committed the family violence in their statutory declaration evidence.

**Proposal 21–5** The *Migration Regulations 1994* (Cth) should be amended to provide that visa decision makers can seek further information from competent persons to correct minor errors or omissions in statutory declaration evidence.

**Proposal 21–6** The *Migration Regulations 1994* (Cth) should be amended to provide that visa decision makers are required to provide reasons for referral to an independent expert.

**Proposal 21–7** The *Migration Regulations 1994* (Cth) should be amended to require independent experts to give applicants statements of reasons for their decision.

**Proposal 21–8** The *Migration Regulations 1994* (Cth) should be amended to provide for review of independent expert assessments.



**Proposal 22–1** The Minister for Immigration and Citizenship should issue a direction under s 499 of the *Migration Act 1958* (Cth) to visa decision makers to have regard to the Department of Immigration and Citizenship’s *Procedures Advice Manual 3* Gender Guidelines when making refugee status assessments.

**Question 22–1** Under s 417 of the *Migration Act 1958* (Cth), the Minister for Immigration and Citizenship may substitute a decision for a decision of the Refugee Review Tribunal, if the Minister considers that it is in the public interest to do so. Does the ministerial intervention power under s 417 of the *Migration Act 1958* (Cth) provide sufficient protection for victims of family violence? If not, what improvements should be made?

## 20. Migration Law—Overarching Issues

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### Summary

20.1 This chapter considers a number of broad issues surrounding the family violence exception contained in the *Migration Regulations 1994* (Cth). The exception—which is invoked mainly in partner visa cases—provides for the grant of permanent residence to victims of family violence, notwithstanding the breakdown of the spouse or de facto relationship on which their migration status depends.<sup>1</sup>

20.2 A major focus of this chapter concerns whether the family violence exception should be expanded to apply to a broader range of onshore permanent and temporary visa categories, including the Prospective Marriage (Subclass 300) visa.

20.3 The ALRC considers that the family violence exception should be made available to all *secondary visa applicants* for onshore permanent visas. Similarly, the ALRC proposes that the family violence exception should be made available to holders of a Prospective Marriage (Subclass 300) visa who have experienced family violence, but who have not married their Australian sponsor. Beyond these cases, the ALRC acknowledges that those on other temporary visas may also experience family violence. However, in light of the need to ensure the integrity of the visa system the

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1 Provisions relating to family violence are found in the *Migration Regulations 1994* (Cth) pt 1 div 1.5.

ALRC does not propose that the family violence exception be extended to apply to temporary visa holders.

20.4 The ALRC considers that the above proposals need to be complemented by adequate education, training and information dissemination to all those within the system. Accordingly, the ALRC proposes that the Australian Government should ensure consistent and regular education and training in relation to the nature, features and dynamics of family violence, including its impact on victims, for visa decision makers, competent persons and independent experts, in the migration context. The ALRC also proposes that information about legal rights, family violence support services, and the family violence exception should be provided to visa applicants prior to and upon arrival in Australia, and that such information should be provided in a culturally appropriate and sensitive manner.

### Terminology

20.5 In this Inquiry the ALRC uses the expression ‘family violence’, as defined in Chapter 1.<sup>2</sup> A number of overseas jurisdictions use the term ‘domestic violence’, where that is the case, the ALRC uses the term in such places.

20.6 This chapter will also refer to ‘primary’ and ‘secondary’ applicants for a visa. Schedule 2 of the *Migration Regulations* prescribes, for all visa subclasses, ‘primary’ and ‘secondary’ criteria that must be met for the grant of a visa. A ‘primary visa applicant’ refers to a person who has applied for, and seeks to meet the primary criteria for a visa. A ‘secondary visa applicant’ is a person who is included in a visa application as a member of the family unit of a primary visa applicant, and is dependent therefore on the migration status of the primary visa applicant. In most instances, secondary visa applicants are the spouse and/or children of the primary applicant.

### Family violence and immigrant communities

20.7 As noted in Chapter 1, the National Council to Reduce Violence against Women and their Children (the National Council) in the report, *Time for Action*, provided a summary of the extent of the problem of violence against women in the Australian community.<sup>3</sup> In doing so, it highlighted that while violence ‘knows no geographical, socio-economic, age, ability, cultural or religious boundaries’, the experience of violence is not evenly spread, and migrants may experience violence in different and/or disproportionate ways.<sup>4</sup> Stakeholders have highlighted numerous challenges faced by victims of family violence from migrant communities and culturally and linguistically diverse (CALD) backgrounds in integrating into the Australian community. Such challenges include: language barriers; isolation;

2 See also *Migration Amendment Regulations (No 13) 2007* (Cth) cl 3 which replaced the term ‘domestic violence’ with ‘family violence’ in the *Migration Regulations 1994* (Cth). The definition of ‘relevant family violence’ applies to all visa applications made on or after 15 October 2007.

3 While the majority of those who experience family violence are women, the ALRC acknowledges that family violence is also experienced by men.

4 National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council’s Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 16.

precarious economic and employment situations; and the inability—or in some cases hesitancy—to access the legal system.<sup>5</sup>

20.8 The ALRC acknowledges that these challenges may exacerbate family violence dynamics in immigrant and CALD communities and, therefore, they should be kept in mind in examining whether legislative arrangements are adequately ensuring the safety of victims and their families.

### Australia's partner visa scheme

20.9 Partner visas form part of Australia's family migration stream, and allow 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.<sup>6</sup> All applicants for a partner visa must be sponsored by an Australian citizen or permanent resident.<sup>7</sup>

#### *Two-stage process to permanent residence*

20.10 To obtain permanent residence on a partner visa, applicants must go through a two-stage process.<sup>8</sup> Irrespective of whether the visa application is made onshore or offshore, a partner visa application is an application for both a temporary and permanent visa.<sup>9</sup> In the first stage, a temporary visa is granted for a period of two years, on the basis that the parties are in a genuine spouse or de facto relationship.<sup>10</sup> After this probationary period, the relationship is reassessed and a permanent visa can only be granted if, among other things, the spouse or de facto relationship remains 'genuine and continuing'.<sup>11</sup>

5 Good Shepherd Australia New Zealand, *Submission CFV 41*, 15 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011; Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

6 See, generally, Department of Immigration and Citizenship, *Fact Sheet 30: Family Stream Migration—Partners* (2010) <<http://www.immi.gov.au/media/fact-sheets/30partners.htm>> at 13 December 2010. 'Spouse' is defined in *Migration Act 1958* (Cth) s 5F and *Migration Regulations 1994* (Cth) reg 1.15A; and 'de facto partner' in *Migration Act 1958* (Cth) s 5CB, *Migration Regulations 1994* (Cth) regs 1.09A, 2.03A.

7 *Migration Regulations 1994* (Cth) reg 1.20(2)(a). The sponsor undertakes, among other things, to assist the applicant, to the extent necessary, financially and in relation to accommodation for a two year period.

8 See Immigration Advice and Rights Centre, *Domestic/Family Violence and Australian Immigration Law* (2009), 4–6 for a comprehensive outline of the different onshore and offshore categories, and the two-stage process.

9 Applications are made at the same time and on the same form. See Department of Immigration and Citizenship, *Form 47SP—Application for Migration to Australia by a Partner* (2010) <<http://www.immi.gov.au/allforms/pdf/47sp.pdf>> at 13 December 2010. The definitions of temporary and permanent visas are set out in the *Migration Act 1958* (Cth) s 30.

10 See *Migration Regulations 1994* (Cth) reg 1.15A for the factors that must be considered in determining whether a spouse or de facto relationship is genuine.

11 Permanent visas can be granted before the two year waiting period if, at the time of application, the relationship is considered a long-term partnership: three years or more or two years or more if there is a dependent child of the relationship. See eg *Migration Regulations 1994* (Cth) sch 2, cl 100.221(5) in relation to Subclass 100 visas.

20.11 Thus, all temporary partner visas involve an assessment as to whether the relationship is ‘genuine and continuing’ at the time the application is lodged, and at the time of the decision to grant the temporary visa. Permanent partner visas only involve an assessment as to whether the relationship remains ‘genuine and continuing’ at the time of the decision to grant the visa, after the initial two-year period.

20.12 The two stages can be illustrated as follows:

Stage 1 (Temporary)	➔	Stage 2 (Permanent)
Partner Visa (Subclass 820)– lodged onshore	➔	Partner Visa (Subclass 801)
Partner Visa (Subclass 309)– lodged offshore	➔	Partner Visa (Subclass 100)

### ***Prospective marriage visas***

20.13 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).<sup>12</sup> This provisional visa allows the holder to enter and remain in Australia for a nine-month period, within which the marriage must take place.<sup>13</sup> After the marriage, an application can be made for permanent residence on the basis of the married relationship via the two-stage process outlined above.

20.14 The three stages can be illustrated as follows:

Stage 1 ➔	Stage 2 ➔	Stage 3
Prospective Marriage Visa (Subclass 300)	Temporary Partner Visa (Subclass 820)	Permanent Partner Visa (Subclass 801)

### ***The visa application process***

20.15 Applications for partner visas are considered, in the first instance, by an officer of the Department of Immigration and Citizenship (DIAC) as a delegate of the Minister for Immigration and Citizenship (the Minister). In the event of an unfavourable decision, applicants can apply for merits review of the visa decision to the Migration Review Tribunal (MRT).<sup>14</sup>

<sup>12</sup> *Migration Regulations 1994* (Cth) sch 2 cls 300.215, 300.216 require the applicant to establish that the parties genuinely intend to marry within the visa period and genuinely intend to live together as spouses.

<sup>13</sup> *Ibid* sch 2 cl 300.511.

<sup>14</sup> *Migration Act 1958* (Cth) s 347. Although the Migration Review Tribunal and Refugee Review Tribunal are separate Tribunals, they are co-located with members and staff cross-appointed to both Tribunals. The Tribunals operate as a single agency for the purposes of the *Financial Management and Accountability Act 1997* (Cth).

***Fee waivers in review applications***

20.16 When making an appeal to the MRT, a requirement for a valid review application requires payment of an application fee.<sup>15</sup> Prior to 1 July 2011, the application fee for review in an MRT case was \$1400.<sup>16</sup> This amount is refundable to an applicant if a favourable decision on the case is made.<sup>17</sup> Prior to 1 July 2011, the fee could be waived, in its totality, where the relevant decision-maker is satisfied that ‘the fee has caused, or is likely to cause, severe financial hardship to the review applicant’.<sup>18</sup> However, the *Migration Amendment Regulation 2011 (No 4)* (Cth) removed this ability,<sup>19</sup> and, a separate piece of amending legislation increased the review application fee to \$1540.<sup>20</sup> As a consequence, for applications lodged after 1 July 2011, where the MRT is satisfied that payment of the fee has caused, or is likely to cause, severe financial hardship’ on a review applicant, it can reduce the fee by 50% to \$770.<sup>21</sup>

***ALRC’s views***

20.17 The ALRC is concerned that the removal of the ability of the MRT to waive the review application fee in its totality may have a detrimental effect on victims of family violence who are suffering severe financial hardship. As discussed in Chapter 5, financial security and independence are crucial factors that help a person to leave a violent relationship and thus protect their safety. Stakeholders in this Inquiry have also emphasised that migrant victims of family violence often have little or no income and are reliant on overstretched pro bono legal services for legal representation.<sup>22</sup> Depending on their visa class, some victims of family violence may be unable to access any social security payments or entitlements.

20.18 The ALRC therefore considers that there is a real risk that victims of family violence who are facing severe financial difficulties will be unable to pay even the reduced fee required to access merits review, which may ultimately prevent access to the family violence exception.

20.19 Further, to require victims of family violence to pay the reduced fee of \$770—in circumstances where that money may otherwise have been used to seek medical assistance, accommodation, counselling, or otherwise to leave an abusive relationship—reduces their ability to take measures to protect their safety.

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15 *Migration Act 1958* (Cth) s 347(1)(c).

16 *Migration Regulations 1994* (Cth) reg 4.13(1).

17 Ibid reg 4.14. Refunds are also available if the application is not reviewable by the MRT, or if the Minister has issued a conclusive certificate under s 339 of the Act in relation to the decision.

18 Ibid reg 4.13(4) provides that the fee may be waived by the Registrar, the Deputy Registrar or another officer of the MRT authorised in writing by the Registrar.

19 *Migration Amendment Regulation (No 4) 2011* (Cth) sch 1 reg 2.

20 *Migration Legislation Amendment Regulations (No 1) 2011* (Cth).

21 *Migration Amendment Regulation (No 4) 2011* (Cth) reg 3.

22 Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011; Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

20.20 Later in this chapter, the ALRC raises the possibility for temporary visa holders and prospective marriage (Subclass 300) visa holders to be able to access ‘Special Benefit’ payments under the *Social Security Act 1991* (Cth).<sup>23</sup> Proposals to this effect are made in Chapter 7, which if accepted, may provide some assistance to review applicants.

20.21 In light of the concerns raised above, the ALRC seeks stakeholder views as to whether the removal of the MRT’s power to waive the review application fee will, in practice, make it difficult for victims of family violence to access merits review and, therefore, the family violence exception.

**Question 20–1** From 1 July 2011 the Migration Review Tribunal will lose the power to waive the review application fee in its totality for review applicants who are suffering severe financial hardship. In practice, will those experiencing family violence face difficulties in accessing merits review if they are required to pay a reduced application fee? If so, how could this be addressed?

## The family violence exception

### How the exception works

20.22 The family violence exception is set out in the criteria for the relevant visa under sch 2 to the *Migration Regulations*. The exception is usually expressed as an alternate ground to the requirement for a genuine and continuing spouse or de facto relationship. DIAC’s guidelines for decision makers—the *Procedures Advice Manual 3* (PAM 3)—state that, broadly, the family violence exception allows for the grant of a permanent visa to be considered if:

- (a) the partner relationship has broken down; and
- (b) depending on the visa class applied for:  
the visa applicant; or  
a dependent child of that applicant/or that applicant’s ex-partner; or
- (c) a member of the family unit of that applicant and/or of that applicant’s ex-partner has suffered family violence committed by the visa applicant’s ex-partner.<sup>24</sup>

20.23 In addition to the partner visa class, the family violence exception can be invoked in certain skilled stream (business) visa classes.<sup>25</sup> In those cases, the secondary visa applicant can rely on the family violence exception if the relationship has ceased,

<sup>23</sup> For a more detailed discussion and the proposals, see Ch 7.

<sup>24</sup> Department of Immigration and Citizenship, *Procedures Advice Manual 3* (2010)—*The FV Provisions in Migration Law*, [2.1].

<sup>25</sup> These are: Established Business in Australia (Subclass 845); State/Territory Sponsored Regional Established Business in Australia (Subclass 846); Labour Agreement (Subclass 855); Employer Nomination Scheme (Subclass 856); Regional Sponsored Migration Scheme (Subclass 857); and Distinguished Talent (Subclass 858).

and the secondary visa applicant, or a member of his or her family unit, has suffered family violence committed by the primary visa applicant.<sup>26</sup>

20.24 In addition, in order to meet the family violence exception, applicants must meet the requirements for a judicially or non-judicially determined claim of family violence prescribed in regs 1.23(2)—(14). The ALRC considers issues relating to the evidentiary requirements in Chapter 21.

### ***Family violence in partner cases***

20.25 DIAC statistics show that only a small percentage of partner visa cases involve family violence claims. Although the number of claims has been steadily increasing since 2005, the number of claims, on average, account for approximately 1.5% of all partner visa cases.<sup>27</sup> However, there are several factors that may influence this result.

20.26 First, research suggests that family violence tends to be under-reported generally, and particularly in migrant communities, such that these numbers may not accurately reflect the extent of the problem.<sup>28</sup> This concern was expressly highlighted by one stakeholder.<sup>29</sup>

20.27 Secondly, the ALRC understands that, in cases where the family violence exception was not claimed before a DIAC delegate, but made for the first time before the MRT, this is not recorded in the MRT's official statistics.<sup>30</sup>

### **Policy tensions**

20.28 In Chapter 2, the ALRC provides a snapshot of some of the key themes and policy tensions that are common in each of the Inquiry areas. The policy challenge in this area—as emphasised to the ALRC by stakeholders in the course of this Inquiry—is, on one hand, to ensure *accessibility* to the family violence provisions for genuine victims of family violence while, on the other, preserving the *integrity* of the visa system. Accessibility is a broad concept, but in this context refers to a number of things that may help to ensure that a victim can take measures to protect his or her safety, including:

- removing barriers to accessing the family violence exception;
- improving the ability of victims to access family violence services;
- empowering victims to access the legal system through better education and information dissemination;
- ensuring that visa decision makers and the legal system in general are aware of, and sensitive to family violence issues.

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26 See, eg, *Migration Regulations 1994* (Cth) sch 2 cl 846.321(3).

27 Based on statistics from DIAC's Annual Report for the period from 2005–2009, and comparing the number of family violence claims with the total number of partner visa applications made.

28 See, eg, P Easteal, 'Double Jeopardy: Violence Against Immigrant Women in the Home' (1996) 45 *Family Matters* 26.

29 National Legal Aid, *Submission CFV 75*, 20 May 2011.

30 Sobet Haddad, Migration and Refugee Review Tribunals, *Consultation*, Sydney, 12 November 2010.



20.29 The visa system is the primary measure giving effect to the object of the *Migration Act* to regulate ‘in the national interest, the coming into, and presence in, Australia of non-citizens’.<sup>31</sup> Integrity concerns in this context relate to ensuring that the visa system is not abused or manipulated to obtain migration outcomes that are not intended.

20.30 The tension is manifested in a number of issues examined in this chapter, and particularly in Chapter 21, in relation to the evidentiary requirements. For example, if the evidentiary requirements for making family violence claims are too strict, there is a risk that genuine victims will be unduly denied access to the family violence exception. On the other hand, if the evidentiary bar is set too low, this may encourage vexatious claims and provide an incentive to use a claim of family violence as a means to obtain a migration outcome.

20.31 The challenge in terms of protecting the safety of victims of family violence lies in examining whether the right balance has been struck between these two competing policy objectives, surrounding the operation of the family violence exception.

### Definition of ‘relevant family violence’

20.32 The *Migration Regulations* define the term ‘relevant family violence’ to mean a reference to conduct, whether actual or threatened, towards:

- (a) the alleged victim; or
  - (b) a member of the family unit of the alleged victim; or
  - (c) a member of the family unit of the alleged perpetrator; or
  - (d) the property of the alleged victim; or
  - (e) the property of a member of the family unit of the alleged victim; or
  - (f) the property of a member of the family unit of the alleged perpetrator;
- that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.<sup>32</sup>

20.33 This definition takes a similar approach to the definition of family violence in the *Family Law Act 1975* (Cth) in giving focus to the effect of the conduct on the victim, rather than categorising types of conduct.

20.34 In Chapter 3, the ALRC considers the issue of the definition of family violence, and makes proposals that the *Migration Regulations* (Cth) be amended to insert a definition of family violence consistent with that recommended by the ALRC and New South Wales Law Reform Commission in the report *Family Violence—A National Legal Response*.<sup>33</sup>

31 *Migration Act 1958* (Cth) s 4.

32 *Migration Regulations 1994* (Cth) reg 1.21(1).

33 See Ch 3, Proposal 3-1.

***Violence perpetrated by a family member of the sponsor***

20.35 As noted in Chapter 3, in addressing the issue of the definition of family violence, a number of stakeholders argued that the family violence exception should apply in instances where the violence was perpetrated by a member of the sponsor's family, to take into account the nature, features and dynamics of family violence. Under the current legislative arrangements, sch 2 to the *Migration Regulations* provide, for each visa subclass, who may be an 'alleged perpetrator' and 'alleged victim' for the purposes of the family violence exception. In practice, the requirements mean that, in most instances, the 'alleged perpetrator' is the sponsor and the 'alleged victim' is the visa holder.

20.36 A number of stakeholders argued that the legislation should be changed to allow the family violence exception to apply in instances where a family member of the sponsor committed the family violence against the visa holder.<sup>34</sup> For example, ANU College of Law argued that the current legislative arrangements do not correspond with the dynamics of family violence. In its view, there is:

a serious fault in the wording of Division 1.5—Special provisions relating to family violence—and the wording in Schedule 2 visa criteria for various visas that contain the family violence exception. This is that the legislation assumes that the perpetrator is the sponsoring partner ... such that only violence committed by the sponsoring partner (whether against the applicant partner or family member) will trigger the exception.<sup>35</sup>

20.37 Similarly, the Refugee and Immigration Legal Service (RAILS) submitted that the family violence exception should apply where family violence has been committed by 'relatives in the household, other than the sponsoring spouse' or where 'the sponsoring spouse has not directly committed the violence, but has not taken steps to protect their partner against this violence'.<sup>36</sup>

***ALRC's view***

20.38 The ALRC considers that the issue of whether the family violence exception should apply in instances where the violence was perpetrated by a family member of the sponsor must be considered within the policy principles underpinning the family violence exception. That is, a migration outcome obtained on a partner visa is based on a *genuine and continuing* relationship between the sponsor and the visa applicant, or in the cases of secondary visa applicants, the relationship with the primary visa applicant. The family violence exception reflects the policy that a temporary visa holder should not have remain in a violent relationship *with the sponsor or primary visa applicant* in order to preserve his or her eligibility for permanent residence.

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34 ANU College of Law, *Submission CFV 79*, 7 June 2011; Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011.

35 ANU College of Law, *Submission CFV 79*, 7 June 2011.

36 Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011.

20.39 While the ALRC acknowledges that visa holders may be subjected to violence by a sponsor's family—consistent with the nature and dynamics of family violence—there may be situations where, despite this, the couple remain in a genuine and continuing relationship. For example, there may be instances where both the visa applicant and the sponsor are subjected to family violence by the sponsor's family members, who may disapprove of the relationship.

20.40 The ALRC considers that it is inconsistent with the policy for the family violence exception to apply where the relationship remains genuine and ongoing, without some risk of the integrity of the visa system. Rather, in such circumstances, it should be the role of the family law, criminal law, or other legal systems—rather than a migration outcome—that should be entrusted with protecting the safety of the visa applicant.

20.41 However, the ALRC considers that where the relationship has broken down, and family violence has been perpetrated by a family member of the sponsor, at the instigation or coercion of the sponsor, the violence can be attributed to the sponsor by recognising the instigation or coercion as a form of coercive and controlling conduct. Accordingly, in Chapter 3 the ALRC proposes that guidance should be provided in PAM 3 that the concept of 'controlling and coercive conduct' can include instances where the sponsor instigates or coerces a third party to perpetrate family violence against the visa holder.<sup>37</sup>

## The scope of the family violence exception

20.42 In the Migration Issues Paper, the ALRC asked whether the family violence exception under the *Migration Regulations* should be expanded to cover other visa categories.<sup>38</sup> Stakeholders addressed this issue by considering the merits of applying the family violence exception to temporary or permanent visas—rather than specific subclasses of visas. The next two sections deal with whether the family violence exception should be expanded to cover permanent visas and temporary visas.

### Permanent visas

#### *Submissions and consultations*

20.43 The majority of submissions expressed strong support for extending the scope of the family violence exception to cover *secondary visa applicants* applying onshore for a *permanent visa*.<sup>39</sup>

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37 Ibid, Proposal 3-9.

38 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Immigration Law*, ALRC Issues Paper 37 (2011), Question 3.

39 ANU College of Law, *Submission CFV 79*, 7 June 2011; National Legal Aid, *Submission CFV 75*, 20 May 2011; Law Institute of Victoria, *Submission CFV 74*, 17 May 2011; Good Shepherd Australia New Zealand, *Submission CFV 41*, 15 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011; Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011; Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011.

20.44 In particular, stakeholders argued that where temporary or provisional visas provide a pathway to permanent residency—that is, where the permanent visa requires the holder to have previously held a temporary or provisional visa—the nature of the dependency between the primary and secondary visa applicant may exacerbate family violence dynamics. For example, National Legal Aid expressed concern that the threat of removal of the application for a permanent visa is one way that family violence can be perpetuated:

We are of the view that family violence ... can potentially arise in any kind of visa ... our experience is that the primary visa applicant may use the conditions of the temporary visa to perpetrate what is in effect further family violence on the dependents of the visa holder by threatening to remove the spouse from the visa and keep the children on the visa. Towards the end of the temporary visa, when an application is made for permanent residency, it is also not uncommon for an application to be made for permanent residency on behalf of the primary visa applicant and the children, leaving the spouse of the visa applicant without legal status upon expiration of the temporary visa.<sup>40</sup>

20.45 The Immigration Advice and Rights Centre Inc (IARC), and Domestic Violence Victoria and others, also raised concerns in relation to secondary visa holders of a Temporary Business (Long Stay) Subclass 457 visa who were reliant on a relationship with the primary visa holder to obtain permanent residence. The IARC submitted that:

The law should be amended in such a way that when a permanent visa application is lodged (whether 2-stage economic visa or otherwise) by these primary applicants which include their dependent family members as secondary applicants, the dependent members' application should continue to be considered if the relationship has subsequently ceased due to family violence. Whether the permanent visa should be granted should depend on the grant of the perpetrator primary applicant's permanent visa subject to the usual public interest criteria.<sup>41</sup>

20.46 The ANU College of Law stressed that, in the case of visas with a two-stage pathway to permanent residence, it was essential that the family violence exception could be assessed at both the time of application and the time of decision for the permanent visa, because:

At present, a secondary visa applicant must still be a member of the family unit of the primary applicant at time of application. As seen above, the family may have already been living in Australia on the provisional visa for a number of years before the permanent visa is applied for. We submit that it is important to allow for a partner or other family member to escape family violence without losing their eligibility for permanent residency.<sup>42</sup>

20.47 More fundamentally, the ANU College of Law questioned why the current legislative arrangements allow access to the family violence exception for some permanent onshore visa categories but not others. In its view, 'to provide protection in one pathway of migration and not in analogous ones is inconsistent and bad policy':

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40 National Legal Aid, *Submission CFV 75*, 20 May 2011.

41 Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011.

42 ANU College of Law, *Submission CFV 79*, 7 June 2011.

A further example of a two-stage migration track that does not include the family violence exception is that of the temporary contributory parent visa followed by the permanent contributory parent visa onshore.<sup>43</sup>

However the family violence provisions are included in the Employer Nomination Scheme visa subclass 856, and the Distinguished Talent visa subclass 858. It is not clear why these visas, which can be applied for without ‘serving time’ on a pre-requisite provisional visa, offer the protection of the family violence provisions but onshore permanent visas do not. For instance, secondary applicants for the carer, remaining relative, aged parent, or business talent visas are not afforded this protection.<sup>44</sup>

20.48 Domestic Violence Victoria and others in a joint submission also expressed concern about the situation of those who arrive as secondary visa applicants of someone seeking asylum in Australia, and who experience family violence. It was argued that such persons, as a result of the family violence, may have an independent claim for refugee status, but are barred from doing so because of s 48A of the *Migration Act 1958* (Cth):

A woman who has applied for protection as a secondary applicant with her husband is barred from applying for protection again by s 48A of the *Migration Act*. However, separating from her husband due to experiences of family violence may actually give rise to an independent refugee claim for a woman from certain religious and cultural groups in certain countries. As it currently stands a woman in this position ... is reliant on the Minister exercising his non compellable and non reviewable discretion under s 48B of the *Migration Act* in order to be allowed to apply for protection again.

It may be that certain exceptions in the case of family violence could be added to s 48A of the *Migration Act* to account for circumstances of family violence occurring in Australia which may give rise to an independent refugee claim for a woman who has already applied for protection as part of a her husband’s application.<sup>45</sup>

### **ALRC’s views**

20.49 For a number of reasons, the ALRC considers that the family violence exception should be made accessible to *secondary visa applicants* where an application for a *permanent visa* is made onshore.

20.50 First, the ALRC is concerned that the nature of the dependence between primary and secondary visa applicants may exacerbate family violence dynamics for those who are on temporary visas with a pathway to permanent residence. As the ALRC argued in Chapter 3, the threat of removal from Australia—or in this case, the consequences of not being included in a permanent visa application—is one form of controlling and coercive conduct that may constitute family violence in the migration context.

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43 This two stage process could take the form of either a Contributory Parent Temporary (Subclass 173) visa followed by the Contributory Parent Visa (Subclass 143); or the Contributory Aged Parent Temporary (Subclass 844) followed by the Contributory Aged Parent Visa (Subclass 864).

44 ANU College of Law, *Submission CFV 79*, 7 June 2011.

45 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

20.51 Given that there is often a long transition period from a temporary to permanent visa, there is a real risk that the secondary visa holder will have endured significant family violence by the time an application for a permanent visa is made. As highlighted below, this situation may be exacerbated where a person on a temporary visa is not able to regularly access family violence services, health services, or financial assistance, to help him or her deal with family violence problems. The ALRC considers it entirely consistent with the spirit of the family violence exception that such persons should be able to access the family violence provisions once they are included in an application for a permanent visa.

20.52 During the course of the Inquiry, the ALRC learned that the Australian Government is committed to ensuring the integrity of temporary visas by placing much stricter control over onshore links from temporary to permanent residence, especially in relation to temporary skilled and student visas.<sup>46</sup> However, to the extent that these links still exist in the student and skilled visa categories, and indeed in other visa categories, the ALRC considers that secondary visa holders should be able to access the exception when an application for a permanent visa is made.

20.53 Secondly, there appears to be no sound policy reason why the family violence exception should apply to protect secondary visa applicants on certain business (skilled streamed) visas—as it currently does—but not to other onshore permanent visas. If there is potential for family violence to arise, the ALRC considers that the inconsistent and differential application of the family violence exception across different visa subclasses is potentially detrimental to the safety of victims of family violence. Consistency in the application of the family violence exception across visa subclasses where family violence may occur addresses the key theme in this Inquiry—that of *accessibility*.

20.54 Lastly, in making this proposal, the ALRC considers it important that where there is a pathway to permanent residence, the family violence exception should be accessible at both the time of application, and the time of decision in the relevant criteria for the permanent visa. This would ensure that such persons can remove themselves from the violent relationship at the earliest stage. For other permanent visas, where there is no pre-requisite temporary visa, the ALRC considers it is appropriate that the family violence exception can be accessed by secondary visa applicants at the time of the decision. This would cover instances where, once the application for the permanent visa is made onshore, the secondary visa applicant becomes a victim of family violence and may feel compelled to stay in the relationship so as not to jeopardise the application.

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46 See K Krukoc, 'Integrity and Other Challenges in a Sustainable Migration program and Australia's Skills Needs' (Paper presented at 5th Annual CPD Immigration Law Conference, Melbourne, 11 May 2010). The raft of measures introduced included stricter sponsorship requirements for employers of 457 visa holders; a new Migration Occupation in Demand List; and the introduction of a new points test for student visas with effect from 1 July 2011.

### ***Secondary visa applicants for protection visas***

20.55 While the family violence exception in the *Migration Regulations* does not extend to refugee claims—because claims for refugee status are assessed against the UN Convention Relating to the Status of Refugees—the ALRC acknowledges concerns raised by Domestic Violence Victoria and others about secondary visa applicants whose spouse or family member has made an application for a protection visa.

20.56 The ALRC acknowledges that there may well be instances where such secondary visa applicants are subjected to violence once in Australia, but due to the operation of the s 48A bar, are not able to apply for another protection visa, in their own right, onshore. The ALRC notes that s 48A only applies where an application for a protection visa has been made, and the grant of the visa has been refused (whether or not the application has been finally determined).<sup>47</sup> This means that where the application has been refused by DIAC, a secondary visa applicant is barred from making a further protection visa application in his or her own right. As explored in Chapter 22, family violence can be grounds on which a person may claim, and be granted, refugee status in Australia.

20.57 The ALRC is therefore interested in stakeholder views about how the ministerial discretion under s 48B—to waive the s 48A bar—is working in relation to victims of family violence, and whether there is a need to amend the *Migration Act* to ensure that such victims can make a further application for a protection visa onshore.

**Proposal 20–1** The *Migration Regulations 1994* (Cth) should be amended to provide that the family violence exception applies to all secondary applicants for all onshore permanent visas. The family violence exception should apply:

- (a) as a ‘time of application’ and a ‘time of decision’ criterion for visa subclasses where there is a pathway from temporary to permanent residence; and
- (b) as a ‘time of decision’ criterion, in all other cases.

**Question 20–2** Given that a secondary visa applicant, who has applied for and been refused a protection visa, is barred by s 48A of the *Migration Act 1958* (Cth) from making a further protection visa application onshore:

- (a) In practice, how is the ministerial discretion under s 48B—to waive the s 48A bar to making a further application for a protection visa onshore—working in relation to those who experience family violence?

<sup>47</sup> *Migration Act 1958* (Cth) s 48A(1)(a), (b). See also *Migration Act 1958* (Cth) s 5(9) which states an application is finally determined when either: a decision that has been made with respect to the application, is no longer subject to merits review; or a decision made with respect to application was subject to review but the period in which the review could be instituted has ended without a review having been instituted as prescribed.

- (b) Should s 48A of the *Migration Act 1958* (Cth) be amended to allow secondary visa applicants who are experiencing family violence, to make a further protection visa application onshore? If so, how?

### Temporary visas

20.58 The *Migration Act* defines a ‘temporary visa’ as a visa that allows the holder to remain in Australia (whether also to travel and enter Australia) for a specified period while the holder as a specified status.<sup>48</sup>

#### *Submissions and consultations*

##### *Access to the family violence provisions*

20.59 Some submissions explicitly noted that the family violence exception should *not* apply to those on temporary visas.<sup>49</sup> The Law Institute of Victoria pointed to practical problems in expanding the family violence exception to cover temporary visa holders, where the alleged victim is a secondary visa applicant:

If the family violence exception was expanded to temporary visas, a link would be maintained between the primary and secondary visa applicant, even though the couple have separated, because the secondary visa holder is wholly dependent on the validity of the primary visa and may then be limited in further visa options. The fate of the victim of family violence would still therefore be dependent on their former spouse.<sup>50</sup>

20.60 Accordingly, the Law Institute of Victoria recommended:

that a new temporary visa subclass be created for former spouses of temporary visa holders, who are victims of family violence. The new visa category could be granted for a temporary period such as 6 or 12 months, to allow the victim time to access support and decide how to proceed (for example, make a further visa application or exit Australia).<sup>51</sup>

20.61 Visa Lawyers Australia did not believe that other categories of visa applicants—beyond partner visas—should have access to the family violence exception unless certain conditions apply, such as:

- (1) The victim of family violence is dependent on the perpetrator’s visa to remain lawfully in Australia; and
- (2) The couple’s relationship is a ‘long-term relationship’, as per the definition in the *Migration Regulations 1994*; or
- (3) The couple have been lawfully resident in Australia for a minimum period of time, say 2 years; and
- (4) The couple have:

<sup>48</sup> *Migration Act 1958* (Cth) s 30.

<sup>49</sup> ANU College of Law, *Submission CFV 79*, 7 June 2011; Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011; Law Institute of Victoria, *Submission CFV 74*, 17 May 2011.

<sup>50</sup> Law Institute of Victoria, *Submission CFV 74*, 17 May 2011.

<sup>51</sup> *Ibid.*



- (i) Submitted a permanent visa application; or
- (ii) Have children who are:
  - (a) Studying full time; or
  - (b) Despite the family violence which has occurred, the parents will share parental responsibilities, as evidenced by a court order or other formal arrangement between the two parties.<sup>52</sup>

20.62 In the alternative, Visa Lawyers Australia supported the creation of a new visa, which would be granted through the exercise of ministerial intervention under s 351 of the *Migration Act*, thereby, ‘leaving it to the Minister’s discretion to consider the particular facts of the case to determine whether the victim should be entitled to a further temporary or permanent stay’.<sup>53</sup>

#### ***Access to family violence services and social security***

20.63 While some stakeholders did not support extending the family violence exception to cover temporary visa holders, concerns were raised about the limited ability for temporary visa holders to access crisis services, accommodation, and income support.<sup>54</sup> For example, Domestic Violence Victoria and others in a joint submission submitted that, in their experience:

Access to health, counselling, family violence and sexual assault services is variable and changeable for women on temporary visas. Each visa category carries different entitlements and these entitlements change regularly. While some agencies will provide a service to all women regardless of visa category, others restrict their services to those on permanent visas. This means that the system is extremely complex, confusing and difficult to navigate, both for service providers making referrals as well as for women attempting to link into the system.

Access to emergency accommodation for this group of women is very limited ... the lack of housing options, ineligibility for public and community housing and lack of income support all limit the capacity of family violence services to support women without residency rights.<sup>55</sup>

20.64 These concerns were captured in a case study provided in the submission from Women Everywhere Advocating Violence Elimination (WEAVE).<sup>56</sup>

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52 Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011.

53 Ibid.

54 Confidential, *Submission CFV 36*, 12 April 2011; Confidential, *Submission CFV 35*, 12 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

55 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

56 WEAVE, *Submission CFV 31*, 12 April 2011.

**Case study**

A woman and her children came to Australia as secondary holders of her partner's temporary, regional skilled visa. The child protection authorities removed her and the children from the family home due to his physical and sexual abuse of the children. The woman and her children were placed in domestic violence accommodation. Whilst there she received a letter from the Immigration Department telling her she was in breach of her visa conditions that could lead to her deportation. Further trauma on top of her and her children's devastating experience.

This woman had no access to the family violence provisions because of her visa type.

The option of paying for a visa in her own right was not possible given the financial cost (\$2,000) of making such an application. She had no access to Medicare, income support, Red Cross or NGO emergency moneys.

She had to rely on the support of the local domestic violence service. Not all domestic violence services have the resources to provide such long term financial and accommodation services to such women. It was only after an appeal, and many years living under such conditions, that she was granted a protection visa and became eligible for Centrelink support.

***ALRC's views******Access to the family violence exception***

20.65 The ALRC acknowledges that the integrity of the visa system requires that temporary visas, by their nature, do not envisage an applicant being in Australia beyond the specified period contemplated by the relevant visa. The ALRC considers that any move to extend the family violence exception to apply to *temporary* visas, such as student or tourists visas, does not uphold the integrity of the visa system. That is, a person on a temporary visa should not be automatically granted permanent residence solely by being a victim of family violence. This has the obvious risk of creating an incentive to claim family violence as a means of securing a migration outcome.

20.66 A situation involving a temporary visa holder can be distinguished from circumstances in which a *secondary* visa applicant has been in Australia for a number of years, and makes an application for a *permanent visa* onshore. As the ALRC has argued above, such persons may be in Australia for a considerable period of time, with the legitimate expectation that he or she will be included in an application for permanent residence when an application for a permanent visa is made. It accords with the spirit of the family violence exception to allow a secondary visa applicant to access the exception when an application for a permanent visa is made onshore. The ALRC considers that no such expectation for a permanent visa outcome is present for primary or secondary holders of a *temporary* visa.

20.67 In any event, the ALRC is of the view that there would be practical difficulties—as highlighted by submissions—in extending the family violence provisions to cover temporary visas—in particular, secondary holders of temporary visas.

**Ministerial intervention**

20.68 The ALRC shares concerns raised in submissions that persons on temporary visas may be subjected to family violence whilst in Australia. The ALRC is interested in stakeholder views as to whether temporary visa holders should be able to apply for ministerial intervention under s 351 of the *Migration Act*, in circumstances where a decision to refuse a visa has not been made. The ALRC considers that ministerial intervention would cover unique or exceptional circumstances—such as, where a temporary visa holder suffers significant harm as a result of family violence—that may compel the granting of a visa on compassionate grounds.

20.69 The ALRC notes in Chapter 21 that, in Canada, a person on a temporary visa can still apply for permanent residence on ‘Humanitarian and Compassionate’ grounds if he or she has experienced family violence.<sup>57</sup> A number of considerations must be taken into account in considering an application on this basis, including: establishment in and ties to Canada; the best interest of any children involved; health considerations; consequences of the separation of relatives; factors in the applicant’s country of origin; and the degree of establishment in Canada.<sup>58</sup> These factors suggest a policy that a victim of family violence, who has a degree of establishment in the country, can be considered for permanent residence notwithstanding that he or she is on a temporary visa. The ALRC considers that the approach taken in Canada could provide a useful model in the Australian context.

**Question 20–3** Section 351 of the *Migration Act 1958* (Cth) allows the Minister to substitute a decision for the decision of the Migration Review Tribunal if the Minister thinks that it is in the public interest to do so:

- (a) Should s 351 of the *Migration Act 1958* (Cth) be amended to allow victims of family violence who hold temporary visas to apply for ministerial intervention in circumstances where a decision to refuse a visa application has not been made by the Migration Review Tribunal?
- (b) If temporary visa holders can apply for ministerial intervention under s 351 of the *Migration Act 1958* (Cth), what factors should influence whether or not a victim of family violence should be granted permanent residence?

**Access family violence services and social security**

20.70 The ALRC shares stakeholder concerns that secondary temporary visa holders are not able to regularly access family violence services, income support, or crisis accommodation, and that this may jeopardise their safety. On the one hand, there is an argument that if the relationship on which the visa status depends has ended, the person

<sup>57</sup> See generally, Immigration and Citizenship Canada, *IP 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* (2011).

<sup>58</sup> See Ch 21.

should return home to the country of origin. On the other, Australia has moral and legal obligations to ensure the safety of victims of family violence, once they are in Australia, whether temporarily or permanently.

20.71 There is a legitimate question as to whether, and to what extent, this should be a responsibility of the migration system, or whether it is more appropriately addressed through the social security or other law systems. In the ALRC's preliminary view, there is a role for the migration system, to the extent that certain visas may in practice—as suggested by stakeholders—restrict the ability of victims to access family violence services and social security payments and entitlements. The ALRC considers that access to appropriate social security payments and entitlements are important in empowering victims to leave violent relationships, and hence protect their safety.

20.72 As noted in Chapter 7, a general principle of social security law is that a person must be an Australian resident—defined as an Australian citizen, a permanent visa holder, or a Protected Special Category visa holder—in order to qualify for social security payments and entitlements.<sup>59</sup> In addition to meeting the residence requirements, some payments require an applicant to also meet the 'newly arrived resident's waiting period', being a period of, or periods totalling, 104 weeks (2 years) before benefits are payable.<sup>60</sup>

20.73 However, the Minister for Families, Community Services and Indigenous Affairs has power to make determinations to allow the holders of particular temporary visas to meet the residence requirements for Special Benefit.<sup>61</sup> Currently, such determinations are in force for nine types of temporary visa, including Partner (Subclass 820 and 209) visas.<sup>62</sup>

20.74 The ALRC is therefore interested in stakeholder comments about whether those on temporary visas should be able to access Special Benefit under the *Social Security Act* and, if so, which particular temporary visa classes should be exempt from the residence requirements under the *Social Security Act* to allow holders to access such benefits. The ALRC notes, for example, that submissions highlighted family violence concerns in relation to those on student and tourist visas, as well as secondary holders of subclass 457 visas. It would be difficult to expand Special Benefit payments to all temporary visa subclasses without jeopardising the integrity of the social security system. A question in relation to this issue is raised in Chapter 7.<sup>63</sup>

59 *Social Security Act 1991* (Cth) s 7(2); Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011, [2.2.4.10] (Verifying Residence/Citizenship).

60 Department of Families, Housing, Community Services and Indigenous Affairs, *Social Security Payments Residence Criteria* (2011) <[www.fahcsia.gov.au/sa/international/policy/Residence\\_Criteria](http://www.fahcsia.gov.au/sa/international/policy/Residence_Criteria)> at 12 July 2011.

61 *Ibid.*

62 The other visas include: subclasses 310 and 826 (interdependency, provisional); subclass 785 (temporary protection); subclass 786 (humanitarian concerns); subclass 447 (Secondary Movement Offshore Entry); subclass 451 (Secondary Movement Relocation); subclass 695 (Return Pending); subclass 787 (Witness Protection (Trafficking) (Temporary); Subclass 070 (Bridging Removal Pending) and Criminal Justice Stay visas relating to the offence of people trafficking, sexual servitude or deceptive recruiting.

63 Ch 7, Question 7–7.

### Prospective marriage visas

20.75 In *Equality Before the Law* the ALRC expressed concerns in relation to the position of women entering Australia on a Prospective Marriage Visa (Subclass 300).<sup>64</sup> As noted above, the prospective marriage visa holder must marry his or her Australian sponsor within the visa period (nine months), before applying for a temporary or permanent spouse visa.<sup>65</sup>

20.76 At the time of applying for a temporary Partner Visa (Subclass 820), applicants who are holders (or previous holders) of a Prospective Marriage Visa (Subclass 300) can invoke the family violence exception. However, the family violence exception applies only if: the person *has married* his or her Australian sponsor; the marriage has broken down; and there has been family violence committed against the visa applicant, a member of the family unit of the applicant, or a dependent child of the couple by the Australian partner.<sup>66</sup>

20.77 In effect, if the marriage never takes place, for whatever reason, the non-citizen who is a victim of family violence is precluded from accessing the family violence exception. In the report *Equality Before the Law: Justice for Women* (ALRC Report 69), the ALRC highlighted stakeholder concerns that ‘the provisions treat women as a commodity in that if the relationship does not work out, the woman can be sent back to her country of origin’.<sup>67</sup> Similar concerns have been expressed by a number of commentators.<sup>68</sup> For example, Dr Edwin Odhiambo-Abuya argued that:

Despite the reality of domestic violence occurring in such relationships ... the law fails to recognise there is little or no difference between domestic violence inside or outside the marriage for immigrant victims. It is easy to imagine that both married and unmarried victims have similar challenges to getting citizenship. Based on this assumption, it would be proper to amend this part of the legislation to bring it to terms with reality. Effectively, this will make fiancées eligible to benefit from domestic violence concessions currently offered to their married counterparts under immigration law.<sup>69</sup>

20.78 The requirement for a Prospective Marriage Visa (Subclass 300) holder to have married his or her sponsor before accessing the family violence exception, was reinforced by legislative amendments affecting visa applications made on or after 9 September 2009, these require that the family violence ‘must have occurred while the

64 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), 224.

65 At the time of *Equality Before the Law*, the time period within which the parties were required to marry was 6 months.

66 See *Migration Regulations 1994* (Cth) sch 2 cl 820.211(8)–(9).

67 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), 224.

68 See M Crock, ‘Women and Migration Law’ in P Eastal (ed), *Women and the Law* (2010) 328; P Eastal, ‘Broken Promises: Violence Against Immigrant Women in the Home’ (1996) 21(2) *Alternative Law Journal* 53; E Odhiambo-Abuya, ‘The Pain of Love: Spousal Immigration and Domestic Violence in Australia—A Regime in Chaos?’ (2003) 12 *Pacific Rim Law & Policy Journal* 673.

69 E Odhiambo-Abuya, ‘The Pain of Love: Spousal Immigration and Domestic Violence in Australia—A Regime in Chaos?’ (2003) 12 *Pacific Rim Law & Policy Journal* 673, 706.

married relationship or de facto relationship was in existence between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator'.<sup>70</sup>

20.79 In *Equality Before the Law*, the ALRC recommended that the family violence exception should apply to partners who have been sponsored on a Prospective Marriage Visa (Subclass 300), whether the breakdown occurred at any time before the marriage, or after marriage, but before an application for permanent residence has been lodged.<sup>71</sup>

### ***Submissions and consultations***

20.80 In the Migration Issues Paper, the ALRC asked whether the *Migration Regulations* should be amended to allow former or current Prospective Marriage (Subclass 300) visa holders to access the family violence exception when applying for a temporary visa in circumstances where he or she has not married the Australian sponsor.<sup>72</sup>

20.81 A majority of stakeholders were of the view that the family violence exception should extend to Prospective Marriage (Subclass 300) visa holders.<sup>73</sup> In expressing support for such an amendment, submissions highlighted the particularly vulnerable position of those on a prospective marriage visa in relation to other partner visa categories. The ALRC also heard in consultations that—in addition to the threat of removal—given their short time in Australia, prospective marriage visa holders who experience family violence are highly vulnerable due to isolation, lack of knowledge of the legal system and the inability to access services.

### ***Vulnerable position of prospective marriage visa holders***

20.82 Stakeholder concerns about the vulnerable position of prospective marriage visa holders were exemplified in the submission by Erskine Rodan and Associates, who said that, in their experience:

Some men are able to convince vulnerable women to move to Australia on the promise that he will one day marry her. However, once in Australia, the woman becomes the victim of abuse and then ultimately, the engagement is called off. Some women are falsely imprisoned in their fiancés' homes and are regularly raped—an action justified by their abuser with the promise of marriage. Many women are

70 See *Migration Amendment Regulations (No 12) 2009* (Cth). The requirement is expressed in regs 1.23(3),(5),(7), (12), (14).

71 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), Rec 10–4.

72 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Immigration Law*, ALRC Issues Paper 37 (2011), Question 4.

73 Erskine Rodan and Associates, *Submission CFV 80*, 17 June 2011; ANU College of Law, *Submission CFV 79*, 7 June 2011; Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011; National Legal Aid, *Submission CFV 75*, 20 May 2011; Law Institute of Victoria, *Submission CFV 74*, 17 May 2011; Good Shepherd Australia New Zealand, *Submission CFV 41*, 15 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011; Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011; Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

financially and psychologically abused ... Such cases seem to equate to sex-trafficking of women who have come to Australia in good faith. Despite this, however, these women are not entitled to rely on the family violence exception.<sup>74</sup>

20.83 The Australian Family and Domestic Violence Clearinghouse (ADFVC) was concerned that ‘sponsors use this requirement to marry as a weapon to control their prospective spouses’.<sup>75</sup> In a joint submission, Domestic Violence Victoria and others expressed similar concerns: that, in practice, the *Migration Regulations* ‘create opportunities for abuse of the system’.<sup>76</sup>

20.84 The ANU College of Law argued that it is arbitrary to allow access to the family violence provisions only to those who have married:

Given that the prospective marriage visa presupposes an existing partner-like relationship, with full potential for family violence to manifest, it is an arbitrary and insupportable distinction to make between applicants who have married their sponsor (who can access the family violence provisions) and applicants who have not married their sponsor but who are victims of family violence committed by their sponsor (who can’t access the family violence provisions).<sup>77</sup>

20.85 The IARC, while acknowledging the policy position that, if the marriage does not eventuate, a prospective marriage visa holder should return home to the country of origin, argued that in reality, a range of cultural, familial and social factors may force victims to remain in violent relationships to avoid the negative consequences of returning home unharmed:

There are many subclass 300 visa entrants who find it very difficult to return to their respective countries when their marriage fails to proceed. The difficulties include cultural (shame that it would bring to themselves and their families, e.g. where customary or religious marriage has occurred before they departed their country), financial (no independent means to support themselves) and social (leaving their respective fiancés results in situations where their family disowns them or, worse, persecutes them due to their unwillingness to submit themselves to their sponsors). The notion of protecting visa applicants who do not submit themselves to an otherwise abusive relationship seems at odds with the thought that these victims should remain in the relationship and marry the perpetrator sponsoring spouse.<sup>78</sup>

### ***Preserving the integrity of the visa system***

20.86 Stakeholders also expressed an awareness of the need to balance the protection of victims of family violence with the integrity of the visa system as a strong counter balancing theme. For example, the Law Institute of Victoria acknowledged that:

A prospective marriage visa is a temporary visa and that the purpose of the marriage requirement is to ensure the integrity of the Partner Visa program, which is intended to facilitate the migration of married and de facto partners.<sup>79</sup>

74 Erskine Rodan and Associates, *Submission CFV 80*, 17 June 2011.

75 ADFVC, *Submission CFV 26*, 11 April 2011.

76 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

77 ANU College of Law, *Submission CFV 79*, 7 June 2011.

78 Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011.

79 Law Institute of Victoria, *Submission CFV 74*, 17 May 2011.

20.87 Visa Lawyers Australia, however, submitted that allowing prospective marriage visa holders to access the family violence provisions would not harm the integrity of the visa system:

We assume that the exclusion of subclass 300 visa holders from the family violence provisions is justified on the basis that they have not shown their commitment to remaining in Australia by marrying their Australian spouse. However, for the grant of a prospective marriage visa, DIAC has had to accept that the visa applicant has a genuine intention to marry their partner once they arrive in Australia. The genuineness of this intention can be further confirmed by the person's travel to Australia and the contract they have with their Australian fiancé once they are in Australia. Evidence of this could be provided with any application an unmarried sc 300 visa holder makes for a spouse visa under the family violence provisions. Opening the Partner Visa subclass 820 to unmarried sc 300 visa holders cannot harm the integrity of the family violence scheme, given the extensive safeguards in place to determine whether family violence has occurred.<sup>80</sup>

20.88 Similarly, WEAVE argued that the genuineness of the relationship should not be a factor to take into consideration because 'such assessment would have taken place when the visa for temporary residence was approved'.<sup>81</sup>

20.89 In consultations, the ALRC heard concerns that extending the family violence provisions to prospective marriage visa holders would risk 'incentivising' family violence to obtain a quick, permanent migration outcome. That is, by claiming to have suffered family violence, a prospective marriage visa holder can bypass the marriage requirement, and the need to be on a temporary spouse visa for two years before the grant of the permanent residence visa can be considered. For example, in consultation, DIAC recounted that it was aware of a number of family violence claims involving applicants where the applicants were represented by the same migration agent, had used the same psychologists and social worker, and claimed to have suffered family violence based on similar specific incidents. Such cases raise concerns about possibly fraudulent or manipulated claims and possible abuse of the migration system to secure a permanent visa outcome.<sup>82</sup>

### ***Reform options***

20.90 In addition to allowing prospective marriage visa holders to access the family violence exception, stakeholders outlined in consultations a range of other possible options for reform to address issues which arise in relation to the prospective marriage visa. These options included: the introduction of a new temporary visa; and abolishing the prospective marriage visa in favour of a subclass of tourist visas similar to the approach taken in New Zealand. These options, along with the ALRC's views, are explored below.

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80 Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011.

81 WEAVE, *Submission CFV 31*, 12 April 2011.

82 Department of Immigration and Citizenship, *Consultation*, Canberra, 17 May 2011.



***Access to the family violence provisions***

20.91 One possible option for reform is to amend the requirements for a combined Partner (Subclass 820/801) visa to allow access to the family violence exception in circumstances where the current, or former holder of a prospective marriage visa, has not married his or her Australian spouse. In effect, this would allow for the grant of a permanent visa to victims of family violence who are subclass 300 visa holders, and who have not married their Australian sponsor.

20.92 On one hand, the ALRC recognises that there are legitimate policy reasons underlying the outcome that, if the visa applicant does not marry his or her sponsor—as is the purpose of the Prospective Marriage (Subclass 300) visa—that person should return to the country of origin. As stakeholders argued in consultations, opening the family violence exception to those on prospective marriage visas risks ‘incentivising’ family violence claims as a means to obtain a quick permanent migration outcome.

20.93 In addition, the ALRC notes that Australia’s family migration stream is capped. Given the considerable demand for partner migration, issues of fairness may arise where amendments allow those who have not married their Australian sponsor to access the family violence exception—and be granted a permanent visa—at the expense of others who have married and have already spent considerable time in Australia.

20.94 On the other hand, the ALRC considers that there are a number of exceptional reasons as to why prospective marriage visa holders should be able to access the family violence exception.

20.95 First, the ALRC is concerned that prospective marriage visa holders are more vulnerable than those on other partner visa classes. The ALRC considers that—given the limited amount of time in Australia (9 months)—vulnerability factors including isolation, lack social support, language barriers, and lack of knowledge of the legal system are exacerbated for victims of family violence in this position. The ALRC is particularly concerned about extreme cases that may involve sex-trafficking and extreme sexual and psychological abuse.

20.96 Secondly, while the prospective marriage visa is a provisional visa, there is a clear pathway to permanent residence, via the three-stage process outlined previously. The grant of the prospective marriage visa presupposes that there is already a relationship between the applicant and the sponsor. In the normal course of events, a person who enters Australia on a prospective marriage visa has the genuine intention of marrying their sponsor, and subsequently applying for permanent residence by way of a combined 820/801 visa application. However, as stakeholders have emphasised, there is a real risk that threats to ‘withdraw from the marriage’, and thus removal from Australia can be used to perpetuate family violence dynamics. Consistent with the ALRC’s position in relation to secondary visa holders, the ALRC considers that prospective marriage visa holders should not have to remain in a violent relationship in order to secure a migration outcome.

20.97 Weighing up these factors, the ALRC considers that the family violence exception should be extended to victims of family violence who are holders or former holders of a prospective marriage visa when applying for a combined Partner (820/801) visa. In doing so, the ALRC acknowledges the potential that this may further expose the system to fraudulent, manipulated, or exaggerated claims. While any such issues do not outweigh the considerations in favour of extending the family violence exception, in order to minimise such risks, the ALRC is interested in stakeholder views about what measures, if any, can be taken to ensure the integrity of the visa system if prospective marriage visa holders are able to access the family violence exception.

#### ***Introduction of a new temporary visa***

20.98 The ALRC acknowledges concerns raised by stakeholders that prospective marriage visa holders who have entered Australia, but who have not married their Australian sponsor, find it difficult to return home for a range of cultural, social and economic reasons. In particular, the ALRC is concerned that those returning to their home countries after a ‘failed marriage’ may be ostracised, or, in the worst case scenario, persecuted by family members and communities. Evidently, there are implications for the safety of victims of family violence in returning home in these circumstances.

20.99 Another option that may improve the safety of victims would be to create a new temporary visa that would allow a former prospective marriage visa holder who is the victim of family violence, to remain in Australia for a period of time to: apply for a visa in their own right; or to make arrangements to return home. To address concerns noted above, in relation to temporary visa holders and their inability to access family violence and migration support services, health services and accommodation, the ALRC envisages that such a visa could be exempted from the residence requirements under the *Social Security Act*, to allow holders to access Special Benefit payments. Access to such benefits could improve the safety of victims of family violence by allowing them financial independence to deal with the issues arising from the family violence, to access services, or seek legal advice in applying for a new visa. The ALRC makes a proposal in relation to this in Chapter 7.

20.100 There is a historical precedent for such a visa. For example, the ‘Return Pending Visa’—which was introduced in 1999 and ceased in 2004—allowed temporary protection visa holders, whose application for a further protection visa had been finally refused, to stay in Australia for 18 months in order to make arrangements for departure. The Return Pending Visa was exempt from the residency requirements under the *Social Security Act*, and allowed holders to access Special Benefit.<sup>83</sup> The ALRC envisages that the arrangements under this visa may provide a useful model for the development of any new visa.

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83 Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* <[www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)> at 22 July 2011 pt 9, ch 2, s 9.2.9 (Visa Subclasses 600-699 Payment Eligibility, Visa subclass 695 Return Pending).

20.101 In addition, a temporary visa such as the one proposed is consistent with the underlying themes in the Inquiry expressed in Chapter 2—to preserve the autonomy of individuals, by allowing them the ability to make a decision about whether to apply for another visa, or to return home.

***The New Zealand visitor visa model***

20.102 Alternatively, another suggestion made by stakeholders was the possible abolition of the Prospective Marriage (Subclass 300) visa altogether, instead allowing prospective marriage applicants to enter on a special category visitor visa. Such an approach has been adopted in New Zealand, where there is no visa equivalent to a prospective marriage visa.<sup>84</sup> Instead, applicants can apply for a special category of visitor visa, based on a ‘genuine and stable’ partnership with a New Zealand resident or citizen.

20.103 The duration of the visa granted is dependent on the duration of the partnership relied upon.<sup>85</sup> For example, if the partnership has existed for less than 12 months at the time assessed, then the initial visitor visa cannot exceed 12 months. If the relationship has existed beyond 12 months, a visitor visa can be granted for a maximum of two years. Once onshore, an application for permanent residence can be made under the Family Visa category. As discussed in Chapter 21, an applicant for permanent residence class visas who is a victim of family violence in New Zealand may be granted a permanent visa under a special category visa (similar to Australia’s family violence exception).

20.104 Applicants for this category of visitor visa must be sponsored by their New Zealand partner, and the New Zealand partner must pass the requirement for partners supporting ‘partnership-based’ temporary applications. The character requirement will not be met if the New Zealand citizen has, in the seven years prior to the date of the application, been convicted of: any offence involving domestic violence; and any offence of a sexual nature, unless granted a character waiver.<sup>86</sup> A character assessment is usually determined by way of a New Zealand police certificate. In considering whether to grant a character waiver, officers will take into account, among other things: the seriousness of the offence; whether there was more than one offence; and how long ago the offence occurred.<sup>87</sup> Officers must comply with the requirements of procedural fairness and natural justice in making decisions to waive the character requirement.<sup>88</sup>

20.105 The ALRC considers that abolishing the prospective marriage visa subclass in Australia, in favour of a special category of sponsored visitor visas, similar to New Zealand, would have a number of potential benefits.

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84 However, New Zealand has a visa that allows for the entry into New Zealand for a period of three months in order to facilitate arranged marriages. This special category of visa is a subset of Visitors Visa. See New Zealand Immigration Service, *Operations Manual: Temporary Entry* (2011), V3.35 ‘Entry into New Zealand for the Purposes of Culturally Arranged Marriage’.

85 Ibid, V 13.5.1(a).

86 Ibid, E7.45 (a) and (b).

87 Ibid, E7.45.10 (c).

88 Ibid, E7.45.10 (d).

20.106 First, it would remove the requirement that a person must have married their sponsor at the time of applying for permanent residence in order to access the family violence exception. Persons who enter on the proposed visitor visa and then apply for a Partner Visa onshore—based on either a marriage or a de facto relationship—would have access to the family violence provisions.

20.107 Secondly, and importantly, the combination of a requirement for a ‘genuine relationship’, and character requirements for sponsorship, would provide a measure of safety for victims of family violence when compared with the current prospective marriage visa scheme, as no such checks on sponsorship currently takes place.

20.108 The ALRC considers that, in theory, under the current legislative framework, there appears to be no reason why, for example, a person could not enter Australia on a tourist visa and then marry or form a de-facto relationship with an Australian on which an application for a Partner Visa could be based. However, the ALRC acknowledges concerns expressed about the limited protection for victims of family violence offered by the current framework. For example, the ADFVC submitted that:

Women on tourist visas have been known to arrive in Australia at the invitation of an Australian citizen/permanent resident as a mechanism to bypass the sponsorship requirements. This is a particularly vulnerable group as these women are engaging in relationships with Australian citizens and permanent resident yet they do not have protection under the family violence exception.<sup>89</sup>

20.109 The ALRC is interested in stakeholder views about the merits of repealing the Prospective Marriage (Subclass 300) visa, in favour of a sponsored visitor visa similar to that in New Zealand.

#### **OPTION ONE: Proposal 20–2**

**Proposal 20–2** The *Migration Regulations 1994* (Cth) should be amended to allow a former or current Prospective Marriage (Subclass 300) visa holder to access the family violence exception when applying for a temporary partner visa in circumstances where he or she has not married the Australian sponsor.

#### **OPTION TWO: Proposal 20–3**

**Proposal 20–3** Holders of a Prospective Marriage (Subclass 300) visa who are victims of family violence but who have not married their Australian sponsor, should be allowed to apply for:

- (a) a temporary visa, in order make arrangements to leave Australia; or
- (b) a different class of visa.

<sup>89</sup> ADFVC, *Submission CFV 26*, 11 April 2011.

**Question 20–4** If Prospective Marriage (Subclass 300) visa holders are granted access to the family violence exception, what amendments, if any, are necessary to the *Migration Regulations 1994* (Cth) to ensure the integrity of the visa system?

**Question 20–5** Should the Prospective Marriage (Subclass 300) visa be abolished, and instead, allow persons who wish to enter Australia to marry an Australian sponsor to do so on a special class of visitor visa, similar to that in place in New Zealand?

## Sponsorship

20.110 As noted earlier, all applicants for a partner visa must be sponsored by an Australian citizen or permanent resident. Currently, there are no separate provisions in the *Migration Regulations* under which an Australian citizen or permanent resident must apply, and be approved, as a sponsor for a partner visa. Rather, a citizen or permanent resident applies to be a sponsor by filling out a sponsorship application form, which is then submitted to DIAC along with the partner visa application.<sup>90</sup> This means that the ‘sponsorship approval is dealt with as part of the visa approval process, treating the sponsor and the visa applicants essentially as joint parties to the same application’.

20.111 There are limitations on sponsorship. The *Migration Regulations* provide that subject to certain exceptions, a person cannot sponsor more than two persons in a lifetime, for partner visas, and such sponsorships must occur at least five years apart.<sup>91</sup> However, the Minister for Immigration and Citizenship may exercise his or her discretion to waive the limitation and approve the sponsorship where there are compelling circumstances affecting the sponsor.<sup>92</sup>

20.112 *Time for Action* acknowledged that:

Women who are sponsored by Australian citizens and residents are particularly vulnerable to abuse due to the threat of deportation. In the late 1980s and early 1990s, domestic violence practitioners became concerned about the number of repeat or serial sponsors who abused the women and then triggered their deportation. Predominantly, the concern related to the abuse of Filipino women by serial sponsors, although more recently concerns have increased about women sponsored from other countries such as Russia, Thailand, Indonesia and Fiji.<sup>93</sup>

20.113 In *Equality Before the Law*, the ALRC expressed similar concerns about serial sponsors and recommended that where a prospective sponsor’s record showed past

90 Department of Immigration and Citizenship, *Form SP 40—Sponsorship for a Partner to Migrate to Australia* 2011.

91 *Migration Regulations 1994* (Cth) reg 1.20J.

92 Ibid reg 1.20J(2).

93 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), [2.5] (citations omitted).

violence or previous sponsorships, information should be drawn to the attention of the applicant by a DIAC officer at an interview. The ALRC also recommended that the information must be provided in a culturally and linguistically appropriate manner and the interviewer must be satisfied that the applicant understands the nature of the information provided.<sup>94</sup>

### ***Requirements for sponsorship of a child***

20.114 Legislative changes to the *Migration Regulations* that took effect from 27 March 2010 inserted a new sponsorship limitation for child, partner and prospective marriage visas.<sup>95</sup> The new regulations now provide that the Minister for Immigration and Citizenship must refuse sponsorships where a child is included in a visa and the sponsor has a conviction or outstanding charge for a ‘registrable offence’.<sup>96</sup> For a child visa, the sponsor’s partner or spouse must also be free of a conviction or outstanding charge for a ‘registrable offence’. A ‘registrable offence’ is defined within the meaning of state and territory legislation dealing with registrable or reportable offences.<sup>97</sup>

20.115 The *Migration Regulations* also gives power to the Minister for Immigration and Citizenship to request that a sponsor, or the sponsor’s partner, submit to a police check, and to refuse sponsorship if the police check is not provided.<sup>98</sup> Police checks can be obtained from the Australian Federal Police.<sup>99</sup>

20.116 In the Migration Issues Paper, the ALRC asked whether sponsors for partner visas should—in a manner similar to the requirement for child sponsorships—be required to submit to a police check in relation to past family violence convictions or protection orders, and whether such information should be disclosed to a prospective visa applicant.<sup>100</sup> The ALRC highlighted that this requirement would be aimed at protecting the safety of prospective partners who may not be aware of a sponsor’s past history of violence, and allowing them to make informed choices about pursuing the relationship. The ALRC emphasised that, in including such a requirement, a number of issues would need to be addressed, including: affording procedural fairness to the

94 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), Rec 10–7. This recommendation was aimed at protecting the safety of women and to assist them to exercise their right to fully informed choice in marrying.

95 See *Migration Amendment Regulations (No. 2) 2010* (Cth).

96 *Migration Regulations 1994* (Cth) reg 1.20KB(2).

97 Ibid reg 1.20KB(13) defines ‘registrable offence’ as a registrable offence within the meaning of, or an offence that would be registrable under the following Acts if it were committed in that jurisdiction: *Child Protection (Offenders Registration) Act 2000* (NSW); *Sex Offenders Registration Act 2006* (SA); *Crimes (Child Sex Offenders) Act 2005* (ACT). An offence is a reportable offence within the meaning of the following Acts: the *Child Protection (Offender Reporting) Act 2004* (Qld); *Community Protection (Offender Reporting) Act 2004* (WA); *Community Protection (Offender Reporting) Act 2005* (Tas); *Child Protection (Offender Reporting and Registration) Act* (NT).

98 *Migration Act 1958* (Cth) s 56 contains a general power for the department to collect information relevant to a visa application.

99 Sponsors (or partners) must complete the National Police Check application form available from the Australian Federal Police website. See Australian Federal Police, *National Police Checks* <<http://www.afp.gov.au/what-we-do/police-checks/national-police-checks.aspx>> at 7 February 2011.

100 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Immigration Law*, ALRC Issues Paper 37 (2011), Question 16.

sponsor; avoiding discrimination on the basis of previous convictions; and privacy concerns.<sup>101</sup>

### ***Submissions and consultations***

20.117 The majority of stakeholders who responded to this question supported the need for sponsors to submit to a police check in relation to past family violence convictions or protection orders when making an application for sponsorship. However, stakeholders were divided on how this information should be used, and whether or not such information should be disclosed to the potential visa applicant. In consultations, some stakeholders also expressed concern about procedural fairness to the sponsor; privacy; and discrimination on the basis of prior conviction; and how such issues would be resolved in practice.

20.118 Good Shepherd Australia New Zealand submitted that:

Current Australian policy requires an immigrant to have a clear criminal background check, psychological report and character test. Professionals in Australia working with domestic violence victims ask why the sponsoring men are not required to reciprocally undergo the same checks and send the information to their potential partners. Both sponsors and partners deserve complete explanations of the rights and expectations in marriage in Australia, legal definitions and consequences of forced and servile marriage, trafficking, family violence and other related crimes.<sup>102</sup>

20.119 Those stakeholders that supported the requirement for sponsors to submit to a police check and for such information to be disclosed to the prospective applicant, stressed that having such information was vital to the safety of the applicant.<sup>103</sup> For example, Domestic Violence Victoria and others in a joint submission submitted that:

This is a critical and urgent area of reform. It is a significant inequity that an applicant is required to undergo rigorous character and police checks whereas sponsors do not receive the same level of scrutiny. This checking process should be an essential safeguard for potential victims of family violence, and the absence of such a process is a significant gap that allows users to manipulate the immigration system to perpetrate violence against women.<sup>104</sup>

20.120 Stakeholders that opposed the police check and disclosure questioned the utility of a police check, and whether the provision of such information would be beneficial to the prospective visa applicant.<sup>105</sup> For example, the IARC submitted that the current Australian Federal Police certificate does not provide information on AVOs against the person. Therefore, an obligation to submit a police check only reveals the sponsor's past conviction:

The balance between protecting victims of family violence and allowing adults to make their own considered choice is a delicate pursuit. While Australian residents and

<sup>101</sup> Ibid, Question 17.

<sup>102</sup> Good Shepherd Australia New Zealand, *Submission CFV 41*, 15 April 2011.

<sup>103</sup> Ibid; Confidential, *Submission CFV 36*, 12 April 2011; Confidential, *Submission CFV 35*, 12 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

<sup>104</sup> Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

<sup>105</sup> Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011; Law Institute of Victoria, *Submission CFV 74*, 17 May 2011; Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011.

citizens are not required to declare their family violence records before cohabitating with their respective spouses, it may be questionable why the law should treat these people differently when their counterparts are foreign nationals.<sup>106</sup>

20.121 RAILS expressed similar concerns in relation to whether a police check could provide all the relevant information to the prospective visa applicant:

Consideration would need to be given to people who may not have a criminal record but have perpetrated acts of violence in the past, particularly against previously sponsored partners. In these cases the person may be subject to a Magistrates Court (Protection Order or Apprehended Violence Order) which may or may not necessarily appear on the AFP certificate as it is a civil offence. Consideration should be given as to how the *Migration Act* could be informed of these matters.<sup>107</sup>

20.122 The Law Institute of Victoria argued that the provision of information may induce a false sense of security for prospective visa applicants, because prior convictions may not be ‘an accurate predictor of future family violence being perpetrated by the sponsor’, and therefore ‘the proposal might provide some false sense of security to applicants about the likelihood of experiencing family violence without a proper basis’.<sup>108</sup>

#### *Alternative options for reform*

20.123 As an alternative to the provision of information to a prospective visa applicant based on a police check, Visa Lawyers Australia submitted that the separation of sponsorship applications and visa applications into distinct legal provisions warrants consideration:

While approval sponsorship would remain a criterion for the grant of the visa, distinct legal provisions dealing solely with family violence sponsorship applications would allow DIAC to treat the sponsor as a client distinct from the visa applicant. This in turn would assist DIAC in discussing character concerns (or any other issue that goes to the eligibility of the sponsor) with the sponsor confidentially, and without the risk of disclosure to the visa applicant. Where it is evident that a sponsor has a violent past, DIAC could be given the power to refuse sponsorship on the basis that the sponsor is not of good character. Such a decision, giving reasons for the decision, would need to be sent to the sponsor only, and a separate decision sent to the sponsor that the sponsorship has been refused.<sup>109</sup>

20.124 The IARC was hesitant in precluding a person from being a sponsor on the basis of past family violence because it may be ‘overly intrusive’. Therefore, it was argued that better education and information dissemination to the prospective visa applicant may provide a more measured approach:

If the law intends to protect those who are less able to protect themselves due to lack of knowledge then we submit that the legislative change should include a mandatory education component, which would enable individual visa applicants to be aware of

106 Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011.

107 Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011.

108 Law Institute of Victoria, *Submission CFV 74*, 17 May 2011.

109 Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011.



relevant facts, facilitating them in making their own decisions and dealing with potential consequences.<sup>110</sup>

### ***ALRC's views***

20.125 The ALRC reiterates its view expressed in *Equality Before the Law*, that the 'Australian government has a special responsibility to immigrant women who are particularly vulnerable to abuse and the consequences of abuse' and therefore should 'assist them to exercise their right to a fully informed choice in marrying'.<sup>111</sup> The issue in this context is whether such assistance should involve disclosure of the sponsor's past history of family violence to a prospective visa applicant.

20.126 The ALRC agrees that requiring DIAC to disclose a sponsor's past history of family violence would be problematic. Having regard to the overall objective of improving safety, the ALRC shares concerns expressed by stakeholders that a police check may not provide all the relevant information in relation to a sponsor's history of violence, and therefore, is unlikely to provide an accurate reflection as to any future likelihood of family violence. In any event, the ALRC considers that the issues of procedural fairness to the alleged perpetrator, privacy and discrimination may outweigh any potential gains from disclosure to the applicant.

20.127 The ALRC considers that the current safeguards surrounding serial sponsorship—a limit of no more than two sponsored in a lifetime and a five year period between sponsorships—already provides some measure of protection for victims of family violence. However, it remains important for prospective visa applicants to have knowledge about the family violence exception, and services available to them in Australia in order to protect their safety. The ALRC makes proposals below in relation to information dissemination, in particular, that appropriate information should be given to a visa applicant before, and after, they have entered Australia.

20.128 Nonetheless, the ALRC is interested in stakeholder views about the merits of making sponsorship a separate criterion for the grant of partner visas as outlined in the submission by Visa Lawyers Australia. As noted, this would separate the approval of the sponsorship from other requirements for a partner visa, and allow DIAC to deal with the sponsor separately. In particular, it would allow for criteria to be created around the approval of sponsorship, and allow for merits review in the event of refusal. This process can be achieved without the provision of a sponsor's past history to the applicant.

**Question 20–6** Should the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth) be amended to provide that sponsorship is a separate and reviewable criterion for the grant of partner visas?

110 Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011.

111 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), 231.

## Education, training and information dissemination

20.129 In its report, *Family Violence—A National Legal Response*, the ALRC and the New South Wales Law Reform Commission (the Commissions) considered that education on the nature, features, and dynamics of family violence better enables those in the family law system to assist victims. The Commissions recommended that the Australian, state and territory governments, and educational, professional and service delivery bodies should ensure regular and consistent education and training for participants in the family law, family violence, and child protection systems, in relation to the nature, features and dynamics of family violence, including its impact on victims, in particular those from high risk or vulnerable groups.<sup>112</sup>

20.130 In *Equality Before the Law*, the ALRC emphasised that ‘information about legal rights, financial matters, and domestic violence and community services in Australia must be provided to women who are immigrating both before departure and once in Australia’.<sup>113</sup> The ALRC highlighted that the provision of information could be targeted to countries where concerns about serial sponsorship exists, and highlighted the Philippines as an example:

Since 1989 the Philippine government has required all persons intending to emigrate as spouses or prospective spouses to attend counselling at the Commission on Filipinos Overseas about such matters as cultural differences, their rights, and available support and welfare services in the country of destination. The Manila office of the Department of Immigration and Ethnic Affairs requires proof of the woman’s attendance at this counselling before processing her application for immigration to Australia.<sup>114</sup>

### *Submissions and consultations*

20.131 In the Migration Issues Paper, the ALRC sought views as to the provision of training to competent persons about the nature and dynamics of family violence.<sup>115</sup>

20.132 A number of stakeholders reinforced the importance of education and training, not only in relation to the nature, features and dynamics of family violence, but also in relation to migration processes for visa decision makers, competent persons and independent experts, family violence and immigration service providers, as well as visa applicants and sponsors.<sup>116</sup> In particular, stakeholders expressed concern about the lack

112 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), Rec 31-1.

113 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), 233.

114 Ibid, 233.

115 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Immigration Law*, ALRC Issues Paper 37 (2011), Question 10.

116 ANU College of Law, *Submission CFV 79*, 7 June 2011; Law Institute of Victoria, *Submission CFV 74*, 17 May 2011; Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011; Good Shepherd Australia New Zealand, *Submission CFV 41*, 15 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

of training and education for competent persons with respect to the nature, features and dynamics of family violence, and the family violence exception.<sup>117</sup>

#### **Visa decision makers**

20.133 The IARC commented that ‘decision makers tend too readily to re-open prior spousal relationship issues in order to avoid considering complex evidence in support of a non-judicially determined claim of family violence’, citing visa applicants

who sought to rely on the family violence provisions (whether judicially determined or otherwise) for their permanent visa applications, and had their visas refused because the decision makers were of the view that an unhappy relationship was not a genuine spousal relationship.<sup>118</sup>

20.134 This concern was echoed in the submission from the Law Institute of Victoria:

Where no relationship is found to have existed, there will be no consideration of the family violence exception. The LIV is extremely concerned by the approach of DIAC, the MRT and the courts, in cases where a genuine and continuing relationship is found never to have existed because evidence of family violence shows, for example, that there was ‘no mutuality of support or companionship at any stage of the relationship’.<sup>119</sup>

#### **Competent persons**

20.135 The Australian Association of Social Workers Queensland Branch (AASW) expressed concerns about the lack of comprehensive and consistent training for competent persons in relation to the nature, features and dynamics of family violence:

Anecdotal evidence from the field strongly suggests that the concept of a ‘competent person’ is fraught, in that it implies the individual has specialised knowledge and training in the immigration law, DIAC requirements and domestic and family violence. Yet this is not always the case. Training and education is therefore critical in ensuring a comprehensive and robust assessment process, yet the AASW understands that the current training provided in regard to the nature and dynamics of family violence is insufficient and ad hoc. Comprehensive training in domestic and family violence needs to be established, provided by accredited trainers and standardised across Australia, and provided on an ongoing basis.<sup>120</sup>

20.136 National Legal Aid stressed that, without appropriate understanding of the nature, features and dynamics of family violence, competent persons may have a narrow view of what constitutes family violence and how a victim should appear and act. In their view,

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117 National Legal Aid, *Submission CFV 75*, 20 May 2011; Good Shepherd Australia New Zealand, *Submission CFV 41*, 15 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011; Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

118 Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011.

119 Law Institute of Victoria, *Submission CFV 74*, 17 May 2011 citing *Shadali v Minister for Immigration and Citizenship* [2007] FMCA 1230.

120 Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011.

training should also address the value of seeking information from other service providers and/or significant others with whom the alleged victim first discloses family violence. In many cases, the people whom a victim first discloses the violence are not ‘competent persons’.<sup>121</sup>

20.137 Visa Lawyers Australia were concerned that many competent persons have little understanding of the legislative requirements when making statutory declarations:

It is however evident from our dealings with competent witnesses that they are not familiar with the provisions in the *Migration Regulations* and require guidance when preparing their statutory declaration evidence to ensure that it satisfies the legislative requirements. This is of particular concern for unrepresented applicants who rely on non-judicially determined claims, as they will be relying on their own reading of the legislation and the ability of the competent witness to comply with the statutory requirements.<sup>122</sup>

### ***Independent experts***

20.138 In relation to independent experts, IARC submitted that anecdotal evidence suggested that in some cases independent experts ‘might have been influenced by the nature (including the gender of the victim) of the family violence claims’.<sup>123</sup> Similarly, National Legal Aid expressed concerns about cases in which ‘independent experts have formed an opinion based on the expert’s own notion of what constitutes family violence rather than by applying the definition of ‘relevant family violence’ set out in the *Migration Regulations*.<sup>124</sup>

### ***Information for prospective visa applicants***

20.139 The ALRC also heard in consultations about the need to ensure that prospective visa applicants are provided with information in relation to their legal rights, the family violence provisions and family violence support services in Australia, especially at the pre-embarkation stage. This view was reiterated in a number of submissions.<sup>125</sup> For example, the ANU College of Law submitted that:

There is a need for legal information to be made available to visa applicants, including what they can do to get protection and help in the event of experiencing family violence and information specifically about the existence of the family violence provisions. This information needs to be available in community languages.

Applicants for permanent residence are required to sign a statement that they have read (or have had read to them) information provided by the Australian Government on Australian society values. We suggest that the Australian values information kit

121 National Legal Aid, *Submission CFV 75*, 20 May 2011.

122 Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011.

123 Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011.

124 National Legal Aid, *Submission CFV 75*, 20 May 2011.

125 National Legal Aid, *Submission CFV 75*, 20 May 2011; ANU College of Law, *Submission CFV 79*, 7 June 2011; Good Shepherd Australia New Zealand, *Submission CFV 41*, 15 April 2011. See also R Braaf and I Meyering, *Seeking Security: Promoting Women’s Economic Wellbeing Following Domestic Violence* (2011).

would be an appropriate place to include this sort of fundamental information about legal rights.<sup>126</sup>

20.140 The ADFVC submitted that once in Australia,

specialised workshops on women's legal rights could be provided to newly arrived migrants and/or that information about family violence could be provided as part of the 510 hours of English classes offered.<sup>127</sup>

20.141 The IARC was of the view that the sponsor and visa applicant should be required to 'undertake a mandatory educational information session in relation to family violence and migration law'.<sup>128</sup>

#### ***ALRC's views***

20.142 The ALRC reinforces the views expressed by the Commissions in the *Family Violence—A National Legal Response* that education and training on the nature and dynamics of family violence—in particular its impact on immigrant communities—for decision makers and service providers, will assist in protecting the safety of victims of family violence. If as the ALRC proposes, a definition of family violence is inserted into the *Migration Act*, which is consistent with that in the *Family Law Act*, and other state and territory family violence legislation, this will provide for a common understanding of family violence on which education, training and information dissemination can be based.

20.143 The ALRC shares the concerns raised in submissions in relation to inconsistent and incorrect application of the definition of family violence, and notes that this is underpinned by a lack of understanding as to the nature, features and dynamics of family violence. The ALRC considers that a proper understanding of the nature and dynamics of family violence will help decision makers to be more confident in assessing claims, improve consistency in decision making, and ultimately, increase the safety of victims of family violence.

20.144 The ALRC considers that education and training should be complemented by the provision of information about legal rights, the family violence exception, and family violence and migration services in Australia. Such information should be provided in a culturally appropriate and sensitive manner, and be provided both prior to, and upon arrival in Australia.

**Proposal 20–4** The Australian Government should ensure consistent and regular education and training in relation to the nature, features and dynamics of family violence, including its impact on victims, for visa decision makers, competent persons and independent experts, in the migration context.

126 ANU College of Law, *Submission CFV 79*, 7 June 2011.

127 R Braaf and I Meyering, *Seeking Security: Promoting Women's Economic Wellbeing Following Domestic Violence* (2011).

128 Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011.

**Proposal 20–5** The Australian Government should ensure that information about legal rights, family violence support services, and the family violence exception are provided to visa applicants prior to and upon arrival in Australia. Such information should be provided in a culturally appropriate and sensitive manner.

## Information sharing

20.145 The ALRC is directed by the Terms of Reference to consider whether information sharing across Commonwealth, state and territory agencies is appropriate to protect the safety of those experiencing family violence.<sup>129</sup>

20.146 In *Family Violence—A National Legal Response*, the Commissions recommended that a national register, which would include certain information about protection orders and family law orders and injunctions should be established.<sup>130</sup> In the Migration Issues Paper, the ALRC asked whether the MRT and DIAC should have access to the proposed register.<sup>131</sup> The ALRC heard in consultation that the MRT has, on occasion, had difficulty in ascertaining from courts whether family violence protection orders are in place when considering judicially determined claims of family violence.<sup>132</sup> This may arise in instances, for example, where an applicant seeks to make a judicially-determined claim of family violence, but is unable to obtain a copy of the family violence protection order.

20.147 The ALRC also asked what other reforms, if any, are needed to improve information sharing between courts and decision makers in migration matters involving family violence.<sup>133</sup>

### *Submissions and consultations*

20.148 A number of stakeholders supported the MRT having access to the proposed National Register.<sup>134</sup> The MRT submitted that:

The majority of matters that come before the MRT involving family violence issues are founded on non-judicially determined claims of family violence. Nevertheless, in the Tribunals' opinion, access to a national register of the type contemplated in ALRC Report 114 would assist in ensuring that the MRT has before it all the current

129 The full Terms of Reference are set out at the front of this Discussion Paper and are available on the ALRC's website at <www.alrc.gov.au>.

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

131 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Immigration Law*, ALRC Issues Paper 37 (2011), Question 19.

132 Sobet Haddad, Migration and Refugee Review Tribunals., *Consultation*, Sydney, 12 November 2010.

133 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Immigration Law*, ALRC Issues Paper 37 (2011), Question 20.

134 National Legal Aid, *Submission CFV 75*, 20 May 2011; Principal Member of the Migration and Refugee Review Tribunals, *Submission CFV 29* 12 April 2011; Good Shepherd Australia New Zealand, *Submission CFV 41*, 15 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

information relevant to judicially determined claims of family violence. The Tribunals recognises that such a register may contain highly sensitive material and that safeguards may be necessary to ensure appropriate access to data.<sup>135</sup>

20.149 National Legal Aid provided ‘in principle’ support, but suggested that access to the register should be limited to ‘MRT and DIAC specialist staff who have received appropriate training’ and emphasised that merely because a person’s name is not on the register, does not mean that the person has not used family violence.<sup>136</sup>

20.150 The Office of the Information Privacy Commissioner submitted that:

Access to the register should be restricted to a ‘need to know’ basis ... and should only be granted where there is clear public interest in doing so. Access beyond that which is reasonably necessary for the protection of family violence victims may increase the privacy risks associated with the register and make it harder to protect personal information from misuse, loss and unauthorised access. In turn, this may ultimately compromise the safety of those experiencing family violence.<sup>137</sup>

20.151 The IARC submitted that, given the extensive procedural fairness obligations under the *Migration Act*, that:

Before a national register is available to the authorised agencies seeking this personal information, it would seem prudent to amend the *Migration Act* and *Regulations* requiring full disclosure by the sponsors in relation to family violence matters as well as allowing the decision makers to seek consent from the sponsor to obtain this personal information.<sup>138</sup>

20.152 In relation to what measures could be taken to improve access to information between courts and decision makers, few submissions answered this question. However, the MRT submitted that:

Information sharing between courts and migration decision makers should be encouraged to ensure that decision makers are able to quickly access information relevant to matters involving claims of family violence. In the Tribunal’s view, legislative reforms may not be necessary, and information sharing may be achieved through the implementation of practical measures such as centralised liaison points.<sup>139</sup>

### ***ALRC’s views***

20.153 In making recommendations for the establishment of a national register in the report, *Family Violence—A National Legal Response*, the Commissions were concerned to ensure that ‘various systems are aware of orders and proceedings relating to the same family’ to ensure consistency in decision making across the different jurisdictions.<sup>140</sup> The Commissions therefore recommended that the national register be available to federal, state and territory police, federal family courts, state and territory

135 Principal Member of the Migration and Refugee Review Tribunals, *Submission CFV 29* 12 April 2011.

136 National Legal Aid, *Submission CFV 75*, 20 May 2011.

137 Office of the Australian Information Commissioner, *Submission CFV 30*, 12 April 2011.

138 Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011.

139 Principal Member of the Migration and Refugee Review Tribunals, *Submission CFV 29* 12 April 2011.

140 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), 1456.

courts that hear matters related to family violence and child protection, and child protection agencies.<sup>141</sup>

20.154 While the ALRC considers that it may be useful for DIAC and the MRT to have access to a national register of protection orders, there are a number of reasons why the ALRC considers that access to the register should—at this point in time—be restricted to courts.

20.155 First, as stakeholders have argued, a number of other issues would have to be determined, for example, in relation who in DIAC or the MRT should have access to the register, and under what circumstances. The ALRC considers that significant resources would be required to ensure that the privacy of the alleged perpetrator is protected, and that the register is not open to misuse or unauthorised access.

20.156 Secondly, in cases before DIAC and the MRT, the onus is on the applicant, who must make his or her case to the decision maker, such that the existence or otherwise of a family violence protection order, or interim order, would only be an issue where the applicant purports to make a judicially determined claim of family violence. The ALRC considers that it would only be in rare instances where an applicant makes a judicially determined claim, but for whatever reason, cannot present a copy of a family violence protection order. In such circumstances, the ALRC considers that it is open to the visa applicant to obtain a copy of the family violence protection order from a court.

20.157 If a national register is implemented along the lines suggested, this would help applicants who have moved jurisdictions to be able to obtain a copy of the family violence protection order. Having weighed the above concerns, the ALRC therefore considers that better information dissemination to visa applicants about how to obtain a copy of a family violence protection order from a court may be a more measured approach to ensuring that applicants are able to make a judicially-determined claim of family violence.<sup>142</sup>

20.158 For these reasons, the ALRC makes no proposals in relation to DIAC and the MRT having access to the proposed national register.

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141 Ibid, Rec 30–18.

142 Proposal 20–5.





## 21. The Family Violence Exception— Evidentiary Requirements

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### Summary

21.1 This chapter considers the evidentiary requirements for making a family violence exception claim under the *Migration Regulations 1994* (Cth). Compared to overseas jurisdictions, Australia has complex evidentiary requirements that require family violence claims to be made on the basis of judicially or non-judicially determined evidence of family violence. The evidentiary requirement is an area where the competing tensions of accessibility and integrity of the visa system—discussed in Chapter 20—are most visibly manifested.

21.2 Non-judicially determined claims require an applicant to submit statutory declaration evidence from certain ‘competent persons’. The strict requirements for a valid statutory declaration—as prescribed by the *Migration Regulations* and interpreted by the courts—have lead to concerns that the system is a triumph of ‘form over substance’, precluding genuine victims from being able to access the family violence exception. As such, non-judicially determined evidence was identified by stakeholders as an area in need of urgent, and substantial, reform.

21.3 The ALRC considers that the premise of the competent person statutory declaration regime needs to be reconsidered. Accordingly, the ALRC proposes that the independent expert statutory declaration process should be replaced with an independent expert panel that would assess all non-judicially determined claims.

21.4 Alternatively, if the existing competent person regime is to be retained, the ALRC makes a number of proposals aimed at reducing the rigid and strict procedural requirements, and improving the transparency and accountability of the system. These proposals include: allowing decision makers to seek further information from competent persons where appropriate; requiring decision makers to provide reasons for referral to an independent expert; removing the requirement for competent persons to express an opinion as to who committed the family violence; and providing review mechanisms for independent expert assessments.

### Evidentiary requirements in the Australian context

21.5 Compared with overseas jurisdictions, the evidentiary requirements for making a claim under the family violence exception in Australia are complex and strict. The complexity of the system is a manifestation of the policy tensions in this area: on the one hand, the need to ensure accessibility of the family violence exception to genuine victims, counterbalanced with the integrity of the visa system, and the need to prevent fraudulent claims or abuse of the family violence exception for migration outcomes. An understanding of these tensions is best understood by examining the legislative history of the family violence exception.

#### Legislative history

21.6 The family violence exception was introduced in 1991 to redress ‘community concerns that some migrants might remain in an abusive relationship because they believe they may be forced to leave Australia if they end the relationship’.<sup>1</sup> In its initial form, the *Migration Regulations* restricted the forms of acceptable evidence to support a family violence claim to judicially-determined evidence.<sup>2</sup> However, in response to concerns that the immigrant women faced barriers to accessing the judicial system—and the ALRC’s recommendations in the 1994 report, *Equality Before the Law: Justice for Women* (ALRC Report No 69)<sup>3</sup> (*Equality Before the Law*)—legislative changes were introduced in 1995 to broaden the range of evidence that could be adduced to prove that family violence had occurred.

21.7 These changes introduced non-judicially determined forms of evidence, including statutory declarations from the applicant and certain ‘competent persons’.<sup>4</sup> The result was the creation of a two-track system—judicially and non-judicially determined claims—through which victims of family violence could access the family violence exception. Importantly, the ultimate decision as to whether a person met the family violence exception remained with the visa decision maker.

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1 Department of Immigration and Citizenship, *Fact Sheet 38: Family Violence Provisions* (2010) <<http://www.immi.gov.au/media/fact-sheets/38domestic.htm>> at 13 December 2010.

2 Applicants were required to substantiate their claims of family violence through the judicial system, involving police and the courts.

3 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), Rec 10.2. The ALRC recommended that the family violence exception should extend to cases where evidence of domestic violence is available from community and welfare workers, medical and legal practitioners and suitable third parties.

4 The role of ‘competent person’ is discussed in more detail below.

21.8 While the 1995 amendments increased accessibility of the exception to victims of family violence, it caused to some unintended consequences. In particular, there was uncertainty as to the level of evidence required in a competent person's statutory declarations to satisfy a visa decision maker that family violence had occurred, and also whether the visa decision maker could question the veracity of a competent person's opinion.

21.9 Ultimately, the courts resolved these questions by finding that the *Migration Regulations* left no discretion for the visa decision maker to question the veracity of a competent person's opinion—even if they considered that the claim may be vexatious—so long as the statutory evidence was presented in accordance with the *Migration Regulations*. As Wilcox J commented in *Ibrahim v Minister for Immigration and Multicultural Affairs*:

The statutory declarations of the competent person must state the competent person's opinion that relevant domestic violence has been suffered by the visa applicant (reg 1.26(c) and (d)) and must name the person who, in the competent person's opinion, is the perpetrator of the violence (reg 1.26(e)). However, once that is done, it seems immaterial if these opinions are based entirely on statements made to the competent person by the visa applicant or they lack any apparent credibility.<sup>5</sup>

...

The Minister or the Tribunal is not entitled to act on his or its own opinion as to whether the visa applicant has suffered domestic violence, it obviously has no right to reject the competent person's opinion on the basis that it is inherently implausible.<sup>6</sup>

21.10 Consequently, concerns arose that the introduction of non-judicially determined evidence had opened the door for a successful claim of family violence without rigorous scrutiny of the evidence. At that time, the then Department of Immigration, Multicultural and Indigenous Affairs (DIMIA) voiced concerns in relation to statutory declaration evidence. In particular :

- such evidence was often provided after a court had refused to make an order;
- applicants could shop around for evidence (i.e. a sympathetic competent person who would provide a statutory declaration);
- just over 54% of statutory declarations by competent persons were made after only one interview with the applicant; and
- the sponsors did not have the right to contest the allegations.<sup>7</sup>

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5 *Ibrahim v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1279, [37] referring to an earlier decision of *Meroka v Minister for Immigration and Multicultural Affairs* (2002) 117 FCR 251 where Ryan J found that all that was required to satisfy reg 1.26(f) was that the competent person had set out the evidence on which his or her opinion was based.

6 *Ibid.*, [39].

7 Commonwealth, *Parliamentary Debates*, Senate, 1 November 2000, 18870 (P McKiernan—Senator).

***Unsuccessful amendments in 2000***

21.11 As a result of these concerns, outlined above, in 2000 the Australian Government sought to amend the legislation to make the evidentiary requirements more rigorous.<sup>8</sup> It was proposed that where an applicant makes a non-judicially determined claim of family violence, DIMIA must refer the matter to Centrelink for assessment by a social worker. That person must be employed by Centrelink as a social worker, and must be, or eligible to be, a member of the Australian Association of Social Workers. If the matter was appealed to the MRT, the Tribunal would have the discretion to ask Centrelink for a report.<sup>9</sup> The referral to an independent expert was intended to

increase the integrity of the special provisions relating to domestic violence by allowing an independent, qualified service provider to assess domestic violence claims. The independent assessment will replace the system of assessment by the courts or 'competent persons', which have been identified as not always involving a full investigation of the applicant's claims of domestic violence. This amendment will enable skilled service providers to provide Immigration with uniform assessment of cases.<sup>10</sup>

21.12 The resolution to pass these amendments was disallowed by the Senate on 1 November 2000.<sup>11</sup>

***The current evidentiary regime***

21.13 In 2005, the *Migration Regulations* were amended to provide a new system of non-judicially determined evidence.<sup>12</sup> This became the basis for the current system, which provide that:

- if the visa decision maker is satisfied on the non-judicially determined evidence that the applicant has suffered 'relevant family violence', the visa decision maker must proceed with the visa application on the basis that the applicant has suffered 'relevant family violence';<sup>13</sup> or
- if the visa decision maker is not satisfied that the applicant has suffered family violence on the basis of non-judicially determined evidence, the matter must be referred to an independent expert for assessment;<sup>14</sup> and
- the visa decision maker must take as correct the opinion of an independent expert.<sup>15</sup>

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8 See *Migration Amendment Regulations (No 5) 2000* (Cth).

9 Ibid, [4108].

10 Explanatory Statement, *Migration Amendment Regulations (No 5) 2000* (Cth).

11 See Commonwealth, *Parliamentary Debates*, Senate, 1 November 2000, 18870 (P McKiernan—Senator).

12 *Migration Amendment Regulations (No 4) 2005* (Cth).

13 *Migration Regulations 1994* (Cth) reg 1.23(10)(a).

14 Ibid reg 1.23(10)(b).

15 Ibid reg 1.23(10)(c).

21.14 These amendments reflected the policy position that where evidence of family violence has not been test by a court, such evidence is ‘to be assessed by the Minister, and in certain circumstances, an independent expert’.<sup>16</sup> An ‘independent expert’ is defined in reg 1.21 as a person who is ‘suitably qualified and is employed by, or contracted to provide services to, an organisation specified in a Gazette Notice for this definition’.<sup>17</sup> The only organisation gazetted is Centrelink.<sup>18</sup>

21.15 It is worth noting that there is an important difference between the current system, and the amendments proposed in 2000. Under the amendments proposed in 2000, all victims of domestic violence who did not have judicially determined evidence would have been referred to Centrelink to obtain a report, whereas the current arrangements only allow referral to an independent expert if the visa decision maker is not satisfied on the non-judicially determined evidence provided, that family violence has occurred. This was an important and substantial policy change.

21.16 In the next two sections, the ALRC will examine in detail the requirements for judicially and non-judicially determined claims of family violence.

### **Judicially determined claims of family violence**

21.17 Evidence in support of a judicially determined claim of family violence may take the form of:

- an injunction under s 114(1)(a), (b) or (c) of the *Family Law Act 1975* (Cth), granted on the application of the alleged victim against the alleged perpetrator;<sup>19</sup> or
- a conviction against the alleged perpetrator, or finding of guilt against the alleged perpetrator, in respect of an offence against the victim;<sup>20</sup> or
- an order under state or territory law against the alleged perpetrator for the protection of the alleged victim from violence, made after the court has given the alleged perpetrator an opportunity to be heard, or otherwise make submissions.<sup>21</sup>

21.18 With respect to protection orders the *Migration Regulations* do not require that an order be a final order, meaning that interim orders may meet the requirements. However, under guidelines issued by the Department of Immigration and Citizenship (DIAC), interim orders that are made ex parte may not comply with the *Migration*

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16 Explanatory Memorandum, Migration Amendment Regulations (No 4) 2005 (Cth).

17 *Migration Regulations 1994* (Cth) reg 1.21.

18 See Commonwealth of Australia, *Special Gazette S119* (2005).

19 *Migration Regulations 1994* (Cth) reg 1.23(2). The injunctions referred to in s 114 of the *Family Law Act 1975* (Cth) relate to injunctions: for personal protection of a party to a marriage; restraining a party of the marriage from entering a matrimonial home or the premises in which the other party resides; and restraining a party to the marriage from entering the place of work of the other party to the marriage.

20 Ibid reg 1.23(6).

21 Ibid reg 1.23(4).

*Regulations*, if the alleged perpetrator was not given the opportunity to be heard or make submissions.<sup>22</sup>

21.19 In its submission to *Family Violence—A National Legal Response* (ALRC Report No 114, 2010) (*Family Violence—A National Legal Response*), the Immigrant Women’s Support Services (IWWS) expressed concerns about amendments made to the *Migration Regulations* in November 2009 that require, in relation to judicially determined claims, that ‘the violence, or part of the violence, that led to the granting of the order must have occurred *while the married relationship or de facto relationship existed* between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator’.<sup>23</sup> The intended purpose of this amendment was to ‘reinforce that the purpose of the family violence provisions is to ensure that visa applicants are not required to remain in a relationship where family violence is occurring’.<sup>24</sup>

21.20 In particular, the IWWS was concerned that, since the introduction of this amendment, DIAC officers were not readily accepting a final family violence protection order obtained *after separation*.<sup>25</sup> Previously, a final domestic violence protection order was sufficient judicial evidence of family violence in instances where it was applied for, and obtained, after separation.<sup>26</sup>

### ***Submissions and consultations***

21.21 In the Issues Paper, *Family Violence and Commonwealth Laws—Immigration Law* (the Migration Issues Paper), the ALRC asked what issues arise with respect to the use of judicially-determined claims of family violence in migration matters.<sup>27</sup> The ALRC also asked whether the *Migration Regulations* should be amended to make it clear that family violence protection orders granted after the parties have separated amount to sufficient evidence that ‘relevant family violence’ has occurred.<sup>28</sup>

21.22 Stakeholders indicated that, generally, applicants encountered few problems once a valid judicially-determined claim of family violence had been made. Visa Lawyers Australia considered that ‘this is not surprising as such evidence has been tested in a court of law, and it makes no sense for an assessing officer at DIAC to question the veracity of such evidence’.<sup>29</sup>

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22 Departmental guidelines for decision makers suggest that ex parte orders are generally not to be accepted as judicially determined evidence. See Department of Immigration and Citizenship, *Procedures Advice Manual 3* (2010), (Family Violence Provisions), [19.3].

23 See *Migration Regulations 1994* (Cth) regs 1.23(2), 1.23(5), 1.23(7), 1.23(12) and 1.23(14). These amendments to reg 1.23 were made by the *Migration Amendment Regulations (No 12) 2009* (Cth). Emphasis added.

24 See Explanatory Memorandum, *Migration Amendment Regulations (No 12) 2009* (Cth).

25 See Immigrant Women’s Support Service, *Submission FV 61 Part 1*, 1 June 2010, 8.

26 Ibid.

27 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Immigration Law*, ALRC Issues Paper 37 (2011), Question 5.

28 Ibid, Question 6.

29 Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011.

21.23 However, stakeholders emphasised that migrant victims of family violence faced many barriers in accessing the judicial system, including that:

- victims have little or no access to support networks, speak little English, and are not able to access funds to assist themselves;<sup>30</sup>
- judicially-determined claims require victims to have substantial knowledge of, and confidence in, a legal system that is foreign to them;<sup>31</sup>
- victims are reluctant to approach the police and police are sometimes reluctant to take action (possibly due to a lack of resources) if no child was involved and when the physical nature of the violence is disputed and not witnessed by a third party;<sup>32</sup> and
- testifying in court about violence in a relationship is confronting, traumatic and potentially places victims at an increased risk of further violent attacks from their partners.<sup>33</sup>

#### *State and territory family violence protection orders*

21.24 Most stakeholders were of the view that the *Migration Regulations* should be amended to clarify that a family violence protection order granted after separation should be regarded as sufficient evidence that family violence has occurred.<sup>34</sup> In doing so, stakeholders argued that the *Migration Regulations* do not make a reference as to the timing of the grant of a protection order, and therefore, the problems ‘do not stem from the regulations but rather from the way in which a decision maker misapplies the law’.<sup>35</sup> Visa Lawyers Australia, for example, argued that:

While there is clearly a reference in the *Migration Regulations* to the timing of the actual violence, there is no reference to the timing of the judicial procedure relating to the claim. We regard any interpretation of these provisions to mean that injunctions, court orders and convictions obtained after the relationship has ceased but referring to the violence during the relationship as legally incorrect.

Given the plain meaning of the *Migration Regulations* in this regard, in our view it is DIAC policy (Procedures Advice Manual) that should be amended to explicitly state the regulations only provide for consideration of the timing of the family violence that was the subject of a judicially-determined claim, and not the date of the judicial procedure itself.<sup>36</sup>

30 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

31 Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011.

32 Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011.

33 Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011.

34 ANU College of Law, *Submission CFV 79*, 7 June 2011; Visa Lawyers Australia, *Submission CFV 76*, 23 May 2010; National Legal Aid, *Submission CFV 75*, 20 May 2011; Law Institute of Victoria, *Submission CFV 74*, 17 May 2011; Good Shepherd Australia New Zealand, *Submission CFV 41*, 15 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011; Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011.

35 Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011.

36 Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011.



21.25 Immigrant and family violence service groups expressed concerns that, in practice, final rather than interim orders were required to support a judicially-determined claim of family violence.<sup>37</sup> Domestic Violence Victoria and others in a joint submission, noted in relation to ex parte intervention orders:

We understand that despite Interim Intervention Orders being able to be used as evidence in judicial claims; they are routinely dismissed. It is common for interim intervention orders to be granted ex parte; the ineligibility of these types of Orders to be considered leaves groups of women without access to the family violence exception while they await hearing for a final order.<sup>38</sup>

21.26 The Immigration Advice and Rights Centre (IARC) echoed that, where there is a significant time gap between the grant of interim and final orders, the inability to consider interim orders as judicially-determined evidence would prejudice victims of family violence, because:

A final AVO (as opposed to the various interim AVOs) may be dismissed because the time between the last incident and the final court hearing was prolonged: the Court finally dismisses the application on the basis that the fear of personal safety no longer existed to warrant a grant of a final order (even though family violence may well have appeared in the past).<sup>39</sup>

21.27 National Legal Aid and the Law Institute of Victoria also expressed concern that such a time lapse may affect a person's immigration status, and suggested that, where an application for a family violence order has been made, the immigration process should be suspended until finalisation of the court process, unless the delegate is satisfied that family violence has been established by way of non-judicially determined evidence.<sup>40</sup>

### ***Post-separation violence***

21.28 As a separate issue, many submissions queried whether the requirement that 'the violence, or part of the violence must have occurred while the married or de facto relationship was in existence' should be retained at all. Stakeholders were concerned that the requirement fails to consider that violence often escalates or even starts after a couple have separated. The ANU College of Law submitted that:

In some cases an applicant may flee a partner and end the relationship because of their perception of an escalating risk of violence should they remain. The current legislation which requires that the violence subject of the judicial determination must have occurred while the couple were still in the partner relationship could be seen to force an applicant to remain in a relationship until they have become a victim of family violence rather than to leave to protect themselves. We submit that those qualifying subparagraphs go against the spirit of the family violence provisions, are ill-conceived and dangerous and should be deleted.<sup>41</sup>

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37 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011; Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011.

38 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

39 Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011.

40 Law Institute of Victoria, *Submission CFV 74*, 17 May 2011; National Legal Aid, *Submission CFV 75*, 20 May 2011.

41 ANU College of Law, *Submission CFV 79*, 7 June 2011.

21.29 Similarly, the Refugee and Advice and Immigration Legal Service (RAILS) was concerned that the very act of leaving a relationship may escalate the violent or abusive behaviour, forcing the victim to seek an order, and that in such cases:

a strict application of the legislation by the decision maker may lead to a visa refusal as it is seen to be violence which has not occurred while the marriage/de facto relationship existed.<sup>42</sup>

21.30 RAILS therefore supported an amendment that provides for the grant of the visa on the basis of a family violence protection order granted (and other evidence including non-judicial evidence) after the parties had separated.<sup>43</sup> The Law Institute of Victoria expressed a view that the distinction made in reg 1.23 of the *Migration Regulations* takes an artificially neat approach to the break-down of the relationship by assuming that the victim leaves a sponsor following an incidence of family violence, hence:

The law requires amendment to reflect the reality that separation might occur over time, with victims of family violence leaving and returning multiple times and that family violence may take many different forms so that one physically violent incident occurring after separation might have been preceded by a longer period of economic and psychological abuse prior to separation.<sup>44</sup>

21.31 In contrast, Visa Lawyers Australia argued that when family violence occurs post-separation, it should be dealt with on a case by case basis, taking into account the integrity of the visa system, and the consequences of leading to permanent residency:

If the relationship ends and at some point afterwards violence occurs, it is difficult to say whether this should suddenly entitle the migrant to a permanent visa. We consider that there are likely to be cases where these circumstances would warrant granting a visa under family violence provisions. Especially having regard to how long the couple were separated before the violence occurred, the nature of the violence, and the person's ongoing ties with Australia now that the relationship has broken down.

For this reason, we submit there should be some flexibility for DIAC case officers to deal with such a situation. This could take the form of an exception that occurred after the breakdown of the relationship, but only in exceptional circumstances.

Alternatively, it may be more appropriate that an application to the Minister be made in such circumstances rather than trying to carve out a specific exception. We regard either of these approaches as allowing flexibility and consideration of individual facts and circumstances as required.<sup>45</sup>

### ***ALRC's views***

#### ***Family violence protection orders***

21.32 The ALRC notes that there is no temporal limitation in the *Migration Regulations* so as to exclude family violence protection orders obtained post-separation, where that order relates to evidence that violence occurred while the relationship was still in existence. If, as stakeholders have argued, there are problems

42 Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011.

43 Ibid.

44 Law Institute of Victoria, *Submission CFV 74*, 17 May 2011.

45 Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011.

with the application of the legislation by decision makers, the ALRC considers the most appropriate remedy is to amend the *Procedures Advice Manual* (PAM 3) guidelines for decision makers. For example, the guidelines could be amended to make clear that the date of the protection order is not determinative of whether or not family violence occurred while the relationship was in existence.

21.33 In relation to ex parte orders, the ALRC considers that such orders—often made in urgent situations and where the alleged perpetrator has not been given an opportunity to respond—should not be considered as judicially-determined evidence. The ALRC considers that procedural fairness to the alleged perpetrator is vital to the integrity of judicially-determined evidence, since a visa decision cannot go behind evidence that has been determined by a court, and must proceed on the basis that family violence has occurred.

21.34 The ALRC is interested in stakeholder views about whether the migration assessment process should be put on hold where an application for a family violence order has been made, unless the applicant proceeds with a non-judicially determined claim of family violence. Under Departmental Guidelines, judicially-determined claims take precedence whenever submitted, so that ‘the judicially- determined claim must be accepted as evidence that the alleged victim has suffered family violence, despite any reservations the officer may have had concerning the non-judicially determined claim’.<sup>46</sup>

21.35 If the time lapse between the interim and final orders is sufficiently long, there is a risk that a decision may be made in relation to the non-judicially determined claim, thus potentially excluding a genuine victim from accessing the family violence provision if the judicially-determined claim, later determined, is favourable to the applicant.

21.36 On the other hand, the ALRC considers that putting a hold on the migration process may prolong the time it takes for a victim to be granted permanent residence under the family violence exception, and this may be detrimental to their safety. It also extends the period of time a person is required to access family violence services, health services, or adequate housing to ensure his or her safety.

**Proposal 21–1** The Department of Immigration and Citizenship’s *Procedures Advice Manual 3* should provide that, in considering judicially-determined claims, family violence orders made post-separation can be considered.

**Question 21–1** Where an application for a family violence protection order has been made, should the migration decision-making process be suspended until finalisation of the court process?

<sup>46</sup> See Department of Immigration and Citizenship, *Procedures Advice Manual 3* (2010)(Judicially determined FV claims subsequently submitted), 20.1.

*Post-separation violence*

21.37 The ALRC considers that to require that the violence must have occurred while the relationship was still in existence is somewhat at odds with the policy expressed in PAM 3, that there is *no requirement* that the relationship has broken down *because* of the violence.<sup>47</sup> The *Migration Regulations* are similarly silent as to any requirement of causation. The ALRC considers this significant, as the requirement that the violence occurred while the relationship was in existence seems to suggest that the relationship breakdown must be attributable to the violence. Yet, this is not reflected in the *Migration Regulations*.

21.38 The ALRC acknowledges that the requirement may deter those who are in a relationship where there is an escalating, and perhaps imminent risk of violence, to remain in the relationship until violence has taken place, rather than seeking assistance, with obvious ramifications for his or her safety. Alternatively, there is a risk that, where the violence has occurred as a result of the separation, a person may feel compelled to return to the violent relationship, in order to be able to access the family violence exception. In both cases staying in, or returning to, the relationship puts the safety of the visa holder at risk.

21.39 In this respect, the ALRC considers the argument made by the Full Federal Court in *Muliyana v Minister for Immigration and Citizenship* to be highly persuasive:

The policy is intended to cover both situations: not to force a person to stay in an abusive relationship; and not to force a person to go back into an abusive relationship, in either case without compromising his or her immigration status. If that is the correct identification of the policy, then it matters not whether the domestic violence occurred before or after the cessation of the spousal relationship; just that domestic violence occurred and the spousal relationship has ceased.<sup>48</sup>

21.40 Although the Court's comments were in reference to the legislation prior to the 2009 amendments, the ALRC considers that the policy articulated by the Court properly recognises the nature and dynamics of family violence. The safety of victims of family violence would be improved by repealing the requirement that the violence must have occurred while the relationship was still in existence.

21.41 There is substantial evidence to suggest that there is a heightened risk of violence post-separation. For example, in the *Family Violence—A National Legal Response*, the Commissions highlighted research which suggested that the separation of intimate couples is often a trigger for violence, where there is no prior history of violence in the relationship, or in any other setting.<sup>49</sup>

21.42 On the other hand, if the relationship has ended and there is violence afterwards, a legitimate question arises as to whether the migration system—via the family violence exception—should be responsible for ensuring the safety of the person, or

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<sup>47</sup> Ibid—*Purpose of the FV provisions*.

<sup>48</sup> *Muliyana v Minister for Immigration and Citizenship* [2010] FCFCA 24 24, [34].

<sup>49</sup> Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), 282.

whether that responsibility is better addressed in other contexts. Nevertheless, the ALRC considers that Australia has moral and legal obligations to ensure the safety of persons in its jurisdiction, whether or not such persons are here temporarily or permanently.

21.43 In the event that the requirement is not repealed, the ALRC is interested in stakeholder views as to what other measures might be instituted to ensure the safety of those who suffer violence post-separation. For example, would there be merit in allowing such persons to apply for ministerial intervention under s 351 of the *Migration Act*, or amending the *Migration Regulations* to provide for victims to access the family violence exception, in exceptional circumstances, where the violence occurred after the cessation of the relationship?

21.44 The ALRC notes that the approaches taken in overseas jurisdictions may provide some guidance. In Canada, a person may apply for and be granted permanent residence, on ‘humanitarian and compassionate’ grounds—including as a victim of family violence—being that ‘unusual, undeserved or disproportionate hardship would be caused to the person if he or she had to leave Canada’.<sup>50</sup> The Canadian system provides for a number of considerations that may warrant the grant of a permanent visa in such circumstances, and the ALRC envisages that similar factors could be considered where a person experiences family violence post-separation. These factors could include:

- the degree of establishment in and ties to Australia;
- the best interest of any child involved;
- whether the person is of good moral character; and
- whether return to the country of origin would result in undue hardship to the applicant.

**Proposal 21–2** The requirement in reg 1.23 of the *Migration Regulations 1994* (Cth), 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 spouse or de facto partner of the alleged perpetrator should be repealed.

**Question 21–2** If the requirement in reg 1.23 is not repealed, what other measures should be taken to improve the safety of victims of family violence, where the violence occurs after separation?

<sup>50</sup> Immigration and Citizenship Canada, *IP 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* (2011), 12.7.

### Non-judicially determined claims of family violence

21.45 The ALRC recommended in *Equality Before the Law*, that the family violence exception should extend to cases where evidence is obtained from community and welfare workers, medical and legal practitioners, and other suitable third parties.<sup>51</sup>

21.46 Following the ALRC's recommendation, the *Migration Regulations* were amended to allow for non-judicially determined evidence of family violence to include:

- a joint undertaking made by the alleged victim and alleged perpetrator in relation to proceedings in which an allegation is before the court that the alleged perpetrator has committed an act of violence against the alleged victim;<sup>52</sup>
- a police record of assault along with two statutory declarations—one from the alleged victim, plus a statutory declaration made by a competent person;<sup>53</sup> or
- three statutory declarations—a statutory declaration from the alleged victim, plus two statutory declarations by two differently qualified 'competent persons'.<sup>54</sup>

#### *The 'competent person'*

21.47 Reg 1.21 of the *Migration Regulations* lists categories of competent persons who may be relied upon to give a statutory declaration for the purpose of a non-judicially determined claim. They include a person who is:

- registered as a medical practitioner under a law of a state or territory providing for the registration of medical practitioners; or
- registered as a psychologist under a law of a state or territory providing for the registration of psychologists; or
- registered as a nurse within the meaning of s 3 of the *Health Insurance Act 1973* (Cth) and is performing the duties of a registered nurse; or
- a member, or person eligible to be a member, of the Australian Association of Social Workers who is performing the duties of a social worker; or
- a family consultant under the *Family Law Act*;
- a manager or coordinator of a women's refuge;
- a manager or coordinator of a crisis or counselling service that specialises in family violence; or
- in a position that involves decision-making responsibility for a women's refuge or a crisis and counselling service that specialises in family violence, that has a

51 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), Rec 10.2.

52 *Migration Regulations 1994* (Cth) reg 1.23(8).

53 Ibid regs 1.23(9), 1.24(1)(a).

54 Ibid regs 1.24(1)(b), 1.24(2).

collective decision making structure, and whose position involves decision-making responsibility for matters concerning family violence of that refuge or crisis and counselling service.<sup>55</sup>

21.48 Where the alleged victim is a child—in addition to the above—a competent person can also be an officer of the child welfare or child protection authorities of a state or territory.<sup>56</sup>

### ***The statutory declaration requirements***

21.49 Statutory declarations by competent persons must: set out the basis of the person's claim to be a competent person; state that in their opinion the applicant has suffered 'relevant family violence'; name the person who committed the family violence; and set out the evidence on which the person's opinion is based.<sup>57</sup> The statutory declaration of a competent person can be provided on a standard form—called Form 1040—which can be accessed from DIAC's website.<sup>58</sup>

21.50 The courts have required strict compliance with the above requirements before finding that a non-judicially determined claim of family violence has been made, and the applicant is 'taken to have suffered' family violence.

21.51 For example, while the opinion of the competent person need not refer to the definition of 'relevant family violence', there must be a clearly expressed opinion which reflects an assessment of the state of mind of the alleged victim by reference to the definition of 'relevant family violence'. It is not sufficient that a competent person expresses the opinion that the victim may have, or appears to have, suffered family violence.<sup>59</sup>

21.52 For example, in *Du v Minister for Immigration and Multicultural and Indigenous Affairs*,<sup>60</sup> the applicant submitted a statutory declaration from a doctor that stated: 'Thi Lan Du attended our surgery at Campsie on 21/2/97 with multiple bruises which were allegedly caused by domestic violence (assault by her husband)', coupled with one from a registered psychologist that stated: 'Du certainly expressed sentiments and a psychological condition that was consistent with an individual who has suffered from family violence and a marital breakdown'.<sup>61</sup>

21.53 Matthews J accepted the above evidence, but found these declarations did not meet the 'specific and peremptory terms' of the *Migration Regulations*:

It is not sufficient compliance, in my view, for a competent person simply to note the consistency between a person's presentation and their account of domestic violence, or even the occurrence of domestic violence. The Regulations require that the

55 Ibid reg 1.21(1)(a).

56 Ibid reg 1.21(1)(b).

57 Ibid regs 1.26(a)–(g).

58 Department of Immigration and Citizenship, *Form 1040: Statutory Declaration Relating to Family Violence* (2009) <[www.immi.gov.au/allforms/pdf/1040.pdf](http://www.immi.gov.au/allforms/pdf/1040.pdf)> at 20 July 2011.

59 *Minister for Immigration and Citizenship v Ejuetyisi* (2007) 159 FCR 94, [34].

60 *Du v Minister for Immigration and Multicultural Affairs* [2000] 1115 FCA.

61 Ibid, [10], [12].

competent person express an opinion in very specific terms, namely, as to whether relevant domestic violence defined in reg. 1.23 has been suffered by a person.

This involves not only an opinion that past acts of violence have occurred but also an assessment of the state of mind of the alleged victim.<sup>62</sup>

21.54 Strict interpretation of the statutory requirements has been adopted in subsequent cases, over more contextual approaches. In some instances, relatively small departures from the regulatory requirements have proved fatal to the claim that the applicant had suffered ‘relevant family violence’. For example, non-judicially determined claims have been rejected on the basis that the declaration:

- was made on a state—rather than a federal—statutory declaration form;<sup>63</sup>
- was signed one day and witnessed on another;<sup>64</sup>
- did not specify that the competent person was a coordinator of a women’s refuge.<sup>65</sup>

21.55 In other instances, claims have failed where the declaration:

- did not adequately set out the basis for the person’s claim to be a competent person;<sup>66</sup>
- did not state who had committed the family violence;<sup>67</sup>
- simply recited the possession of an opinion, rather than clearly expressing an opinion;<sup>68</sup>
- included the wrong mix of ‘competent persons’.<sup>69</sup>

### ***Submissions and consultations***

21.56 In the Migration Issues Paper, the ALRC expressed concerns that the efforts by the judiciary to clarify and prevent abuse of non-judicially determined claims, by

62 Ibid, [18], [19].

63 See *Mohamed v Minister for Immigration and Citizenship* (2007) 96 ALD 114.

64 *McGuire v Minister for Immigration and Indigenous Affairs* [2004] FMCA 1014 1014, [24].

65 *Kun Yu Cao v Minister for Immigration and Citizenship* [2007] FMCA 1239.

66 See *Safatli v Minister for Immigration and Citizenship* [2009] FMCA 1191, where the court found the applicant did not meet the statutory requirements in circumstances where the psychologist had provided his registration number and ticked the box on the form indicating that he was a competent person for the purposes of the *Migration Regulations*. Rather, the court indicated that a statement such as ‘I am a psychologist registered as a psychologist under a law of the state of Victoria providing for the registration of psychologist’ would have sufficed.

67 *Theunissen v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 88 ALD 97. Where more than one person is listed in the statutory declaration as having committed the relevant family violence, it is likely that the competent person must identify who has done what.

68 See, eg, *Minister for Immigration and Citizenship v Ejueyitsi* (2007) 159 FCR 94, [35]–[36], citing *Ibrahim v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1279, [43], where the court found that a doctor’s statement that ‘based on my full clinical assessment, I am of the opinion that Mr Ibrahim most likely suffered from family violence’ did not meet the legislative requirements. Rather, according to the court, it was no more than a ‘trust me’ statement, which did not express an opinion.

69 See *Mardini v Minister for Immigration* [2005] FMCA 1409.



requiring strict compliance with the letter of the *Migration Regulations*, have produced unconscionable rigidities in the law, to the point where the regime has been described as a ‘triumph of form over substance’.<sup>70</sup> This may have the effect of unduly denying victims of family violence access to the family violence exception, which may jeopardise their safety.

21.57 In light of this, the ALRC asked whether the provisions governing the statutory declaration evidence of competent persons in the *Migration Regulations* were too strict, and if so, what amendments were necessary.<sup>71</sup> In relation to competent person statutory declarations, the ALRC also asked whether competent persons should have to express an opinion as to who committed the family violence.<sup>72</sup> Finally, the ALRC sought views in relation to training and education provided to competent persons.<sup>73</sup>

21.58 The section below canvasses stakeholder concerns about the operation of the competent person regime. Stakeholders also submitted a number of options for reform, and these are discussed later in the chapter.

21.59 The concerns in relation to the operation of the competent person regime were largely related to: the difficulties in accessing competent persons; the strictness of the evidentiary requirements; and the lack of training and education given to competent persons.

#### ***Accessing competent persons***

21.60 Stakeholders highlighted that victims of family violence experienced difficulty in being able to access competent persons who are able to give a valid opinion of the kind required, in particular for those who: cannot speak English and are socially isolated; lack financial resources; or live in remote and regional areas.<sup>74</sup> These concerns were underscored in the following case study provided by Visa Lawyers Australia:

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70 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Immigration Law*, ALRC Issues Paper 37 (2011), 17. See also *Cakmak v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 135 FCR 183; *Ibrahim v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1279.

71 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Immigration Law*, ALRC Issues Paper 37 (2011), Question 7.

72 Ibid, Question 9.

73 Ibid, Question 10.

74 ANU College of Law, *Submission CFV 79*, 7 June 2011; Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011; Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011; Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011.

## Case Study

In a recent case, an applicant in a regional area was unable to find two competent persons who were willing to provide statements on her behalf. Despite the genuineness of her claim it took her months of searching to find health professionals willing to assist her. The applicant lived in a small town and her doctor, the only competent person she knew, refused to provide a statement because the perpetrator was known to her, and she did not wish to become involved. There were few other health professionals in the area and of those it took the applicant weeks to get in to see them, where they again refused to assist her. In the end the applicant was forced to travel some distance from her home to find suitable competent witnesses. Each time the applicant was forced to recount her story and request assistance recreating the trauma for the applicant.<sup>75</sup>

21.61 RAILS suggested that one unintended consequence of the inability to access competent persons—and the strictness of the evidentiary requirements—was the risk that victims would seek out such professionals for the express purpose of obtaining a statutory declaration ‘rather than for assistance in dealing with family violence, thereby setting up an artificial situation in order to comply with the legislation’.<sup>76</sup>

21.62 The IARC argued that delays in accessing competent persons—including where the delay stemmed from seeking the assistance of other professionals who are not competent persons—reduces the quality of the evidence a victim can obtain to support their claim:

According to IARC’s experience, some victims who had left the family violence matter unattended for a considerable period of time (whether due to their apprehension of the outcome or lack of knowledge or other reasons) would find it difficult to get the quality evidence required, perhaps due to lapse of time (by then, the physical and psychological injuries would not be easily discernable to facilitate the competent person’s assessment). The relevant statutory declaration can be obtained in the end but the less resourceful victim can find this task difficult.<sup>77</sup>

21.63 In addition, stakeholders expressed concern that access to competent persons often has financial implications for victims, who may be suffering from financial hardship.<sup>78</sup> For example, the Australian Domestic and Family Violence Clearinghouse (ADFVC) reported cases of

victims claiming that some competent persons, especially doctors, have requested payment for filling out statutory declaration forms as competent persons, because ‘it takes up too much time and detracts from time of other patients’.<sup>79</sup>

<sup>75</sup> Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011.

<sup>76</sup> Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011.

<sup>77</sup> Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011.

<sup>78</sup> Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011; Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

<sup>79</sup> ADFVC, *Submission CFV 26*, 11 April 2011.

21.64 Submissions also suggested that it was not uncommon for victims to have to go back to competent persons numerous times to have forms amended in order to meet the strict statutory requirements.<sup>80</sup>

***Strictness of the evidentiary requirements***

21.65 Stakeholders stressed that even when competent persons can be found, victims of family violence face additional barriers arising from the strict evidentiary requirements in relation to the statutory declaration evidence. The majority of submissions were of the view that the statutory declaration regime was strict and inflexible, and precluded some genuine victims of family violence from accessing the family violence exception.<sup>81</sup> This general concern was reflected in the submission from Visa Lawyers Australia:

The current legislative scheme places too much emphasis on the applicant to provide evidence in a certain form and too little emphasis on DIAC officers considering the evidence. The scheme seems to have created a checklist style assessment of the evidence, which allows for very little discretion and therefore limits the amount of in-depth consideration DIAC officers are required to perform. We believe the current system provides little room for flexibility, which ultimately limits the effectiveness of the scheme.<sup>82</sup>

21.66 Similarly, the IARC submitted that:

The provisions governing the statutory declaration evidence of competent persons are too complicated and interpreted too strictly. The current regime does not necessarily cure the mischief it seeks to remedy.

Only claimants who have sufficient resources can seek competent legal representation to work with ‘competent persons’ to make their statutory declaration compliant (if the ‘competent person’ is willing, and has time to amend their original declaration). Those who do not have financial resources are disadvantaged, unless they are assisted by non-profit migration agents.<sup>83</sup>

21.67 National Legal Aid emphasised that an expert ‘is no less an expert for not having used Form 1040 or for having provided an uncertified copy of their qualifications’.<sup>84</sup>

21.68 The Law Institute of Victoria was concerned that such strict requirements potentially prevent an applicant from having his or her case considered by the visa decision maker and, potentially, being referred to an independent expert:

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<sup>80</sup> Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011; Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011.

<sup>81</sup> Law Institute of Victoria, *Submission CFV 74*, 17 May 2011; Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011; Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011; Good Shepherd Australia New Zealand, *Submission CFV 41*, 15 April 2011 Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011; Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011;

<sup>82</sup> Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011.

<sup>83</sup> Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011.

<sup>84</sup> National Legal Aid, *Submission CFV 75*, 20 May 2011.

We are concerned that the Minister is required to seek the opinion of an independent expert only where the victim's evidence has been presented in accordance with Regulation 1.24. Therefore the independent expert provisions provide no safeguard for applicants who fail to meet the strict requirements under Regulation 1.23 (as interpreted by the courts), as no referral will be made.<sup>85</sup>

***An opinion as to who committed the violence***

21.69 One manifestation of where the strictness of the evidentiary requirements may be particularly burdensome is in relation to the requirement for competent persons to express an opinion about who had committed the family violence. As noted above, the courts have interpreted such requirements strictly.

21.70 A number of stakeholders were of the view that it is not appropriate for the competent person to express an opinion as to who committed the violence, citing that such evidence would, at best, be hearsay.<sup>86</sup> The IARC argued that:

it is inappropriate to require the competent person to name the perpetrator in the statutory declaration as required under reg. 1.26(e) unless the competent person was also a direct witness of the family violence.<sup>87</sup>

21.71 Others expressed concern that the requirement may deter competent persons from giving evidence, for fear of being subjected to litigation, or retribution from the alleged perpetrator.<sup>88</sup> Domestic Violence Victoria and others in a joint submission suggested that:

The competent persons should also have assurance that their details will not be released to the perpetrator under any circumstance. In practice lawyers working in this area have encountered situations where the competent persons approached by a victim refused to provide a statutory declaration for fear of retribution from the accused.<sup>89</sup>

21.72 In contrast, Visa Lawyers Australia submitted that it is not inappropriate for competent persons to give evidence about who committed the family violence, and that it serves a useful purpose:

While the competent witness is essentially providing hearsay evidence, recounting who the applicant identified as their attacker, it provides the decision-maker with corroborative evidence and goes to the applicant's credibility. The prejudice to the sponsor of accepting hearsay evidence does not arise in this context as there are no direct or immediate repercussions for the perpetrator if a finding is made that family violence has occurred.<sup>90</sup>

85 Law Institute of Victoria, *Submission CFV 74*, 17 May 2011.

86 National Legal Aid, *Submission CFV 75*, 20 May 2011; Law Institute of Victoria, *Submission CFV 74*, 17 May 2011; Good Shepherd Australia New Zealand, *Submission CFV 41*, 15 April 2011; Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011.

87 Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011.

88 National Legal Aid, *Submission CFV 75*, 20 May 2011; Law Institute of Victoria, *Submission CFV 74*, 17 May 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

89 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

90 Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011.

21.73 The ADFVC also submitted that in some instances it may be appropriate for a competent person to give an opinion about who committed the relevant family violence ‘for example, if the competent person is the manager of a women’s refuge and a representative of the refuge has accompanied the woman to court proceedings against the perpetrator’.<sup>91</sup>

### ***Training and education***

21.74 A number of submissions were concerned that competent persons lacked training in relation to the nature and dynamics of family violence. The ALRC addresses, and makes proposals in relation to education, training and information dissemination in Chapter 20.

### ***The referral to an independent expert***

21.75 As noted above, if the visa decision maker is not satisfied that the alleged victim has suffered ‘relevant family violence’ on the basis of non-judicially determined evidence, the matter must be referred to a Centrelink independent expert for assessment.

21.76 The *Migration Regulations* provide no guidance on what is required for referral to an ‘independent expert’. Neither the DIAC visa decision makers, nor the MRT on review, have statutory obligations to provide reasons for referring a matter to an ‘independent expert’.<sup>92</sup>

21.77 There has been some judicial consideration of what appropriate qualifications a person needs to be ‘suitably qualified’ to provide an expert opinion in relation to family violence. In *Sok v Minister for Immigration and Citizenship*, Riley FM suggested that a suitably qualified person for the purposes of reg 1.21 could be a person who fell within the meaning of ‘competent person’.<sup>93</sup> On the other hand, in *Ali v Minister for Immigration and Citizenship*, Nicholls FM commented that reg 1.21 contemplates a difference in qualifications required by an ‘independent expert’ and a ‘competent person’, and what is necessary is that the independent person providing the opinion meets the definition of an independent expert.<sup>94</sup>

21.78 The *Migration Regulations* are also silent on whether an independent expert should furnish reasons for his or her opinions to the applicant. In cases before the MRT, the Tribunal has an obligation to disclose to the applicant an independent expert opinion if the Tribunal is to rely on that opinion in a manner adverse to the applicant.<sup>95</sup>

### ***Submissions and consultations***

21.79 In the Migration Issues Paper, the ALRC sought comments on what issues arise in the use of independent experts in non-judicially determined claims of family

<sup>91</sup> ADFVC, *Submission CFV 26*, 11 April 2011.

<sup>92</sup> *Sok v Minister for Immigration and Citizenship* [2007] FMCA 1525, [53].

<sup>93</sup> *Ibid*, [14].

<sup>94</sup> *Ali v Minister for Immigration and Multicultural Affairs* [2007] FMCA 1405, [27].

<sup>95</sup> *Migration Act 1958* (Cth) s 359A. For an illustrative example of the procedure followed by the MRT, see *Alameddine v Minister for Immigration and Citizenship* [2010] FMCA 313.

violence.<sup>96</sup> The ALRC asked whether the legislation should require decision makers to give reasons for referring the matter to an independent expert, and whether the independent expert should provide full reasons for their decisions to the applicant.<sup>97</sup>

21.80 The ALRC also asked whether the requirement that the opinion of the independent expert is to be taken to be correct should be reconsidered, and whether there should be a method for review of such opinions.<sup>98</sup>

### ***Referral to an independent expert***

21.81 Many stakeholders considered that visa decision makers should have to give reasons for referral to an independent expert.<sup>99</sup> This view was based on a general consensus that ‘elements of the referral, assessment and reporting procedures of the independent expert system lack transparency and do not comply with the basic rules of procedural fairness’.<sup>100</sup> Procedural fairness in this context concerns fairness to the person claiming the family violence exception, as distinct from procedural fairness in relation to the allegations of family violence by the perpetrator. For example, the ANU College of Law expressed concern that:

When DIAC officers choose to refer a case to an independent expert they provide information such as notes of interview with the former sponsors, letters written by the former sponsors to DIAC about the applicant’s claims, previous statutory declarations or court evidence. Independent experts may also contact and question the sponsor directly about the allegations. All this is potentially information adverse to the claims raised by the applicant and yet it is not routinely provided to the applicant with an opportunity for her/him to respond.<sup>101</sup>

21.82 Similarly, Visa Lawyers Australia submitted that, since

the independent expert’s assessment is automatically taken to be correct, and the applicant is given no further opportunity to provide evidence to the DIAC decision-maker, applicants should be entitled to know the deficiencies in the evidence already provided before they are assessment by an independent expert.<sup>102</sup>

21.83 Other stakeholders were concerned that applicants were being referred unnecessarily—or as a matter of routine—even in cases where the ‘the statutory

96 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Immigration Law*, ALRC Issues Paper 37 (2011), Question 11.

97 Ibid.

98 Ibid, Question 12.

99 ANU College of Law, *Submission CFV 79*, 7 June 2011; Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011; Good Shepherd Australia New Zealand, *Submission CFV 41*, 15 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011; Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

100 ANU College of Law, *Submission CFV 79*, 7 June 2011. See also National Legal Aid, *Submission CFV 75*, 20 May 2011; Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011; Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011; Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011.

101 ANU College of Law, *Submission CFV 79*, 7 June 2011.

102 Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011.

declarations have been of sufficiently high quality'.<sup>103</sup> It was argued that this places unnecessary stress on applicants to have to recall their experiences of family violence. The Australian Association of Social Workers (Qld Branch) was concerned that

many victims of domestic violence believe that they are not being believed by DIAC, which further exacerbates their feelings of low self-esteem and belief no one believes them or that they have been subjected to domestic and family violence.<sup>104</sup>

21.84 The ANU College of Law expressed a view that the lack of transparency meant that the independent expert process

remains an area open to policy manipulation and anecdotal evidence supports trends in referral rates from DIAC officers on particular case demographics. For example it is standard practice for DIAC officers to refer cases where men are the victim of family violence to an independent expert, regardless of the evidence or competent persons documentation provided.<sup>105</sup>

21.85 In contrast, the Migration and Refugee Review Tribunal argued that there was no need for giving reasons for referral, since referral is not the final decision, but rather a step in the process:

The referral to an independent expert is not the final decision, but rather a step in the process in determining whether the relevant visa should be granted. As the independent expert must conduct their own assessment of the claim, and the Tribunal must take as correct any subsequent opinion, the Tribunal does not consider the legislation should require the giving of reasons for referral.<sup>106</sup>

### *The independent expert assessment*

21.86 There were varying views expressed by stakeholders as to the independent expert assessment process. Domestic Violence Victoria and others in a joint submission expressed a view that:

Anecdotal evidence reports very high satisfaction with independent experts at Centrelink. They are well-trained, professional and respectful of their clients.<sup>107</sup>

21.87 On the other hand, RAILS submitted that, in its experience:

The independent experts are not trained in obtaining evidence. In our experience the quality of the process and assessment by the independent expert varies greatly from person to person. There is very little consistency in their approach. Some have been sensitive in their manner and impartial in their processes, yet others have been leading in their questions and held obviously stereotyped and biased views of the motive of women from certain countries who marry Australian citizens/permanent residents.<sup>108</sup>

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103 Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011. See also ANU College of Law, *Submission CFV 79*, 7 June 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

104 Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011.

105 ANU College of Law, *Submission CFV 79*, 7 June 2011.

106 Principal Member of the Migration and Refugee Review Tribunals, *Submission CFV 29* 12 April 2011.

107 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

108 Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011.

21.88 The ADFVC was concerned that ‘there is no clear criteria that must be met by independent experts with respect to training, experience and supervision’.<sup>109</sup> In this respect, the ANU College of Law queried whether:

the opinion of one, later ‘expert’ should be preferred over that of at least two other ‘experts’ (‘competent persons’)—especially given that the competent persons usually assess the victim’s claims much closer to the time the alleged violence took place.<sup>110</sup>

21.89 Similarly, the IARC argued that given the strict requirements of the competent person’s qualifications, ‘it would seem logical to assume that the competent persons’ opinion would prevail’, given that independent experts’

investigations and comments on the state of mind (fear of safety and well being) of the victim are conducted many months, if not years, after the event and at a time much later than the competent person’s investigation/opinion. This time delay and questions about whether Centrelink social workers adequately trained in family violence assessments, raises doubts about the validity of their assessments.<sup>111</sup>

21.90 Other concerns in relation to independent expert assessments included instances where the independent expert:

- had not applied the correct definition of relevant family violence;<sup>112</sup>
- conducted investigations on specific matters rather than confining their assessment to whether or not the victim had suffered family violence;<sup>113</sup> and
- held views and attitudes that are contrary to the well-being and protection of victims of family violence.<sup>114</sup>

## International comparisons

21.91 A number of overseas jurisdictions including the US, Canada, the UK, and New Zealand have family violence provisions. Although these models reflect differing policy considerations in their respective countries, their approaches to evidentiary requirements—and to the respective family violence provisions as a whole—provide a useful comparison with the Australian system.

### United States

21.92 The US has a comprehensive legislative scheme for the protection of immigrant women who are victims of ‘domestic violence’—the term used in the US rather than ‘family violence’, which is used in the Australian context.<sup>115</sup> This is enshrined in the

<sup>109</sup> ADFVC, *Submission CFV 26*, 11 April 2011.

<sup>110</sup> ANU College of Law, *Submission CFV 79*, 7 June 2011.

<sup>111</sup> See Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011. For example, the IARC noted it had handled a case where non-judicially determined evidence was provided to DIAC in October 2008 but a decision to refer the matter to Centrelink was only made in March 2011, and that longer delays are not uncommon.

<sup>112</sup> ANU College of Law, *Submission CFV 79*, 7 June 2011.

<sup>113</sup> Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011.

<sup>114</sup> WEAVE, *Submission CFV 31*, 12 April 2011.

<sup>115</sup> The differences in terminology are discussed in Ch 20.



*Violence Against Women Act* (VAWA) of 1994, which was ‘reauthorised’ in 2000 and 2005, and codified in various parts of the United States Code.<sup>116</sup> Although the title of the Act refers to women, protection applies to all spouses, including men.

21.93 Under US immigration law, spouses of US citizens or lawful permanent residents may apply for, and be granted conditional residence status, for a period of two years. In order to gain permanent residence, the couple must file a joint petition for removal of the conditional residency status within a 90 day period before the expiration of the two year conditional residence grant.<sup>117</sup> That is, the immigrant must be supported in the petition for permanent residence by his or her US spouse. In the event that: a petition is not filed; the marriage is terminated; or it is found that the marriage was not entered into in good faith, the conditional residence status of the immigrant is terminated and he or she becomes an unauthorised alien,<sup>118</sup> who can then be subjected to removal proceedings.<sup>119</sup>

21.94 Within this framework, VAWA provides two major avenues for victims of domestic violence to obtain temporary and permanent residence: removal of conditional status and cancellation of removal.

### ***Removal of conditional status***

21.95 The key protection mechanism in VAWA allows persons who are victims of domestic violence to self-petition for removal of their conditional residency status independently of their spouse.<sup>120</sup> A victim must be able to show that: the marriage was entered into in good faith; the abuser was a US resident or lawful permanent resident; he or she resided with the US resident or lawful permanent resident; during the marriage, either he or she, or a child, had been battered or subjected to extreme cruelty perpetrated by the US resident or lawful permanent resident; and he or she is of good character.<sup>121</sup> The protection extends to divorced women and widows who apply for self-petition within two years of divorce or death of the US citizen or lawful permanent resident.<sup>122</sup>

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116 The Act was passed as part of *Violent Crime Control and Law Enforcement Act of 1994* Pub L No 103-332, 108 Stat 1796, 1994 (US) and codified in various sections of United States Code.

117 *Violence Against Women Act (1994)* 2005 USC 8 (US) § 1186(a)(1).

118 Ibid § 1186a(c).

119 Ibid § 1186(a)(1).

120 Ibid § 1154(a)(1)(A)(iii)(I).

121 Ibid § 1154(a)(1)(A). The phrase ‘battered by or has been the subject of extreme cruelty’ includes, but is not limited to, being a victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor) or forced prostitution shall be considered acts of violence. VAWA of 1994 required a victim to show that removal would result in ‘extreme hardship’. However, this requirement was removed when the Act was reauthorised in 2000.

122 Ibid § 1154(a)(1)(A)(iii)(II)(aa)(CC)(aaa), (bbb). In the case of divorce, the immigrant woman must demonstrate a connection between the legal termination of the marriage and battering or extreme cruelty by the US citizen spouse or lawful permanent resident. If the abuser to whom the immigrant is, or was married to, has lost his permanent residence due to a conviction related to an incident of domestic violence, the immigrant woman can self petition, provided the abuser lost his residence status within two years of the date of the filing.

***Cancellation of removal***

21.96 Although most victims of domestic violence will be able to apply for the self-petition, it is unavailable to those who are already in removal proceedings—typically, because he or she is present in the US without legal immigration status.<sup>123</sup> In these cases, victims of domestic violence may seek to cancel their removal from the US on this basis. Applications are made to a judge and, if successful, cancellation of removal entitles a victim to permanent residence. In order to be granted the cancellation of removal, it must be demonstrated that:

- the victim has been battered or subjected to extreme cruelty by a spouse or parent who is a US citizen or lawful permanent resident, or by a US citizen or lawful permanent resident whom he or she intended to marry, but whose marriage is not legitimate because of bigamy;<sup>124</sup>
- the victim has been physically present in the US for a continuous period of three years immediately preceding the date of the application;<sup>125</sup>
- the victim has been a person of good moral character during such period;<sup>126</sup> and
- the removal would result in extreme hardship to the victim, or the victim's child or parent.<sup>127</sup>

***Evidentiary requirements***

21.97 The VAWA and the United States Code contain no specific provisions in relation to evidentiary requirements to support a claim for self-petition or cancellation of removal. Rather, a victim must fill out an application form and attach all supporting documentary evidence supporting their claim. Generally, applicants are encouraged to seek assistance from an attorney when making in application. In relation to cancellation of removal status, the United States Code provides that the Attorney-General 'shall consider any credible evidence relevant to the application'.<sup>128</sup>

***Canada***

21.98 In Canada, the *Immigration and Refugee Protection Act 2001* (Canada) provide that Canadian citizens or permanent residents can sponsor a person who falls within the

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123 For example, because the woman entered the US without permission, or overstayed her non-immigrant visa, or for other reasons, such as violating her visa conditions. Prior to April 1, 1997, removal proceedings were referred to as 'deportation proceedings'.

124 *Violence Against Women Act (1994)* 2005 USC 8 (US) § 1229b (2)(A)(i)(I)–(III).

125 Ibid § 1229b(2)(A)(ii). See also § 1229b(2)(d)(2): 'an alien shall have failed to maintain continuous physical presence in the US if the alien has departed for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days. However, the alien demonstrates a connection between the absence and the battering or extreme cruelty perpetrated by the US citizen or lawful permanent resident, such absences do not count towards the 90 or 180 day limit'.

126 Ibid § 1229b(2)(A)(iii).

127 Ibid § 1229b(2)(A)(v).

128 Ibid § 1229b(2)(D).

‘family class’ to obtain permanent residence.<sup>129</sup> The ‘family class’ includes a sponsor’s spouse, common-law partner or conjugal partner.<sup>130</sup>

21.99 Those who fall within the ‘family class’ can be sponsored from abroad, and enter Canada with permanent residence status.<sup>131</sup> Alternatively, applications can be made onshore, where the spouse or common-law partner is cohabitating with the sponsor and is the subject of a sponsorship application.<sup>132</sup> If the relationship is assessed as genuine—and all other criteria are met—the person will be granted permanent residence status. There is no official waiting period comparable to Australia or the US. However, if the sponsorship is withdrawn at any time, no decision shall be made on the application,<sup>133</sup> and the person the subject of sponsorship may be subjected to removal proceedings.

21.100 Those who are onshore, and whose sponsorship has broken down due to family violence, can apply for permanent residence on ‘Humanitarian and Compassionate’ grounds,<sup>134</sup> whether or not the person has temporary residence status.<sup>135</sup> Under the *Immigration Guidelines*, ‘Humanitarian and Compassionate’ grounds refer to circumstances where ‘unusual, undeserved or disproportionate hardship would be caused to the person if he or she had to leave Canada’.<sup>136</sup> The guidelines for officers determining applications explicitly recognise family violence:

Family members in Canada, particularly spouses, who are in abusive relationships and are not permanent residents or Canadian citizens, may feel compelled to stay in the relationship or abusive situation to remain in Canada; this could put them in a situation of hardship.

Officers should be sensitive to situations where the spouse (or other family member) of a Canadian citizen or permanent resident leaves an abusive situation and, as a result, does not have an approved sponsorship.

Officers should consider the following factors:

129 *Immigration and Refugee Protection Act 2001* c 27 (Canada) s 6 (2).

130 See *Immigration and Refugee Protection Regulations 2002* (Canada) reg 117(1)(a) and also div 1 which defines common-law partner as: ‘in relation to a person, an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year’; and ‘conjugal partner’ as being ‘in relation to a sponsor, a foreign national residing outside Canada who is in a conjugal relationship and has been in that relationship for a period of at least one year’. The ‘family class’ also covers parents, grandparents and children (natural and adopted), and relatives.

131 See Immigration and Citizenship Canada, *IP 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* (2011), 5.1: ‘it is a cornerstone of the *Immigration and Refugee Protection Act* that, prior to their arrival in Canada, foreign nationals who wish to live permanently must submit their application outside Canada, and qualify for and obtain a permanent resident visa’.

132 *Immigration and Refugee Protection Regulations 2002* (Canada) reg 124(a)–(c).

133 Ibid reg 126.

134 See *Immigration and Refugee Protection Act 2001* c 27 (Canada) s 25(1); *Immigration and Refugee Protection Regulations 2002* (Canada) reg 66.

135 *Immigration and Refugee Protection Act 2001* c 27 (Canada) s 25(1): ‘the Minister must consider a request from any foreign national in Canada who is inadmissible or who does not meet the requirements of the Act’.

136 Immigration and Citizenship Canada, *IP 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* (2011), 12.7.

- information indicating there was abuse such as police incident reports, charges; or
- convictions, reports from shelters for abused women, medical reports;
- whether there is a degree of establishment in Canada;
- the hardship that would result if the applicant had to leave Canada;
- the laws, customs and culture in the applicant's country of origin;
- the support of relatives and friends in the applicant's home country; and
- whether the applicant has a child in Canada or/and is pregnant.<sup>137</sup>

21.101 Family violence is one of a number of factors to be considered in an 'Humanitarian and Compassionate' application, and the existence of family violence does not give an applicant automatic right to permanent residence. Factors that must be considered when determining 'hardship' include, but are not limited to: establishment in and ties to Canada; the best interests of any child involved; health considerations; consequences of the separation of relatives; and factors in the applicant's country of origin.<sup>138</sup>

21.102 The *Immigration Guidelines* also give guidance on whether there is a significant 'degree of establishment' in Canada. These factors include the person's employment history; level of education; time spent in Canada; type of assets; family and community support; whether the applicant would face hardship if returned to his or her country; and whether the removal would have any impact on others living in Canada.<sup>139</sup>

21.103 As in the US, there are no specific evidentiary requirements spelled out in the guidelines or legislation. Rather, the guidelines state that the onus is on the applicant to put forth any 'Humanitarian and Compassionate' factors that he or she believe are relevant to their case, and 'to be clear in the submission as to exactly what hardship they would face'.<sup>140</sup>

21.104 The *Immigration Guidelines* also recognise that effective decision making in 'Humanitarian and Compassionate' cases involves 'striking a balance between certainty and consistency on the one hand and flexibility to deal with the specific facts of the case, on the other'.<sup>141</sup> As such, the guidelines specifically note that legislation, policy statements, guidelines, and manuals and handbooks may legitimately influence decision makers in their work.

## United Kingdom

21.105 Persons seeking permanent residence in the UK on the basis of a marriage or civil partnership with a UK sponsor are—in a manner similar to Australia—subjected

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<sup>137</sup> Ibid.

<sup>138</sup> Ibid, 5.11.

<sup>139</sup> Ibid, 11.5.

<sup>140</sup> Ibid, 5.7.

<sup>141</sup> Ibid, 5.5.

to a two-year temporary visa period.<sup>142</sup> Under the *Immigration Rules* (UK), victims of family violence may seek ‘indefinite leave to remain’ in the UK if, among other things, they are able to produce evidence as required by the Secretary of State that ‘the relationship was caused to permanently break down before the end of that period as a result of domestic violence’.<sup>143</sup>

21.106 Applicants are required to provide an application form along with supporting documents to support their claim. There are no prescriptions on the type of evidence that may be presented.

21.107 Under the *Immigration Directorate Instructions* (the Instructions), visa decision makers have considerable discretion in assessing whether the relationship has broken down as a result of family violence. The Instructions provide guidance on the relevant types of evidence that an applicant may present and the appropriate weight to be given to each. For example, the Instructions provide that two types of evidence should be sufficient, of themselves, to establish family violence: a relevant court conviction against the sponsor; or full details of a relevant police caution issued against the sponsor.<sup>144</sup>

21.108 A criminal conviction is considered indisputable evidence that family violence has occurred.<sup>145</sup> Where the criminal case is pending, the visa decision maker is to consider evidence from both parties, and make a separate assessment of the application.<sup>146</sup> In relation to police cautions, the visa decision-maker is directed to call the relevant police station to confirm whether a caution has been issued. If confirmed, it may provide evidence that the applicant has suffered family violence.<sup>147</sup>

21.109 In the absence of the above forms of evidence, applicants may provide as many pieces of evidence as possible to support their case. The Instructions set out a non-exhaustive list providing that such evidence can include:

- a medical report from a hospital doctor confirming that the applicant has injuries consistent with being a victim of domestic violence;
- a letter from a GMC registered family practitioner who has examined the applicant and is satisfied that the applicant has injuries consistent with being a victim of domestic violence;
- an undertaking given to a court that the perpetrator of the violence will not approach the applicant who is the victim of violence;
- a police report confirming attendance at an incident resulting from domestic violence;

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142 *Immigration Rules 1994* (UK) reg 287(a).

143 *Ibid* reg 289A(iv). Definition of ‘indefinite leave’ is taken to mean permanent residence. See UK Border Agency, *Partners* (2011) <<http://www.ukba.homeoffice.gov.uk/partnersandfamilies/partners/>> at 13 July 2011.

144 UK Border Agency, *Immigration Directorate Instructions* (2011), ch 8 section 4, [2.1].

145 *Ibid*, [3.1].

146 *Ibid*, [3.1.1].

147 *Ibid*, [3.2].

- a letter from a social services department confirming its involvement in connection with domestic violence;
- a letter of support or a report from a domestic violence support organisation.<sup>148</sup>

21.110 While the Instructions are comprehensive, they are not determinative since ‘any evidence of domestic violence should be considered by caseworkers when making a decision’.<sup>149</sup> The Instructions recognise that

caseworkers might find they are required to make the kind of judgment normally undertaken by other professional bodies, they may also find that they have to consider the validity and authenticity of documents provided by the applicant. In view of this, caseworkers should seek advice from their senior case worker and/or other relevant bodies when assessing an application.<sup>150</sup>

## New Zealand

21.111 The New Zealand model, in many respects, mirrors that of Australia. Under the *Migration Act 2009* (NZ), the Minister for Immigration may certify immigration instructions in relation to the issuance of visas, including their criteria, rules and general objectives.<sup>151</sup>

21.112 In order to be granted a partner visa, applicants must satisfy the visa decision maker that they have been living for 12 months in a ‘partnership’ that is genuine and stable with a New Zealand citizen or permanent resident.<sup>152</sup> A ‘partnership’ is defined to cover a marriage, civil union or de facto relationship (whether opposite or same-sex).<sup>153</sup>

21.113 Under the immigration instructions titled ‘Residence policy for victims of domestic violence’, victims of family violence can apply for permanent residence and have their claims assessed by a departmental officer.<sup>154</sup> Domestic violence applications are given priority processing, and are determined by immigration officers who have received specialist training in applying the policy.<sup>155</sup>

21.114 Under the immigration instructions, evidence of domestic violence means:

a final protection order against the New Zealand citizen or resident partner or intended partner under the *Domestic Violence Act 1995* (NZ); or

a relevant New Zealand conviction of the New Zealand citizen or resident partner or intended partner of a domestic violence offence against the principal applicant or a dependent child of the principal applicant; or

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148 Ibid, [2.3].

149 Ibid, [2].

150 Ibid.

151 *Immigration Act 2009* (New Zealand) s 22(1)–(8).

152 Immigration New Zealand, *Operations Manual* (2011), F 2.5(a).

153 Ibid, F 2.5(b).

154 Ibid, S 4.5.20.

155 Ibid, S 4.5.25.

a complaint of domestic violence against the principal applicant or a dependent child investigated by the New Zealand police, where New Zealand police are satisfied that domestic violence has occurred; or

a statutory declaration from the applicant stating that domestic violence has occurred and declarations completed by persons competent to make statutory declarations that domestic violence occurred.<sup>156</sup>

21.115 The instructions list persons who are competent to make a statutory declaration that domestic violence has occurred to include:

- social workers who are:
  - registered with the Social Workers Registration Board; or
  - full members of the Aotearoa New Zealand Association of Social Workers; or
  - employed under the *State Sector Act 1988* (NZ);
- doctors registered with the New Zealand Medical Council;
- nurses registered with the Nursing Council of New Zealand;
- psychologists registered with the New Zealand Psychologists Board;
- counsellors who are members of the New Zealand Association of Counsellors; and
- experienced staff members of Child Youth and Family approved women's refuges who are nominated by:
  - the National Collective of Independent Women's Refuges; or
  - the Shakti Community Council.<sup>157</sup>

21.116 Applicants must supply statutory declarations from people acting in their professional capacity from two of the groups listed above. The two people must not be professionally related—for example they cannot be two people from the same medical practice.<sup>158</sup> Further, the instructions provide that immigration officers can verify that statutory declarations have been made by the competent persons by contacting the relevant professional bodies.<sup>159</sup>

## Options for reform

21.117 Stakeholders presented various options for reform of non-judicially determined claims of family violence. These fell into two categories. First, there were a number of interlinking proposals for reform that sought to introduce more accessibility, accountability, and flexibility to the system, while still retaining the competent person

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<sup>156</sup> Ibid, S 4.5.5.

<sup>157</sup> Ibid, S 4.5.6.

<sup>158</sup> Ibid, S 4.5.6 (b).

<sup>159</sup> Ibid, S 4.5.6 (c).

regime. The ALRC considers these below as a package of proposals, which would apply if the competent person regime is to be maintained.

21.118 On the other hand, the alternative proposal called for abolishing the competent person regime altogether, and establishing an independent expert panel to deal with all non-judicially determined claims.

21.119 These reform options, and the ALRC's views, are discussed below.

### **Keeping the existing competent person regime**

#### ***Expand the range of competent persons***

21.120 In response to concerns that competent persons are not easily accessible to victims, some stakeholders proposed that the range of competent persons be expanded to include: bi lingual workers;<sup>160</sup> counsellors and case managers in family violence services;<sup>161</sup> ESL teachers;<sup>162</sup> and lawyers.<sup>163</sup> For example, Domestic Violence Victoria and others in a joint submission highlighted that:

Immigrant and refugee women are often assisted by bilingual workers from their community, who are often a first and trusted port of call in family violence situations. However, these workers, often from newly-emerging communities, may not fall under the definition of a competent person if they do not also have relevant qualification. The scope of competent person should be extended to include bilingual workers. These workers should be appropriately trained.<sup>164</sup>

21.121 In contrast, IARC expressed a view that competent persons 'should be amended to eliminate the confusion and to streamline the category of groups of people who are competent to decide whether family violence has occurred at the relevant time'.<sup>165</sup> In its view, the definition of competent person requires clarification, as it 'has caused problems for some applicants who do not have any apparent abuses of the system'.<sup>166</sup> For example:

A qualified psychologist who witnessed the incident as the victim's neighbour can provide a statutory declaration as a competent person but not so if that witness was a nurse.<sup>167</sup>

#### ***Correcting for minor errors and omissions***

21.122 In light of the concerns that the statutory declaration scheme was a 'triumph of form over substance',<sup>168</sup> the ALRC asked whether the *Migration Regulations* should

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160 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

161 Ibid.

162 Good Shepherd Australia New Zealand, *Submission CFV 41*, 15 April 2011.

163 Ibid.

164 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

165 Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011.

166 Ibid.

167 Ibid.

168 See *Cakmak v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 135 FCR 183.



be amended to provide that minor errors and omissions are not fatal to the statutory evidence of a competent person.<sup>169</sup>

21.123 Stakeholders did not expressly support an amendment to the *Migration Regulations* along such lines, but did stress the need for a more flexible approach to assessing the statutory evidence. For example, Visa Lawyers Australia suggested that:

If a competent witness has provided evidence and has failed in some respect to comply with the legislative requirements it is unclear why DIAC officers should not have the power to go back to the competent person and seek further evidence from them, especially if it is in relation to something which could be easily provided such as evidence of credentials.<sup>170</sup>

21.124 This idea found support in a number of submissions.<sup>171</sup> RAILS submitted that DIAC should, in certain circumstances, provide feedback to the competent person where the statutory declaration can be easily amended so that it meets the legal requirements:

For example, in cases where the wrong form was used; where witnessing of the statutory declaration was not properly completed; where the competent person's qualification to be a competent person is not clearly stated; where their opinion is not clearly expressed in the appropriate terms. This would be less time-consuming, cut down on costly and time consuming litigation through the Courts, cause less distress for the victim and provide a form of training for the competent person.<sup>172</sup>

21.125 National Legal Aid suggested that the *Migration Regulations* should be amended to allow for substantial compliance with Form 1040, and that departmental guidelines could

include a list, which should be expressed to be non-exhaustive, of examples which would constitute substantial compliance with the regulations such that minor error/omission should not be taken to be fatal.<sup>173</sup>

21.126 In contrast, the MRT was concerned that, while such amendments may reduce the technicalities, there was potential for uncertainty as to what constitutes 'a minor error or omission':

The Tribunals are of the view that certainty in the legislative scheme is desirable to ensure consistent decision making ... The Tribunals consider such amendments have the potential to create uncertainty as to what constitutes a 'minor error or omission', and whether the statutory declaration is valid for the purposes of the Regulations.

In this context, the Tribunals note that under the current legislative scheme, a visa applicant is able to 'correct' deficiencies in statutory evidence by submitting, any time up until the time of decision, a valid statutory declaration. Deficiencies in any

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169 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Immigration Law*, ALRC Issues Paper 37 (2011), Question 8.

170 Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011.

171 ANU College of Law, *Submission CFV 79*, 7 June 2011; Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

172 Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011.

173 National Legal Aid, *Submission CFV 75*, 20 May 2011.

statutory evidence are matters that would be raised by the Migration Review Tribunal during the course of the Tribunal hearing.<sup>174</sup>

***Improving accountability and transparency of independent expert assessments***

21.127 The majority of submissions expressed a view that independent experts should be required to furnish their reasons to the applicant.<sup>175</sup> Many argued that providing full reasons for assessments is vital in allowing the applicant to consider whether to challenge the assessment—via judicial review—on the basis that the independent expert had not applied the correct definition of relevant family violence.<sup>176</sup>

21.128 It appears that reasons for the independent assessment are not routinely given to the applicant. For example, the IARC noted that independent experts customarily provide full reasoned decisions to DIAC decision makers and that:

DIAC will seek the applicant's comments before their decision but they do not always provide the full reports to the applicants for comments other than the fact that a negative opinion has been made which is binding on the decision maker.<sup>177</sup>

21.129 In contrast, the MRT understood that the applicant is provided with reasons for the decision as part of the 'procedural fairness' requirements under the *Migration Act*.<sup>178</sup>

21.130 In relation to whether the MRT should be bound by an independent expert assessment obtained at the primary level, stakeholders who addressed this issue did not support such a requirement.<sup>179</sup> The MRT submitted that doing so would remove an avenue for meaningful merits review:

Under the current legislative scheme, an applicant may provide further evidence to the Tribunal upon which it may be satisfied that relevant family violence has occurred, notwithstanding that there is an existing independent expert opinion. Requiring the Tribunal to be bound by an existing opinion obtained by the primary delegate would remove the capacity of an applicant to present further evidence and to access meaningful merits review.<sup>180</sup>

174 Principal Member of the Migration and Refugee Review Tribunals, *Submission CFV 29* 12 April 2011.

175 ANU College of Law, *Submission CFV 79*, 7 June 2011; National Legal Aid, *Submission CFV 75*, 20 May 2011; Law Institute of Victoria, *Submission CFV 74*, 17 May 2011; Good Shepherd Australia New Zealand, *Submission CFV 41*, 15 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011; Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011; Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

176 National Legal Aid, *Submission CFV 75*, 20 May 2011; Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011.

177 Principal Member of the Migration and Refugee Review Tribunals, *Submission CFV 29* 12 April 2011.

178 Ibid.

179 Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011; National Legal Aid, *Submission CFV 75*, 20 May 2011; Principal Member of the Migration and Refugee Review Tribunals, *Submission CFV 29* 12 April 2011.

180 Principal Member of the Migration and Refugee Review Tribunals, *Submission CFV 29* 12 April 2011.

21.131 Many stakeholders considered that decisions of independent experts should not automatically be binding on the decision maker, and should be subjected to review.<sup>181</sup> Visa Lawyers Australia argued that:

Although there are obvious resource justifications for ending the process with the independent expert's opinion, it is risky to rely on one opinion and give it ultimate determinative power, especially when the applicant is not provided with reasons for their decisions.<sup>182</sup>

### Repeal the competent person regime

21.132 An alternative that was floated in submissions and consultations was to repeal the competent person statutory declaration regime and replace it with an independent expert scheme, similar to the current health requirements administered by Medical Officers of the Commonwealth.

### *The health assessment regime*

21.133 Under the current legislative scheme, all permanent visa applicants are required to meet health requirements.<sup>183</sup> Applicants are asked to undergo a medical examination, an X-ray, and a HIV/AIDS test (if 15 years of age or older). The Minister must—subject to some exceptions—seek the opinion of a Medical Officer of the Commonwealth (MOC) as to whether the health requirement has been met.<sup>184</sup> An MOC is a medical practitioner who has been appointed in writing by the Minister for the purposes of the *Migration Regulations*.<sup>185</sup> Where the matter is referred to an MOC for his or her opinion, the Minister must take as correct an opinion for the purposes of deciding whether the person meets a requirement or satisfies a criterion.<sup>186</sup> In some cases, the health requirement may be waived, but cannot be waived where the applicant is assessed as representing a risk to public health or safety in Australia.

181 ANU College of Law, *Submission CFV 79*, 7 June 2011; Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011; Law Institute of Victoria, *Submission CFV 74*, 17 May 2010; Good Shepherd Australia New Zealand, *Submission CFV 41*, 15 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 38*, 12 April 2011; Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

182 Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011.

183 It is a criterion for most visa classes that the applicant meets health related public interest criteria (PIC). These are provided for in sch 4 to the *Migration Regulations 1994* (Cth) in PICs 4005, 4007 and 4006A. Section 60 of the *Migration Act 1958* (Cth) provides that the Minister may grant or refuse the visa depending on whether he or she is satisfied that the applicant meets the health criteria. Section 496 enables the Minister or a delegate to delegate the decision-making power to another person. Consequently, the task of examining the health criteria is delegated to medical officers of the Commonwealth. This power is also contained in reg 1.16 which provides that the Minister, 'may by writing signed by the Minister, delegate to an officer any of the Minister's power under these Regulations, other than this power of delegation'.

184 See *Migration Regulations 1994* (Cth) reg 2.25A(1). Under reg 1.16A the Minister may in writing appoint a medical practitioner to be a MOC for the purposes of the Regulations.

185 Ibid reg 1.03 defines a MOC as 'a medical practitioner employed or engaged by the Australian government'.

186 Ibid reg 2.25A(3).

21.134 Depending on the type of application lodged, the applicant may have review rights. In such circumstances, the applicant is able to submit further medical evidence for review by to a Review MOC (RMOC).<sup>187</sup> The RMOC is able to:

- set aside and refuse the decision and substitute a new decision; or
- affirm the Department’s original decision; or
- refer the case back to the Department for further consideration.<sup>188</sup>

21.135 Therefore, under the current framework, the role of the visa decision maker is limited to assessing whether or not the MOC or RMOC has applied the legislation correctly, and the visa decision maker takes no part in assessing the health of the applicant.

### *A panel of experts for family violence*

21.136 Stakeholders saw substantial benefits in replacing the competent person regime with an independent expert panel scheme similar to that used for health assessments, including: greater accessibility for victims; quality and consistent decision-making by experts; improved transparency and accountability; and the opportunity for targeted training and education.<sup>189</sup> For example, the Law Institute of Victoria submitted that an independent expert scheme:

Would remove DIAC officers (or MRT on appeal) from the decision-making process, recognising that they are not trained to make findings about family violence and therefore should not be making findings about whether or not it occurred. However, DIAC officers should be required to consider whether the expert’s opinion was properly formed in accordance with the definition of ‘relevant family violence’.

Repeal of the competent person provisions would provide an opportunity for quality control, to ensure that only reputable professionals in the area of family violence make assessments about whether family violence has occurred. An improved independent expert scheme must, however, be more transparent and accountable than under the current provisions. There should be full reasons given for an opinion about family violence to ensure that the opinion has a proper basis and is made in accordance with the legislative definition of family violence. Provisions should be made for review of an independent expert opinion or for the opportunity to seek a second opinion.<sup>190</sup>

21.137 Visa Lawyers Australia considered that an independent panel could help to overcome difficulties of access to competent persons in regional areas. In their view, the panel of experts

could be trained in the legislative requirements, and could be accessed only by referral from DIAC, where an applicant does not have the access to two competent persons of their choosing. The panel of professionals could operate similarly to panel doctors

187 Department of Immigration and Citizenship, *Form 1071i: Health Requirement for Permanent Entry to Australia* (2011), 2.

188 Ibid, 2.

189 Law Institute of Victoria, *Submission CFV 74*, 17 May 2011; Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011; Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011.

190 Law Institute of Victoria, *Submission CFV 74*, 17 May 2011.

used in medical examinations under the *Migration Regulations*. This would alleviate difficulties faced by applicants seeking access to competent persons in regional areas.<sup>191</sup>

21.138 The IARC submitted that, if a panel scheme were to be instituted, those who do not have judicially determined evidence ‘must be promptly referred to an independent expert (from a panel of experts) for an assessment’ and that the system should allow for an ‘expert review mechanism, similar to that of a review system by the Commonwealth Medical Review Officer in relation to health assessments’.<sup>192</sup>

### ***ALRC’s views***

21.139 The ALRC considers below two options and two sets of proposals for reform of non-judicially determined claims of family violence. In the ALRC’s preliminary view, the preferred option is to replace the competent person regime with an independent expert panel, similar to that currently in place for health assessments, to deal with all non-judicially determined claims of family violence.

21.140 In the alternative, if the competent person regime is to be maintained, the ALRC makes a number of proposals aimed at reducing the rigid and strict procedural requirements for making a non-judicially determined claim, as well as improving the transparency and accountability of the system.

21.141 These options and proposals are explored below.

### ***Abolishing the competent person regime***

21.142 In the ALRC’s preliminary view, there are a number of sound reasons why an independent expert panel scheme similar to that set up for health assessments should be pursued.

21.143 First, an independent expert panel scheme would be consistent with the policy taken in other areas of immigration—such as health or skills assessment—to ‘outsource’ the decision making to expert professionals in those areas, recognising that the visa decision maker is not adequately equipped to make such decisions.<sup>193</sup> The ALRC considers that if the system envisages that visa decision makers are not adequately equipped to make assessments in relation to family violence, this should result in their complete, rather than partial, removal from assessment process in deference to an independent expert panel.

21.144 Secondly, an independent expert panel scheme would simplify the procedural requirements and increase accessibility to visa applicants who experience family violence. An expert panel would remove the strict procedural requirements and allow victims to present a wide range of evidence to the decision maker, including evidence from those persons to whom an immigrant victim may more readily disclose family violence. This mirrors the position taken in the UK and other overseas

191 Visa Lawyers Australia, *Submission CFV 76*, 23 May 2011.

192 Immigration Advice and Rights Centre Inc, *Submission CFV 32*, 12 April 2011.

193 The visa decision maker would still retain a limited role in assessing whether the relevant expert has correctly applied the legislation.

jurisdictions where in the absence of judicially determined evidence, applicants are encouraged to present as many pieces of evidence as possible to support their claim. It also has the benefit of streamlining the system, by reducing the number of times a person may have to re-tell their often traumatic experiences of family violence.

21.145 Thirdly, an independent expert panel scheme presents an opportunity for targeted training and education in relation to the nature, features and dynamics of family violence for those experts appointed to the panel.<sup>194</sup> This would provide a measure of assurance to victims that their claims will be assessed by professionals with specialist understanding of family violence. The ALRC considers that this would arguably lead to more consistent decision making and, ultimately, improve the safety of victims of family violence.

21.146 Fourthly, the ALRC envisages that the expert panel scheme should provide that full reasons be given to the applicant, and that there be a mechanism for review. The *Migration Regulations* could—similar to health assessments—provide that a decision maker must take as correct an opinion of the independent panel assessor. However, in review applications, where there is new evidence or where significant time has elapsed, a review opinion could be sought.

21.147 Lastly, the ALRC considers that access to an independent panel scheme should be free for applicants seeking to access the family violence provisions, given that many victims lack financial resources. The ALRC acknowledges that the independent scheme would have financial implications. However, these may be offset in the long run if consistent decision making leads to lower rates of merits or judicial review. Further, quicker access to the family violence provisions for genuine victims will improve their safety and reduce dependence on social and other services that would otherwise be needed.

#### ***Keeping the existing competent person regime***

21.148 The ALRC acknowledges that the current competent person statutory declaration regime presents barriers to accessing the family violence provisions for some genuine victims of family violence. When the ALRC made recommendations in *Equality Before Law* to expand the range of evidence capable of supporting a non-judicially determined claim, it was envisaged that more discretion would be placed in the hands of visa decision makers. At that time, the ALRC argued that:

Departmental officers are required to exercise discretion in making many decisions at present, and the Commission does not consider that this is a barrier, provided that training in domestic violence issues is provided.<sup>195</sup>

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194 See Ch 20, Proposal 20-4 where the ALRC proposes that training and education in relation to the nature, features and dynamics of family violence be provided for decision makers in the migration system.

195 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), 223.

21.149 The underpinning policy consideration was to ensure that victims could present appropriate evidence of family violence to a decision maker for consideration. As noted above, concerns about the integrity of the family violence exception led to legislative changes in 2005, which introduced the mechanism of referral to an independent expert. In effect, the current hybrid model only gives the visa decision-maker the discretion to make a favourable assessment in relation to the issue of proof of family violence. Where the decision maker has concerns, the system requires determination by an ‘independent expert’, whose decision becomes binding on the visa decision maker.

21.150 The ALRC considers that the shift in policy towards a hybrid model is significant, and calls into question what the appropriate role of the competent person should be, and indeed, the appropriate role of the visa decision maker.

21.151 If the system contemplates that the visa decision maker will be able to make assessments in relation to family violence, there are strong policy grounds for strict requirements governing the evidence of competent persons. This is because a visa decision maker relies upon, or is informed by, the evidence of competent persons when making a determination about family violence. In this sense, the primary purpose of competent persons is to provide an avenue for the applicant to provide substantiated evidence of his or her family violence claim and, at the same time, brings a measure of quality assurance and integrity to the visa decision maker’s decision.

21.152 However, the introduction in 2005 of the mechanism of referral to an independent expert reflected in part, concerns that visa decision makers are not adequately equipped to make determinations in relation to family violence, and that assessment should, in some circumstances, be assessed by an expert. The ALRC considers that the option to refer to an independent expert negates the need for an overly strict regime in relation to statutory evidence from competent persons. The emphasis on ‘form over substance’ does little to assist the visa decision maker in determining whether family violence has occurred. Rather, it deflects the focus of the applicant and the competent person towards meeting the procedural requirements. The ALRC is concerned that having strict procedural requirements means that there is a risk that genuine claims of family violence are precluded from being considered by a visa decision maker on technical grounds, and from being considered by an independent expert.

21.153 In the ALRC’s preliminary view, if the competent person regime is to remain in place, the rigidity of the statutory declaration requirements could be addressed by a suite of reforms to the *Migration Regulations* highlighted by stakeholders. These include: allowing decision makers to seek further information from competent persons where appropriate; requiring decision makers to provide reasons for referral to an independent expert; and removing the requirement for competent persons to express an opinion as to who committed the family violence. In addition, accountability and transparency of the system could be improved by requiring independent experts to give reasons for their assessments to the applicant, and providing for review mechanisms.

21.154 As stakeholders argued above, this suite of proposals would increase the accessibility of competent persons, reduce complexity and rigidity of the system, and introduce a measure of accountability and transparency in decision making. The ALRC considers that the net effect of the proposals would be to increase the accessibility of the family violence exception for victims of family violence and improve their safety.

21.155 The ALRC also acknowledges that expanding the definition of competent persons to include bi lingual workers, ESL teachers, migrant resource centre professionals, and other professionals may increase accessibility for victims of family violence. However, the ALRC has reservations that expanding the definition of competent persons to include such professionals would reduce the integrity of the competent person regime. It is worth noting that the words ‘competent’ and ‘opinion’ in the *Migration Regulations* reflect that such persons have some degree of expertise in family violence due to their profession or due to their position in a family-violence related field. This is not the case for someone who is, for example, an ESL teacher. At best, that person can provide corroborative and hearsay evidence as to whether family violence had occurred.

21.156 Instead, the ALRC considers that better training and education about the nature and dynamics of family violence and the family violence provisions, for those who are currently competent persons may increase their accessibility to victims of family violence. The ALRC makes proposals in relation to training and education on the nature, features and dynamics of family violence in Chapter 20.

**OPTION ONE: Proposal 21–3**

**Proposal 21–3** The process for non-judicially determined claims of family violence in reg 1.25 the *Migration Regulations* 1994 (Cth) should be replaced with an independent expert panel.

**OPTION TWO: Proposals 21–4 to 21–8**

**Proposal 21–4** The *Migration Regulations* 1994 (Cth) should be amended to provide that competent persons should not be required to give an opinion as to who committed the family violence in their statutory declaration evidence.

**Proposal 21–5** The *Migration Regulations* 1994 (Cth) should be amended to provide that visa decision makers can seek further information from competent persons to correct minor errors or omissions in statutory declaration evidence.

**Proposal 21–6** The *Migration Regulations* 1994 (Cth) should be amended to provide that visa decision makers are required to provide reasons for referral to an independent expert.

**Proposal 21–7** The *Migration Regulations* 1994 (Cth) should be amended to require independent experts to give applicants statements of reasons for their decision.



**Proposal 21–8**    The *Migration Regulations 1994* (Cth) should be amended to provide for review of independent expert assessments.

## 22. Refugee Law

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### Summary

22.1 This chapter considers the position of asylum seekers who seek protection in Australia on the basis of having experienced family violence. The first part of the chapter includes an analysis of refugee case law in Australia in relation to family violence. The ALRC concludes that family violence claims can fall under the definition of a refugee contained in the United Nations *Convention Relating to the Status of Refugees* (the Refugee Convention), as incorporated into Australian law by the *Migration Act 1958* (Cth).

22.2 However, the ALRC considers that this is a complex area of the law which is prone to inconsistent decision-making. Assessments of family violence claims require a visa decision maker to have an in-depth understanding of the intersection between family violence and refugee law, and the relevant country information. Accordingly, in order to improve consistency in decision-making, the ALRC proposes that the Minister for Immigration and Citizenship should issue a direction under s 499 of the *Migration Act 1958* (Cth) to require visa decision makers to have regard to the *Procedures Advice Manual 3* Gender Guidelines when making refugee status assessments.

22.3 The chapter also considers whether other amendments, such as those proposed in the Complementary Protection Bill 2011 (Cth) (the Bill) are necessary to protect victims of family violence whose claims may fall outside the Refugee Convention, but

who may need international protection.<sup>1</sup> The ALRC considers that the measures proposed by the Bill provide limited scope for protection of victims of family violence. For the Bill to provide meaningful protection to victims of family violence, substantial amendments would need to be made to the exclusions criteria, which would significantly alter the nature of complementary protection affecting all persons who may need complementary protection, beyond those who are victims of family violence. As a result, the ALRC makes no such proposals in relation to the Bill, as they would go beyond the ALRC's Terms of Reference.

## Refugee law in Australia

### *The Refugee Convention*

22.4 Australia is a signatory to the Refugee Convention, the key international instrument that regulates the obligations of states to protect refugees fleeing from persecution. Article 1A(2) defines a refugee as a person who,

owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

22.5 The *Migration Act* incorporates art 1A(2) of the Refugee Convention into Australian domestic law, and gives effect to Australia's obligation of *non-refoulement*—not to return a refugee in any manner whatsoever to the frontiers of territories where the person's life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.<sup>2</sup> Section 36(2) provides for the grant of a protection visa to a 'non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol'.

22.6 The term 'persecuted' in art 1A(2) of the Refugee Convention is qualified by s 91R(1) of the *Migration Act*, which provides that art 1A(2) does not apply unless persecution for one or more of the Convention reason(s) is:

- the 'essential and significant reason(s), for the persecution'; and
- the persecution involves 'serious harm' to the person; and
- the persecution involves 'systematic and discriminatory conduct'.

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1 *Convention Relating to the Status of Refugees*, 189 UNTS 151 (entered into force on 22 April 1954) (Refugees Convention). The Convention was amended by the *Protocol Relating to the Status of Refugees*, 606 UNTS 267 (entered into force 4 October 1967).

2 The principle of non-refoulement is enshrined in the Refugee Convention art 33.

22.7 A non-exhaustive list of instances of ‘serious harm’ is provided in s 91R(2) of the *Migration Act*, including:

- a threat to the person’s life or liberty;
- significant physical harassment of the person;
- significant physical ill-treatment of the person;
- significant economic hardship that threatens the person’s capacity to subsist; and
- denial of capacity to earn a livelihood of any kind, where the denial threatens the person’s capacity to subsist.

22.8 The onshore component of Australia’s Refugee and Humanitarian program allows those who are in Australia to apply for a protection visa.<sup>3</sup> Primary refugee status determination in Australia is made by a Department of Immigration and Citizenship (DIAC) officer as a delegate of the Minister for Immigration and Citizenship. Unsuccessful applicants can seek merits review by the Refugee Review Tribunal (RRT), and thereafter, judicial review by the courts. Under s 417 of the *Migration Act*, the Minister may personally consider and grant a visa on humanitarian grounds, if he or she considers it to be in the public interest.<sup>4</sup> This personal intervention power is only exercisable by the Minister and only in cases where the applicant has exhausted all avenues of merits review.<sup>5</sup>

### **Family violence and the definition of a refugee**

22.9 Applicants who make asylum claims based on family violence have faced difficulties meeting the definition of ‘refugee’ in art 1A(2) of the Refugee Convention—both internationally, and in Australia. While it is generally accepted that instances of family violence can constitute serious harm, two compounding and interlinking factors have historically excluded victims of family violence from protection under the Refugee Convention. These are family violence claims in the context of gender-related persecution and the public/private dichotomy.

### ***Gender-related claims and the public/private dichotomy***

22.10 First, family violence claims have tended to exist within the wider context of gender-specific harm, including: sexual violence, forced marriage, female genital mutilation and honour killings.<sup>6</sup> These types of harms—generally experienced by women—are not afforded protection because neither gender nor sex is an enumerated

3 The requirements for a Protection Visa (Class XA) (Subclass 866) are in *Migration Regulations 1994* (Cth) sch 2.

4 *Migration Act 1958* (Cth) s 417(1) provides that ‘the Minister may substitute for a decision of the Tribunal under s 415 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision’.

5 *Ibid* s 417(3).

6 See A Roberts, ‘Gender and Refugee Law’ (2002) 22 *Australian Yearbook of International Law* 160, 164 where she draws a distinction between ‘gender-specific harm’ and ‘gender-related claims’. Roberts also notes that, while men can also be victims of family violence, the majority of asylum claims on the basis of being victims of family violence are made by women.

Convention ground. Therefore courts have traditionally failed to consider whether such gender-related claims may fall under the ground of particular social group, or other Convention reasons.<sup>7</sup>

22.11 A more problematic distinction relates to the public/private dichotomy. As Anthea Roberts explained, the Refugee Convention is primarily aimed at protecting individuals from state or public forms of persecution, rather than intruding into the private realm of family life and personal activities.<sup>8</sup>

22.12 This is most evident in the interpretation of the term ‘persecution’. The Refugee Convention contains no definition of ‘persecution’.<sup>9</sup> However, the term is widely recognised as involving a certain relation between the individual and the state, whereby persecution occurs in the public sphere and the perpetrators are the state or its agents.<sup>10</sup> As stated by Gleeson CJ in *Minister for Immigration and Multicultural Affairs v Khawar* (*Khawar*):

the paradigm case of persecution contemplated by the Convention is persecution by the state itself. Article 1A(2) was primarily, even if not exclusively, aimed at persecution by a state or its agents on one of the grounds to which it refers.<sup>11</sup>

22.13 In *Applicant A v Minister for Immigration and Ethnic Affairs*, the High Court explained that:

The Convention is primarily concerned to protect those racial, religious, national, political and social groups who are singled out and persecuted by or with tacit acceptance of the government of the country from which they have fled or to which they are unwilling to return. Persecution by private individuals or groups does not by itself fall within the definition of refugee unless the State either encourages or appears to be powerless to prevent that private persecution. The object of the Convention is to provide refuge for those groups who, having lost the *de jure* or *de facto* protection of their governments, are unwilling to return to the countries of their nationality.<sup>12</sup>

22.14 As family violence tends to be perpetrated by non-state actors within private relationships, such claims have historically been construed as falling outside the bounds of the Refugee Convention, because the state cannot be implicated in the infliction of that harm. In *Equality Before the Law: Justice for Women* (ALRC Report No 69) (*Equality Before the Law*), the ALRC observed that:

Sexual violence against women tends to be seen as occurring in the private rather than public sphere and discounted as persecution ... Discriminatory practices may also be seen as ‘private’ where they affect family life. In many cases, most notably in cases of sexual or domestic violence, the nexus between the individual and the state is

<sup>7</sup> H Crawley, *Refugees and Gender: Law and Process* (2001), 21–26, 79–90.

<sup>8</sup> A Roberts, ‘Gender and Refugee Law’ (2002) 22 *Australian Yearbook of International Law* 160, 161.

<sup>9</sup> Though as noted above, the term ‘persecution’ is qualified by s 91R of the *Migration Act 1958* (Cth) for the purposes of Australian law.

<sup>10</sup> See, eg, C Yeo, ‘Agents of the State: When is an Official of the State an Agent of the State?’ (2003) 14 *International Journal of Refugee Law* 510, 510. The Convention grounds reflected the concerns of the drafters of the Convention to protect those fleeing state based persecution in the aftermath of World War II.

<sup>11</sup> *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, [22].

<sup>12</sup> *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

generally more complex than in 'public' forms of persecution. Difficulties arise as to the exact extent of state responsibility.<sup>13</sup>

### *The role of state responsibility*

22.15 The issue of state responsibility in cases where the harm is inflicted by non-state actors for a non-Convention reason, was clarified by the landmark decision of the High Court in *Khawar*.<sup>14</sup>

22.16 In *Khawar*, the applicant, Ms Khawar, fled Pakistan to Australia with her three daughters, after years of escalating abuse from her husband and his family. She claimed asylum on the basis that the Pakistani authorities (the police) had systematically discriminated against her by failing to provide her protection and that this was tolerated and sanctioned by the state. Thus, it was argued her well-founded fear of persecution was based on the lack of state protection for reasons of her membership of a particular social group—'women in Pakistan'.

22.17 Her case was rejected by the Department of Immigration, Multiculturalism and Ethnic Affairs and the RRT on the basis that there was no nexus to a Convention ground. The RRT considered that Ms Khawar was harmed for personal reasons arising from her marriage and relationship with her husband, and that the Refugee Convention was not intended to protect people involved in personal disputes. The RRT made no findings in relation to the failure of the police to provide protection or the Pakistani state's attitude towards a particular social group comprised of women.<sup>15</sup>

22.18 On appeal to the Federal Court, Branson J found that the RRT had erred in not making findings in relation to any particular social group of which Ms Khawar might be a member.<sup>16</sup> As a consequence, the RRT committed a further error in not making any findings about the lack of state protection in relation to a particular social group of which Ms Khawar was a member.<sup>17</sup> The Full Federal Court dismissed an appeal from Branson J's decision.<sup>18</sup>

22.19 On appeal to the High Court, two issues were in dispute. These were summarised by Gleeson CJ in the following terms:

The first issue is whether the failure of a country of nationality to provide protection against domestic violence to women, in circumstances where the motivation of the perpetrators of the violence is private, can result in persecution of the kind referred to in Art 1A(2) of the Convention.

The second issue is whether women or, for the present purposes, women in Pakistan may constitute a particular social group within the meaning of the Convention.<sup>19</sup>

13 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), 243.

14 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1.

15 See *Reference N98/21419* (Unreported, RRT, 11 January 1999).

16 *Khawar v Minister for Immigration and Multicultural Affairs* (1999) 168 ALR 574, [55].

17 *Ibid.*

18 *Minister for Immigration & Multicultural Affairs v Khawar* (2000) 101 FCR 501.

19 *Minister for Immigration & Multicultural Affairs v Khawar* (2002) 210 CLR 1, [5], [6].

22.20 In separate judgments, the majority answered both questions in the affirmative. Gleeson CJ held that persecution may result where the criminal conduct of private individuals is tolerated or condoned by the state in circumstances where the state has the duty to provide protection against harm.<sup>20</sup>

22.21 Kirby J adopted the formula, ‘Persecution = Serious Harm + The Failure of State Protection’,<sup>21</sup> to find that it was: ‘sufficient that there is both a risk of serious harm to the applicant from human sources, and a failure on the part of the state to afford protection that is adequate to protect the human rights and dignity of the person concerned’.<sup>22</sup> He considered that ‘persecution’ is a construct of these two separate but essential elements. McHugh and Gummow JJ found that ‘the persecution in question lies in the discriminatory inactivity of the State authorities in not responding to the violence of non-state actors’.<sup>23</sup>

22.22 Although the judgments took different approaches, the cumulative effect appears to be that, where serious harm is inflicted by non-state actors for a non-Convention reason, the nexus to the Refugee Convention is met by the conduct of the state in withholding protection—in a selective and discriminatory manner—for reasons of a Convention ground.

22.23 On the issue of particular social group, McHugh and Gummow JJ held that the evidence supported a social group, that was, ‘at its narrowest, married women living in a household which did not include a male blood relation to whom the woman might look for protection against violence by members of the household’.<sup>24</sup> Gleeson CJ considered that it was open on the evidence to conclude that ‘women in Pakistan’ comprise a ‘particular social group’ within the Refugee Convention ground.<sup>25</sup>

### **The position of victims of family violence post-*Khawar***

22.24 While the principle in *Khawar* has allowed family violence claims greater opportunity to be considered, subsequent cases before the RRT and the Federal Court have highlighted that such cases remain complex and challenging for decision makers and applicants alike. In particular, findings of fact as to what comprises a ‘particular social group’, and whether the state has withdrawn protection for a Convention reason, must be made on a case by case basis, requiring an in-depth understanding of the applicants’ claims and the country information.<sup>26</sup>

22.25 First, proving that a state is withdrawing or withholding protection for a Convention reason in a selective and discriminatory manner may be particularly

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20 Ibid, [30].

21 Ibid, [118] referring to *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 629, 653; *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 489, 515–516.

22 Ibid, [115].

23 Ibid, [87].

24 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, [85].

25 Ibid, [32].

26 See, eg, *AZAAR v Minister for Immigration and Citizenship* (2009) 111 ALD 390; *NAIV v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 83 ALD 255; *SBBK v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 117 FCR 412.

difficult for those asylum seekers facing language barriers, lack of legal representation or access to current country information.<sup>27</sup> The courts have made it clear that, where the state is unable to provide effective protection for reasons of maladministration, incompetence or ineptitude, ‘that would not convert the personally-motivated domestic violence into persecution on one of the grounds set out in Article 1A(2)’.<sup>28</sup> In such cases, those who are victims of family violence have no recourse to protection under the Refugee Convention.

22.26 Secondly, much depends on how an applicant argues that he or she is member of a particular social group. In each instance, it is for the applicant to present the case to the decision maker. Claims that define the particular social group too broadly risk a finding that the harm feared is not motivated by their membership of that particular social group. On the other hand, claims that define the particular social group too narrowly risk a finding that the group is impermissibly defined by the harm feared.<sup>29</sup>

22.27 Decision makers also face challenges in making consistent decisions. For example, the consideration of whether the applicant is a member of a particular social group is dependent on the cultural, legal, social and religious factors that must be properly understood. Decisions about whether a victim of family violence can access ‘effective state protection’ therefore depends on access to current and up-to-date country information. As Gleeson CJ emphasised in *Khawar*:

An Australian court or tribunal would need to be well-informed about the relevant facts and circumstances, including cultural conditions, before reaching a conclusion that what occurs in another country amounts to persecution by reason of the attitudes of the authorities to the behaviour of private individuals; but if, after due care, such a conclusion is reached, then there is no reason for hesitating to give effect to it.<sup>30</sup>

### Legislative response to *Khawar*

22.28 Section 91R of the *Migration Act*, set out above, was inserted in response to concern that decisions such as *Khawar* had widened the application of the Refugee Convention ‘beyond the bounds intended’.<sup>31</sup> Consequently, commentators have argued that s 91R has made it more difficult to sustain claims for protection on family violence grounds.

22.29 Section 91R(1) requires the applicant to show that the Convention reason is ‘the essential and significant reason’ for the persecution.<sup>32</sup> Catherine Hunter argues that, in

27 R Bacon and K Booth, ‘Persecution by Omission: Violence by Non-State Actors and the Role of the State under the Refugees Convention in *Minister for Immigration and Multicultural Affairs v Khawar*’ (2002) 24 *Sydney Law Review* 584, 600.

28 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 [26]. Elsewhere, the Court indicates that a shortage of law enforcement resources will not amount to persecution: [84].

29 Case law has established that the common characteristic of a ‘particular social group’ cannot be the harm feared. See eg, R Bacon and K Booth, ‘Persecution by Omission: Violence by Non-State Actors and the Role of the State under the Refugees Convention in *Minister for Immigration and Multicultural Affairs v Khawar*’ (2002) 24 *Sydney Law Review* 584, 600, citing *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

30 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, [26].

31 Explanatory Memorandum, Migration Legislation Amendment Bill (No 6) 2001 (Cth), [19].

32 *Migration Act 1958* (Cth) s 91R(1)(a).



the context of gender-related claims, the ‘essential and significant’ requirement will mean decision makers are likely to focus on aspects other than gender, until gender-related decisions are no longer controversial.<sup>33</sup> This concern is echoed by Leanne McKay, who states that applicants have ‘difficulty articulating their claims in asylum terms that are assessable by decision-makers due to shame or fear’<sup>34</sup> and, therefore,

due to the restrictive terminology of s 91R ... there is now a risk that certain Refugee Convention reasons may not be identified or adequately addressed, resulting in legitimate claims going unrecognised.<sup>35</sup>

22.30 Others have criticised the definition of persecution under s 91R(2) of the *Migration Act* for its failure explicitly to recognise psychological harm as serious harm, and the impact that this may have for victims of sexual violence and abuse.<sup>36</sup> In particular, such victims can experience serious psychological trauma even where there are minimal physical injuries.<sup>37</sup> Another concern is that s 91R(2) makes no reference to the failure of state protection as being an element of persecution and thus appears to direct decision makers towards cases where persecution emanates from the state.<sup>38</sup>

### Submissions and consultations

22.31 In the Issues Paper, *Family Violence and Commonwealth Laws—Immigration Law*, ALRC Issues Paper 37 (2011) (the Migration Issues Paper), the ALRC asked what, if any, legislative amendments are necessary to the *Migration Act 1958* (Cth) to ensure the safety of those seeking protection in Australia as victims of family violence.<sup>39</sup>

22.32 Submissions that addressed this question expressed concern that the definition of ‘serious harm’ under s 91R of the *Migration Act* did not specifically address the experiences of victims of family violence.<sup>40</sup> Some submissions called for amendments

33 C Hunter, ‘Khawar and Migration Legislation Amendment Bill (No 6) 2001: Why narrowing the definition of a refugee discriminates against gender-related claims’ (2002) 8(1) *Australian Journal of Human Rights* 107.

34 L McKay, ‘Women Asylum Seekers in Australia: Discrimination and the Migration Legislation Amendment Act [No 6] 2001 (Cth)’ (2003) 4 *Melbourne Journal of International Law* 439, 459 referring to Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants: Guidelines On Gender Issues For Decision Makers* (1996).

35 L McKay, ‘Women Asylum Seekers in Australia: Discrimination and the Migration Legislation Amendment Act [No 6] 2001 (Cth)’ (2003) 4 *Melbourne Journal of International Law* 439, 459.

36 Ibid, 454.

37 H Crawley, *Refugees and Gender: Law and Process* (2001), 43; UNHCR *Guidelines on International Protection: Gender-related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (2002), UN Doc HCR/GIP/02/01.

38 L McKay, ‘Women Asylum Seekers in Australia: Discrimination and the Migration Legislation Amendment Act [No 6] 2001 (Cth)’ (2003) 4 *Melbourne Journal of International Law* 439, 459.

39 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Immigration Law*, ALRC Issues Paper 37 (2011), Question 21.

40 ANU College of Law, *Submission CFV 79*, 7 June 2011; National Legal Aid, *Submission CFV 75*, 20 May 2011; Law Institute of Victoria, *Submission CFV 74*, 17 May 2011; Good Shepherd Australia New Zealand, *Submission CFV 41*, 15 April 2011; Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011.

to s 91R specifically to recognise gender-based claims,<sup>41</sup> and to recognise that ‘serious harm’ may include family violence coupled with the lack of state protection.<sup>42</sup> In a joint submission, Domestic Violence Victoria and others submitted that:

The definition of ‘serious harm’ under s 91R(2) of the *Migration Act* provides a non exhaustive list of instances which may be considered serious harm. Gender based persecution can be read into several aspects of the s 91R(2) definition, however there remain barriers to decision makers doing so. In these circumstances given the particular vulnerability of women seeking asylum and the particular difficulties they face in doing so, the definition of serious harm under s 91R(2) should be expanded to explicitly include gender based persecution.<sup>43</sup>

22.33 In contrast, the Migration and Refugee Review Tribunal were of the view that no legislative changes were necessary, as family violence claims are covered where serious harm is inflicted for reasons of membership of a particular social group, including harm inflicted through selective withholding of state protection:

Decisions on whether harm suffered for reasons of membership of a particular social group will necessarily differ from case to case, as the definition of a refugee requires consideration of the individual circumstances of each case. This includes consideration of whether the postulated social group constitutes a ‘particular social group’ in the particular context. Although, as the Issues Paper notes, section 91R of the *Migration Act 1958* does not expressly acknowledge either psychological harm or the capacity of a failure of state protection to constitute persecution, these are well established in Australian law as being sufficient to meet the definition of a refugee. In the Tribunal’s view legislative changes are not necessary to enable the potential recognition of persons fleeing family violence.<sup>44</sup>

22.34 In the joint submission from Domestic Violence Victoria and others, the Asylum Seeker Resource Centre (ASRC) stated that it had often observed a lack of consistency in decision making at DIAC and RRT stages, and argued that this could be remedied through the adoption of gender guidelines in the *Migration Act* and *Migration Regulations*:

The ASRC has often observed a lack of consistency in decision making at DIAC and at the RRT. Decisions on gender related claims for women in very similar situations from the same country are often different depending on the decision maker. Whilst we commend the Department of Immigration and the Refugee Review Tribunal for creating gender and vulnerability guidelines which are useful for the treatment of gender related claims, these guidelines are rarely applied in practice, particularly by delegates of the Minister for Immigration and Citizenship.

... Given the rarity with which these guidelines are applied in practice, particularly at the DIAC stage, it is essential that these guidelines be adopted within the *Migration*

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41 Law Institute of Victoria, *Submission CFV 74*, 17 May 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011.

42 ANU College of Law, *Submission CFV 79*, 7 June 2011; Good Shepherd Australia New Zealand, *Submission CFV 41*, 15 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

43 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

44 Principal Member of the Migration and Refugee Review Tribunals, *Submission CFV 29* 12 April 2011.

*Act and Regulations* in order to mandate consideration of those guidelines in practice and create some accountability amongst decision makers who fail to do so.<sup>45</sup>

### ALRC's views

22.35 In light of the decision in *Khawar*, refugee law in Australia can provide protection for victims of family violence where there is serious harm, coupled with the failure of state protection. Section 91R of the *Migration Act* does not provide an exhaustive list of types of harm that may constitute 'serious harm', and while it does not expressly acknowledge psychological harm or the failure of state protection, the ALRC considers that this is well established in Australian law.

22.36 However, the ALRC is concerned that, given the complexities in gender-related claims, there is potential for inconsistency in decision making between different decision makers. This may derive from lack of sensitivity or knowledge of decision makers, or a failure properly to consider the gender guidelines when making decisions. Accordingly, the ALRC considers that there are a number of options for reform that may assist in improving consistency in decision making and, ultimately, better protect the safety of victims of family violence.

22.37 First, the ALRC considers that the gender guidelines made by the RRT and DIAC are particularly useful in giving context to, and guiding decision makers in the assessment of, family violence-related claims. The DIAC guidelines, for example, address many particularities in relation to gender-related claims including:

- guidance on the nature of gender-related persecution including, among other things, that such persecution may include 'violence against women, including family and sexual violence such as rape where the state is unwilling or unable to provide protection';<sup>46</sup>
- sexual violence and harm perpetrated in the 'private sphere' or by non-state agents can also amount to persecution;<sup>47</sup>
- where an applicant fails to seek state protection, officers should investigate why no protection was sought. Where particular types of violence may be officially condemned or illegal but in practice tolerated by local authorities, the inability or failure to request protection may indicate a failure of state protection.<sup>48</sup>

22.38 Secondly, ensuring that decision makers are sensitive to gender-related claims is another important measure in improving consistency in decision making and ensuring the safety of victims of family violence. To this end, the ALRC makes proposals in Chapter 20 in relation to education and training for decision makers about the nature and dynamics of family violence in the context of migration law. The ALRC envisages

<sup>45</sup> Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

<sup>46</sup> Department of Immigration and Citizenship, *Procedures Advice Manual 3 Gender Guidelines: Assessing Gender-Related Claims* (2010) s 14.2.

<sup>47</sup> *Ibid* s 15.1

<sup>48</sup> *Ibid* s 16.2.

that such training and education could also incorporate the intersection between refugee law and family violence and the application of the gender guidelines.

22.39 Finally, ensuring that the guidelines are properly considered by decision makers could be achieved by way of a Ministerial Direction under s 499 of the *Migration Act*.<sup>49</sup> Such directions would be binding on decision makers—at both primary and review levels—and could require that, in cases of gender-related claims, decision makers must have due regard to the gender guidelines, either in whole or in part. The ALRC notes, for example, that similar directions currently exist in student visa cancellation cases, directing that visa decisions makers—when deciding whether a breach of the visa condition was due to exceptional circumstances—must have due regard to a number of factors.<sup>50</sup>

22.40 Overall, requiring decision makers to have regard to the gender guidelines, complemented by education and training, will improve consistency and accountability in decision making with respect to gender-related claims involving family violence, with better outcomes to ensure the safety of victims of family violence.

**Proposal 22–1** The Minister for Immigration and Citizenship should issue a direction under s 499 of the *Migration Act 1958* (Cth) to visa decision makers to have regard to the Department of Immigration and Citizenship’s *Procedures Advice Manual 3 Gender Guidelines* when making refugee status assessments.

## A need for complementary protection?

22.41 The need to protect those seeking asylum—including victims of family violence—whose claims are not covered by the Refugee Convention, but who may need international protection, was a key rationale of the Migration Amendment (Complementary Protection) Bill 2009 (Cth) (the 2009 Bill).<sup>51</sup> Upon introduction into the House of Representatives, the 2009 Bill was referred to the Senate Legal and Constitutional Affairs Committee (the Senate Committee) for inquiry. The 2009 Bill lapsed when parliament was prorogued on 19 July 2010.

22.42 On 24 February 2011, the Migration Amendment (Complementary Protection) Bill 2011 (Cth) (the Bill) was introduced into Parliament. The Bill—based on the 2009 Bill—incorporates amendments to address recommendations made by the Senate

49 The Minister may give written directions to a person or body having functions or powers under this Act if the directions are about (a) the performance of those functions, or (b) the exercise of those powers: *Migration Act 1958* (Cth) s 499.

50 See Department of Immigration and Citizenship, *Ministerial Direction No 38 'Guidelines for considering cancellation of student visas for non-compliance with visa condition 8202 (or review of such decisions) and for considering the revocation of automatic cancellation of student visas (or for the review of decisions not to revoke such cancellations)'*, 19 September 2007.

51 Explanatory Memorandum, Migration Amendment (Complementary Protection Bill) 2009 (Cth).

Committee in the report, *Migration Amendment (Complementary Protection) Bill 2009 [Provisions]*.<sup>52</sup>

22.43 The Bill proposes amendments to s 36 of the *Migration Act* to produce a statutory regime for assessing claims that may engage in Australia's *non-refoulement* obligations under various human rights treaties other than the Refugee Convention.<sup>53</sup> As noted above, *non-refoulement* is an international law principle that prevents the return of persons to countries where their lives or freedom may be endangered. The stipulation against *non-refoulement* is expressed in a range of international human rights, humanitarian, and extradition treaties and has been 'repeatedly endorsed in a variety of international forums'.<sup>54</sup>

### Definitions

22.44 The Bill provides that a non-citizen to whom Australia does not owe protection obligations under the Refugees Convention may still be granted a protection visa—with the same rights and entitlements as refugees—if that person meets the criteria for 'complementary protection'.<sup>55</sup> Under measures proposed in the Bill, 'complementary protection' arises in circumstances where the Minister for Immigration and Citizenship 'has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer 'significant harm'<sup>56</sup> because:

- (a) the non-citizen will be arbitrarily deprived of his or her life; or
- (b) the death penalty will be carried out on the non-citizen; or
- (c) the non-citizen will be subject to torture; or
- (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment;  
or
- (e) the non-citizen will be subjected to degrading treatment or punishment.<sup>57</sup>

22.45 The Bill provides exhaustive definitions of 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' that, *prima facie*, cover instances of family violence. 'Cruel and inhuman treatment or punishment' is defined to include acts or omissions by which:

52 Commonwealth, *Debates*, House of Representatives, 24 February 2011, 3 (C Bowen—Minister for Immigration and Citizenship); Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Complementary Protection) Bill 2009 [Provisions]* (2009).

53 Specifically, the *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23 (entered into force on 23 March 1976); the *Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, 10 December 1984, [1984] G.A. Res. 39/46 (entered into force on 26 June 1987); and the *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4 (entered into force on 2 September 1990).

54 See generally, A Duffy, 'Expulsion to Face Torture? Non-refoulement in International Law' (2008) 20 *International Journal of Refugee Law* 373, 384.

55 Migration Amendment (Complementary Protection Bill) 2011 (Cth) cl 12.

56 Ibid.

57 Ibid cl 14.

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted upon person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature.<sup>58</sup>

22.46 ‘Degrading treatment or punishment’ is defined as an act or omission that ‘causes, and is intended to cause, extreme humiliation which is unreasonable’.<sup>59</sup>

22.47 Importantly, the Bill gives a broader definition of ‘torture’ than that in art 1 of the UN *Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment* (CAT).<sup>60</sup> Under the CAT, ‘torture’ is limited to an act that is inflicted by, at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity.<sup>61</sup> By contrast, under the definition proposed in the Bill, torture may be committed by any person, regardless of whether or not the person is a public official or person acting in an official capacity.<sup>62</sup> This has a particular impact on victims of family violence. As the Public Interest Law Clearing House (Vic) Inc submitted to the inquiry into the 2009 Bill by the Senate Committee:

On this interpretation, the Bill goes beyond Australia’s obligations under the CAT as there are many instances in which private persons may subject others to torture. For example, some types of female genital mutilation may be carried out by religious groups in private, or a person may be subject to domestic violence so grave that it would meet the proposed definition of cruel, inhumane or degrading treatment.<sup>63</sup>

22.48 Similar examples raised to illustrate the coverage of complementary protection were cited in the Second Reading Speech of the 2009 Bill by the Hon Laurie Ferguson:

For example, it is not certain that a girl who would face a real risk of female genital mutilation would always be covered by the refugee convention, whereas she would be covered under complementary protection.

Women at risk of so-called honour killings can also potentially fall through gaps in the refugee convention definition. In some countries victims of rape are executed along with, or rather than, their attackers. Again, depending on the circumstances, this situation may not be covered under the refugee convention.<sup>64</sup>

## Exceptions

22.49 The Explanatory Memorandum to the Bill emphasises that the criteria for complementary protection reflect that ‘a high threshold is required to engage

58 Ibid cl 2.

59 Ibid cl 3.

60 *Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, 10 December 1984, [1984] G.A. Res. 39/46 (entered into force on 26 June 1987).

61 Ibid art 1.

62 Migration Amendment (Complementary Protection Bill) 2011 (Cth) cl 9.

63 See Public Interest Law Clearing House (Vic) Inc, *Submission to the Standing Committee on Legal and Constitutional Affairs on its Inquiry into the Migration (Complementary Protection) Bill 2009* (2009) <[www.pilch.org.au/Assets/Files/Migration%20%28Complementary%20Protection%29%20Bill%202009.pdf](http://www.pilch.org.au/Assets/Files/Migration%20%28Complementary%20Protection%29%20Bill%202009.pdf)> at 21 February 2011.

64 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 September 2009, 8891 (L Ferguson).

Australia's *non-refoulement* obligations'.<sup>65</sup> The Bill also specifies a number of exceptions to the obligations that arise in circumstances where there is not a real risk that the non-citizen will suffer significant harm if the person is returned to their country of origin, including where:

- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
- (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
- (c) the real risk is one faced by the population generally and is not faced by the non-citizen personally.<sup>66</sup>

22.50 The requirement that the risk of harm must be faced by the non-citizen personally was a source of concern expressed to the Inquiry conducted by the Senate Committee into the 2009 Bill.<sup>67</sup> For example, Amnesty International submitted that:

The requirement that the risk faced must not be 'faced by the population of the country generally' may provide, for example, for an applicant fleeing domestic violence to be excluded from [complementary] protection on the grounds that the applicant originates from a country where domestic violence is widespread and where perpetrators are not generally brought to justice. Additionally, the stipulation that the risk must be 'faced by the non-citizen personally' has the potential to exclude, for example, applicants who have not been directly threatened with female genital mutilation but due to their age and gender, face a probable risk that they will be subjected to the practice upon return.<sup>68</sup>

22.51 The Senate Committee recommended that the provision be reviewed 'with a view to ensuring it would not exclude from protection people fleeing genital mutilation or domestic violence from which there is little realistic or accessible relief available in their home country'.<sup>69</sup> On its face the Bill does not give force to this recommendation.

22.52 In the Migration Issues Paper, the ALRC expressed a view that the amendments to the *Migration Act* proposed by the Bill provide some scope for the protection of victims of family violence whose claims may have 'fallen through the cracks', especially in cases of severe gender-related harm or torture.<sup>70</sup> For example, the Refugee Convention would not protect a non-citizen making a *Khawar*-type claim, in circumstances where the state cannot provide protection for reasons of lack of resources, maladministration, or incompetence. This is so, irrespective of the severity of the harm faced. Under complementary protection, such a non-citizen may be

<sup>65</sup> Explanatory Memorandum, Migration Amendment (Complementary Protection Bill) 2009 (Cth), 3.

<sup>66</sup> Migration Amendment (Complementary Protection Bill) 2011 (Cth), item 14.

<sup>67</sup> Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Complementary Protection) Bill 2009 [Provisions]* (2009), 7, 8.

<sup>68</sup> *Ibid.*, 17.

<sup>69</sup> *Ibid.*, Rec 2.

<sup>70</sup> Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Immigration Law*, ALRC Issues Paper 37 (2011), Question 22.

protected if there is a real chance that he or she will suffer significant harm if returned to the country of origin.

### Submissions and consultations

22.53 In the Migration Issues Paper, the ALRC asked whether legislative amendments, such as those proposed in the Bill, are necessary to ensure that victims of family violence whose claims may not be covered by the Refugee Convention, but to whom Australia owes *non-refoulement* obligations, are protected.<sup>71</sup>

22.54 The majority of submissions gave principled and cautious support to the Migration Amendment (Complementary Protection) Bill, to the extent that it may cover gaps in protection in claims that do not fall neatly under a ‘particular social group’.<sup>72</sup> For example, in a joint submission, Domestic Violence Victoria and others supported the complementary protection regime, but argued:

If the Bill is intended to assist those with gender-based claims of persecution, it is vital that the Bill does not replicate current problems relating to the Act’s lack of direction as to what will constitute a risk of serious harm. The current provision in the Bill that the real risk of serious harm does not constitute ‘one faced by the population generally’ but requires a risk faced by the applicant personally will not adequately protect those ... such as girls and young women facing genital mutilation. It does not appear to seriously contemplate the situation where women, in general, are at high risk of family violence.

Furthermore, without explicitly providing for gender based claims under the new complementary protection regime women seeking protection in Australia are likely to experience the same difficulties they experience under the current regime in fitting what is persistently viewed as ‘private’ harm into a definition which does not explicitly allow for gender based persecution and harm.<sup>73</sup>

22.55 The Law Institute of Victoria submitted that amendment to the Bill was necessary to clarify that complementary protection will not be available where

there is general lawlessness in the applicant’s country of origin, rather than imposing requirements that an applicant must show that they personally face the risk of harm.<sup>74</sup>

22.56 The above concerns were echoed in the submission by National Legal Aid that the scope of complementary protection was ‘narrowly defined’, and that there was a risk that ‘the definitions contained in the Bill might be perceived by decision makers as not covering situations of family violence’.<sup>75</sup> Additionally, the ALRC heard concerns in consultations that the attempts to legislate to cover all claims of family violence via complementary protection may have the adverse effect of narrowing the circumstances

71 Ibid, Question 22.

72 ANU College of Law, *Submission CFV 79*, 7 June 2011; National Legal Aid, *Submission CFV 75*, 20 May 2011; Law Institute of Victoria, *Submission CFV 74*, 17 May 2011; Good Shepherd Australia New Zealand, *Submission CFV 41*, 15 April 2011; Refugee and Immigration Legal Service Inc, *Submission CFV 34*, 12 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011; WEAVE, *Submission CFV 31*, 12 April 2011.

73 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*, 12 April 2011.

74 Law Institute of Victoria, *Submission CFV 74*, 17 May 2011.

75 National Legal Aid, *Submission CFV 75*, 20 May 2011.



where an applicant can make a claim, when compared to the current provisions for ministerial intervention under s 417 of the *Migration Act*.

### **ALRC's views**

22.57 The ALRC supports the measures in the Bill to introduce a complementary protection scheme and considers that, with appropriate amendments, the Bill may cover gaps in protection to account for those whose family violence claims may fall outside the Refugee Convention.

22.58 However, the ALRC is concerned that if the Bill is passed in its current form, it would only cover limited and extreme cases of family violence. For example, the current exceptions could be used to deny protection to applicants on the basis that the risk of family violence is a risk faced by the population generally, or that the risk may be real but is not directed at the applicant personally. In addition, claims made under complementary protection would be required to meet the qualifying phrases of 'significant harm', 'cruel or inhuman treatment or punishment', or 'degrading treatment or punishment'. These qualifying phrases are untested in relation to family violence claims, and their lack of certainty may result in a denial of protection to victims of family violence in a manner detrimental to their safety.

22.59 The ALRC considers that amendments to the exclusion criteria for complementary protection—along the lines of those proposed in submissions—are necessary, and would allow the scheme more readily to accommodate family violence claims. However, in the ALRC's view, such amendments to the exclusion criteria would significantly alter the nature of complementary protection, with ramifications beyond the issue of ensuring the safety of victims of family violence. For example, removing the requirement that the applicant must face harm personally would affect all persons who may make a claim for complementary protection, not just those who are victims of family violence. For the above reasons, the ALRC makes no proposals in relation to the Bill, as they would go beyond the Terms of Reference for this Inquiry.

22.60 The ALRC notes that the current arrangements for ministerial intervention under s 417 of the *Migration Act* affords a measure of flexibility in allowing the Minister to consider the individual circumstances of each applicant whose case does not fall neatly within the Refugee Convention. The ALRC is interested in stakeholder views about whether the current arrangements in relation to ministerial intervention are sufficient to protect the safety of victims of family violence.

22.61 As noted above, in the ALRC's view, the issuance of a ministerial direction under s 499 of the *Migration Act* requiring decision makers to have regard to gender guidelines, coupled with training and education for decision makers, will go some way to ensuring greater consistency in decision making, and improve the safety of victims of family violence. If so, it should reduce the need for applicants to apply for ministerial intervention.

**Question 22–1** Under s 417 of the *Migration Act 1958* (Cth), the Minister for Immigration and Citizenship may substitute a decision for a decision of the Refugee Review Tribunal, if the Minister considers that it is in the public interest to do so. Does the ministerial intervention power under s 417 of the *Migration Act 1958* (Cth) provide sufficient protection for victims of family violence? If not, what improvements should be made?



## Appendix 1. List of Submissions

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<i>Name</i>	<i>Number</i>	<i>Date</i>
ACCI	CFV 19	8 April 2011
ADFVC	CFV 71 CFV 53 CFV 26	11 May 2011 27 April 2011 11 April 2011
ANU College of Law	CFV 79	7 June 2011
Association of Superannuation Funds of Australia	CFV 24	8 April 2011
Australian Association of Social Workers (Qld)	CFV 46 CFV 38 CFV 17	21 April 2011 12 April 2011 5 April 2011
Australian Council of Trade Unions	CFV 39	13 April 2011
Australian Human Rights Commission	CFV 48	21 April 2011
Australian Services Union Victorian Authorities and Services Branch	CFV 10	4 April 2011
Bundaberg Family Relationship Centre	CFV 04	16 March 2011
Central Australian Aboriginal Legal Aid Service	CFV 78	2 June 2011
Commonwealth Ombudsman	CFV 62 CFV 54 CFV 16	27 April 2011 21 April 2011 6 April 2011
Confidential	CFV 69	6 May 2011
Confidential	CFV 56	27 April 2011

Confidential	CFV 49	21 April 2011
Confidential	CFV 42	15 April 2011
Confidential	CFV 36	12 April 2011
Confidential	CFV 35	12 April 2011
Confidential	CFV 27	11 April 2011
Confidential	CFV 13	5 April 2011
Confidential	CFV 09	29 March 2011
Confidential	CFV 06	27 March 2011
Confidential	CFV 01	21 December 2010
J Coombs	CFV 72	13 May 2011
Council of Single Mothers and their Children	CFV 55 CFV 44	27 April 2011 21 April 2011
Joint Submission from Domestic Violence Victoria and others	CFV 59 CFV 33 CFC 22	27 April 2011 12 April 2011 6 April 2011
P Easteal and E Emerson-Elliott	CFV 05	23 March 2011
Elder Abuse Prevention Unit Older Person's Programs Lifeline Community Care Queensland	CFV 77	31 May 2011
Erskine Rodan and Associates	CFV 80	17 June 2011
Good Shepherd Australia New Zealand	CFV 41	15 April 2011
Good Shepherd Youth and Family Service, McAuley Community Services for Women and Kildonan Uniting Care	CFV 65	4 May 2011
A Hatcher	CFV 03	8 January 2011

Immigration Advice and Rights Centre Inc	CFV 32	12 April 2011
Law Council of Australia	CFV 23	5 April 2011
Law Council of Australia, Family Law Section	CFV 67	5 May 2011
Law Institute Victoria	CFV 74	17 May 2011
Multicultural Disability Advocacy Association	CFV 60	28 April 2011
National Children's and Youth Law Centre	CFV 64	3 May 2011
National Council of Single Mothers and their Children Inc	CFV 57 CFV 45	28 April 2011 21 April 2011
National Legal Aid	CFV 81 CFV 75	24 June 2011 20 May 2011
National Network of Working Women's Centres	CFV 20	6 April 2011
Non-Custodial Parents Party (Equal Parenting)	CFV 50	25 April 2011
North Australian Aboriginal Justice Agency	CFV 73	17 May 2011
Northern Rivers Community Legal Centre	CFV 08	28 March 2011
C O'Donnell	CFV 82	14 July 2011
Office of the Australian Information Commissioner	CFV 68 CFV 61 CFV 30 CFV 18	6 May 2011 4 May 2011 12 April 2011 6 April 2011
M Phillips	CFV 02	22 December 2010
Principal Member of Migration and Refugee Review Tribunals	CFV 29	12 April 2011
Public Interest Advocacy Centre	CFV 40	15 April 2011
Queensland Law Society	CFV 21	6 April 2011

Redfern Legal Centre	CFV 15	5 April 2011
Refugee and Immigration Legal Service Inc	CFV 34	12 April 2011
SingleMum	CFV 07	27 March 2011
Sole Parents' Union	CFV 63 CFV 52	27 April 2011 27 April 2011
Victoria Legal Aid	CFV 25	7 April 2011
Visa Lawyers Australia	CFV 76	23 May 2011
M Vnuk	CFV 47	21 April 2011
WEAVE	CFV 58 CFV 31 CFV 14	27 April 2011 12 April 2011 5 April 2011
Welfare Rights Centre Inc Queensland	CFV 66 CFV 43	5 May 2011 21 April 2011
Welfare Rights Centre NSW	CFV 70	9 May 2011
M Winter	CFV 51 CFV 12	27 April 2011 5 April 2011
Women's Health Victoria	CFV 11	5 April 2011
Women's Legal Services NSW	CFV 28	11 April 2011

## **Appendix 2. List of Agencies, Organisations and Individuals Consulted**

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<b>Name</b>	<b>Location</b>
Aboriginal Family Violence Prevention and Legal Service Victoria	Sydney
Australian Chamber for Commerce and Industry	Melbourne
Australian Council of Trade Unions; Australian Education Union; Australian Nursing Federation; Australian Services Union; Community and Public Sector Union; Unions NSW; Victorian Trades Hall Council	Sydney
Australian Institute of Superannuation Trustees	Sydney
Australian National University Legal Workshop	Canberra
L Barfoed and P Huta, Centrelink	Canberra
E Bodsworth, The Brotherhood of St Laurence	Melbourne
J Bythway, Jobwatch	Melbourne
Associate Professor J Burn, Faculty of Law, University of Technology Sydney; Sudrshiti Reich, College of Law, Australian National University	Sydney
Professor T Carney, Sydney Law School, University of Sydney	Sydney
Centrelink, Social Workers	Sydney
Centrelink, Disability Carers and Older Australian Division	Canberra
Centrelink, Service Strategy and Policy	Canberra
A Chapman and Associate Professor B Gaze, Centre for Employment and Labour Relations Law, University of Melbourne	Melbourne



Professor R Chisholm, University of Sydney and Australian National University, and Dr B Smyth, Australian National University	Sydney
Department of Human Services and Centrelink	Canberra
R Dale, URCOT	Melbourne
Department of Education, Employment and Workplace Relations	Canberra
Department of Families, Housing, Community Services and Indigenous Affairs	Sydney
Department of Human Services, Family Violence Steering Committee	Canberra
Department of Families, Housing, Community Services and Indigenous Affairs	Sydney/Canberra
Department of Families, Housing, Community Services and Indigenous Affairs and Centrelink	Canberra
Department of Families, Housing, Community Services and Indigenous Affairs, Customer Review Workshop Group	Sydney
Department of Families, Housing, Community Services and Indigenous Affairs, Non-Parent Carers Group	Sydney
Department of Immigration and Citizenship and Centrelink	Canberra
M Dimopoulos, MyriaD Consultants	Sydney
Professor P Easteal and Professor D Emerson-Elliott	Canberra
Magistrate A Goldsbrough; M Dimopoulos, MyriaD Consultants and Justice for Refugees, Department of Justice Victoria	Melbourne
S Haddad, Migration and Refugee Review Tribunal	Sydney
Immigrant Women's Speak Out Association	Sydney
InTouch Multicultural Centre Against Family Violence	Melbourne
Office of the Commonwealth Ombudsman	Sydney

M Kenny, Law Reform Commission of Western Australia	Sydney
D Manne, Refugee and Migration Legal Centre	Melbourne
V Masters, Australian Government Solicitor	Melbourne
H Martin, Visa Lawyers Australia	Sydney
Migration Institute of Australia	Sydney
Dr P Miller and J Collins, Safe Work Australia	Sydney
Dr L Moloney, Senior Research Fellow, Australian Institute of Family Studies and Adjunct Professor, La Trobe University; Dr K Cook, Senior Research Fellow, School of Psychology, Faculty of Health, Deakin University	Melbourne
Justice N Mushin, Family Court of Australia	Sydney
L McFerran, Australian Domestic and Family Violence Clearinghouse	Sydney
National Research Centre for Occupational Health and Safety Regulation	Sydney
D Nelson, Social Security Rights, Victoria	Melbourne
Office of Australian Information Commissioner	Sydney
R Pilkington and S Lowes, Legal Aid NSW	Sydney
Associate Professor H Rhoades, Melbourne Law School, University of Melbourne	Sydney
K Swinbourne, Sole Parents' Union	Sydney
Women's Legal Services	Sydney
C Wright, Fragoman Lawyers	Sydney



## Appendix 3. List of Abbreviations

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AAT	Administrative Appeals Tribunal
ACCI	Australian Chamber of Commerce and Industry
AASW	Australian Association of Social Workers Queensland Branch
ACTU	Australian Council of Trade Unions
ADFVC	Australian Domestic and Family Violence Clearinghouse
AFPCS	Australian Fair Pay and Conditions Standard
AHRC	Australian Human Rights Commission
AIFS	Australian Institute of Family Studies
AIRC	Australian Industrial Relations Commission
AIST	Australian Institute of Superannuation Trustees
ALRC	Australian Law Reform Commission
APONT	Aboriginal Peak Organisations Northern Territory
APRA	Australian Prudential Regulatory Authority
ARO	Authorised Review Officer
ASFA	Association of Superannuation Funds of Australia
ASIC	Australian Securities and Investments Commission
ASU	Australian Services Union
ATO	Australian Taxation Office
ATM	Automated Teller Machine

AVO	Apprehended Violence Order
BOOT	Better Off Overall Test
CAALAS	Central Australian Aboriginal Legal Service
CALD	Culturally and Linguistically Diverse
CCA	Comprehensive Compliance Assessment
CCB	Child Care Benefit
CDEP Scheme	Community Development Employment Projects Scheme
CDPP	Commonwealth Director of Public Prosecutions
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
Child Support and Family Assistance Issues Paper	<i>Family Violence and Commonwealth Laws Issues Paper—Child Support and Family Assistance Law</i>
Child Support Issues Paper	<i>Family Violence and Commonwealth Laws Issues Paper—Child Support and Family Assistance Law</i>
COAG	Council of Australian Governments
COCR	Change of the Circumstances Reassessment
Compulsory IM	Compulsory Income Management
CPSIM	Child Protection Scheme of Income Management
CROC	<i>Convention on the Rights of the Child</i>
CSA	Child Support Agency
CSMC	Council of Single Mothers and their Children
CTP	Capacity to Pay

DAF	Deny Access Facility
DEEWR	Department of Education, Employment and Workplace Relations
DES	Disability Employment Services
DHS	Department of Human Services
DIAC	Department of Immigration and Citizenship
DPO	Departure Prohibition Order
DVO	Domestic Violence Order
DV Victoria	Domestic Violence Victoria
DVRC Victoria	Domestic Violence Resource Centre Victoria
Employment Law Issues Paper	<i>Family Violence and Commonwealth Laws Issues Paper—Employment and Superannuation Law</i>
EPF	Employment Pathway Fund
EPP	Employment Pathway Plan
ESAt	Employment Services Assessment
FaHCSIA	Department of Families, Housing, Community Services and Indigenous Affairs
FAO	Family Assistance Office
Family Assistance Issues Paper	<i>Family Violence and Commonwealth Laws Issues Paper—Child Support and Family Assistance Law</i>
FMSS	Financial Management Support Services
FRCA	<i>Family Responsibilities Commission Act 2008 (Qld)</i>
FTB	Family Tax Benefit

FWA	Fair Work Australia
FWO	Fair Work Ombudsman
IARC	Immigration Advice and Rights Centre Inc
ICC	Indigenous Call Centre
ICCPR	International Covenant on Civil and Political Rights
ICT	Information and Communication Technology
IEP	Indigenous Employment Program
IFA	Individual Flexibility Arrangement
IGA	Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety
ISO	Indigenous Service Officer
JCA	Job Capacity Assessment
JSA	Job Services Australia
JSCI	Job Seeker Classification Instrument
Law Council	Law Council of Australia
LGA	Local Government Area
LGBTI	Lesbian, Gay, Bisexual, Trans and Intersex
Migration Issues Paper	<i>Family Violence and Commonwealth Laws Issues Paper—Immigration Law</i>
MOC	Medical Officer of the Commonwealth
MDAA	Multicultural Disability Advocacy Association
MRT	Migration Review Tribunal
MSO	Multicultural Service Officer

NAAJA	North Australian Aboriginal Justice Agency
National Council	National Council to Reduce Violence against Women and their Children
<i>National Plan</i>	<i>National Plan to Reduce Violence against Women and their Children</i>
NCSMC	National Council of Single Mothers and their Children
NES	National Employment Standards
New IM	New Income Management
NNWWC	National Network of Working Women's Centres
NTER	Northern Territory Emergency Response
OAIC	Office of the Australian Information Commissioner
OHS	Occupational Health and Safety
PCBU	Person Conducting a Business or Undertaking
PIR	Post-Implementation Review
RACS	Restricted Access Computer System
RAILS	Refugee and Immigration Legal Centre Inc
RDA	<i>Racial Discrimination Act 1975 (Cth)</i>
Refugee Convention	<i>Convention Relating to the Status of Refugees</i>
RMOC	Review Medical Officer of the Commonwealth
RRT	Refugee Review Tribunal
SCAG	Standing Committee of Attorneys-General
SCCB	Special Child Care Benefit
SCT	Superannuation Complaints Tribunal



SEAM	School Enrolment and Attendance Measure
<i>Seeking Security</i>	<i>Seeking Security: Promoting Women's Economic Wellbeing Following Domestic Violence</i>
SMSF	Self-Managed Superannuation Fund
Social Security Issues Paper	<i>Family Violence and Commonwealth Laws Issues Paper—Social Security Law</i>
SRCC	Safety, Rehabilitation and Compensation Commission
SSAT	Social Security Appeals Tribunal
SSAA	<i>Social Security (Administration) Act 1999 (Cth)</i>
Superannuation Law Issues Paper	<i>Family Violence and Commonwealth Laws Issues Paper—Employment and Superannuation Law</i>
SWA	Safe Work Australia
<i>Time for Action</i>	<i>Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021</i>
TFN	Tax File Number
UDHR	Universal Declaration of Human Rights
UNDRIP	Universal Declaration on the Rights of Indigenous Peoples
Voluntary IM	Voluntary Income Management
WAD	Workplace Agreements Database
Waiting period	Newly Arrived Resident's Waiting Period
WEAVE	Women Everywhere Advocating Violence Elimination Inc
WRMC	Workplace Relations Ministers Council