



Australian Government

Australian Law Reform Commission

Family Violence and Commonwealth Laws— Improving Legal Frameworks

FINAL REPORT

This Final Report reflects the law as at 1 November 2011

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Australian Government

Australian Law Reform Commission

The Hon Robert McClelland MP
Attorney-General of Australia
Parliament House
Canberra ACT 2600

30 November 2011

Dear Attorney-General

Family Violence and Commonwealth Laws

On 9 July 2010, you issued Terms of Reference for the Australian Law Reform Commission, to undertake a review of 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

On behalf of the Members of the Commission involved in this Inquiry—and in accordance with the *Australian Law Reform Commission Act 1996*—I am pleased to present you with the final Report on this reference, (ALRC Report 117) *Family Violence and Commonwealth Laws—Improving Legal Frameworks*.

Yours sincerely,

A handwritten signature in black ink that reads 'Rosalind Croucher'.

Professor Rosalind Croucher
President

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Terms of Reference

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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Australian Law Reform Commission

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Recommendations

3. Common Interpretative Framework

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

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

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

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

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

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

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

4. Disclosure and Issues Management

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

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

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

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

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

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

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

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

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

5. Social Security—Overview and Overarching Issues

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

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

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

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

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

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

6. Social Security—Relationships

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

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

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

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

- (i) because of extreme family breakdown or other similar exceptional circumstances; or
- (ii) because it would be unreasonable to expect the person to do so as there would be a serious risk to his or her physical or mental well-being due to violence, sexual abuse or other similar unreasonable circumstances.

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

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

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

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

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

7. Social Security—Proof of Identity and Residence Requirements

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

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

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

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

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

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

8. Social Security—Determining Capacity to Work

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10. Income Management—Social Security Law

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

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

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

11. Child Support Frameworks

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

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

12. Child Support—Issues Management and Informal Carers

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

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

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

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

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

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

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

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

(c) departure prohibition orders.

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

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

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

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

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

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

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

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

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

14. Family Assistance

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

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

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

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

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

15. Employment Law—Overarching Issues and a National Approach

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

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

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

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

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

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

16. *Fair Work Act 2009* (Cth)

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

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

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

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

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

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

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

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

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

17. The National Employment Standards

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

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

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

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

18. Occupational Health and Safety Law

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

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

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

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

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

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

19. Superannuation Law

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

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

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

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

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

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

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

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

20. Migration Law—The Family Violence Exception

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

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

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

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

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

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

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

21. The Family Violence Exception—Evidentiary Requirements

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

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

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

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

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

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

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

22. Refugee Law

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

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

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

Executive Summary

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Improving legal frameworks

A continuing project

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

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

Together the ALRC's family violence reports provide a significant contribution to improving legal frameworks to protect the safety of those experiencing family violence. They reflect the goal identified by the Australian Government 'to reduce all violence in our communities', recognising that 'whatever the form violence takes, it

has serious and often devastating consequences for victims, their extended families and the community’, and ‘comes at an enormous economic cost’.¹

The law reform brief

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

Legal frameworks

The ALRC was asked to inquire into and report on the treatment of family violence in Commonwealth laws, specifically: child support and family assistance law, immigration law, employment law, social security law and superannuation law and privacy provisions in relation to those experiencing family violence. The ALRC was also asked to identify what, if any, improvements could be made to relevant legal frameworks to protect the safety of those experiencing family violence.

The ALRC was asked to consider whether legislative arrangements across the Commonwealth impose barriers to providing effective support to those adversely affected by family of violence, and whether the extent of sharing of information across the Commonwealth and with state and territory agencies is appropriate to protect the safety of those experiencing family violence.

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

Safety

The overall touchstone throughout the chapters and recommendations is improving safety. In considering safety throughout the Report, the ALRC refers both to actual safety from harm and to financial security and independence, through things such as social security payments and entitlements, paid employment, and appropriate payments of child support. The importance of financial security and independence for the safety of victims of family violence was noted by participants in a study conducted by the Australian Domestic and Family Violence Clearinghouse:

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

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

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

Limits of law

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

Development of the reform response

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

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

Principles for reform

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

- (1) *Seamlessness*—to ensure that the legal framework is as seamless as possible from the point of view of those who engage with it.

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

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

Summary of recommendations

Part A—Common Threads

Common interpretative framework

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

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

The common interpretative framework recommended in *Family Violence—A National Legal Response* is based on a core definition of family violence, describing the context in which behaviour takes place, as well as the types of conduct—both physical and non-physical—that may fall within the definition of family violence. The context, set out in the first part of the definition, is violent, threatening or other behaviour that coerces or controls a family member or causes that family member to be fearful. The second part of the definition provides a non-exhaustive list of the types of behaviour that may constitute family violence.

Disclosure and issues management

There are a number of tools and methods that may be used to identify family violence-related safety concerns. The ALRC recommends—in Chapter 4—that Department of Human Services (DHS) staff providing customer services should facilitate the

disclosure of family violence-related safety concerns by providing information about how family violence may be relevant to a person's social security, child support and family assistance case, at the point of registration and at subsequent intervention points.

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

Part B—Social Security

Underlying concepts

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

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

A need for transparency

To ensure fairness in the administration of the social security system and to provide a level of self-agency, greater transparency and consistency is required in relation to the information a person can rely on to support a claim of family violence. The ALRC therefore recommends—in Chapter 5—that a broad range of types of information should be available for this purpose. Finally, the ALRC recommends defined 'intervention points' at which Centrelink should promote the disclosure of family violence.

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

Impact of family violence on relationships

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

Proof of identity and residence

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

Determining capacity to work

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

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

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

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

Payments

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

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

Part C—Income Management

‘Income management’ is an arrangement under the *Social Security (Administration) Act 1999* (Cth) by which a proportion of a person’s social security and family payments is quarantined to be spent only on particular goods and services, such as food, housing, clothing, education and health care. The object is to ensure that ‘income support payments are spent in the best interests of children and families and helps ease immediate financial stress’.⁴

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

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

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

Following discussion of compulsory and voluntary income management, the ALRC examines practical issues arising in relation to accessing income managed funds. The ALRC considers that ensuring victims of family violence are able to access and control their income management account—whether through a BasicsCard, voucher or other form of payment or credit—is consistent with the underlying principles of accessibility and self-agency articulated in Chapter 2 of the Report. In particular, the limited definition of ‘priority needs’ is contrary to these principles and poses particular difficulties for victims of family violence. The ALRC therefore recommends that the Australian Government should amend the definition of ‘priority needs’ in s 123TH of

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

the *Social Security (Administration) Act* to include travel or other crisis needs for people experiencing family violence.

Part D—Child Support and Family Assistance

Issues management

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

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

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

Family Assistance

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

The safety of family violence victims who are family assistance applicants or recipients should be improved by the reforms in Chapter 4 that are targeted at legal frameworks—primarily family assistance, social security and child support. Chapter 14 recommends further reforms specifically targeted at family assistance law and policy, particularly in relation to CCB—to improve access to increased CCB in cases of family violence (including child abuse), by lowering the eligibility threshold where children are at risk of abuse.

Part E—Employment Law

A national and phased approach

Family violence is not simply a private or individual issue, but rather a systemic one arising from wider social, economic and cultural factors. Accordingly, effective measures to address family violence need to operate in both the private and public

spheres. This is particularly so in the context of employment, as the line between private and public—or family life and work—is increasingly unclear. As one stakeholder in this Inquiry commented during a consultation, ‘workplaces are becoming our new communities and therefore they must be a place for change’.⁵

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

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

The Fair Work Act

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

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

- family violence clauses in enterprise agreements—the ALRC concludes the Australian Government should support the inclusion of family violence clauses and recommends that the FWO should develop a guide to negotiating such clauses;

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

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

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

Occupational Health and Safety

Occupational health and safety (OHS) laws are being harmonised across Australia, with a Model Act, Model Regulations and Model Codes of Practice forming the basis of the harmonised OHS regime from 1 January 2012. Chapter 18 examines ways in which the Commonwealth OHS system protects employees experiencing family violence and, where it does not do so, how that might be addressed. In particular, the chapter examines: legislative duties of care; the nature and role of regulatory guidance; the importance of further consideration of family violence as a possible work health and safety issue, including research and data collection; as well as increased awareness, education and training around family violence and its impact as a possible work health and safety issue. The central premise underlying Chapter 18 is that, where family violence is a possible OHS issue, employees should be given the highest level of protection reasonably practicable, and employers should introduce measures to address family violence and create and sustain safe work environments.

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

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

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

Part F—Superannuation

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

In Chapter 19 the ALRC examines ways in which the Australian superannuation system does, or could, respond to protect those people experiencing family violence. In doing so, the ALRC makes a number of recommendations, but also acknowledges the specific role that superannuation plays as a long-term form of savings and recognises the policy tension between the need to preserve superannuation benefits until retirement and the need, in limited circumstances, to allow early access to superannuation funds.

The first part of Chapter 19 deals with circumstances in which a victim of family violence may have been coerced into taking action in respect of their superannuation and considers spousal contributions and self-managed superannuation funds (SMSFs). The ALRC concludes that the treatment of superannuation should be considered in the

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

context of a wider inquiry into how family violence should be dealt with in respect of property proceedings under the *Family Law Act 1975* (Cth). The ALRC also makes a number of suggestions with respect to compliance action taken in relation to SMSFs and recommends changes to guidance material with respect to establishing, managing and winding up a SMSF.

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

Part G—Migration

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

Permanent visa pathways

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

A non-citizen who wishes to enter Australia for the purpose of marrying an Australian sponsor can apply for a Prospective Marriage visa (Subclass 300), that allows for entry into Australia for a nine-month period, within which the marriage must take place. After the marriage, an application can be made for permanent residence on the basis of the married relationship. The ALRC recommends that holders of a Prospective Marriage (Subclass 300) visa who have experienced family violence but who have not married their Australian sponsor should also have access to the family violence exception.

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

Evidence

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

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

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

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

Partners of temporary visa holders

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

Refugee law

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

definition of a refugee as contained in the Refugees Convention, this remains a complex area of the law marked by inconsistent decision making.

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

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

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

Net effect of the recommendations

The net effect of the recommendations will be that:

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

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

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

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

Part A—Common Threads

Chapters

1. Introduction to the Inquiry
2. Conceptual Framework
3. Common Interpretative Framework
4. Disclosure and Issues Management

1. Introduction to the Inquiry

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Summary

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 asked to identify what, if any, improvements could be made to relevant legal frameworks to protect the safety of those experiencing family violence.¹

1.2 The ALRC was asked to consider legislative arrangements across the Commonwealth that affect 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 to consider whether the extent of

1 The full Terms of Reference are set out at the front of this Report and are available on the ALRC website at <www.alrc.gov.au>.

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 chapter summarises the background to the Inquiry, its scope, and the processes of reform leading to this Report and its 102 Recommendations. The ALRC also identifies key issues, such as the under-reporting of family violence, that may reflect barriers to providing effective support.

Background to the Inquiry

Government commitment

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. The resulting report, *Family Violence—A National Legal Response* (2010) (ALRC Report 114), contained 187 recommendations for reform. The overarching, or predominant principle reflected in the recommendations was that of seamlessness and that, 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.

1.5 The Commissions drew attention to the need for a further inquiry focusing on other legislative schemes in the Commonwealth field, and these are reflected in the Terms of Reference for this Inquiry.²

1.6 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.³ The report, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (*Time for Action*), was released on 29 April 2009.

1.7 In response to *Time for Action*, the Australian Government announced a package of immediate actions,⁴ including investments: in a new national domestic violence and sexual assault telephone and online crisis service; in primary prevention activities towards building respectful relationships; and to support research on perpetrator treatment.

1.8 The Government also committed to working with the states and territories through the Standing Committee of Attorneys-General (SCAG),⁵ to establish a national scheme for the registration of domestic and family violence orders; to improve the

2 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].

3 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.

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

5 Now the Standing Council on Law and Justice.

uptake of relevant coronial recommendations; and to identify the most effective methods to investigate and prosecute sexual assault cases.⁶

1.9 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 2011,⁷ providing the ‘framework for action’ by all Australian governments to reduce violence against women and children.⁸ The six ‘national outcomes’ are:

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

1.10 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.⁹

1.11 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.

Extent of the problem of family violence

1.12 *Time for Action* drew attention to the extent of the problem of family violence in Australia. *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’.¹⁰ Research undertaken for the National Council also reported that

6 In addition to the ALRC’s work that led to the report, *Family Violence—A National Legal Response*, 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; and the establishment of the Violence Against Women Advisory Group to advise on the National Plan to Reduce Violence against Women.

7 FaHCSIA, *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.

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

9 Ibid, Strategy 5.3.

10 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.

an estimated 750,000 Australian women ‘will experience and report violence in 2021–22, costing the Australian economy an estimated \$15.6 billion’.¹¹

1.13 The National Council also drew attention to the fact that, while violence ‘knows no geographical, socio-economic, age, ability, cultural or religious boundaries’,¹² the experience of violence is not evenly spread. 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.¹³

1.14 Submissions to this Inquiry reiterated such evidence. The Indigenous Law Centre of the University of New South Wales reported, for example, that in New South Wales in 2008 the rates of reported victims of domestic violence were six times higher for Aboriginal females than non-Aboriginal females.¹⁴ This submission also noted that ‘[t]he true extent of the incidence and prevalence of family violence for Indigenous women and children is largely hidden’,¹⁵ and contributing factors were ‘under-reporting, inconsistent approaches to screening by service providers and incomplete data relating to the Indigenous status of victims’.¹⁶

1.15 The National Council pointed to other groups who may also experience violence in a different and disproportionate way, for example: women with disability; women who identify themselves as lesbian, bisexual, trans or intersex (LGBTI); and immigrant women.¹⁷ Such experiences were also strongly echoed in submissions to the ALRC and noted in *Family Violence—A National Legal Response*,¹⁸ as well as in submissions to this Inquiry.¹⁹

1.16 *Time for Action* identified 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.²⁰ Similar

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), 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.

12 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.

13 *Ibid.*, 17.

14 Indigenous Law Centre, *Submission CFV 144*.

15 *Ibid.*

16 *Ibid.*

17 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), 18.

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), [1.9].

19 For example, Women with Disabilities ACT, *Submission CFV 153*.

20 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.

concerns were reported in *Family Violence—A National Legal Response*,²¹ as well as in submissions to this Inquiry.

1.17 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.²² The Homeless Persons' Legal Service identified domestic and family violence as 'overwhelmingly central to women's trajectories into homelessness';²³ and the Department of Human Services added that '[t]here are profound repercussions for those who experience family violence, in addition to long term consequences for both individuals and the communities in which they live'.²⁴

Under-reporting and barriers to disclosure

1.18 *Family Violence—A National Legal Response* identified a continuing theme of the under-reporting of family violence and the range of concerns that may impede disclosure.²⁵ Barriers or reluctance to disclose family violence was a theme that continued in this Inquiry.²⁶ The Inner City Legal Centre argued that 'one of the greatest challenges' in talking about family violence is that it is a 'hidden issue'.²⁷ Women's Health Victoria, for example, referred to the 'silencing effect' of 'the stigma associated with family violence'—an effect also cited by the Homeless Persons' Legal Service and the Office of the Australian Information Commissioner.²⁸ The National Network of Working Women's Centres identified a range of barriers in the employment context why people experiencing family violence may not disclose it, including:

- Loss of job.
- Not being considered for work if a disclosure of family violence is made at interview.

21 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].

22 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.

23 Homeless Persons' Legal Service, *Submission CFV 40*.

24 DHS, *Submission CFV 155*.

25 See especially Part G, [24.17]–[24.18], [24.21].

26 For example, Inner City Legal Centre, *Submission CFV 131*; Homeless Persons' Legal Service, *Submission CFV 95*; Law Institute of Victoria, *Submission CFV 74*; Sole Parents' Union, *Submission CFV 63*; Council of Single Mothers and their Children (Vic), *Submission CFV 55*; Homeless Persons' Legal Service, *Submission CFV 40*; ACTU, *Submission CFV 39*; WEAVE, *Submission CFV 31*; AASW (Qld), *Submission*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; Queensland Law Society, *Submission CFV 21*; National Network of Working Women's Centres, *Submission CFV 20*; AASW (Qld), *Submission CFV 17*; Redfern Legal Centre, *Submission CFV 15*; Women's Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

27 Inner City Legal Centre, *Submission CFV 131*.

28 Office of the Australian Information Commissioner, *Submission CFV 142*; Homeless Persons' Legal Service, *Submission CFV 40*.

- Shame.
- An escalation of violence from a partner if they become aware that a disclosure of family violence has been made.
- Risking disclosure of their details or whereabouts by the employer or other person in the workplace, perhaps to the detriment of them and their children's safety.
- Judgemental attitudes and responses from the people they disclose to, whether that be workmates, the Union or OHS representative or the employer.
- Fears about the safety of their workmates and having to shoulder the responsibility of that, rather than the partner who is causing the threats or violence being seen as 'responsible'.
- Fears about their own safety.
- Using up all leave options and thus having no leave entitlements to access if they or their children become ill.²⁹

1.19 The Aboriginal & Torres Strait Islander Women's Legal Services NQ Inc referred to many reasons for Indigenous women feeling uncomfortable and unwilling to disclose family violence, including:

- Feelings of shame relating to the nature of the family violence or to community, family or cultural values;
- Feeling uncomfortable with the social worker/other person conducting the screening if she is judgemental, paternalistic, condescending or not skilled in communicating with Aboriginal and Torres Strait Islander women;
- Not being able to recognise that family violence has occurred;
- Fear of not being believed;
- Fear of not being understood;
- Fear of being judged by others generally, particularly where the person already feels marginalised by the wider community.³⁰

1.20 Moreover, for Indigenous communities, underreporting is common

due to the fear that any attempts to obtain assistance from police or medical staff will result in mandatory reporting to child protection authorities and removal of children. In these cases the mandatory reporting requirements actually work *against* the protection of the children as well as the primary victim.³¹

1.21 Language difficulties were also seen as a significant barrier for Indigenous as well as culturally and linguistically diverse (CALD) communities.³² The Aboriginal &

29 National Network of Working Women's Centres, *Submission CFV 20*. See also Women's Health Victoria, *Submission CFV 133*.

30 Aboriginal & Torres Strait Islander Women's Legal Service North Queensland, *Submission CFV 99*.

31 Ibid. See also Aboriginal & Torres Strait Islander Women's Legal & Advocacy Service, *Submission CFV 103*.

32 Federation of Ethnic Communities' Councils of Australia, *Submission CFV 126*; Aboriginal & Torres Strait Islander Women's Legal Service North Queensland, *Submission CFV 99*. Inner City Legal Centre, *Submission CFV 131* refers to the 2010 report of Dr Hillier, *writing themselves In 3*, noting that young

Torres Strait Islander Women's Legal Services NQ Inc singled out the need for 'culturally appropriate language and procedure, for them to be able to be screened by a person whose cultural understanding places women at ease, to be able to access services which are culturally appropriate'.³³

1.22 The Federation of Ethnic Communities' Councils of Australia (FECCA) highlighted not only language barriers, but also 'cultural practices and attitudes towards private and public family issues, gender roles and information provision preferences':

there are systemic factors which may position CALD women and their families at greater risk of experiencing certain types of violence and/or disadvantage and isolation from the appropriate support services. ... [G]ender roles which can create isolating financial, cultural and religious dependency arrangements with spouses, families and communities can be considered relevant to the experiences of CALD women undergoing family violence.³⁴

1.23 The Good Shepherd Youth & Family Service stated that women from immigrant and refugee backgrounds 'face particular obstacles in their struggle to break the cycle of violence' and that women from CALD communities in rural areas 'often have unique issues',

including lack of trust in the confidentiality of support services, lack of knowledge of services, especially in newly arrived communities, higher unemployment and poor education opportunities.³⁵

1.24 For people who identify as LGBTI there are particular compounding difficulties in terms of disclosure of family violence. The Inner City Legal Centre submitted that the experiences of family violence in the LGBTI community 'differ from the wider community's experience' and that 'it may not be clearly identifiable to people who are not part of these communities'.³⁶

1.25 For men who are victims of family violence there may also be particular barriers to disclosure. The Lone Fathers Association, for example, referred to 'a complex of reasons' for a man's reluctance to disclose family violence, including:

the shame involved in publicly admitting his victim status, a desire to hold his family together and protect his children from a violent partner, and/or a belief that if he did complain he would be unlikely to be taken seriously by the police or the judiciary.³⁷

1.26 Family Voice Australia argued that reliance on the underpinning conclusion that 'family violence is predominantly committed by men', as reflected in the discussion of the nature, features and dynamics of family violence, may add to reluctance to disclose and 'runs the risk of obscuring the reality of family violence perpetrated by women and

people from CALD backgrounds were less likely to tell their parents and, if they did, less likely to get family support.

33 Aboriginal & Torres Strait Islander Women's Legal Service North Queensland, *Submission CFV 99*.

34 Federation of Ethnic Communities' Councils of Australia, *Submission CFV 126*.

35 Good Shepherd Youth & Family Service, *Submission CFV 132*.

36 Inner City Legal Centre, *Submission CFV 131*.

37 Lone Fathers Association Australia, *Submission CFV 109*, attachment, 24; FamilyVoice Australia, *Submission CFV 86*.

making male victims of family violence invisible or more likely to be overlooked’, and is ‘likely to make disclosure of family violence more difficult for male victims of family violence perpetrated by women’.³⁸

Scope of the Inquiry

Matters outside the Inquiry

1.27 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.

1.28 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.

1.29 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.

1.30 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 ...’;³⁹ 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.⁴⁰

1.31 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.⁴¹

Raising systemic issues

1.32 This Inquiry raised some broad, systemic problems that require solutions beyond those that can be described as improvements to protect the safety of those experiencing

38 FamilyVoice Australia, *Submission CFV 86*.

39 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].

40 Ibid, [1.67].

41 FaHCSIA, *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.

family violence. For example, concerns about the calculation of child support payments may be described as relating to a systemic issue. If recommendations were to go to the child support system as a whole, 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 recommendations 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.

1.33 On occasion, however, the ALRC has identified particular areas of law of which stakeholders have urged review. Here the approach has been one of suggesting that ‘consideration be given’ to repeal or review of those areas, rather than making a specific recommendation that such action be taken—given the specific limits of the Terms of Reference.

Processes of reform

Consultation processes

1.34 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.⁴² 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.⁴³ 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.

1.35 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.

1.36 Of particular relevance in this Inquiry were 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

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

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

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 Work Australia, Fair Work Australia, the Superannuation Tribunal and the Fair Work Ombudsman. The ALRC is grateful to these departments and bodies for their constructive discussions and reflective practice throughout this Inquiry.

Community consultation and participation

1.37 A multi-pronged strategy of seeking community comments was used during the Inquiry. Internet communication tools—an e-newsletter and an online forum—were used to provide information and obtain comment. Four Issues Papers were released online, in discrete areas of the Inquiry—employment and superannuation law;⁴⁴ immigration law;⁴⁵ child support and family assistance law;⁴⁶ and social security law.⁴⁷ This was followed by an extensive Discussion Paper, released online, divided into seven parts, again reflecting the discrete areas of the Inquiry. This was accompanied by a Discussion Paper Summary, online and in hardcopy, to facilitate focused consultations in the final stage of the Inquiry process.

1.38 Two national rounds of stakeholder consultation meetings, forums and roundtables were conducted. In addition, the ALRC developed consultation strategies for engaging with Indigenous peoples, those from CALD backgrounds, people with disability and people who identify themselves as LGBTI. The ALRC conducted 110 consultations, as listed in Appendix 2.

1.39 The ALRC received 165 submissions, a full list of which is included in Appendix 1. Submissions were received from a wide range of 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.

1.40 The ALRC acknowledges the contribution of all those who participated in the Inquiry consultation rounds and the considerable amount of work involved in preparing submissions, which can have a significant impact in organisations with limited funding. It is the invaluable work of participants that enriches the whole consultative process of ALRC inquiries and the ALRC records its deep appreciation for this contribution.

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

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

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

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

Appointed experts

1.41 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, Panels, Roundtables and the appointment by the Attorney-General of part-time Commissioners. Because of the complex nature of this Inquiry, the ALRC established Advisory Roundtables of experts in each of the key areas reviewed, each of which is listed at the front of this publication.

1.42 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.

1.43 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, Panel or Roundtable 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.

Overview of the Report

Definitions and terminology

1.44 This section sets out some of the terminology that will be used in this Report.

Culturally and linguistically diverse

1.45 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

1.46 The definition of ‘family’ or ‘domestic’ relationship varies across the Australian jurisdictions and legislation. In this Report the particular definitions of ‘family’ are considered in the context of the specific legislation under consideration.

Family violence

1.47 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.⁴⁸

48 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).

1.48 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’.⁴⁹ The term ‘domestic’ has been criticised on the basis that it ‘qualifies and arguably reduces the term “violence”’.⁵⁰ 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.⁵¹

1.49 Reports and writing in this area have adopted varying terminology. Some have referred to both ‘family and domestic violence’, or vice versa;⁵² others to ‘family violence’;⁵³ and some to ‘domestic violence’.⁵⁴ 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.

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

Indigenous peoples

1.51 In this Report, 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. As he has explained:

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.⁵⁵

49 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].

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

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

52 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)*.

53 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).

54 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). Fehlberg and Behrens adopt the terminology of ‘violence and abuse in families’: B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008), 178.

55 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report* (2009), vi.

1.52 This is affirmed under international law principles and by the *United Nations Declaration on the Rights of Indigenous Peoples*.⁵⁶ ‘Indigenous women’ and ‘Indigenous children’ also reflect this terminology.

People with disability

1.53 A contemporary view of disability acknowledges that, while a person may have an impairment or medical condition, it is 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.⁵⁷

1.54 The ALRC uses the term ‘people with disability’ throughout this Report, 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

1.55 The abbreviation ‘LGBTI’ is used in this Report to describe people who identify themselves as lesbian, gay, bisexual, trans or intersex, as it is a broadly understood abbreviation.⁵⁸ 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 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.

Structure of the Report

1.56 This Report comprises 22 chapters divided into seven parts, A–G:

Part A—Common Threads, contains four chapters, Chapters 1–4.

Part B—Social Security, contains five chapters, Chapters 5–9.

Part C—Income Management, comprises one chapter, Chapter 10.

Part D—Child Support and Family Assistance, contains four chapters, Chapters 11–13.

Part E—Employment, comprises four chapters, Chapters 15–18.

Part F—Superannuation, comprises one chapter, Chapter 19.

Part G—Migration, comprises three chapters, Chapters 20–22.

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

57 See, *People With Disability, A Guide to Reporting On Disability* <www.pwd.org.au/documents/pubs/Guide-to-Reporting-Disability.doc> at 21 July 2011.

58 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> at 11 August 2011.

Stop press—new legislation

Family violence amendments to the *Family Law Act* passed

1.57 On 24 November 2011, as this Report was going to Press, the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (the Family Violence Bill) passed through the Australian Parliament.

1.58 The Family Violence Bill introduces a new definition of ‘family violence’ in the *Family Law Act 1975* (Cth). This substantially implements a recommendation made by the ALRC and the NSW Law Reform Commission in the 2010 report, *Family Violence—A National Legal Response*. The report recommended a consistent two-part definition across the *Family Law Act* and certain state and territory legislative schemes.

1.59 In this Report, the ALRC extends this position, recommending that the Commonwealth legislation under review also adopt the consistent-two part definition similar to that previously recommended, now also largely contained in the *Family Law Act*. This issue is considered in Chapter 3 of this Report.

Stronger Futures in the Northern Territory Bill

1.60 In November 2011, the Australian Government introduced the Stronger Futures in the Northern Territory Bill 2011 (Cth), and its companion, the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth) into the House of Representatives. The bills ‘form a part of [the Government’s] next steps in the Northern Territory’.⁵⁹ All three bills were referred to the Senate Community Affairs Legislation Committee which is due to report on 29 February 2012.

1.61 The Stronger Futures Bill is intended to replace the *Northern Territory National Emergency Response Act 2007* (Cth) and contains three key measures—‘the tacking alcohol abuse measure, the land reform measure and the food security measure’.⁶⁰ In addition, the Government also introduced elements of the Social Security Legislation Amendment Bill 2011 (Cth), which applies beyond the Northern Territory, in order to provide ‘greater flexibility in for the operation of income management so it can be implemented in’ five new sites.⁶¹ It also contains proposed reforms to allow referrals by recognised state or territory authorities to trigger income management as well as measures in relation to enrolment and school attendance. Income management is considered in Part C of this Report.

59 Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November, 6 (J Macklin—Minister for Families, Housing, Community Services and Indigenous Affairs).

60 Explanatory Memorandum, Stronger Futures in the Northern Territory Bill 2011 (Cth).

61 Explanatory Memorandum, Social Security Legislation Amendment Bill 2011 (Cth).

2. Conceptual Framework

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Summary

2.1 In undertaking inquiries the ALRC is directed to have regard to ‘Australia’s international obligations that are relevant to the matter’.¹ This chapter considers a number of international instruments that affect the 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 who experience family violence.

2.2 In *Family Violence—A National Legal Response*, the ALRC identified a number of specific principles to provide the conceptual framework for the recommendations for reform in that Report: seamlessness, accessibility, fairness and effectiveness.² These have been evident as distinct themes in this Inquiry as well. Additional themes include: self-agency or autonomy, privacy and system integrity.

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

2 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 3.

International setting

2.3 A number of international conventions are relevant to the legal framework in relation to violence in the family, and acknowledge that violence against women and children is a violation of human rights.

2.4 Such international instruments do not become part of Australian law until incorporated into domestic law by statute.³ 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'.⁴ 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.⁵

2.5 The particular instruments of relevance to this Inquiry are summarised below in chronological order of introduction.

Universal Declaration of Human Rights

2.6 The *Universal Declaration of Human Rights* (UDHR), proclaimed by the General Assembly of the United Nations (UN) on 10 December 1948, was the first international expression of human rights.⁶ It is the basis of a number of later instruments that 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); art 16 (concerning marriage and the family); and art 22 (the right to social security).

International Covenant on Civil and Political Rights

2.7 The *International Covenant on Civil and Political Rights* (ICCPR), described as 'one of the most important human rights conventions of the United Nations era',⁷ was adopted by the UN General Assembly on 16 December 1966 and ratified by the Australian Government in 1980.

3 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–8, 315.

4 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.

5 *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'.

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

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

Protecting families

2.8 A number of articles of the ICCPR are of particular relevance in the context of a consideration of family violence. 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'.⁸ It also stipulates 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'.⁹

2.9 Article 17 provides protection for the family, including specific recognition of privacy, 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.¹⁰

Protecting children

2.10 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'.¹¹ Article 24 focuses particularly on children in their own right, that they have the right 'to such measures of protection as are required' on the part of the child's 'family, society and the State'. In 1990, the UN adopted the *Convention on the Rights of the Child*—considered specifically below.

Protection of the law

2.11 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;¹² 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'.

2.12 There are also provisions that target discrimination. First, art 2 provides a positive assertion of the responsibility of signatories to ensure equal treatment, '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'. Secondly, art 26 provides a specific proscription of discrimination 'on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

Tensions in the protected rights

2.13 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

8 Reflecting art 16 of the UDHR.

9 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23 (entered into force on 23 March 1976), art 23(4).

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

11 *Ibid.*, art 23(4).

12 This article reflects art 10 of the UDHR.

(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).

Convention on the Elimination of Discrimination Against Women

2.14 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),¹³ which came into force for Australia on 27 August 1983.¹⁴ In March 2009, Australia also 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.

2.15 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’.¹⁵ In doing so, it ‘moves beyond the concept of discrimination used in other human rights treaties’,¹⁶ to define the concept of discrimination ‘more broadly than earlier international treaties on women’.¹⁷ 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’¹⁸ and as representing ‘a commitment by the international community to equality in the enjoyment of human rights’.¹⁹

2.16 In an inquiry in the 1990s as part of the Australian Government’s ‘New National Agenda for Women’, the ALRC noted that, as a party to CEDAW, Australia had undertaken to pursue ‘by all appropriate means and without delay a policy of eliminating discrimination against women’.²⁰ 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’,²¹ the ALRC concluded

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

14 *Ibid.*

15 *Ibid.*, arts 1–3.

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

17 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*.

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

19 *Ibid.*, 437.

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

21 *Ibid.*

that a significant aspect of gender inequality—and therefore of discrimination in contravention of CEDAW—was ‘women’s experience and fear of violence’.²²

Declaration on the Elimination of Violence against Women

2.17 At the time that the ALRC was conducting its work in the 1990s that led to the report, *Equality Before the Law: Justice for Women*,²³ the Declaration on the Elimination of Violence against Women was adopted by the General Assembly of the UN on 20 December 1993, to complement and strengthen CEDAW. Violence against women was defined as meaning

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.²⁴

2.18 This was further spelled out as encompassing:

- (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.²⁵

Convention on the Rights of the Child

2.19 The UN *Convention on the Rights of the Child* (CROC)²⁶ has been described as ‘the most comprehensive statement of children’s rights ever drawn up at the international level’,²⁷ and as providing ‘a universally accepted rights-based framework

22 Ibid, [2.30]. 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’: 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. 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’: 441.

23 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994); Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 2)*, Report 69 (1994).

24 *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.

25 Ibid, art 2. In 1999, the General Assembly designated 25 November as the International Day for the Elimination of Violence against Women.

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

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

for addressing the treatment of children'.²⁸ It was ratified by Australia on 17 December 1990.²⁹

2.20 CROC sets out the full range of human rights—civil, cultural, economic, political and social rights—pertaining to children under 18 years of age.³⁰ 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.³¹

2.21 That same year, 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.³²

2.22 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, especially the principle that 'the best interests of the child' is a 'primary consideration'.³³

Convention on the Rights of Persons with Disabilities

2.23 The Convention on the Rights of Persons with Disabilities and its Optional Protocol were adopted by the UN on 13 December 2006 and entered into force on

28 National Children's and Youth Law Centre, *Submission CFV 64*.

29 CROC was significant 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)': L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [7.5].

30 UNICEF, *Convention on the Rights of the Child: Introduction* <www.unicef.org/crc/index_30160.html> at 18 January 2010. The rights include the right to survival (art 6); to develop to the fullest (art 6); to protection from harmful influences, abuse and exploitation (art 19); and to participate fully in family, cultural and social life

31 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].

32 *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676, [10.19]. 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: Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365. 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.

33 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4 (entered into force on 2 September 1990), art 3(1). See, eg, AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*.

3 May 2008.³⁴ Australia ratified the Convention on 17 July 2008, joining other countries around the world ‘in a global effort to promote the equal and active participation of all people with disability’.³⁵ The purpose of the Convention, as set out in art 1, is

to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

2.24 The Convention sets out the following guiding principles in art 3:

- a. Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;
- b. Non-discrimination;
- c. Full and effective participation and inclusion in society;
- d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- e. Equality of opportunity;
- f. Accessibility;
- g. Equality between men and women;
- h. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

2.25 With respect to this Inquiry, a key article of relevance is art 16, ‘Freedom from exploitation, violence and abuse’, by which States parties agree to take:

all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.³⁶

2.26 States parties also agree to put in place

effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.³⁷

Declaration on the Rights of Indigenous Peoples

2.27 The Declaration on the Rights of Indigenous Peoples was adopted by the UN General Assembly on 13 September 2007³⁸ and has been described as ‘the greatest

34 *Convention on the Rights of Persons with Disabilities*, 30 March 2007, [2008] ATS 12 (entered into force on 3 May 2008).

35 Attorney-General’s Department, *United Nations Convention on the Rights of Persons with Disabilities* <www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_UnitedNationsConventionontheRightsofPersonswithDisabilities> at 17 November 2011.

36 *Convention on the Rights of Persons with Disabilities*, 30 March 2007, [2008] ATS 12 (entered into force on 3 May 2008), art 16(1).

37 *Ibid*, art 16(5).

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

development on indigenous rights’ in the decade up to 2009.³⁹ 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’.⁴⁰

2.28 The Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, hailed the Declaration as providing ‘a blueprint for Indigenous peoples and governments around the world’, containing the ‘minimum standards for the survival, dignity and well-being of Indigenous peoples all over the world’.⁴¹

2.29 The emphasis is ‘collectivist or peoples oriented’, in contrast to that of the UDHR and the ICCPR, which emphasise ‘human dignity and the worth of every individual person’.⁴² A number of articles, however, combine both approaches.⁴³ Article 1, for example, provides that Indigenous peoples have the right to the full enjoyment of all human rights recognised by the UN, ‘as a collective or as individuals’. 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.

2.30 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.
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.

2.31 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.

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

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

41 M Gooda, *Community Guide to the UN Declaration on the Rights of Indigenous Peoples* <www.hreoc.gov.au/declaration_indigenous/index.html> at 12 July 2011.

42 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.

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

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.⁴⁴

2.32 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.⁴⁵

Conceptual framework

2.33 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’.⁴⁶ The overarching objective of this Inquiry therefore reflects the Government’s objective—through recommendations for reform of legal frameworks to protect the safety of those experiencing family violence. In this context, the idea of ‘legal frameworks’ extends beyond law in the form of legislative instruments and includes education, information sharing and other related matters. The overall touchstone throughout the chapters and recommendations, however, is one of improving safety.

2.34 This section provides an outline of the key themes and policy tensions that emerged in the Inquiry: seamless; fairness; accessibility; effectiveness; self-agency or autonomy; privacy; and system integrity.⁴⁷

Seamlessness

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

Seamlessness—to ensure that the legal framework is as seamless as possible from the point of view of those who engage with it.⁴⁸

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

45 See 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).

46 FaHCSIA, *National Plan to Reduce Violence Against Women and Their Children—Including the First Three-year Action Plan* (2011), 2.

47 In its submission, the Department of Immigration and Citizenship agreed with the focus on these key themes and noted ‘the importance of these factors in providing protection for victims of family violence’: DIAC, *Submission CFV 121*.

48 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].

2.36 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.

Fairness

2.37 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.⁴⁹

2.38 *Time for Action* identified as one key ‘outcome’ area, that ‘responses are just’.⁵⁰ Fairness also reflects human rights principles—in particular, Australia’s obligations under international instruments considered above.

2.39 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;
- there is procedural certainty;⁵¹
- issues of family violence or safety concerns do not give rise to inappropriate advantages or disadvantages—what may be called ‘system perversities’;⁵²
- safety concerns are not exacerbated by the applicable system requirements;⁵³ and
- 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.⁵⁴

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

49 Ibid, [3.10]. See also [3.16]–[3.17].

50 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.

51 See, eg, AASW (Qld), *Submission CFV 46*; WRC Inc (Qld), *Submission CFV 43*; Principal Member of the Migration and Refugee Review Tribunals, *Submission CFV 29*.

52 For example: concern about the ‘financial incentive for perpetrators’ was expressed in National Council of Single Mothers and their Children, *Submission CFV 45*.

53 For example, in the context of child support: ADFVC, *Submission CFV 53*; Sole Parents’ Union, *Submission CFV 52*.

54 Concern about the role of allegations of family violence was noted, eg, by Women with Disabilities ACT, *Submission CFV 153*; Commonwealth Ombudsman, *Submission CFV 54*; Non-Custodial Parents Party (Equal Parenting), *Submission CFV 50*; WRC Inc (Qld), *Submission CFV 43*.

2.41 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 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.⁵⁵

Accessibility

2.42 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'.⁵⁶ 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.⁵⁷

2.43 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. The consequential under-reporting of family violence and fears for safety, for this and other reasons, were also identified.⁵⁸

Effectiveness

2.44 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*.⁵⁹ Similarly, the *National Plan* stressed that '[a]ll systems need to work together to make a major

55 ACCI, *Submission CFV 19*.

56 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]. 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': 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.

57 For example: Visa Lawyers Australia, *Submission CFV 76*. In the context of social security, see, eg, Council of Single Mothers and their Children (Vic), *Submission CFV 55*.

58 See the discussion in Ch 1 concerning under-reporting and barriers to disclosure.

59 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].

difference to the prevalence and impact of violence against women'.⁶⁰ This theme is also reflected in the idea of 'seamlessness'.

2.45 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 to⁶¹—also an aspect of fairness. 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.⁶² The limited extent to which information about safety concerns was sought, or information provided, in some situations, was also noted.⁶³

Self-agency or autonomy

2.46 Another theme 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'.⁶⁴ An example in the context of this Inquiry may be called the 'right to choose' to disclose safety concerns,⁶⁵ or not, and the consequences that might flow from such choice.

2.47 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.⁶⁶ 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

60 FaHCSIA, *National Plan to Reduce Violence Against Women and Their Children—Including the First Three-year Action Plan* (2011), 14 and 32 (Strategy 5.3).

61 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.

62 See discussion in Ch 1 concerning under-reporting and barriers to disclosure.

63 For example: WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*; Commonwealth Ombudsman, *Submission CFV 54*.

64 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).

65 For example: ADFVC, *Submission CFV 26*.

66 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.

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.⁶⁷

2.48 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’.⁶⁸

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.⁶⁹

2.49 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.

2.50 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 Part C, 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 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.⁷⁰

2.51 Another area where the issue of agency is of particular concern is in relation to child support and family assistance, considered particularly in Part D, where law reform recommendations 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

2.52 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 identified the challenge

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

68 Ibid, 238.

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

70 ADFVC, *Submission CFV 71*. See also, eg, Erskine Rodan and Associates, *Submission CFV 80*; WRC (NSW), *Submission CFV 70*.

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.⁷¹

2.53 The theme of privacy is particularly relevant to the linking of service responses—an aspect of accessibility. What information is obtained and how it is used is also relevant to 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.⁷²

System integrity

2.54 A number of the legislative regimes under consideration provide pathways to particular benefits. 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.

2.55 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 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.

71 Office of the Australian Information Commissioner, *Submission CFV 68*; Office of the Australian Information Commissioner, *Submission CFV 61*; Office of the Australian Information Commissioner, *Submission*.

72 For example: ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*. See discussion in Ch 1 concerning under-reporting and barriers to disclosure.

3. Common Interpretative Framework

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Summary

3.1 In considering what, if any, improvements can be made to relevant legal frameworks to protect the safety of those experiencing family violence, the definition, and understanding, of family violence are key starting points. As a foundational aspect of establishing a common interpretative framework in this Inquiry, the ALRC recommends including in the Commonwealth laws under review the same core definition of family violence. The recommended definition of family violence describes the context in which behaviour takes place, as well as the types of conduct—both physical and non-physical—that may fall within the definition.

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

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.¹

3.4 However, the Australian Bureau of Statistics points out that:

There is no single nationally or internationally agreed definition as to what constitutes ‘family violence’, ‘domestic violence’ or any similar, related term. The broad term ‘Family and Domestic Violence’ is a combination of the terms ‘Family Violence’ and ‘Domestic Violence’. These terms can be defined with reference to various contextual elements such as relationships, location of offences, and/or domestic arrangements; and may be interpreted differently depending on the particular legal, policy, service provision, or research view being taken.²

3.5 In *Family Violence—A National Legal Response*, ALRC Report 114 (2010), the ALRC and New South Wales Law Reform Commission (the Commissions) undertook a detailed review of the definitions of family violence. This was a first step in considering interaction issues across and within jurisdictions, as required by the Terms of Reference for that inquiry. The Commissions identified wide variation in definitions of family violence in Australia in: family violence legislation; the *Family Law Act 1975* (Cth); the criminal law; and other legislation, such as victims’ compensation legislation and migration regulations.³

Towards a common definition

3.6 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.⁴ Definitions of family violence usually recognise that violence can constitute more than single ‘incidents’ and

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), ‘Issues in defining family and domestic violence’.

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.

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.

can involve ‘a continuum of controlling behaviour and violence, which can occur over a number of years’.⁵ As the Department of Human Services commented,

family and domestic violence is not just a series of behaviours, but an underlying attitude and approach to intimate relationships on the part of the person who uses violence, based on an attitude of superiority, entitlement, and an adversarial approach. The experience of family and domestic violence is not simply the experience of a sequence of events, but one which influences and controls all areas of the victim’s life.⁶

3.7 In *Family Violence—A National Legal Response*, the Commissions concluded that a critical assessment of definitional issues was a necessary prelude to a consideration of when it was 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, devalue the experience of its victims, or facilitate the abuse of the protection order system in civil law.⁷

The recommended definition

3.8 The common interpretative framework recommended in *Family Violence—A National Legal Response* is based on a core definition of family violence, describing the context in which behaviour takes place and the types of conduct that may fall within the definition. The context, set out in the first part of the definition, is violent, threatening or other behaviour that coerces or controls a family member or causes that family member to be fearful. The second part of the definition provides a non-exhaustive list of the types of behaviour that may constitute family violence. The Commissions included examples of both physical and non-physical conduct, including:

- (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

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

6 DHS, *Submission CFV 155*.

7 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].

- (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.

3.9 The Commissions considered that adopting consistent definitions of family violence, across the different legislative schemes under review, would allow the courts to send clear messages about what constitutes family violence. The Commissions recommended that the same core definition be included in 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.⁸

3.10 The Commissions distinguished the goal of achieving definitional consistency from the consequences that might flow in civil or criminal law. In particular, 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 Commissions suggested that the purposes of the respective legal frameworks should determine the appropriate legal response—whether criminal or civil.⁹

3.11 While the Commissions recommended a consistent contextual core definition, when it came to the non-exhaustive list of examples of specific types of conduct that may fall within the concept of family violence, the Commissions did not suggest that the types of conduct needed to be drafted in precisely the same terms. The Commissions considered that there should be flexibility to incorporate specific types of violence relevant to each jurisdiction, which accommodate, for example, local or demographic-specific issues. This was a pragmatic approach, given that the Commissions were considering all state and territory legislation, as well as the *Family Law Act*.

3.12 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, was that common definitions of family violence should reflect a consistent and shared understanding of the concepts that underlie the legislative schemes, reinforced by appropriate and regular training.

Nature, features and dynamics of family violence

3.13 Consistent definitions inform a shared understanding of what constitutes family violence—one plank of a common interpretative framework. In *Family Violence—A National Legal Response* the Commissions also recommended that the *Family Law Act* and state and territory family violence legislation adopt consistent or similar provisions setting out the nature, features and dynamics of family violence. This is the second plank of a common interpretative framework, which should establish a shared understanding of the features of family violence.

8 Ibid. Recs 5–1, 6–1, 6–4.

9 Ibid, Ch 4.

3.14 The Commissions recommended a provision that explained that, 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.¹⁰

3.15 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.¹¹

3.16 The Commissions considered that provisions setting out the nature, features and dynamics of family violence provide a contextual framework for judicial decision-making. They also serve an important educative function. Further, highlighting the impact of violence on particular groups may assist in the challenging task of ensuring that experiences of family violence of such groups are properly recognised across the legal system. The Commissions also considered that such legislative provisions should be developed in consultation with the groups affected.

Implementation in the *Family Law Act*

3.17 The first step towards a common definition and a shared understanding of family violence in Commonwealth laws is the proposed amendment of the *Family Law Act 1975* (Cth). After the release of *Family Violence—A National Legal Response*, the Australian Government introduced the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth) (Family Violence Bill). Among other things, this Bill proposes an amendment to the definition of family violence in s 4(1) of the *Family Law Act*. The amended definition, while influenced by the work of the Commissions, was a little different from the definition recommended in the report.

3.18 The definition contained in the Bill, for enactment as s 4AB, provides that:

- (1) For the purposes of this Act, family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful.
- (2) Examples of behaviour that may constitute family violence include (but are not limited to):
 - (a) an assault; or

¹⁰ Ibid, Rec 7–2.

¹¹ Ibid, Recs 5–2, 7–2. The Commission also recommended that a similar provision be included in the *Family Law Act 1975* (Cth): Rec 7–3.

- (b) a sexual assault or other sexually abusive behaviour; or
- (c) stalking; or
- (d) repeated derogatory taunts; or
- (e) intentionally damaging or destroying property; or
- (f) intentionally causing death or injury to an animal; or
- (g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
- (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
- (i) preventing the family member from making or keeping connections with his or her family, friends or culture; or
- (j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

3.19 The Bill adopts the two-part approach to the definition recommended in *Family Violence—A National Legal Response*—providing a contextual core definition accompanied by a non-exhaustive list of examples. There are several differences between the definition in the Bill and that recommended by the Commissions, with respect to the list of behaviours that may constitute family violence. The Family Violence Bill sets this list out in proposed s 4AB(2). However, these differences are not necessarily inconsistent with the Commissions' recommendation, which was flexible in relation to this second component of the definition.

3.20 The Family Violence Bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee (the Senate Committee), which reported in August 2011.¹² The Committee's response to the definition is considered below.

The breadth of the definition

3.21 Throughout the Senate Committee's inquiry, the proposed definition of family violence in the Family Violence Bill attracted broad support from many experts and stakeholders—including on the grounds of its breadth and the range of behaviour captured.¹³ Others, however, opposed the proposed definition including on 'precisely

12 Senate Legal and Constitutional Affairs Legislation Committee—Parliament of Australia, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 [Provisions]* (2011).

13 Ibid, Committee Report, [3.63]. Submissions supporting the definition included: Australian Human Rights Commission, *Submission 254, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011); Family Relationships Services Australia, *Submission 163, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011); Australian Domestic and Family Violence Clearinghouse, *Submission 59, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011); Redfern Legal Centre and Sydney Women's Domestic Violence Court Advocacy Service, *Submission 48, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011); H Rhoades and J Dewar, *Submission 9, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011).

the same grounds’—that is, on the basis of the breadth and the range of behaviour captured.¹⁴ For example, the Family Law Practitioners Association of Western Australia argued that the proposed definition was ‘simply too wide and captures behaviour that goes well beyond that which most members of the community would define as “violence”’.¹⁵

3.22 In its evidence and submission to the Committee, the ALRC stated that the Commissions’ recommended definition was not too broad. While the definition sets out a wide range of behaviour in its second component, the first component—the contextual core—acts as a ‘filter’ for these behaviours, operating to exclude conduct committed outside the context of controlling or coercive behaviour. For example, the recommended definition would exclude verbal abuse in the course of an intimate relationship, or acts of violent resistance by victims, where such conduct does not engender fear or does not form part of a pattern of controlling or coercive behaviour. This filter function was an important reason for the adoption of a two-part definition in *Family Violence—A National Legal Response*.

3.23 The ALRC acknowledged, however, that there may be one potentially over-inclusive aspect of the definition. Emeritus Professor Richard Chisholm, a former Justice of the Family Court and the writer of the report for the Attorney-General, the *Family Courts Violence Review*,¹⁶ was a key contributor to the Senate Inquiry. While generally supporting the Family Violence Bill definition, in giving evidence to the Senate Committee Chisholm pointed out one way in which the definition may be too broad. In relation to the definitional core included in s 4AB(1), he commented that:

If you focus on the ‘other behaviour’, you have got ‘family violence’ means other behaviour—that is, behaviour—that causes a family member to be fearful. So any behaviour that causes a family member to be fearful literally really fits in with this definition.¹⁷

14 Senate Legal and Constitutional Affairs Legislation Committee—Parliament of Australia, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 [Provisions]* (2011), Committee Report, [3.65] Submissions that opposed the definition included: Joint Parenting Association, *Submission 146, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011); One in Three Campaign, *Submission 64, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011); Men’s Health Australia, *Submission 60, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011); Dads on the Air, Australia, *Submission 3, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011); Non-Custodial Parents Party (Equal Parenting), *Submission 1, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011).

15 Senate Legal and Constitutional Affairs Legislation Committee—Parliament of Australia, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 [Provisions]* (2011), Committee Report, [3.65].

16 R Chisholm, *Family Courts Violence Review* (2009).

17 Commonwealth, *Parliamentary Debates*, Senate, 8 July 2011 (R Chisholm—witness), 3.

3.24 Chisholm’s submission to the Senate Committee’s inquiry illustrated the way in which this may be over-inclusive:

Suppose a family member tells another, correctly, that the family house is on fire, and this makes the person fearful. Or suppose a family member accidentally frightens another in the course of a practical joke. On a literal reading, such behaviour—telling the family member, carrying out the joke—could be seen as falling within the definition of ‘family violence’, because it is behaviour that causes the person to be fearful, and on a literal reading this would be enough to bring it within the definition of family violence.¹⁸

3.25 Chisholm noted that the definition is obviously not intended to include such behaviour, and that courts may interpret it in such a way as to give it a ‘sensible operation’.¹⁹ However, he considered that the drafting of proposed s 4AB(1) could be improved to ‘preserve its substance, but to eliminate the problem of over-inclusion’.²⁰ He suggested several possible improvements, including the following core definition:

For the purposes of this Act, family violence means behaviour by a person towards a member of the person’s family that is violent, threatening, coercive or controlling, or is intended to cause the family member to be fearful.²¹

3.26 This suggested reformulation appears to sharpen the definition recommended by the Commissions and contained in the Family Violence Bill—addressing its unintended over-inclusiveness. Professor Chisholm’s suggestion was also supported by the Family Law Council²² and by Professor Rosalind Croucher and Ms Sara Peel in giving evidence on behalf of the ALRC.²³ The re-focusing of the definition in the way proposed by Professor Chisholm advances the thinking expressed in this Inquiry and in the Commissions’ earlier work. It also meets some of the criticisms of stakeholders.²⁴

Illustrations of behaviour

3.27 In its submission to the Senate Committee, the ALRC drew attention to the ways in which the definition in the Bill deviated from that proposed in *Family Violence—A National Legal Response*, including as outlined below.²⁵

3.28 **Economic abuse:** The ALRC submitted that economic abuse should be expressly recognised as a type of behaviour that may fall within the definition of family violence.²⁶ The definition may then be supplemented by a further definition of

18 R Chisholm, *Submission 203, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011), 4.

19 Ibid, 5. See also Commonwealth, *Parliamentary Debates*, Senate, 8 July 2011 (R Chisholm—witness), 3.

20 Ibid, 5.

21 Ibid, 5.

22 Family Law Council, *Answers to Questions on Notice 11, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011* (2011).

23 Commonwealth, *Parliamentary Debates*, Senate, 8 July 2011 (R Croucher and S Peel).

24 For example, that the definition is ‘open ended’ with respect to ‘any other form of behaviour’: AFEL, *Submission CFV 158*.

25 Australian Law Reform Commission, *Submission 69, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011).

26 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [5.181].

‘economic abuse’, with non-exhaustive illustrative examples of such abuse.²⁷ Examples may include: coercing a partner to relinquish control over assets; coercing a person to claim social security payments; preventing a person from seeking or keeping employment; and the practice of ‘humberging’ in Indigenous communities—that is, demanding money from relatives, often by the use of standover tactics.²⁸

3.29 **Emotional or psychological abuse:** In *Family Violence—A National Legal Response*, the conduct listed in the proposed s 4AB(2)(d), that is, ‘repeated derogatory taunts’, was characterised more broadly as ‘emotional or psychological abuse’. The ALRC considers that this broader definition is preferable. As discussed above, concerns that specifying emotional or psychological abuse as a type of family violence may lead to misuse are addressed by placing this conduct in the context of behaviour that is violent, threatening, coercive, controlling or causing fear—the core definition.²⁹

3.30 The Commissions recommended (in the context of a discussion on the definition of family violence in family violence legislation) that legislation should include examples of emotional and psychological abuse that illustrate conduct that would affect—although not exclusively—certain vulnerable groups, including: Indigenous persons; those from a culturally and linguistically diverse background; the aged; those with disability; and those from the gay, lesbian, bisexual, trans and intersex communities.³⁰ As noted above, the Commissions also recommended that the same definition of family violence be adopted in the *Family Law Act*. Accordingly, other examples of emotional or psychological abuse should be included in the definition as illustrations of behaviour that affect particular groups, for example:

- threatening to institutionalise a person;
- withdrawing care on which the person is dependent;
- withholding medication or preventing the person from accessing necessary treatment or aids and equipment used in the person’s daily life;
- threatening to disclose a person’s sexual orientation against the person’s wishes; and
- racial taunts; and
- preventing a person from making or keeping connections with the person’s family, friends or culture, including spiritual ceremonies or practices.³¹

3.31 In its submission to the Senate Committee, the ALRC noted that the Family Violence Bill includes, as proposed s 4AB(2)(i), ‘preventing the family member from keeping connections with his or her family, friends or culture’ as an example of family

27 As for example in the *Family Violence Protection Act 2008* (Vic) s 6.

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), [5.183].

29 Ibid, [5.185].

30 Ibid, Rec 5–2.

31 Ibid, [5.188].

violence. The ALRC supported the inclusion of this behaviour in the definition of family violence—whether listed as an example of emotional or psychological abuse, as in the Victorian family violence legislation³² and recommended by the Commissions, or as a stand-alone example of family violence.

3.32 A further example contained in the Family Law Amendment (Family Violence) Bill 2010—Exposure Draft (the Exposure Draft Bill), was threats of suicide or self-harm with intent to torment or intimidate. While the ALRC did not consider that this example should be framed as a stand-alone example of family violence, it may usefully illustrate emotional or psychological abuse within the definition of family violence.³³

3.33 **Property damage and harm to animals:** The ALRC strongly supports the position taken in the Family Violence Bill of distinguishing harm to animals from damage to property, particularly in light of research that indicates the particular impacts on victims' behaviours arising from fear of an animal being harmed.³⁴ However, the ALRC submitted that the reference to property damage or destruction in the Family Violence Bill in proposed s 4AB(2)(e) should make it clear that this is relevant, irrespective of who owns the property. As stated in *Family Violence—A National Legal Response*, if a person violently smashes a chair against a wall in the presence of a spouse or child, and that conduct causes fear, it is irrelevant that the person who smashed the chair owns the chair.³⁵ Similarly, this qualification should be made to the reference to 'causing death or injury to an animal'—that is, it should apply irrespective of whether the victim owns the animal.³⁶

3.34 **Exposure of children to violence:** The Commissions recommended that behaviour of the person using violence that causes a child to be exposed to the effects of family violence should be included in the definition of family violence. In making this recommendation, the Commissions referred to the 'considerable amount of research documenting the fact that exposure of children to family violence causes long-term emotional, psychological, physical and behavioural issues'.³⁷ The definition of family violence should also clarify that a child is exposed to the effects of family

32 *Family Violence Protection Act 2008* (Vic) ss 5, 7.

33 The Commissions heard of particular examples of threats of suicide having occurred in Indigenous family relationships, in the context of exercising coercion and control over a family member.

34 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [5.200].

35 *Ibid.*, [5.198].

36 *Ibid.*, [5.200].

37 *Ibid.*, [5.209]. See Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [5.204]–[5.212] for further reasons for the inclusion of this category in the definition of family violence. The ALRC noted that the Family Violence Bill included exposure to violence in the definition of 'abuse' in relation to a child in s 4(1), but urged that the legislation include such exposure in the definition of family violence. Clearly, certain behaviour can constitute both family violence and child abuse: Australian Law Reform Commission, *Submission 69, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011).

violence by the behaviour of the person using family violence, and not due to the failure of the victim parent to protect that child from such exposure.³⁸

The Senate Committee's response

3.35 The Senate Committee's majority report stated that the proposed definition of family violence 'provides a more descriptive and subjective, but not exclusive, test, which requires decision makers to consider the personal experiences of family members'.³⁹ It commended the Australian Government 'for giving greater recognition to the breadth of behaviours which constitute family violence'.⁴⁰

3.36 In their additional comments, the Coalition Senators stated that, while they endorsed the objective of giving greater recognition to the breadth of behaviours that may constitute family violence, they held concerns that the definition cast the net too wide.⁴¹ Referring to Professor Chisholm's evidence, the Coalition Senators considered that the proposed s 4AB(1) was 'over-inclusive', insofar as it captured 'any behaviour which causes a family member to be fearful', and made 'no allowance for the intent of the party giving rise to a "fear"'.⁴² The Coalition Senators endorsed Professor Chisholm's alternative provision, and recommended that the Bill be amended accordingly.⁴³

A common definition in other Commonwealth laws

First step to a common interpretative framework

3.37 The Discussion Paper traversed the particular Commonwealth legislative areas under review, identifying where definitions of family violence are, or are not, included in Commonwealth laws, and proposing where such definitions might best be placed.

3.38 The ALRC considers that the same approach should be adopted in relation to Commonwealth laws in relation to this Inquiry, and 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 effectiveness underlying the approach to reform advocated in the Report.

3.39 The ALRC recommends that, in the various areas under review, a common definition should be adopted. As outlined above, a common interpretative framework is based first on a consistent core definition of family violence. In the light of the comments considered by the Senate Committee in relation to the Family Violence Bill, the ALRC recommends that the core definition should provide that family violence

38 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [5.205]–[5.206].

39 *Ibid.*, [3.168].

40 *Ibid.*, [3.168].

41 Senate Legal and Constitutional Affairs Legislation Committee—Parliament of Australia, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 [Provisions]* (2011), Additional comments by Coalition Senators, [1.12].

42 *Ibid.*, Additional comments by Coalition Senators, [1.13].

43 *Ibid.*, Additional comments by Coalition Senators, [1.14].

means behaviour by a person towards a member of the person's family that is violent, threatening, coercive or controlling, or is intended to cause the family member to be fearful.⁴⁴

3.40 The ALRC also considers that it is appropriate to include a non-exhaustive list of behaviours that may fall within the core definition. This second component of the definition should set out a range of behaviours that may amount to family violence. Particular kinds of behaviour may present themselves as examples—depending upon the legislative scheme under consideration. The illustrative list of behaviours contained in the second part of the definition was recommended as a non-exhaustive one and that it should be tailored to fit the context. This ensures that definitions are suitable for individual legislative schemes, while maintaining consistency across Commonwealth laws.

3.41 Given that the Australian Government is moving towards implementation of an amended definition of family violence in the *Family Law Act*, as discussed above, the ALRC recognises that this may form the basis of the definitions across the areas of Commonwealth law under review in this Inquiry. The ALRC considers that consistency is the key goal, but commends consideration of the comments put to the Senate Committee with respect to the final form of the amended definition in the *Family Law Act*.

Benefits of a common approach

3.42 The ALRC confirms its views expressed in *Family Violence—A National Legal Response* that systemic benefits would flow from the adoption of a common definition across different legislative schemes. Many stakeholders in this Inquiry have strongly supported a common definition of family violence.⁴⁵ For example, DEEWR supported a 'consistent and comprehensive definition' of family violence and indicated it would consider amendment of 'relevant guidelines and material to reflect any changes'.⁴⁶ The Australian Association of Social Workers (AASW) (Qld) and the Welfare Rights Centre (WRC) (Qld) supported

the articulation of a clear uniform definition of family violence that encompasses the continuum of violent behaviours that can manifest themselves within domestically violent relationships.⁴⁷

3.43 Stakeholders identified a number of benefits from a consistent approach to the definition of family violence. FaHCSIA commented that it would support actions raised in the *National Plan to Reduce Violence Against Women and their Children* and

44 This is the formulation proposed by Chisholm during the Senate Inquiry into the Family Violence Bill, discussed above.

45 Submissions to the Issues Papers are cited more fully in the Discussion Paper: Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011). Particular submissions are referred to below. Some submissions gave general 'I agree' responses to the questions in relation to the common interpretative framework, eg: NSW Women's Refuge Movement, *Submission CFV 120*; ADFVC, *Submission CFV 102*; WEAVE, *Submission CFV 84*.

46 DEEWR, *Submission CFV 130*.

47 AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*.

the *National Framework for Protecting Australia's Children*. It would also assist 'with gaining a shared understanding across the community of what constitutes family violence, who is affected and who is eligible to seek access to service and support as a consequence'.⁴⁸

3.44 Other benefits of a common approach identified by stakeholders included:

- fostering a common understanding that could then lead to appropriate training and consistent responses;⁴⁹
- the alignment of policies;⁵⁰
- a reduction in the repetition of a person's story and having to obtain different kinds of evidence;⁵¹ and
- enhancement of safety.⁵²

3.45 The ALRC considers that a common definition should have the following additional benefits:

- increase certainty for victims that family violence will be recognised and treated consistently across legal and administrative frameworks;
- improve the ease and effectiveness of decision making and interpretation of laws and policies for agencies, departments, and courts; and
- facilitate better coordination of responses to family violence, through appropriate information sharing and the improvement of pathways between agencies.

3.46 FaHSCIA submitted that 'without more definitive policy and practice guidance', there is the potential 'for inconsistent assessment of legal entitlements'. However, backed up by such guidance—and ongoing 'monitoring and maintenance'—it would 'ensure consistency into the future'.⁵³ The ALRC agrees that legislative definitions should be complemented by replication and guidance in policy guidelines—and makes recommendations to this effect in Chapters 5, 11 and 14. This is also discussed further below.

48 FaHSCIA, *Submission CFV 162*. However, FaHSCIA also listed a number of concerns about the adoption of a consistent definition across the relevant frameworks, for example that 'the proposed definition would need to be used in its entirety by all Commonwealth legislation'.

49 National Legal Aid, *Submission CFV 164*; FaHSCIA, *Submission CFV 162*; DHS, *Submission CFV 155*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*; DEEWR, *Submission CFV 130*; Federation of Ethnic Communities' Councils of Australia, *Submission CFV 126*; DIAC, *Submission CFV 121*; White Ribbon, *Submission CFV 112*; Aboriginal & Torres Strait Islander Women's Legal Service North Queensland, *Submission CFV 99*.

50 Commonwealth Ombudsman, *Submission CFV 54*.

51 DHS, *Submission CFV 155*; Commonwealth Ombudsman, *Submission CFV 54*.

52 Gippsland Community Legal Service, *Submission CFV 114*.

53 FaHSCIA, *Submission CFV 162*.

Resistance to the proposed definition

3.47 Some stakeholders regarded the ALRC's proposed definition as too broad. A number who had made submissions to the Commissions' earlier inquiry repeated their opposition to the proposed definition both to the Senate Committee inquiry into the Family Violence Bill and to this Inquiry.⁵⁴ The Non-Custodial Parents Party (Equal Parenting) opposed the inclusion of the definition in the child support context, arguing that it amounted to an 'unreasonable broadening of the definition of family violence', and that 'unfounded allegations of family violence' should not be 'an acceptance criterion to establish a relationship between child support and family violence'.⁵⁵

3.48 Family Voice Australia drew attention to Professor Chisholm's comments to the Senate Committee consideration of the Family Violence Bill.⁵⁶

3.49 The Australian Federation of Employers and Industries argued that the definition was 'unacceptably broad' and for the purposes of the *Fair Work Act 2009* (Cth) it would be 'an impractical definition on which to base an entitlement for leave or any other condition of employment'.⁵⁷ Other employer groups suggested that family violence issues are better dealt with through workplace policies and education, rather than changes to the *Fair Work Act*.⁵⁸

Illustrative examples of the types of family violence

3.50 The ALRC considers it may be useful for the definition to list examples of the types, or higher order examples, of family violence that are specified in the second part of the definition. DHS has commented that the

meaning and limits of the terms of the definition of family violence must be made very clear, to ensure that they are useful and do not lead to further confusion or conflict. It may be useful to provide examples of some of the forms of family and domestic violence within the definition so that these can be recognised.⁵⁹

3.51 In *Family Violence—A National Legal Response*, the Commissions considered that the higher level examples of family violence contained in the definition of family violence should ideally be illustrated by non-exhaustive lists of examples—in particular, in relation to emotional/psychological or economic abuse. Including such illustrative examples in the Commonwealth legislative schemes under review should help to educate service officers, lawyers, judicial officers, and those engaging with the various schemes. It may also assist in achieving more consistent responses to family

54 For example, Lone Fathers Association Australia, *Submission CFV 109*; FamilyVoice Australia, *Submission CFV 86*; Non-Custodial Parents Party (Equal Parenting), *Submission CFV 50*.

55 Non-Custodial Parents Party (Equal Parenting), *Submission CFV 50*. See also Lone Fathers Association Australia, *Submission CFV 109*.

56 FamilyVoice Australia, *Submission CFV 86*. As noted above, the ALRC agrees that Chisholm's suggested reformulation improves upon the definition recommended by the Commissions and addresses its unintended over-inclusiveness.

57 AFEL, *Submission CFV 158*.

58 Ai Group, *Submission CFV 141*; ACCI, *Submission CFV 128*.

59 DHS, *Submission CFV 155*.

violence from departments and the legal system. The family violence legislation of Victoria and South Australia may be instructive in this regard.⁶⁰

3.52 Alternatively, relevant policy guides—in particular, the *Guide to Social Security*, the *Child Support Guide*, and the *Family Assistance Guide*—may illustrate the categories of family violence specified in the legislation with lists of examples. As discussed in Chapters 5, 11 and 14, the ALRC recommends that legislative definitions of family violence should be replicated and reflected in relevant policy guides. Further, whatever list of behaviours is adopted in particular legislation may be amplified in an illustrative way in the relevant policy guide. Policy guides therefore provide appropriate platforms for complementary material regarding the legislative definition.

3.53 The ALRC considers that the illustrative categories of family violence in the definition should be tailored to each legal framework to reflect the presentations of family violence, and the particular risks victims may face, in that context. Some stakeholders suggested including additional, amended, or expanded, examples of behaviour that may constitute family violence.

3.54 The AASW (Qld) and WRC (Qld), for example, suggested that other examples could be given in the illustrative list, including socially isolating a person denying cultural and/or religious autonomy, as well as threats to commit any of the above or threats to commission others to do so.⁶¹ National Legal Aid also suggested that threats to carry out the behaviours listed should be included as well as a threat ‘to commit suicide or self harm’.⁶² A specific example was given concerning animals:

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.⁶³

3.55 With respect to Indigenous peoples, the Aboriginal and Torres Strait Islander Women’s Legal Services NQ Inc submitted that the definition ‘fails to acknowledge the extent to which a person’s cultural, spiritual and family life form part of the person’s sense of self-worth’. It suggested that emotional and psychological abuse are ‘too general and generally an inaccurate description for specific types of abuse such as’:

- Cultural abuse;
- Deliberately isolating a person from their family, their community or social life, their cultural life or their religious or spiritual beliefs;
- Demeaning a person with reference to their culture, or spiritual beliefs.⁶⁴

60 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 9; *Family Violence Protection Act 2008* (Vic) ss 5–7.

61 AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*.

62 National Legal Aid, *Submission CFV 164*.

63 *Ibid.*

64 Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*.

3.56 In the migration context, the ‘threat of removal’ from Australia was considered by many stakeholders as a form of family violence used 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.⁶⁵ Many stakeholders supported amendments to the *Procedures Advice Manual 3* to provide illustrative examples. For example, the ANU Migration Law Program 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.⁶⁶

3.57 Other examples of matters suggested to be considered were:

- expanding the paragraph referring to causing a child to be exposed to family violence—paragraph (i) in the Commissions’ definition—to refer specifically to the ‘short-term effects’ of the listed behaviours;⁶⁷
- as an example of child abuse, the ‘denial of access by the child to one of his/her parents’;⁶⁸
- ‘legal abuse through the [Federal Magistrates Court], and the threat of future financial devastation via legal abuse’;⁶⁹
- that any definition of family violence ‘needs to reflect the differing experiences of victims taking into account their specific circumstances of age, abilities, race, culture, lifestyles and gender’;⁷⁰
- socially isolating a person, denying cultural and/or religious autonomy;⁷¹
- the ‘increasingly common incidence of violence by teenage children (usually sons) against mothers’;⁷²
- threats of violence—‘victims of violence report that perpetrators can maintain control with threats of even a “look” if past acts have shown what a perpetrator is capable of’.⁷³

65 ANU College of Law, *Submission CFV 79*; AASW (Qld), *Submission CFV 38*; ADFVC, *Submission CFV 26*.

66 ANU Migration Law Program, *Submission CFV 79*.

67 Women’s Information and Referral Exchange, *Submission CFV 93*.

68 Lone Fathers Association Australia, *Submission CFV 109*.

69 Confidential, *Submission CFV 83*.

70 AASW (Qld) and WRC Inc (Qld), *Submission CFV 140*.

71 AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*.

72 CPSU, *Submission CFV 147*.

73 Confidential, *Submission CFV 165*.

3.58 DHS commented on the inclusion of ‘economic abuse’ in the list of behaviours that may amount to family violence. It stated that, in particular areas such as child support, this term ‘raises especially sensitive issues ... because the Child Support program facilitates and enforces transfers of money from one to the other’.⁷⁴

3.59 The Multicultural Disability Advocacy Association stated 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.⁷⁵

3.60 The National Welfare Rights Network (NWRN) considered that the examples of behaviour should be informed by direct consultation with people who have experienced family violence who identify as being from those groups.⁷⁶

Nature, features and dynamics of family violence

3.61 The ALRC also recommends in Chapters 5, 11 and 14 that relevant policy guides should contain a statement regarding the nature, features and dynamics of family violence—in particular, the *Guide to Social Security*, the *Child Support Guide* and the *Family Assistance Guide*.

3.62 Including a statement of the nature, features and dynamics has a number of benefits. In brief, such a statement serves an important educative function for staff, and provides a contextual basis for training and the identification of family violence concerns (through screening or other measures). However, the ALRC does not consider that such a provision is necessary in the Commonwealth legislation under review, as prevention of family violence is not the primary purpose of such legislation.

3.63 The ALRC considers that the formulation of the nature, features and dynamics recommended for state and territory family violence legislation in the *Family Violence—A National Legal Response* provides an instructive model for relevant Australian Government departments. However, the departments should modify the formulation to best reflect the exigencies of the framework in which they operate. Some stakeholders have suggested modification or additions to the formulation.⁷⁷ For example, WEAVE submitted that the formulation should also address ‘the impact of family violence on children and young people’.⁷⁸ This may be particularly relevant in the social security and child support contexts—for example, to complement legislative provisions and policy regarding youth allowance and the child support eligibility of informal carers of children who have experienced family violence.⁷⁹

74 DHS, *Submission CFV 155*.

75 Multicultural Disability Advocacy Association, *Submission CFV 60*.

76 National Welfare Rights Network, *Submission CFV 150*.

77 See, eg, Women’s Health Victoria, *Submission CFV 133*; WEAVE, *Submission CFV 14*.

78 WEAVE, *Submission CFV 85*.

79 See Chs 6 and 12.

3.64 The Lone Father’s Association objected to the component of the formulation stating that ‘family violence is predominantly committed by men’, arguing that this ‘amounts to illegal gender profiling of males’.⁸⁰ While the ALRC considers it important that definitions of family violence, both in legislation and policy guides, are gender-neutral,⁸¹ it is appropriate for policy guides to state that, while anyone may be a victim of family violence, or use family violence, it is predominantly committed by men.

3.65 *Time for Action* reported that ‘overwhelmingly sexual assault and domestic and family violence is perpetrated by men against women’, although it acknowledged that men can also be victims of family violence.⁸² In *Family Violence—A National Legal Response*, the Commissions considered that, ‘where state and territory governments accept statistics indicating that family violence is predominantly used by men against women, this should be reflected in the principles of family violence legislation’. In the ALRC’s view, this principle is also applicable to the Australian Government and the relevant policy guides published by its departments.

Location of common definition

3.66 The ALRC considers that the key outcome is to achieve consistency of understanding across the Commonwealth legal frameworks under review. In some instances this will be achieved by including a common definition in the primary legislation itself; in others, the appropriate place may be elsewhere, such as in policy guides for decision makers. The next section examines each of the areas under review and considers where best to place the definition.

Social security

3.67 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) contain 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).⁸³

3.68 The *Guide to Social Security Law* provides that ‘domestic and family violence’ in relation to Crisis Payment includes: child abuse; maltreatment; exploitation; verbal abuse; partner abuse; elder abuse; neglect; sexual assault; emotional abuse; economic

80 Lone Fathers Association Australia, *Submission CFV 109*.

81 This is consistent with the aim of this Report—to improve the safety of all victims of violence, whether male or female.

82 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), 29.

83 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [1.1.D.235] (Domestic and/or Family Violence (CrP)).

abuse; assault; financial coercion; domestic violence; psychological abuse, or social abuse.⁸⁴

3.69 ‘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).

3.70 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’.⁸⁵

3.71 The National Welfare Rights Network (NWRN) commented on the narrowness of s 23(14) and stated that the discretion in (c) is ‘exercised in a very circumspect manner’. NWRN argued that the discretion was ‘not the most appropriate mechanism for extending the definition of “family member”’.⁸⁶ NWRN suggested including a detailed definition of family member— independent of the definition of ‘member of a couple’ in s 4.

3.72 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,⁸⁷ except in relation to Crisis Payment. The recommendations made in Chapter 9 would delete this latter reference.⁸⁸ However, ‘family member’ is also used in the recommended definition of family violence and therefore it is important to understand how this definition will be interpreted in the social security context. In particular, for Indigenous communities, where the meaning of ‘family member’ has an immutable connection to custom and practice through Aboriginal law, or revitalised customs and practice through a reconnection to ‘country’ and family membership.

3.73 DEEWR raised concerns about the potential narrowing of the definition of family violence. In this regard, DEEWR noted that the existing definition of domestic violence in the *Guide to Social Security Law* can include violence to someone who is not a family member, such as co-tenants or people in shared housing situations, while the ALRC’s recommended definition of family violence would not extend to such situations.⁸⁹ Similarly, the Commonwealth Ombudsman noted that any definition of family violence in child support, family assistance and social security legislation would

84 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).

85 Ibid, [1.1.F.60] (Family member).

86 National Welfare Rights Network, *Submission CFV 150*.

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

88 Rec 9–2.

89 DEEWR, *Submission CFV 130*.

‘need to be broad enough to include violence involving persons connected by a variety of current and former “family” relationships’, and it may be necessary to separately define ‘family’.⁹⁰

3.74 It may therefore be necessary to complement the recommended definition of family violence in the social security definition with a definition of family member in the *Social Security Act*. The ALRC considers that such a definition should capture at least the categories of relationships that *Family Violence—A National Legal Response* recommended should be covered by state and territory family violence legislation. These categories include:

- past or current intimate relationships, including dating, cohabiting, and spousal relationships, irrespective of the gender of the parties and whether the relationship is of a sexual nature;
- family members;
- relatives;
- children of an intimate partner;
- those who fall within Indigenous concepts of family; and
- those who fall within culturally recognised family groups.⁹¹

3.75 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. While the current definition contained in the *Guide to Social Security Law* is already broad, the ALRC considers that placing the definition of family violence in the *Social Security Act* may afford a measure of stability and visibility to the definition. References to family violence in the *Social Security (Administration) Act* should cross-reference to this definition. The ALRC also considers that the particular nature, features and dynamics of family violence should be expanded on in the *Guide to Social Security Law*.

3.76 From the first responses to the Issues Paper, there was strong support among stakeholders for consistency of definitions in the areas under review, including in the area of social security.⁹² DEEWR supported in principle the amendment of the definition in the *Social Security Act*, noting that any amendments would need to be jointly considered by DEEWR and FaHCSIA, as joint administrators of social security policy and law. While DEEWR supported a consistent and comprehensive definition of family violence, it considered that it may not be practical or effective to include a definition in every Departmental document.⁹³

90 Commonwealth Ombudsman, *Submission CFV 62*.

91 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 7–6.

92 See Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), Ch 3.

93 DEEWR, *Submission CFV 130*. It commented that reference to a source definition ‘may be appropriate’.

3.77 In the pre-employment context, the term domestic violence is included in publications such as the Job Seeker Classification Instrument (JSCI) Guidelines, other material utilised by Job Services Australia (JSA), Disability Employment Services (DES) and Indigenous Employment Program (IEP) providers and in relation to Job Capacity Assessments and Employment Services Assessments. However, domestic violence is not definite in these publications.

3.78 The ALRC recommends in Chapter 8 that the JSCI include a new and separate category of family violence.⁹⁴ The ALRC also recommends that JSA, DES and IEP deeds and contracts should include a requirement that providers should appropriately and adequately consider the existence of family violence when tailoring service responses to individual job seeker needs.⁹⁵

3.79 If such amendments are made, the recommended definition of family violence should be included in the JSCI Guidelines and relevant JSA, DES and IEP deeds and contracts.

Child support and family assistance

Child support

3.80 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.⁹⁶

3.81 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.⁹⁷

94 Rec 8–3.

95 Rec 8–6.

96 Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011, [6.10.1].

97 *Ibid.*, [6.10.1].

Family assistance

3.82 The 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’.⁹⁸

Amending the primary legislation?

3.83 Provisions that affect the lives and safety of particularly vulnerable groups of society may be more appropriately placed in primary legislation.⁹⁹ The ALRC considers it desirable for the definition of family violence to be set out in the *Child Support (Assessment) Act* and the *Child Support (Registration and Collection) Act* as well as in the *Family Assistance Act* and the *Family Assistance (Administration) Act*. Placing the definition of family violence in the primary legislation gives the definition increased stability, visibility and authority.

3.84 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. It would also provide victims with clarity and the certainty that family violence will be recognised and treated similarly across Commonwealth laws. A joint submission by Domestic Violence Victoria and others argued that, in the child support and family assistance context, 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’.¹⁰⁰ Moreover, 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’.¹⁰¹ 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’.¹⁰²

3.85 The Council of Single Mothers and their Children (CSMC) said that it was ‘imperative’ that information and definitions of family violence are ‘clearly articulated in legislation and guides that decision makers refer to’.¹⁰³ CSMC considered that this may address a ‘lack of understanding of the impact on children of being exposed to family violence’, and a lack of ‘sympathetic response to disclosures of family violence’.¹⁰⁴

98 The *Guide to Social Security Law*, which is also hosted on the FAHCSIA website, does contain a definition of family violence. FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [1.1.D.235].

99 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.

100 Joint submission from Domestic Violence Victoria and others, *Submission CFV 59*.

101 National Legal Aid, *Submission CFV 81*.

102 Council of Single Mothers and their Children, *Submission CFV 44*. See, similarly, ADFVC, *Submission CFV 53*.

103 Council of Single Mothers and their Children, *Submission CFV 44*.

104 *Ibid.*

3.86 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.¹⁰⁵

3.87 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. However, 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. Legislative definitions also inform associated training especially in service delivery areas.

3.88 Achieving consistency is the principal aim. This can be achieved either by specific amendment to the relevant primary legislation or by amendment to one, with cross-references in the others. As noted above, amendment to the *Family Law Act* is the first step towards implementing an improved definition of family violence in Commonwealth laws. It is likely, therefore, to form the model on which the other definitions are based. The ALRC recommends that the relevant primary legislation in each case, as considered in this Report, include the definition.

3.89 The *Family Law Act* is the central piece of legislation in the ‘family law system’ and child support may be considered—to some extent—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—reference to the *Family Law Act* definition is clearly one possible direction for reform. There are practical issues that remain, however, where cross-referencing itself becomes out of date, and explanations in policy material are no longer relevant.¹⁰⁶ There is also the distinct educative role and value of placing the definition in the relevant primary legislation.

Defining family member?

3.90 The recommended definition of family violence refers to the term ‘family member’, and this is not defined in the child support and family assistance legislation. However, the ALRC considers it unnecessary for these legislative frameworks to define the terms ‘family’, ‘family member’ or ‘family relationships’. 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.

105 Law Council of Australia Family Law Section, *Submission CFV 67*.

106 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).

3.91 By contrast, and as discussed in Chapter 11, family violence in the child support framework does not, in and of itself, prompt an outcome that determines rights between parties. There is, therefore, not the same imperative to define the context in which family violence may occur. Indeed, legislatively defining family or family relationships may unnecessarily limit the application of an issues-management response to family violence that promotes customer safety.

3.92 However, where departments consider that staff would be assisted by guidance regarding the relationship context of family violence within a particular framework, departments may set out further information within policy guides. For example, DHS has stressed the need for recognition of family violence occurring in relationships other than families or couples:

‘domestic’ violence can occur between people co-habiting for other reasons, such as friends, people living in a shared house or in other non-familial domestic arrangements, or live-in caregivers.¹⁰⁷

3.93 It may be appropriate to set out such information to complement the definition in the relevant policy guide—in this case, the *Child Support Guide*.

3.94 The ALRC has taken a similar approach in relation to former relationships in the child support context. DHS submitted that the family violence concept ‘needs to include both *current* and *former* members of a family/relationship or household’.¹⁰⁸ While the Commissions recommended in *Family Violence—A National Legal Response* that this should be specified in state and territory family violence legislation,¹⁰⁹ in the child support context such guidance regarding the legislative interpretation may, where necessary, be situated in policy guides.

3.95 In the family assistance context, while family violence does not generally prompt outcomes that affect rights and entitlements there is some limited scope for it to do so. In particular, exemptions from the ‘reasonable maintenance action’ requirements enable victims of family violence to forgo child support, where necessary for their safety, without an associated reduction to their Family Tax Benefit Part A (as discussed in Chapters 11 and 13). Further, family violence may be relevant in obtaining increased rates of Child Care Benefit (as discussed in Chapter 14).

3.96 It may therefore be necessary to complement the recommended definition of family violence in the family assistance definition with a definition of family member in the legislation or the *Family Assistance Guide*. The categories of relationship recommended to be included for the purposes of state and territory family violence legislation are referred to above.

107 DHS, *Submission CFV 155*.

108 *Ibid.*

109 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 7–6.

Employment and superannuation

3.97 The ALRC considers that consistency of definitions across the areas under consideration in this Inquiry promotes the seamlessness identified as a key framing principle. In an employment context, such consistency can then underpin awareness raising initiatives, education, training as well as responses to family violence, including articulation of duties, rights and entitlements.

3.98 As outlined in Chapters 15–18, while in many respects the intersections between family violence and employment are increasingly being recognised, neither the *Fair Work Act 2009* (Cth) nor the *Fair Work Regulations 2009* (Cth) has specific provisions dealing with family violence or the manifestation of family violence in the workplace. As a result, there is no specific reference to, or definition of, family violence in Fair Work Australia (FWA) or Fair Work Ombudsman (FWO) material.

3.99 Similarly, given Safe Work Australia’s view that family violence is not an OHS issue, the Model Work Health and Safety Act, Regulations and Codes of Practice under the harmonised OHS regime do not refer to, or contain a definition of, family violence.

3.100 While placing the definition of family violence in primary legislation may give the definition increased stability, visibility and authority, in the context of the *Fair Work Act*, given there are limited direct legislative entitlements, it is unnecessary at this time. Rather, the ALRC considers the consistent definition of family violence should be included in FWA and FWO material and other relevant material developed by bodies such as the Office of the Australian Information Commissioner, Equal Opportunity for Women in the Workplace Agency, and the Australian Human Rights Commission.

3.101 However, in the course of the phased implementation of reforms in the employment context, outlined in Chapter 15, it may be necessary to reconsider the inclusion of a definition of family violence in the *Fair Work Act*. For example, in the course of considering whether amendments should be made to the National Employment Standards (NES), 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)).¹¹⁰

3.102 Similarly, two stakeholders suggested 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, for example, suggested that ‘domestic or family violence’ should include ‘physical, sexual, mental, verbal or emotional abuse by a member of the employee’s immediate family or a member of the employee’s household’.¹¹¹

110 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*.

111 ADFVC, *Submission CFV 26*.

3.103 Women’s Health Victoria added that, if family violence is included under s 65 of the *Fair Work Act*, it would recommend, ‘accompanying materials be produced for both employers and employees explaining the reason for its inclusion, legal definitions of what constitutes family violence’.¹¹²

3.104 However, the Australian Chamber of Commerce and Industry expressed the view that the consistent definition is ‘far too wide as a workable definition for the purposes of determining minimum conditions of employment’ under the *Fair Work Act*.¹¹³

3.105 In the OHS context, as outlined in Chapter 18, the ALRC considers there are some circumstances in which primary duties of care may encompass risks arising from family violence. Accordingly, the ALRC recommends that Safe Work Australia include family-violence related information in Codes of Practice and other relevant material. In the course of doing so, the ALRC recommends that the consistent definition of family violence is included.

Superannuation

3.106 There is no relevant definition of family violence in the central pieces of superannuation legislation, including the *Superannuation Act 1976* (Cth), *Superannuation Industry (Supervision) Act 1993* (Cth), or *Superannuation Industry (Supervision) Regulations 1994* (Cth). To ensure family violence may be considered in the context of spousal contributions, self-managed superannuation funds and early access to superannuation, the ALRC recommends that where appropriate, all Australian Prudential Regulation Authority, DHS, Australian Taxation Office and superannuation fund material, should provide for a consistent definition of family violence as set out in Recommendation 3–1.

3.107 Northern Rivers Community Legal Centre suggested that the consistent definition should include ‘recognition that family violence also includes “coercing a partner or other family member to relinquish control over assets”’.¹¹⁴

Migration

3.108 The *Migration Regulations 1994* (Cth) defines 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

112 Women’s Health Victoria, *Submission CFV 11*.

113 ACCI, *Submission CFV 128*.

114 Northern Rivers Community Legal Centre, *Submission CFV 08*.

- (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.¹¹⁵

3.109 This definition takes a similar approach to the definition of family violence in the *Family Law Act*,¹¹⁶ in giving focus to the effect of the conduct on the victim, rather than categorising types of conduct.¹¹⁷

Judicial consideration of the term ‘violence’

3.110 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 view that violence was ‘meant to exclude instances where the damage suffered by the applicant was not wholly physical’.¹¹⁸ However, later authorities have reinforced an understanding of ‘violence’ to cover emotional violence, economic abuse and psychological abuse.¹¹⁹

‘Relevant family violence’

3.111 If the ALRC’s definition of family violence is adopted, this would result in the removal of the term ‘relevant’ from the current definition in the *Migration Regulations*. Stakeholders argued that including the term ‘relevant’ was confusing, unnecessary and risks not encompassing all forms of violence.¹²⁰ For example, the AASW (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.¹²¹

3.112 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.¹²²

115 *Migration Regulations 1994* (Cth) reg 1.21(1).

116 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.

117 *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.

118 See *Malik v Minister for Immigration and Multicultural Affairs* (2000) 98 FCR 291; *Ibrahim v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1279; and *Meroka v Minister for Immigration and Multicultural Affairs* (2002) 117 FCR 251. In, *Cakmak v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 135 FCR 183 the Full Federal Court commented that the term ‘violence’ was restricted to physical violence, and that things like belittling, lowering self esteem, ‘emotional violence’ or ‘psychological violence’ broadened the scope of the *Migration Regulations* beyond their words.

119 See *Sok v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 144 FCR 170.

120 Federation of Ethnic Communities’ Councils of Australia, *Submission CFV 126*; Good Shepherd Australia New Zealand, *Submission CFV 41*; IARC, *Submission CFV 32*; WEAVE, *Submission CFV 31*.

121 AASW (Qld), *Submission CFV 38*.

122 RAILS, *Submission CFV 34*.

3.113 There has also been judicial concern about the impact of the term ‘relevant’ in the *Migration Regulations*. In *Al-Momani v Minister for Immigration and Citizenship*, The court considered ‘relevant family violence’ to be a subset of ‘violence’, such that a person who is found to have suffered ‘family violence’ may not have suffered ‘relevant family violence’ for the purposes of the *Migration Regulations*.¹²³ The court remarked that:

The issues represent a potential legal minefield. The minefield could be avoided if the definition of ‘relevant family violence’ were to be replaced with the proposed definition of ‘family violence’ in the *Family Law Act* if that definition is enacted. That definition has the advantage that it focuses specifically on coercive and controlling violence which carries with it the concept of an abuse of power, while maintaining the concept of induced fear.¹²⁴

3.114 In the ALRC’s view, all forms of family violence should be considered by a visa 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.

‘Reasonableness’

3.115 The adoption of the ALRC’s definition would also see the removal of the requirement that a victim ‘reasonably’ fears for his or her safety. Some stakeholders 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.¹²⁵ 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.¹²⁶

3.116 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’.¹²⁷

3.117 The Department of Immigration and Citizenship (DIAC), however, suggested there was utility in a ‘well founded’ or ‘reasonableness’ requirement, as this gives a decision maker an opportunity to test the applicant’s claims. DIAC was concerned that,

123 *Al-Momani v Minister for Immigration and Citizenship* [2011] FMCA 453, [37]–[39].

124 *Ibid*, [39].

125 See eg, Federation of Ethnic Communities’ Councils of Australia, *Submission CFV 126*; Law Institute of Victoria, *Submission CFV 157*; Law Institute of Victoria, *Submission CFV 74*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*.

126 Law Institute of Victoria, *Submission CFV 74*.

127 National Legal Aid, *Submission CFV 75*.

as the reactions and feelings of an individual are subjective, there is a risk that a definition without the scope to test the reasonableness of those feelings may be open to behaviours which would not usually be accepted as family violence.¹²⁸

3.118 DIAC considered that a ‘reasonableness’ test would be consistent with the way it assesses Protection visa requirements, on which there is a significant body of case law.¹²⁹

3.119 The ALRC accepts that, in the migration context, there is utility in a definition of family violence that provides a threshold to test an applicant’s claims. However, the requirement in the ALRC’s definition that the conduct be ‘violent’ or ‘threatening’, or behaviour that ‘coerces or controls’ a family member, provides a lens in which to consider the conduct in question. As Professor Richard Chisholm argued:

To add a requirement of reasonable fear would mean that the person alleging violence would have to lead additional evidence of a highly personal nature, and this is not necessary if there is evidence of behaviour that is violent, or threatening, or coercive or controlling. The need for such evidence, and concerns about what the court might or might not consider reasonable, would be a disincentive to some people who have been subjected to such behaviour to disclose it to the court.¹³⁰

Violence perpetrated by someone other than sponsor

3.120 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. A number of stakeholders called for amendments to the *Migration Regulations* to reflect that family violence may be committed by someone other than the sponsor.¹³¹

3.121 For example, Domestic Violence Victoria and others 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.¹³²

3.122 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’.¹³³

128 DIAC, *Submission CFV 121*.

129 Ibid.

130 R Chisholm, *Submission 203, Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law (Family Violence and Other Measures) Bill 2011* (2011).

131 See eg, ANU Migration Law Program, *Submission CFV 159*; Townsville Community Legal Service, *Submission CFV 151*; IARC, *Submission CFV 149*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*.

132 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*.

133 ANU Migration Law Program, *Submission CFV 79*.

3.123 The ALRC considers that whether or not the definition of family violence should apply to circumstances where violence is committed by someone other than the sponsor is an issue to be considered in the implementation of the definition. The current requirement that the family violence must have been committed by the sponsor appears to reflect the policy that the visa holder should not have to remain in a violent relationship with the sponsor or primary visa applicant in order to preserve his or her eligibility for permanent residence. Extending the applicability of family violence to cases where the violence is committed by someone other than the sponsor may have effects on the integrity of the visa system.

3.124 However, the ALRC considers that illustrative examples of conduct that may constitute family violence can be provided for in relevant guides. For example, a number of stakeholders supported the ALRC’s proposal to provide in *Procedures Advice Manual 3* (PAM) that, where 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.¹³⁴

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

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

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

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

¹³⁴ See eg, Law Institute of Victoria, *Submission CFV 157*; Migration Institute of Australia, *Submission CFV 148*; IARC, *Submission CFV 149*; Federation of Ethnic Communities’ Councils of Australia, *Submission CFV 126*; DIAC, *Submission CFV 121*. As noted above, other relevant conduct, such as the ‘threat of deportation’ or threat to remove a person from a visa permanent visa application could also be considered.

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

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

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

4. Disclosure and Issues Management

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Summary

4.1 This chapter considers ways in which agencies within the Department of Human Services (DHS) portfolio—in particular Centrelink, the Child Support Agency (CSA) and the Family Assistance Office (FAO)—can better identify and respond to family violence-related safety concerns.

4.2 There was substantial agreement among stakeholders about the need for DHS to identify and respond to family violence-related safety concerns, with disagreement largely centred on how this could be best achieved by DHS. The ALRC also notes that DHS has already begun a process of considering the range of matters raised in this chapter. The ALRC’s recommendations are aimed at complementing such initiatives.

4.3 The ALRC recommends that DHS staff providing customer services should facilitate the disclosure of family violence-related safety concerns by providing information about how family violence may be relevant to a person’s social

security, child support and family assistance case, at the point of registration and at subsequent intervention points.

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

4.5 Lastly, the ALRC recommends that DHS staff receive consistent, regular and targeted training and education to ensure that they are appropriately equipped to deal with family violence-related safety concerns.

Relevant concepts

4.6 In this chapter, and in Chapter 12, the ALRC will refer to the concepts of ‘identifying family violence-related safety concerns’ and ‘issues management’.

Identifying family violence-related safety concerns

4.7 There are a number of tools and methods that may be used to identify family violence-related safety concerns. In the Discussion Paper, the ALRC outlined the concept of ‘screening’ for family violence, being ‘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’.¹ ‘Screening’ helps to identify those at risk, by 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.²

4.8 Apart from ‘screening’, the disclosure of family violence-related safety concerns can be promoted by other tools and measures.³ These include the provision of information about family violence and how it is relevant to a customer’s entitlement and claims, and assurances to the customer that such disclosure will lead to an adequate response.

1 Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), 123 referring to Australian Institute of Social Relations, *Screening, Risk Assessment and Safety Planning* (2010).

2 Australian Institute of Social Relations, *Screening, Risk Assessment and Safety Planning* (2010).

3 Stakeholders have also noted, for example, that practical measures such as conducting an interview in private or ensuring a customer has access to a person of the same cultural background may be conducive to disclosure of family violence-related concerns.

Issues management

4.9 In the report, *Delivering Quality Outcomes—Report of the Review of Decision Making and Quality Assurance Processes of the Child Support Program*, David Richmond described the interface between the DHS agencies—Centrelink, the CSA, and the FAO—and their customers as characterising ‘issues management’.⁴ Richmond distinguishes this from the term ‘case management’, which involves, ‘the handling of a customer by a dedicated case officer over an extended, if not indefinite period of time’.⁵

4.10 In its submission, DHS referred to a new service delivery approach called ‘Case Coordination’, which is currently being trialled to provide customers ‘facing disadvantage or complex challenges with better integrated services and intensive support’.⁶ The level of support and assistance varies, depending on customer need, from ‘simple referrals to services or information through to intensive support involving multiple coordinated appointments with non-government and local community services’.⁷

4.11 The ALRC uses the term ‘issues management’ to describe agencies’ interface with customers. However, its recommendations in relation to issues management in this chapter and in Chapters 5 and 12 may fit within, or complement, DHS’ Case Coordination approach.

Promoting the disclosure of family violence

Service delivery reform

4.12 The DHS is responsible for the development of service delivery policy and provides access to social, health and other payments and services.⁸ The *Human Services Legislation Amendment Act 2011* (Cth) integrated the services of Medicare Australia, Centrelink and CRS Australia on 1 July 2011 into DHS.⁹

4.13 As part of these reforms, agencies within the DHS portfolio have been integrating back-office support services, information systems, customer contact areas, and co-locating some shopfronts.¹⁰ A key goal of integration is to provide seamlessness for customers who access services delivered by the DHS portfolio.¹¹ In addition, it is envisaged that it will allow a ‘tell us once’ approach for customers,

4 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].

5 Ibid.

6 DHS, *Submission CFV 155*.

7 Ibid.

8 T Plibersek, *The Human Services Portfolio* <http://www.mhs.gov.au/the_human_services_portfolio.php> at 22 July 2011. DHS was created on 26 October 2004 as part of the Finance and Administration portfolio.

9 DHS Website <www.humanservices.gov.au/corporate/about-us/> at 14 December 2011.

10 Revised Explanatory Memorandum, *Human Services Legislation Amendment Bill 2010* (Cth).

11 DHS, *Additional Submission to the Senate Community Affairs Committee Inquiry of the Human Services Legislation Amendment Bill 2010* (2011).

and make it easier to update their details once, should they choose to have their information shared.¹²

4.14 DHS’ ‘Case Coordination’ trials¹³ are aimed at providing integrated and intensive support to those who most need it—in particular, those who are homeless, long-term unemployed, living with disability, or those with alcohol and drugs dependency.¹⁴

A duty to seek disclosure

4.15 In Chapter 1, the ALRC discusses the reasons many do not disclose family violence. Stakeholders have argued that, as ‘family violence is seriously under-reported’,¹⁵ there is a need for service delivery agencies to identify or promote disclosure of family violence-related safety concerns. For example, the Commonwealth Ombudsman argued that service delivery agencies

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.¹⁶

4.16 Currently DHS agencies—Centrelink, CSA and the FAO—rely on self-disclosure of family violence. For example, staff providing customer services do not ask routine questions about family violence and application or information forms for various social security payments do not include specific information about family violence.¹⁷

4.17 A number of stakeholders called for DHS—Centrelink and the CSA in particular¹⁸—to take measures to: screen for family violence or safety concerns;¹⁹ ensure customers are aware that specific provisions exist in relation to family

12 Ibid.

13 DHS, *Budget 2011-12: Increased Support for People Needing Assistance* (2011).

14 Ibid. Case coordination trials are being planned for 19 sites in 2011–12, with a total of 44 sites by 2013–14.

15 Council of Single Mothers and their Children, *Submission CFV 44*. The issue of under-reporting of family violence is discussed in Ch 1.

16 Commonwealth Ombudsman, *Submission CFV 62*.

17 For example, application forms do not explain 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.

18 Commonwealth Ombudsman, *Submission CFV 62*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 59*; Council of Single Mothers and their Children (Vic), *Submission CFV 55*; M Winter, *Submission CFV 51*; Council of Single Mothers and their Children, *Submission CFV 44*.

19 Council of Single Mothers and their Children (Vic), *Submission CFV 55*; Council of Single Mothers and their Children, *Submission CFV 44*.

violence;²⁰ and indicate a willingness to discuss and deal with family violence-related matters.²¹

4.18 Some stakeholders suggested that ‘screening’ via ‘direct questioning’ was the preferred and most effective method of identifying family violence related-safety concerns, rather than relying on ‘oblique invitations to self-identify’.²² Academic commentators have supported direct questioning as an effective method of eliciting information about family violence.²³

4.19 In the Discussion Paper, the ALRC proposed that CSA, FAO staff and Centrelink customer service advisers, social workers, Indigenous Service Officers and Multicultural Service Officers should, when commencing application processes with a customer, immediately after that, and at defined intervals and trigger points,²⁴ screen for family violence by way of a short oral statement about family violence and the existence of support services, such as a Centrelink social worker.²⁵ This should be combined with the provision of an information pack on family violence and its relevance to a person’s social security, child support and family assistance case.²⁶ The ALRC considered that this was an appropriate response which would:

- allow for individual choice as to the disclosure of family violence;
- not assume that everyone is a victim of family violence; and
- be less labour-intensive for front line staff.²⁷

An information-based approach

4.20 Stakeholders were supportive of the ALRC’s proposals around ‘screening’ and promoting the disclosure of family violence.²⁸ However, rather than routine

20 Commonwealth Ombudsman, *Submission CFV 62*; Council of Single Mothers and their Children (Vic), *Submission CFV 55*; Council of Single Mothers and their Children, *Submission CFV 44*.

21 Council of Single Mothers and their Children (Vic), *Submission CFV 55*; National Council of Single Mothers and their Children, *Submission CFV 45*; Council of Single Mothers and their Children, *Submission CFV 44*.

22 ADFVC, *Submission CFV 53*. See also WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*.

23 M Bonner, L Campillo and G Cosier, ‘I Have Learnt How to Ask Questions: Implementing Screening for Domestic Violence’ (Paper presented at Expanding our Horizons Conference, Sydney, 18–22 February); Attorney-General’s Department, *Screening and Assessment in the Family Relationship Centres and the Family Relationships Advice Line: Practice Framework and Guidelines* (2006).

24 In this Report, the ALRC prefers the term ‘intervention points’ as being consistent with the language used by DHS.

25 Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), Proposal 4–2.

26 *Ibid*, Proposal 4–3.

27 *Ibid*, 132.

28 Confidential, *Submission CFV 165*; National Legal Aid, *Submission CFV 164*; FaHCSIA, *Submission CFV 162*; DHS, *Submission CFV 155*; National Welfare Rights Network, *Submission CFV 150*; Indigenous Law Centre, *Submission CFV 144*; NSW Women’s Refuge Movement Working Party, *Submission CFV 120*; Gippsland Community Legal Service, *Submission CFV 114*; ADFVC, *Submission CFV 102*; Women’s Information and Referral Exchange, *Submission CFV 93*; WEAVE, *Submission CFV 84*.

and direct questioning, a number of stakeholders called for an information-based approach to promote a customer's disclosure of family violence-related safety concerns.²⁹ Throughout the Inquiry, stakeholders have argued that the lack of knowledge about the relevance of family violence presents a barrier to disclosure.³⁰ For example, the National Welfare Rights Network (NWRN) submitted:

There is a considerable lack of awareness of entitlements, exemptions and assistance available for a person experiencing family violence. This is especially the case in relation to the area of exemptions from activity requirements and entitlements to income support payments.³¹

4.21 Therefore, NWRN considered that an information-based approach was most appropriate, given the position of DHS as a 'master agency'. In its view, the service delivery reforms 'should allow for greater reach of consistent information dissemination and messaging to target audiences with the aim of improving awareness of support services'.³²

4.22 Similarly, the Australian Association of Social Workers (Qld) and the Welfare Rights Centre (Qld) argued that:

Routine direct inquiry is problematic and potentially risky for victims of family violence. We would advocate an approach that uses the provision of information at all aspects of client engagement which could include printed forms, brochures, posters and websites. This would serve to inform victims of family violence as well as provide them with options which may be open to them for support.³³

4.23 DHS agreed about the need to provide detailed information about family violence and its impact on entitlements at 'multiple points during the life of a customer's case, including at the initial application for registration' and stated that it was 'actively exploring a number of approaches to risk identification, screening and assessment for different customer interactions'.³⁴

4.24 However, DHS did not consider the provision of information to be a 'screening' mechanism and were cautious about requiring staff to provide detailed verbal information about family violence. While acknowledging that the 'the most effective models of "screening" involved routine questions at key intervention points', DHS considered that any 'screening' proposal must form part of a wider risk-assessment framework that considers:

Customer responses or behaviours which might indicate family or domestic violence;
Proactive risk identification questions at the point the customer first makes contact with programs where family and domestic violence may be an issue; and

29 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 140*; Aboriginal & Torres Strait Islander Women's Legal & Advocacy Service, *Submission CFV 103*.

30 See Ch 1 for a more in depth discussion of the barriers to the disclosure of family violence.

31 National Welfare Rights Network, *Submission CFV 150*.

32 *Ibid.*

33 AASW (Qld) and WRC Inc (Qld), *Submission CFV 140*.

34 DHS, *Submission CFV 155*.

Screening questions at certain key administrative events linked to greater risk of family and domestic violence.³⁵

4.25 DHS cited particular concerns that the provision of detailed verbal information about family violence by staff providing customer services would need to be considered in light of ‘the length and information level already associated with current interviews and processes’ and the ‘increase in workload’ required to incorporate verbal provision of information within customer interactions.³⁶

4.26 There was stakeholder support for the proposal that ‘screening’ 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.³⁷ For example, the Aboriginal and Torres Strait Islander Women’s Legal Services NQ Inc submitted that

an Aboriginal or Torres Strait Islander woman should be given choices as to who she speaks to in the screening process. Not every woman wants to speak to a person from her own culture about the problem, but she should have the option if this makes disclosure easier and support services more accessible.³⁸

4.27 The Aboriginal and Torres Strait Islander Women’s Legal Advocacy Service argued that ‘screening’ via a short statement may not be culturally appropriate for Indigenous women, and that ‘screening should always be performed in private by an Indigenous woman’.³⁹ However, the Indigenous Law Centre cautioned that, given the interconnectedness in Indigenous communities,

it may be inappropriate to call in an Indigenous service officer to screen or interview an Indigenous client when family violence is suspected, particularly, if a kinship connection to the client or the client’s partner exists which could present as a conflict of interest.⁴⁰

4.28 The Centre recommended that ‘screening’ should directly seek information about family violence via ‘a question, or series of question about family violence’ on application forms, correspondence and telephone prompts.⁴¹

Proactive risk identification

4.29 In its submission, DHS advised that a Child Support Family Violence Risk Identification Pilot was being trialled in two sites. The pilot focuses on ‘proactive family violence risk identification’.⁴² As part of the pilot, a small sample of Customer Service Officers asked customers brief questions at key points—initial

35 DHS, *Submission CFV 155*.

36 Ibid.

37 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 140*; ADFVC, *Submission CFV 102*; Women’s Information and Referral Exchange, *Submission CFV 93*; WEAVE, *Submission CFV 84*.

38 Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*.

39 Aboriginal & Torres Strait Islander Women’s Legal & Advocacy Service, *Submission CFV 103*.

40 Indigenous Law Centre, *Submission CFV 144*.

41 Ibid.

42 DHS, *Submission CFV 155*.

registration and requests for change of assessment—preceded by a short introductory statement about family violence. DHS noted that

the question were designed to be as inclusive as possible and simple enough to avoid re-traumatisation or prompt detailed responses which might lead to needing to re-tell the story again later, and also vicarious traumatisation of staff.⁴³

4.30 Where customers responded positively to concerns about safety, they were offered ‘warm transfers’⁴⁴ to appropriate family violence and similar services, which can provide further assessment and support. Where a customer declined the warm transfer, they were offered contact information about relevant services. If particular concerns about family violence were indicated, a ‘sensitive issues indicator’ for family violence is activated on their electronic record.⁴⁵

4.31 This appears to be a hybrid approach in which ‘screening’—by way of direct questioning—is combined with the provision of verbal information to customers. Importantly, the disclosure of family violence-related safety concerns triggers an issues management response, which involves both referral to appropriate services and information sharing by way of the ‘sensitive issues indicator’.

4.32 The Commonwealth Ombudsman considered this a ‘very important initiative’ and noted positively that ‘Child Support has reported a high proportion of customers in the pilot have identified safety concerns and have accepted referrals to an external organisation for assistance or advice’.⁴⁶

A multi-faceted response

4.33 The ALRC recommends that DHS provide all customers with information about how family violence may be relevant to the child support, family assistance, social security and Job Services Australia systems. The information should be presented in a range of formats, including: electronic and paper claim forms, posters and brochures, websites, telephone prompts and publications. Information should be provided at, or immediately following, the application process and at defined intervention points.⁴⁷

4.34 Information dissemination can be reinforced by a short verbal statement to the same effect from DHS staff providing customer services. This is a necessary and practical step in promoting the disclosure of family violence, as it communicates a message to customers that DHS is willing to engage with customers on family violence-related issues. This may improve trust and

43 Ibid. The questions are asked of both paying and receiving parents of both genders.

44 Ibid. A ‘warm transfer’ to be the ability to transfer a customer’s call directly from the Child Support program to the service provider without the customer having to end the call—in effect, the customer is able to speak to the service provider as part of the same call he or she made to the Child Support program.

45 The sensitive issues indicator is discussed below in the context of privacy and information sharing.

46 Commonwealth Ombudsman, *Correspondence*, 28 October 2011.

47 In particular, intervention points are discussed in Ch 12 (in relation to child assessment claims and change of assessment) and Ch 5 (in relation to social security payments).

empathetic engagement with customers that may allow for the disclosure of family violence.

4.35 The provision of information to promote the disclosure of family violence-related safety concerns by a customer is consistent with a major theme of this Inquiry—that of self-agency. As stakeholders have argued, it is important that customers should have the right to choose whether, and how, they disclose family violence.⁴⁸ In the ALRC’s view, that right is best promoted by service agencies fostering an environment in which customers are well informed about how family violence may be relevant to their circumstances and can be assured that, once family violence-related safety concerns are disclosed, an appropriate and empathetic issues management response will be triggered.

4.36 The ALRC considers that such goals are achievable within DHS’ service delivery reforms. For example, training staff to give a statement about the relevance of family violence could be fed into current training procedures.

Targeting recommendations: policy or procedure?

4.37 The majority of stakeholders supported the ALRC’s proposal that information about ‘screening’ for family violence be included in the *Child Support Guide*, the *Family Assistance Guide* and the *Guide to Social Security Law*.⁴⁹ The ALRC considers that providing guidance about the provision of information and the making of a verbal statement about the relevance of family violence in these Guidelines is of particular importance.

4.38 Significant information about the relevance of family violence should be contained in publicly-articulated policy guides, rather than contained in non-publicly accessible instructions. Including information in the Guides should improve transparency and may also enhance consistency and accountability. Importantly, it should also improve general awareness, among customers and their advocates, about measures in place to protect the safety of victims of violence, and may help in promoting disclosure.

Expansion of the Child Support Family Violence pilot

4.39 The Child Support Family Violence pilot provides potential for robust ‘screening’ procedures—revolved around asking questions at identified intervention points—to be utilised in identifying family violence-related safety concerns. However, a wider policy around ‘screening’ would require consideration of a number of issues, including resourcing. For example, a robust ‘screening’ model requires a highly skilled workforce, and the ALRC recognises that this may

48 See eg, National Welfare Rights Network, *Submission CFV 150*.

49 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*; ADFVC, *Submission CFV 102*; Women’s Information and Referral Exchange, *Submission CFV 93*; WEAVE, *Submission CFV 84*.

require significant outlays towards education and training of DHS staff. As DHS submitted:

DHS is not in a position to commit to specific servicing of customers impacted by family violence until resourcing issues are fully understood, costed and priorities and negotiated with partner agencies and Government. Resourcing pressures include staff time, training and systems and procedural support.⁵⁰

4.40 The ALRC notes that, if the pilot is successful in achieving high disclosures of family violence-related safety concerns, DHS may wish to consider expanding the pilot program to other areas beyond the CSA. The success or otherwise of the pilot may indicate whether further reforms towards a more robust ‘screening’ model are necessary.

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

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

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

Issues management

4.41 The ALRC recommends that when family violence-related safety concerns are identified, the DHS staff must refer the customer to a Centrelink social worker or other expert service providers.

50 DHS, *Submission CFV 155*.

Referrals and pathways

4.42 Stakeholders uniformly agreed that once family violence-related safety concerns are disclosed—through ‘screening’ processes or otherwise—there was a need to ensure an immediate response and, in particular, referral to necessary support services.⁵¹ For example, DHS submitted that:

risk identification should not occur in the absence of an immediate supportive response being available to the customer ... Risk identification must be accompanied by the immediate availability of someone qualified to carry out a more complex screening and assessment, and to provide support and advocacy.⁵²

4.43 Within the agencies under DHS, a number of guidelines provide for the referral to a Centrelink social worker when family violence is disclosed, including the *Guide to Social Security Law*, the Job Seeker Classification Instrument (JSCI) Guidelines and related Department of Education, Employment and Workplace Relations (DEEWR) advices. However, it is not consistently provided for in the *Child Support Guide* and *Family Assistance Guide*.

4.44 In the Discussion Paper, the ALRC proposed that when family violence is identified or disclosed, through the ‘screening’ process, or otherwise, Centrelink, Child Support Agency and Family Assistance Office staff must make a referral to a Centrelink social worker.⁵³ This reflected the policy position that staff providing customer service are not skilled to conduct risk assessment, and that this is a role most suited to a social worker.

4.45 A number of stakeholders supported this proposal.⁵⁴ There was general agreement that social workers play an important role in providing support to victims of family violence, and were best placed to make further referrals to legal and non-legal services.⁵⁵ The NWRN also noted that Centrelink social workers play an important role in the ‘training and support they provide to other Centrelink staff to enable those other workers to provide an appropriate service response to people experiencing family violence’.⁵⁶

51 Ibid; FaHCSIA, *Submission CFV 162*; Indigenous Law Centre, *Submission CFV 144*; Women’s Information and Referral Exchange, *Submission CFV 93*.

52 DHS, *Submission CFV 155*.

53 Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), Proposal 4–10.

54 National Legal Aid, *Submission CFV 164*; FaHCSIA, *Submission CFV 162*; National Welfare Rights Network, *Submission CFV 150*; Lone Fathers Association Australia, *Submission CFV 109*; Women’s Information and Referral Exchange, *Submission CFV 93*; WEAVE, *Submission CFV 84*.

55 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*.

56 National Welfare Rights Network, *Submission CFV 150*.

4.46 Stakeholders also supported the creation of a specialist family violence unit or team within DHS,⁵⁷ with a number suggesting that a specialist team would be an appropriate point for referral.⁵⁸ It was suggested that a specialised family violence team could case manage ongoing interactions between various sections of Centrelink, the CSA and the client.⁵⁹

4.47 Other stakeholders suggested that specialist family violence teams could include case workers from Aboriginal and Torres Strait islander communities and those from linguistically diverse backgrounds.⁶⁰ This would help to ensure that, where appropriate, referrals can be made taking into account a customer's cultural and linguistic needs.

4.48 Stakeholders suggested that a specialist team could assume a range of responsibilities that could include:

- acting as the first point of contact for victims of family violence;⁶¹
- coordinating the provision of information and referral to support services;⁶²
- acting as a conduit between the victim and government agencies;⁶³
- critically discussing the various options available to customers, and supporting them in their decisions and their negotiation through the system,⁶⁴ and
- organising exemptions and reviews.⁶⁵

A responsive and flexible approach

4.49 DHS agreed that the identification of family violence must elicit an immediate response to link the customer with support services, but noted that, 'referral to a social worker is not the only response and that it is important to

57 AASW (Qld) and WRC Inc (Qld), *Submission CFV 140*; NSW Women's Refuge Movement Working Party, *Submission CFV 120*; Aboriginal & Torres Strait Islander Women's Legal & Advocacy Service, *Submission CFV 103*; ADFVC, *Submission CFV 53*; National Council of Single Mothers and their Children, *Submission CFV 45*; Council of Single Mothers and their Children, *Submission CFV 44*.

58 AASW (Qld) and WRC Inc (Qld), *Submission CFV 140*; NSW Women's Refuge Movement Working Party, *Submission CFV 120*.

59 AASW (Qld) and WRC Inc (Qld), *Submission CFV 140*.

60 Ibid; Aboriginal & Torres Strait Islander Women's Legal & Advocacy Service, *Submission CFV 103*;

61 National Council of Single Mothers and their Children, *Submission CFV 45*.

62 ADFVC, *Submission CFV 53*; National Council of Single Mothers and their Children, *Submission CFV 45*; Council of Single Mothers and their Children, *Submission CFV 44*.

63 National Council of Single Mothers and their Children, *Submission CFV 45*; Council of Single Mothers and their Children, *Submission CFV 44*.

64 Council of Single Mothers and their Children, *Submission CFV 44*.

65 National Council of Single Mothers and their Children, *Submission CFV 45*.

recognise the roles of other services in the family violence sector'.⁶⁶ This position was also supported by a number of other stakeholders.⁶⁷

4.50 DHS argued for a more nuanced response, taking into account the customer's current circumstances and concerns:

It is not correct to presume that every customer who presents with or identifies a family violence issue requires a high level of intervention through a social worker. In some circumstances, lower level responses, such as information provision, may be appropriate, and in some situations customers may be receiving suitable assistance through other organisations in the family violence sector and only financial assistance is sought from DHS.⁶⁸

4.51 In particular, DHS emphasised that the aim of 'Case Coordination' was to provide appropriate referrals to support services such as refuges, 1800-RESPECT, Family Relationship Centres, the Family Relationships Advice Line, and the Child Support program's Parent Support Service, rather than case management.

4.52 The ALRC considers that an issues management response to the disclosure of family violence-related safety concerns should take into account a customer's needs and individual circumstances. While the Centrelink social worker is generally well placed to provide assistance to a customer, the ALRC agrees with DHS that referral to a Centrelink social worker may not always be the most appropriate response. Mandating referral to a Centrelink social worker may be unnecessary if a customer does not want, or need, high level support. In other instances, such as where a person has a disability, stakeholders have suggested that referrals should be made directly to expert service providers in the disability sector, rather than to a Centrelink social worker.

4.53 However, in some circumstances referral to a Centrelink social worker is essential. For example, in Chapter 12, the ALRC considers that it is suitable for the CSA to refer a customer to a Centrelink social worker when the customer takes action that may affect their compliance with the 'reasonable maintenance action' requirement and their Family Tax Benefit (FTB) Part A. Where this is the case, the ALRC recommends relevant Guidelines should direct staff to refer the person to a Centrelink social worker.

4.54 There are good policy reasons—consistent with the *National Plan to Reduce Violence against Women* strategies around coordinated responses—to recognise the range of expert providers within the family violence sector who play a role assisting victims of family violence.⁶⁹ An advantage of a nuanced response is that it allows these actors to have a significant role in supporting victims. Referrals to

66 DHS, *Submission CFV 155*.

67 National Legal Aid, *Submission CFV 164*; Women's Information and Referral Exchange, *Submission CFV 94*.

68 DHS, *Submission CFV 155*.

69 See eg Australian Government, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (2009), 9.

other expert service providers, where appropriate, may also reduce the workload on Centrelink social workers and allow for more considered responses for cases that require high level intervention.

4.55 The ALRC also supports the creation of specialised family violence units within DHS. Specialised family violence teams may be a particularly useful referral point for customers from Aboriginal and Torres Strait Islander backgrounds, persons with disability, and others in need of a higher level of support. Beyond this, there is scope for specialist units to undertake a wide range of responses commensurate with a customer's needs. While the ALRC makes no recommendations about specialist family violence units—given it would carry significant resourcing implications at this early stage in DHS' integration—it notes that such units could be considered within DHS' Case Coordination trials, with a long-term view to their wider establishment.

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

'Safety concern' flag

4.56 The ALRC recommends that DHS should consider developing and implementing a 'safety concern flag' to be placed on a customer's file. Subject to the informed consent of the customer, and with appropriate privacy safeguards, the 'flag' should be subject to information sharing arrangements between DHS and other agencies.

Parallels with vulnerability and sensitive issues indicators

4.57 In the social security system, a 'vulnerability indicator' may be placed on a customer's record—accessible by Centrelink, DEEWR and a job seeker's job services provider—in certain circumstances. The 'vulnerability indicator' is used to identify those with psychiatric problems or mental illness, drug or alcohol dependence, homelessness and recent traumatic relationship breakdown (including relocation as a result of a recent family violence situation). For example, 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.⁷⁰ The indicator alerts job service providers and Centrelink that a job seeker may have difficulty meeting their

70 J Disney, A Buduls and P Grant, *Impacts of the new Job Seeker Compliance Framework: Report of the Independent Review* (2010).

requirements for receiving social security payments or entitlements (such as activity test or participation requirements) due to vulnerability and thus ensures that the vulnerabilities are taken into account when setting participation requirements for the job seeker and responding to failures to comply.

4.58 A similar mechanism exists in the child support system. The CSA's *Family Violence—Common Module* states that when 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.⁷¹ Conversations regarding family violence are also required to be documented in the CSA database.⁷²

Should a 'safety concern flag' be developed and implemented?

4.59 In the Discussion Paper, the ALRC proposed that when family violence is identified through the 'screening' process or otherwise, a 'safety concern flag' should be placed on the customer's file.⁷³ The ALRC considered that this reduced the need for victims of family violence to have to repeat their story to different agencies.⁷⁴ If such a flag is shared between agencies, it may give an indication that a person is eligible for different entitlements and exemptions, which in turn may ensure an issues management response that enhances his or her safety.

4.60 While stakeholders supported the principle of the 'safety concern flag',⁷⁵ there was consensus that a number of issues would need to be addressed prior to its implementation, to ensure the 'privacy, safety and autonomy'⁷⁶ of the customer at all times. Particular concerns were raised about how to:

- keep the 'safety concern flag' current, to ensure that the flag is not used for some collateral purpose;⁷⁷
- keep customers informed of actions arising out of having a 'safety flag' on their file;⁷⁸ and

71 DHS, *Common Module—Family Violence*, 7 June 2011.

72 Ibid.

73 Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), Proposal 4–11.

74 Ibid, 142.

75 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; Indigenous Law Centre, *Submission CFV 144*; ADFVC, *Submission CFV 102*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 140*; Women's Information and Referral Exchange, *Submission CFV 94*; WEAVE, *Submission CFV 84*;

76 AASW (Qld) and WRC Inc (Qld), *Submission CFV 140*.

77 DHS, *Submission CFV 155*.

78 AASW (Qld) and WRC Inc (Qld), *Submission CFV 140*.

- ensure that existing infrastructure is sufficient to host a ‘safety concern flag’ without allowing unintended access by various government departments and agencies.⁷⁹

4.61 DHS submitted that its experience with the sensitive issues and vulnerability indicators suggests that, while ‘some benefits can manifest in terms of reduced repetition for the customer’, such benefits need to be balanced with ‘the costs of system development and associated staff training and processes’ to ensure that a customer’s record is current and that the existence of a flag is appropriate.⁸⁰ It also considered that Centrelink experience with similar indicators suggest that ‘the flag itself is not the answer but should be suggestive that other supports may be in place or offered’.⁸¹

4.62 The ALRC does not recommend implementation of a ‘safety concern flag’ until the concerns raised above have been addressed. In particular, DHS integration is in its very early stages and introducing a new ‘safety concern flag’ at this point in time may require significant resources towards ‘system development and associated staff training’.⁸²

4.63 The ALRC therefore recommends that DHS should consider developing and implementing a ‘safety concern flag’ to be placed on a customer’s file when family violence-related safety concerns are identified. The ALRC notes that DHS experience with the ‘sensitive issue’ and ‘vulnerability’ indicators will be useful in developing and implementing any ‘safety concern flag’.

Privacy and information sharing

4.64 The *Privacy Act 1988* (Cth) regulates the handling of personal information by the Australian Government—to which 11 Information Privacy Principles apply.⁸³ 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’.⁸⁴

4.65 The Office of the Information and Privacy Commissioner also submitted that a privacy impact statement should be undertaken as part of developing protocols for the sharing of a ‘safety concern’ flag to ensure that arrangements are consistent with the *Privacy Act* and Information Sharing Principles. DHS has stated that it has

79 DHS, *Submission CFV 155*.

80 *Ibid.*

81 *Ibid.*

82 *Ibid.*

83 However, in June 2010, the Government released an exposure draft of legislation intended to unify the Information Privacy Principles and the National Privacy Principles.

84 DHS, *Submission to the Senate Community Affairs Committee for the Inquiry of the Human Services Legislation Amendment Bill 2010* (2011).

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’.⁸⁵

4.66 DHS therefore submitted that the easiest way of disclosing the existence of any ‘safety concern flag’ to other agencies is via informed customer consent:

Which means the customer will need to be advised of the ‘safety concern flag’, what it means, and who it could potentially be disclosed to. The customer may also want some assurances about what another agency might use this information for—for example State Police Services. It is also likely to lead to other agencies wanting further information.⁸⁶

4.67 This view was also adopted by stakeholders.⁸⁷ National Legal Aid expressed a view that consent should ‘ideally be obtained once and early on, so that the customer need not be engaged in unnecessary interactions’.⁸⁸ The Office of the Information and Privacy Commissioner stressed that individuals should be given the ‘opportunity to decide whether or not their personal information will be shared’, and that

improving communication with customers as part of seeking informed consent may minimise the risk of misunderstandings about information sharing, which can lead to privacy complaints. It may also promote community trust and confidence in the handling of information by Australian Government agencies.⁸⁹

4.68 The National Welfare Rights Network submitted that DHS should develop (in consultation with stakeholders and clients) information/scripts explaining issues such as ‘safety concern flags’ and ‘informed consent’ to ensure that individuals and groups clearly understand processes and their rights with respect to information sharing, consent and revocation thereof.⁹⁰ The NWRN also suggested that a customer should be able to provide consent to disclosure ‘that is limited to particular agencies or limited to a particular time’.⁹¹

4.69 The ALRC considers that a model of informed consent would be the most appropriate way to share information about the existence of a ‘safety concern flag’ across agencies. The ‘safety concern flag’ could be considered in light of the preliminary privacy impact statement and DHS’ current procedures around consent for information sharing generally. The ALRC also stresses that, in implementing

85 Ibid.

86 DHS, *Submission CFV 155*.

87 National Legal Aid, *Submission CFV 164*; FaHCSIA, *Submission CFV 162*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 140*; Aboriginal & Torres Strait Islander Women’s Legal & Advocacy Service, *Submission CFV 103*; ADFVC, *Submission CFV 102*; Women’s Information and Referral Exchange, *Submission CFV 93*; WEAVE, *Submission CFV 84*.

88 National Legal Aid, *Submission CFV 164*.

89 Office of the Australian Information Commissioner, *Submission CFV 142*.

90 National Welfare Rights Network, *Submission CFV 150*.

91 Ibid.

any flag, DHS will need to ensure that its customers know about: the existence of a safety concern flag; the purpose for which the flag may be disclosed to other agencies; and how the customer can have the flag removed from their file.

4.70 The ALRC considers that, if a ‘safety concern flag’ is implemented, information about its existence could be given to customers to promote disclosure of family violence in a wide variety of formats, as recommended in Recommendation 4–1.

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

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

Education and training

4.71 There was general consensus among stakeholders that any recommendation about ‘screening’ must be underpinned by appropriate, and targeted, education and training of staff.⁹² DHS acknowledged that ‘an unskilled response to disclosures carries the risk of further traumatisation to the sufferer’.⁹³ Similarly, the AASW (Qld) and the Welfare Rights Centre cautioned against ‘secondary victimisation’ arising from inappropriate responses and argued that such risk can be minimised ‘through training, monitoring of responses, timely referral both internal and external to appropriately qualified people, and evaluation of the family violence strategy that seeks feedback from victims who have been clients’.⁹⁴

4.72 Gippsland Community Legal Service submitted that family violence risk assessment and ‘screening’ training should ‘be compulsory for all Centrelink and Child Support Agency staff to ensure best practice responses to family violence across the organisations’.⁹⁵

92 National Legal Aid, *Submission CFV 164*; DHS, *Submission CFV 155*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 140*; Gippsland Community Legal Service, *Submission CFV 114*; White Ribbon, *Submission CFV 112*; Aboriginal & Torres Strait Islander Women’s Legal & Advocacy Service, *Submission CFV 103*; Women’s Information and Referral Exchange, *Submission CFV 94*; WEAVE, *Submission CFV 84*.

93 DHS, *Submission CFV 155*.

94 AASW (Qld) and WRC Inc (Qld), *Submission CFV 140*.

95 Gippsland Community Legal Service, *Submission CFV 114*.

4.73 DHS preferred a model that would supplement current ‘training procedures and assist staff undertaking a range of duties at all levels’.⁹⁶ Given the wide range of staffing roles and levels within the DHS portfolio, it was suggested that a strategic approach was required, staged around four categories of need:

- 1) General understanding and awareness of family and domestic violence and the ability to identify risks and subsequent responses and referral approaches (targeted at customer service officers and specialised service delivery staff);
- 2) A deeper understanding of family and domestic violence and the ability to identify risk and subsequent responses and referral approaches (targeted at customer service officers and specialised service delivery staff, such as Case Coordination);
- 3) Refresher training for social workers and professional staff to maintain current knowledge and awareness of family and domestic violence issues; and
- 4) General understanding of family and domestic violence issues together with an appreciation of the role and capacity of the employer to support employees (targeted at team leaders and managers).⁹⁷

4.74 DHS also indicated that it had research contemporary training content for family and domestic violence, and that it will

use the findings to enhance and expand existing family and domestic violence training resources for staff with respect to their various roles and requirements. For example, there are a number of positions within the Department that are not primarily customer facing but have a key role in raising awareness of issues and services in the community, such as Multicultural Services Officers.⁹⁸

4.75 Other stakeholders noted a wide range of matters that education and training could cover for DHS service staff, including in relation to: definitions; mandatory reporting requirements; ethics and informed consent; referral pathways; family violence in cultural contexts; identifying and managing conflicts of interest; managing disclosures; why victims choose to leave or to seek help; and helpful and unhelpful responses to disclosures.⁹⁹

4.76 DHS suggested that it had, to a certain extent, already considered such issues. For example, training currently finalised for delivery to the Child Support Program ‘includes risk indicators and appropriate responses options ... aimed at increasing staff awareness of family and domestic violence and enhancing responsiveness where relevant customer circumstances arise’.¹⁰⁰

4.77 National Legal Aid submitted that the recently released national family violence training package, *Avert Family Violence: Collaborative Responses in the Family Law System*, might be an appropriate component, ‘particularly given that it

96 DHS, *Submission CFV 155*.

97 *Ibid.*

98 *Ibid.*

99 Indigenous Law Centre, *Submission CFV 144*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 140*.

100 DHS, *Submission CFV 155*.

will be used by other government and non-government family law service providers'. It was argued that the use of shared training resources will facilitate shared understanding and language for communication around family violence.¹⁰¹

4.78 The ALRC considers that part of the package may be of particular use, especially the modules on 'risk assessment', 'responding to cultural diversity' and 'dimensions, dynamics and impact of family violence'.¹⁰²

4.79 DHS acknowledged that there are sections of the community who are vulnerable to family violence due to power imbalances based on 'Indigenous status, culture, sexuality, disability or age'.¹⁰³ DHS agreed that an understanding of the nature, features and dynamics of family violence is crucial for customer service staff and that 'this information should be included in policy documents, procedures and training materials'.¹⁰⁴ In relation to DHS Indigenous Specialist Officers (ISOs), it was noted that

DHS ISOs currently receive appropriate training and support to ensure that their knowledge of family violence issues is relevant within the context of Aboriginal and Torres Strait Islander communities and peoples. DHS ISOs are supported with their knowledge of DHS payments, programs and services together with their knowledge of Aboriginal and Torres Strait Islander service delivery and policy priority areas.¹⁰⁵

4.80 It was further suggested that the training will be supported by Centrelink social workers providing their expertise, and 'will reflect the importance of referral responsibilities and options in relation to identified trigger behaviours or self identified customers at risk'.¹⁰⁶

Targeted and strategic approach

4.81 For a major service delivery agency such as DHS, training and education of a large workforce in relation to family violence 'must be done within existing resources' and 'balanced against the need of other vulnerable groups'.¹⁰⁷ The ALRC welcomes many of the initiatives taken by DHS around training and education as part of the integration strategy, and notes that the ALRC's recommendations are intended to complement DHS' ongoing initiatives.

4.82 A nuanced approach to issues management will require DHS staff to be able to advise customers about how family violence is relevant to their circumstances, and make judgements as to the appropriate response in each case, after a family violence-related safety concerns are disclosed. The ALRC considers—as suggested by DHS—that a deeper understanding of family violence and the ability to identify

101 National Legal Aid, *Submission CFV 164*.

102 See Avert Family Violence Website, <www.avertfamilyviolence.com.au/> accessed 8 November 2011.

103 DHS, *Submission CFV 155*.

104 *Ibid.*

105 *Ibid.*

106 *Ibid.*

107 *Ibid.*

risk and subsequent responses and referral approaches are required of customer service and specialised service delivery staff (including those working in Case Coordination). If the ALRC's recommendations in this chapter are implemented, training to this cohort of DHS staff should be given priority.

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

- (a) advising customers on the impact of family violence on their case or claim;
- (b) responding to disclosures of family violence-related safety concerns, including by referrals to Centrelink social workers and other expert service providers; and
- (c) the nature, features and dynamics of family violence including the particular impact of family violence on: Indigenous peoples; those from a culturally and linguistically diverse background; those from lesbian, gay, bisexual, trans and intersex communities; older persons; and people with disability.

Part B—Social Security

Chapters

5. Social Security—Overview and Overarching Issues
6. Social Security—Relationships
7. Social Security—Proof of Identity and Residence Requirements
8. Social Security—Determining Capacity to Work
9. Social Security—Crisis Payment, Methods of Payment and Overpayment

5. Social Security—Overview and Overarching Issues

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Summary

5.1 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 ALRC makes recommendations in the key areas of interpretative frameworks around family violence, screening, and collecting information about family violence.

5.2 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.

5.3 In order to enhance the common interpretative framework, the ALRC recommends that the definition of family violence, and its nature, 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 a recommendation that a broad range of types of information should be available to be relied on to support a claim of family violence. Finally, the ALRC recommends defined ‘intervention points’ at which Centrelink should promote the disclosure of family violence.¹

Australia’s social security framework

Law and policy

5.5 The legislative, policy and administrative framework of social security in Australia comprises the *Social Security Act 1991* (Cth), the *Social Security (Administration) Act 1999* (Cth) and the *Social Security (International Agreements) Act 1999* (Cth).

5.6 In some circumstances, the Ministers responsible for 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.² The head of FaHCSIA and DEEWR—the Secretary, in each case—is occasionally given similar powers to make directions under social security legislation.³

5.7 The *Guide to Social Security Law* provides the lens through which the legislation is to be implemented, by providing guidance to decision makers. Although not binding in law, it is a relevant consideration for the decision maker⁴ and, as such, is a significant aspect of the ‘legal frameworks’ considered in this Inquiry.

5.8 A further element of the policy framework is the electronic guidelines referred to as the ‘e-reference’ used by Centrelink. These are not publicly available.

5.9 The ALRC considers that there is a need for greater transparency, consistency and accountability in the way Centrelink deals with cases involving family violence. Consequently, where changes to Centrelink procedures are considered, recommendations are aimed at either social security legislation or the *Guide to Social Security Law*, rather than Centrelink’s e-reference, which is not publicly available.

1 See Rec 4–1.

2 See, eg, *Social Security Act 1991* (Cth) s 25.

3 *Ibid* s 3A.

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

5.10 In addition, the ALRC considers that including procedural information in the *Guide to Social Security Law* may promote awareness regarding the ways that 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.

Administrative arrangements

5.11 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.

5.12 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.⁵ 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' payment⁶ and have specific requirements for Parenting Payment, Carer Payment and Special Benefit.⁷

Underlying principles of social security law

5.13 Australia's 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, workers' compensation, a national health care system, paid sick leave and other cash and in-kind welfare benefits and services such as personal tax concessions.⁸ Several principles underpin the social security framework in Australia: the responsibility to assist those in need; the concept of 'mutual obligations'; and a person's relationship status and residence.

5.14 First, the Australian social security system is based on the recognition of government and community responsibility to assist those in need—measured by reference to the income and assets of the applicant. 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).⁹

5 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [8.1.7.10].

6 Ibid.

7 Ibid, [8.1.7.20].

8 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.

9 A Herscovitch and D Stanton, 'History of Social Security in Australia' (2008) 80 *Family Matters* 51.

5.15 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.¹⁰ 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.¹¹

5.16 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’.¹² This is reflected, for example, in the relevance of the concept of ‘member of a couple’—and that a person who is a member of a couple receives a lower social security payment than one who is single. 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.¹³

5.17 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,¹⁴ reflecting the theme of ‘fairness’ identified in Chapter 2.

Qualification and payability

5.18 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. A person is qualified to receive a payment when all the qualification criteria set out in the *Social Security Act* are met.¹⁵ Qualification criteria may include age and residence requirements as well as practical issues such as whether a person has made a claim.

5.19 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.

10 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [1.1.M.160].

11 T Carney and P Hanks, *Social Security in Australia* (1994).

12 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.

13 *Debates*, House of Representatives, 20 March 1974, 668 (Bill Hayden—Minister for Social Security).

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

15 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [1.1.Q.10].

Social security and family violence

5.20 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.¹⁶ To the extent that such need also reflects a certain disadvantage, this aligns with the administrative principles of social security that include having regard to ‘the special needs of disadvantaged groups in the community’.¹⁷ The ALRC’s recommendations are directed towards enhancing the capacity of social security law and policy to achieve this aim for victims of family violence.

How does social security help protect safety?

5.21 The importance of financial security and independence for the safety of victims of family violence 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.¹⁸

5.22 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’.¹⁹

5.23 A lack of independent financial resources for victims of family violence can mean ‘feeling imprisoned by financial need’, keeping many victims trapped in an abusive relationship.²⁰ This can also have compounding impacts, including homelessness.²¹ 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.²²

5.24 Social security payments and entitlements can be a source of financial security and thereby facilitate the safety of those experiencing family violence. This is recognised in the existing responses to family violence in the social security system—

16 The Terms of Reference are set out at the front of this Report and can be found on the ALRC website <www.alrc.gov.au>.

17 *Social Security (Administration) Act 1999* (Cth) s 8.

18 R Braaf and I Meyering, *Seeking Security: Promoting Women’s Economic Wellbeing Following Domestic Violence* (2011).

19 *Ibid.*, 5.

20 *Ibid.*; ADFVC, *Submission CFV 71*.

21 S Tually and others, *Women, Domestic and Family Violence and Homelessness: A Synthesis Report* (2008); Homeless Persons’ Legal Service, *Submission CFV 40*.

22 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*.

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 urgent or weekly payments. Having independent financial resources can enable victims of family violence to leave a violent relationship²³ and seek alternate accommodation.

Barriers to accessing social security for victims of family violence

5.25 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 accessing the financial assistance they may need to be safe. Consequently, the ALRC makes a number of recommendations to enhance the accessibility of the social security system.

5.26 A number of these barriers are noted in Chapter 1. Other barriers particular to social security include knowledge on the part of the customer as to how family violence is relevant to a social security payment and knowledge as to the type of information required by Centrelink to verify a claim of family violence.

Interpretative framework

Consistent definition in Commonwealth law

5.27 Chapter 3 considers placing a consistent definition of family violence in the *Social Security Act* in addition to other Commonwealth legislation.²⁴ In the ALRC’s view, the definition of family violence in the *Guide to Social Security Law* should also be amended to reflect this definition, to enhance consistency across the policy and legislative base of the social security system.

5.28 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 legislation and guidelines may foster a shared understanding across agencies, jurisdictions, courts and tribunals, reflecting the theme of ‘seamlessness’ referred to in Chapter 2.

5.29 In addition, the ALRC recommends that the nature, features and dynamics and the particular impact of family violence on different sectors of society be included in the *Guide to Social Security Law*. This was supported by most stakeholders.²⁵ Including a statement of the nature, features and dynamics of family violence in the *Guide to Social Security Law* would serve an important educative function and provide

23 R Braaf and I Meyering, *Seeking Security: Promoting Women’s Economic Wellbeing Following Domestic Violence* (2011), 5.

24 Rec 3–1.

25 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*; ADFVC, *Submission CFV 105*; M Winter, *Submission CFV 97*; Homeless Persons’ Legal Service, *Submission CFV 95*; Confidential, *Submission CFV 90*; WEAVE, *Submission CFV 85*.

a contextual basis for screening. Such a measure also complements the recommendations regarding definitions in Chapter 3, by developing a common interpretative framework around family violence across agencies and legal frameworks. As discussed in Chapter 3, the form of the statement should be altered to best suit the presentations of family violence, and the particular risks victims may face, in each particular legal framework.

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

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

Training

5.30 The ALRC recommends that any legislative or policy change should be accompanied with consistent, regular and targeted training for relevant staff. This view was strongly supported by stakeholders who agreed that consistent and regular training on the definition of family violence, including its nature, features and dynamics, should be provided to decision makers.²⁶ Stakeholders made suggestions as to the manner in which training should be conducted, including:

- drawing on ‘the perspectives, experience and expertise of external stakeholders and client representatives, in addition to direct testing with clients themselves’;²⁷
- being informed by feminist principles;²⁸ and
- employing a principle of trauma-informed care, ‘which takes as its starting point the likely presence and long-term effects of family violence’.²⁹

5.31 The NWRN expanded on what should be defined as regular training—‘to occur when policies are changed, for new staff, to accommodate regular internal movement and to refresh skills of existing staff’.³⁰

5.32 Beyond the definition and nature, features and dynamics of family violence, family violence affects social security payments and processes in a number of ways. In

26 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*; DEEWR, *Submission CFV 130*; M Winter, *Submission CFV 97*; Homeless Persons’ Legal Service, *Submission CFV 95*; Confidential, *Submission CFV 90*; WEAVE, *Submission CFV 85*.

27 National Welfare Rights Network, *Submission CFV 150*.

28 WEAVE, *Submission CFV 85*.

29 Homeless Persons’ Legal Service, *Submission CFV 95*.

30 National Welfare Rights Network, *Submission CFV 150*.

some circumstances additional training for relevant staff is required to ensure that staff are aware of the ways in which family violence may be relevant to a customer's social security case. In response to concerns about the resource-intensiveness of providing training to all Centrelink customer service advisers,³¹ the ALRC recommends targeted training, including for Centrelink customer service advisers, social workers and specialist officers.

5.33 One stakeholder questioned whether training should be extended to SSAT members as training in relation to legislative amendments is already provided to members.³² However, the ALRC considers that SSAT and AAT members, as decision makers, should receive such training.

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

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

Verifying family violence

5.34 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.

5.35 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. 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 possibly manipulated claim of family violence.

5.36 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 it is relevant to a person's social security payments and entitlements.

31 DHS, *Consultation*, by telephone, 30 September 2011.

32 Confidential, *Submission CFV 122*.

5.37 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.³³ In other areas, more specific guidance is provided.³⁴

The need for transparency

5.38 The ALRC considers that there is a need for increased 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.

5.39 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.

5.40 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'.³⁵ Likewise, the Welfare Rights Centre Inc Queensland (WRC Inc (Qld)) submitted that there needed to be 'a choice of assessment methods, to enable the victim to provide the information'.³⁶ Similarly, the ADFVC supported the use of a 'wide range of evidence to support a claim of experiencing family violence'.³⁷

5.41 The ALRC recommends that any amendments to the type of information relied on by Centrelink to support a claim of family violence should be included in the *Guide to Social Security Law* as 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. The ALRC also recommends that this information be included in the recommendations in Chapter 4 regarding information provision to customers 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

33 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011 [3.2.11.70]; [3.5.1.280].

34 See, for eg, *Ibid* in relation to 'member of a couple' [2.2.5.10]; separation under one roof [2.2.5.30]; unreasonable to live at home [3.2.5.40], [3.2.5.70]; and Crisis Payment [3.7.4.25].

35 Commonwealth Ombudsman, *Submission CFV 62*.

36 WRC Inc (Qld), *Submission CFV 66*.

37 ADFVC, *Submission CFV 71*.

Centrelink office repeatedly and enable him or her to bring all the required information on the first visit.

Forms of information

5.42 In particular, the ALRC considers that the following types of information may be appropriate:

- statements, including statutory declarations;
- third party statements such as statutory declarations by witnesses, employers or family violence services;
- social workers' 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.

5.43 This was supported by stakeholders.³⁸ However, a number of stakeholders emphasised that the word of the victim should suffice in most cases³⁹—in particular, where no independent verification is available⁴⁰—and that the victim should be given the benefit of the doubt,⁴¹ as 'the nature of family and relationship violence is that it is generally hidden from view'.⁴²

5.44 The NWRN considered further that, if additional verification is required, the onus should be on Centrelink to collect that information with the person's consent—for example, through the use of information-gathering powers under s 192 of the *Social Security Act*.⁴³

38 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; DEEWR, *Submission CFV 130*; ADFVC, *Submission CFV 105*; Homeless Persons' Legal Service, *Submission CFV 95*; Confidential, *Submission CFV 90*; WEAVE, *Submission CFV 85*.

39 National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*; M Winter, *Submission CFV 97*; Confidential, *Submission CFV 90*; WEAVE, *Submission CFV 85*; WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*.

40 WRC (NSW), *Submission CFV 70*; WEAVE, *Submission CFV 58*.

41 WRC (NSW), *Submission CFV 70*; WRC Inc (Qld), *Submission CFV 66*; WEAVE, *Submission CFV 58*.

42 National Welfare Rights Network, *Submission CFV 150*.

43 Ibid.

5.45 In addition to these concerns, the ALRC also notes stakeholders' comments regarding Centrelink staff responses to information about family violence—that staff may be dismissive⁴⁴ or sceptical to claims.⁴⁵ It is important that a person who is experiencing family violence is able to access the services and support needed to ensure his or her safety. The ALRC therefore recommends that Centrelink customer service advisers and social workers receive training on the types of information that a customer can rely on for claims of family violence as part of Recommendation 5–2.

Assessing the weight of information

5.46 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.

5.47 In this respect, the ALRC considers that the level of verification of family violence should be proportionate to the 'entitlement' gained. This was supported by a number of stakeholders.⁴⁶ 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 and ongoing consequences than a decision that a person should receive a one-off Crisis Payment.

5.48 For example, 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

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.⁴⁷

5.49 The NWRN was however concerned that a 'high' threshold will unduly constrain the ability of a person experiencing family violence to satisfy a decision maker of that fact. In addition, concerns were raised that a hierarchy of forms of information could result in unfair outcomes for the victim—that if a person has no third party corroboration, their story would be taken less seriously.⁴⁸

44 M Winter, *Submission CFV 51*.

45 WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*.

46 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; DEEWR, *Submission CFV 130*; ADFVC, *Submission CFV 105*; Homeless Persons' Legal Service, *Submission CFV 95*; Confidential, *Submission CFV 90*.

47 Commonwealth Ombudsman, *Submission CFV 62*.

48 AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*.

5.50 Some stakeholders supported the use of third party verification,⁴⁹ 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'.⁵⁰ However, stakeholders also raised concerns about the reliance on certain third party statements, such as:

- engaging with a third party may serve only to provide another source to repeat what the victim has said and disempowering the victim as a potential liar and an inadequate source of information;⁵¹
- due to secrecy, non-physical forms of violence and difficulties in expressing what has happened to them, there may be no 'independent third party';⁵²
- overreliance on police reports may lead to an assumption that if there is no report, there is no violence;⁵³ and
- accessing information from a former employer to establish that a person has not voluntarily left his or her job or caused their dismissal.⁵⁴

5.51 Concerns such as these should be reflected in the *Guide to Social Security Law* to ensure that information that a person experiencing family violence is able to provide is considered sufficient.

Collecting information from parents, partners and family members

5.52 A parent, partner or other family member 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.

5.53 Several references in the *Guide to Social Security Law* are made to collecting information from a person's parent or partner 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 parent or partner in circumstances of family violence⁵⁵—for example, in relation to 'Independent—

49 WRC (NSW), *Submission CFV 70*; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*.

50 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*.

51 WEAVE, *Submission CFV 58*.

52 University of Queensland Union, *Submission to the Senate Employment, Workplace Relations and Education References Committee Inquiry into Student Income Support* (2004).

53 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*.

54 WEAVE, *Submission CFV 14*.

55 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [2.2.5.30].

Unreasonable To Live At Home’, where contact with the parent presents a ‘severe risk’ to the young person or others.⁵⁶

5.54 Despite these provisions in the *Guide to Social Security Law*, some stakeholders found that family violence was not consistently considered by Centrelink before a parent or partner was interviewed⁵⁷ indicating that improvement is needed to ensure that Centrelink customers are aware that Centrelink has discretion not to contact parents or partners if the customer is a victim of family violence.⁵⁸ Specifically, the Welfare Rights Centre NSW (WRC (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’.⁵⁹

5.55 Victims of family violence also need to be aware that a parent, partner 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. For example, 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

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.⁶⁰

5.56 In this regard, the ALRC makes recommendations 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 targeted 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 as part of Recommendation 5–2; and
- information provided to Centrelink customers about the discretion of Centrelink staff not to contact a partner or parent in circumstances of family violence in accordance with Recommendation 4–2.

56 Ibid, [3.2.5.70].

57 WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*; M Winter, *Submission CFV 51*; P Eastale and D Emerson-Elliott, *Submission CFV 05*.

58 WRC (NSW), *Submission CFV 70*; WRC Inc (Qld), *Submission CFV 66*; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*; WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*; M Winter, *Submission CFV 51*; Homeless Persons’ Legal Service, *Submission CFV 40*.

59 WRC (NSW), *Submission CFV 70*.

60 University of Queensland Union, *Submission to the Senate Employment, Workplace Relations and Education References Committee Inquiry into Student Income Support* (2004).

5.57 These recommendations were supported by stakeholders⁶¹ who considered that ‘safety considerations should always take precedence in any interaction with young people who are experiencing family violence’.⁶²

5.58 In addition, the ALRC considers it inappropriate that information should only not be collected from a family member where that member presents a ‘severe risk’. The ALRC considers that any risk of family violence should be sufficient.

5.59 The NWRN noted that such a policy should not prevent a person experiencing family violence from seeking to adduce evidence from the person using family violence that would support their claim of family violence. The NWRN also suggested that such verification may be sought by Centrelink in reliance on the information-gathering powers in s 192 of the *Social Security Act* or by Tribunals through appropriate procedures.⁶³ The use of s 192 for similar purposes is discussed in further detail in Chapter 7.

5.60 In implementing these recommendations, care will need to be taken to ensure procedural fairness is afforded to any person who is alleged to have used family violence.⁶⁴ For example, to ensure that where the person alleged to have used family violence is also a recipient of social security payments or entitlements, this allegation does not adversely affect their entitlements without the opportunity to present their case.

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

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

Promoting the disclosure of family violence

5.61 Promoting the disclosure of 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 promote disclosure of family violence.

61 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*; DEEWR, *Submission CFV 130*; M Winter, *Submission CFV 97*; Homeless Persons’ Legal Service, *Submission CFV 95*; Confidential, *Submission CFV 90*; WEAVE, *Submission CFV 85*; WRC Inc (Qld), *Submission CFV 66*.

62 AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*.

63 National Welfare Rights Network, *Submission CFV 150*.

64 Commonwealth Ombudsman, *Submission CFV 62*.

5.62 Stakeholders considered a number of intervention points for promoting the disclosure of family violence and considered that there should not be a ‘wrong time’; and that ‘all Centrelink forms, correspondence and telephone prompts should directly seek information about family violence to facilitate victims of family violence overcoming their reluctance to disclose their experiences’.⁶⁵ DEEWR, however, considered that existing processes were sufficient to identify victims in circumstances where a victim chooses to disclose.⁶⁶ Community and Public Sector Union (CPSU) members submitted that

it is current practice for these questions to be asked, with all Centrelink staff are required to explore a customer’s current circumstances at all points of contact. This includes exploring relationship status and family violence incidents.⁶⁷

5.63 However, existing processes rely on self-disclosure of family violence. Stakeholders identified a number of barriers to self-disclosure of family violence to Centrelink including:

- lack of confidence to classify what they are experiencing as family violence,⁶⁸ such as financial or economic abuse⁶⁹—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’;⁷⁰
- lack of knowledge—both of what constitutes family violence legally, and of the significance of family violence in obtaining entitlements;⁷¹
- the person using family violence supervises all contact with the service agency;⁷²
- fear of adverse consequences such as being ‘punished’ by not receiving payments or more stringent work requirements;⁷³
- having to repeat an account of family violence multiple times;⁷⁴
- lack of privacy at Centrelink offices;⁷⁵ and
- concerns that disclosure of family violence will not be believed or their experiences trivialised.⁷⁶

65 Homeless Persons’ Legal Service, *Submission CFV 95*.

66 DEEWR, *Submission CFV 130*.

67 CPSU, *Submission CFV 147*.

68 National Children’s and Youth Law Centre, *Submission CFV 64*.

69 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*.

70 Multicultural Disability Advocacy Association, *Submission CFV 60*.

71 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*; Commonwealth Ombudsman, *Submission CFV 62*; Council of Single Mothers and their Children (Vic), *Submission CFV 55*.

72 WRC Inc (Qld), *Submission CFV 66*.

73 Sole Parents’ Union, *Submission CFV 63*.

74 Council of Single Mothers and their Children, *Submission CFV 44*.

75 WRC Inc (Qld), *Submission CFV 66*.

76 National Council of Single Mothers and their Children, *Submission CFV 45*.

5.64 The ALRC therefore considers actively promoting the disclosure of family violence is necessary. This was supported by most stakeholders⁷⁷—while ensuring that autonomy is left with the victim as to whether to disclose or not.⁷⁸

Intervention points

5.65 Chapter 4 recommends that Centrelink promote the disclosure of family violence at defined ‘intervention points’. In addition to those identified in Chapter 4, the ALRC considers that there may be other ‘intervention points’ in the social security process for Centrelink to promote the disclosure of family violence. The negotiation and revision of a person’s Employment Pathway Plan,⁷⁹ and the consideration of imposing a 26 week exclusion period when a person moves to an area of lower employment prospects,⁸⁰ may be two such intervention points.

5.66 Other intervention points identified by stakeholders included:

- changes in the types of payment claims, address details, illness reports, non-compliance with requirements;⁸¹
- at regular intervals or at points of change;⁸²
- where young people are identified as at risk and/or unable to live at home;⁸³ and
- in cases where debts are sought to be or have been waived for recipients of Parenting Payment (Single).⁸⁴

Deny Access Facility

5.67 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 who may be eligible to have their personal information on the DAF include customers who are escaping domestic or physical violence.

5.68 In *Family Violence—Commonwealth Laws*, ALRC Discussion Paper 76 (2011), the ALRC asked whether a person should be placed on the DAF upon the request of a person who has disclosed safety concerns. The ALRC does not consider this appropriate. 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

77 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; ADFVC, *Submission CFV 105*; M Winter, *Submission CFV 97*; Homeless Persons’ Legal Service, *Submission CFV 95*; Confidential, *Submission CFV 90*; WEAVE, *Submission CFV 85*.

78 AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*.

79 Council of Single Mothers and their Children (Vic), *Submission CFV 55*.

80 National Welfare Rights Network, *Submission CFV 150*.

81 WEAVE, *Submission CFV 85*.

82 ADFVC, *Submission CFV 105*.

83 DEEWR, *Submission CFV 130*.

84 Ibid.

corresponding increase in people whose information is on the DAF. Further, if more people were placed on the DAF, the system would become unworkable, customers would encounter delays and the underlying purpose of the DAF would be defeated.

6. Social Security—Relationships

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Summary

6.1 This chapter considers how family violence may have implications in relation to the definition of relationships in social security law and practice—that is, whether a person is considered to be a ‘member of a couple’ or ‘independent’.

6.2 Such categorisation 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 Allowance¹—and the rate of a social security payment.² Generally, being regarded as ‘single’ or ‘independent’ attracts a higher rate of payment, on the assumption 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, where a person has been incorrectly paid on the single rate.

6.3 This chapter discusses 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. The issue of family violence and debt repayment is considered in Chapter 9.

1 *Social Security Act 1991* (Cth) ss 408BA, 500.

2 Commonwealth Ombudsman, *Marriage-Like Relationships: Policy Guidelines for Assessment Under Social Security Law* (2007).

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

Member of a couple

6.5 The concept of being a couple, namely in a de facto relationship, is relevant across a wide range of Commonwealth and state and territory laws. The definition has a number of key elements and a finding that a person is in a de facto relationship may lead to a range of consequences such as the calculation of pension entitlements and the identification of next of kin.

6.6 In the social security context, ‘member of a couple’ is the basis of a different income support assessment based on the premise that it is cheaper to live as a couple than as a single person.

6.7 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.³

6.8 While the same concerns have been raised in this Inquiry,⁴ 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.

6.9 The problem in this Inquiry is how best to factor in family violence issues in the social security context. Should family violence be considered as so undermining of a de facto relationship as to lead to a conclusion that the persons are not ‘members of a couple’? Or is there some other place in the social security context to include an understanding of the impact of family violence?

6.10 Section 4(2) of the *Social Security Act* 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-

3 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 2)*, Report 69 (1994), [12.17].

4 North Australian Aboriginal Justice Agency, *Submission CFV 73*.

like relationship'.⁵ There are exceptions: ss 4(2)(a) and 4(3A) exclude people who are 'living separately and apart'; and ss 4(6) and 24 allow persons who otherwise would be treated as a 'member of a couple' to be considered 'single' for a 'special reason'.⁶

6.11 Section 4(3) of the *Social Security Act* provides a detailed range of criteria to be considered by a decision maker in determining whether a person is a member of a couple. Many of these criteria are relevant to family violence. However, the presence of family violence is not always considered by decision makers when assessing these criteria, nor are they directed to do so, even though family violence may influence a number of the criteria. This may have implications for determining whether a person is a member of a couple or whether they are living separately and apart—including whether they are separated under one roof.

Section 4 criteria

6.12 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;⁷
- the nature of the household;⁸
- the social aspects of the relationship (including whether the persons hold themselves out as married to each other);⁹
- any sexual relationship between the persons;¹⁰ and
- the nature of the commitment to each other.¹¹

6.13 These criteria are points for the decision maker to consider and give weight to.¹² They are not a checklist of circumstances that must be met in all cases,¹³ nor a balancing test requiring a relationship to satisfy the majority of criteria.¹⁴ They provide a core of what needs to be investigated, but do not close off the circumstances of a relationship from investigation.

5 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).

6 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.

7 *Social Security Act 1991* (Cth) s 4(3)(a).

8 *Ibid* s 4(3)(b).

9 *Ibid* s 4(3)(c).

10 *Ibid* s 4(3)(d).

11 *Ibid* s 4(3)(e).

12 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [2.2.5.10]; *Re Secretary, Department of Family & Community Services and Bell* [2000] AATA 252.

13 *Re Pill and Secretary, Department of Family and Community Services* (2005) 81 ALD 266, 272.

14 *Stauton-Smith v Secretary, Department of Social Security* (1991) 25 ALD 27.

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.¹⁵

6.14 In relation to determining living separately and apart, including separation under one roof, the *Guide to Social Security Law* directs a decision maker to consider the criteria under s 4(3).¹⁶

6.15 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’.¹⁷

6.16 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.¹⁸ The Commonwealth Ombudsman has also noted that it is not unusual for a decision maker’s own experiences and values to weigh into the decision-making process.¹⁹ 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.²⁰

Concerns with the s 4(3) criteria

6.17 Concerns have been expressed by stakeholders in this Inquiry about possible underlying assumptions of a decision maker that may disregard family violence and its potential impact on a victim’s decisions.

6.18 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

15 *Re Cahill and Secretary, Department of Family and Community Services* [2005] AATA 1147 at [22].

16 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [2.2.5.30].

17 *Ibid.*, [2.2.5.10].

18 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.

19 Commonwealth Ombudsman, *Marriage-Like Relationships: Policy Guidelines for Assessment Under Social Security Law* (2007).

20 *Re Pelka and Secretary, Department of Family and Community Services* [2006] FCA 735. 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).

family violence.²¹ This reflects the concerns that economic abuse may obviate consent to the ‘significant pooling of financial resources’.²²

6.19 Further concerns were expressed in relation to the criteria concerning the ‘nature of the commitment to each other’. For example, 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’.²³

6.20 There may also be a correlation between the length of the relationship and the degree of violence.²⁴ In other words, that due to violence—or threats of violence—a person feels trapped and unable to leave a relationship.

6.21 The Commonwealth Ombudsman noted anecdotal instances when 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. For example:

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.²⁵

6.22 Other concerns include:

- 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; and
- violence in a relationship may negate consent for any sexual relationship between the couple.²⁶

21 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*.

22 P Eastale 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 Eastale (ed) *Women and the Law in Australia* (2010) 424.

23 Council of Single Mothers and their Children (Vic), *Submission CFV 55*; Homeless Persons’ Legal Service, *Submission CFV 40*.

24 P Eastale 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 Eastale (ed) *Women and the Law in Australia* (2010) 424.

25 Commonwealth Ombudsman, *Submission CFV 62*.

26 P Eastale 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 Eastale (ed) *Women and the Law in Australia* (2010) 424.

6.23 The Welfare Rights Centre NSW (WRC (NSW)) and the North Australian Aboriginal Justice Agency (NAAJA) also raised concerns that information about family violence—such as police reports—has been used to demonstrate the existence of a couple relationship, rather than finding that one did not exist.²⁷

6.24 Throughout the Inquiry, stakeholders indicated that determination of separation under one roof was not made consistently.²⁸ Stakeholders provided examples of difficulties faced by customers, such as:

- where a person has obtained a protection order and the person using family violence breaches the order and returns to the home;²⁹
- 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;³⁰ 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.³¹

6.25 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.³²

6.26 The Homeless Persons' Legal Service considered that, without clear articulation of family violence as an example of people living separately and apart under one roof, there is a risk that victims of family violence may be forced into homelessness, in order to receive Centrelink payments.³³

Does family violence always mean that there is no couple relationship?

6.27 It is inherently difficult to define, in precise terms, what constitutes a relationship. Some relationships, while unpleasant, do not necessarily involve family violence.

27 North Australian Aboriginal Justice Agency, *Submission CFV 73*; WRC (NSW), *Submission CFV 70*.

28 National Welfare Rights Network, *Submission CFV 150*; ADFVC, *Submission CFV 71*; WRC Inc (Qld), *Submission CFV 66*; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*; Sole Parents' Union, *Submission CFV 63*; WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*; Council of Single Mothers and their Children (Vic), *Submission CFV 55*; P Eastal and D Emerson-Elliott, *Submission CFV 05*.

29 Sole Parents' Union, *Submission CFV 63*.

30 Ibid.

31 ADFVC, *Submission CFV 71*.

32 Sole Parents' Union, *Submission CFV 63*.

33 Homeless Persons' Legal Service, *Submission CFV 95*.

6.28 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 criterion, and the circumstances of the whole relationship still to be considered.

6.29 This may mean that the presence of family violence can lead to a decision that a person is in a couple relationship or not. It is one factor to consider in the determination of a person’s relationship status. Likewise, if the couple is living under the same roof, they may be considered to be ‘separated under one roof’.

6.30 The ALRC therefore recommends that further information about the effect of family violence on ‘member of a couple’ decisions be provided in the *Guide to Social Security Law*. 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.

6.31 To some extent, s 4(3A) of the *Social Security Act* may provide for this. Subsection 4(3A) states that people who are living separately and apart should not be treated as being in a couple relationship. This includes where people are living separately and apart but remain under the one roof.³⁴ This means that, in the social security context, a person is treated not as a member of a couple and can access the single rate of payment.

6.32 Generally, a physical separation as well as an emotional separation of the couple is required.³⁵ They must establish that: they are living apart, either permanently or indefinitely, and there has been an ‘estrangement or breakdown in their relationship’.³⁶ The *Guide to Social Security Law* recognises that there may be instances where a person is ‘living separately and apart under one roof’,³⁷ but one or both parties must ‘form the intention to sever or not to resume that relationship and act on that intention’.³⁸ The *Guide to Social Security Law* directs a decision maker to consider the criteria in s 4(3) when making a determination as to whether people are living separately and apart.

6.33 In particular, the *Guide to Social Security Law* provides that the consideration of the criterion of ‘the nature of the commitment to each other’ and the degree to which they have distanced themselves physically and emotionally, includes whether there has been a withdrawal of intimacy, companionship and support to the other party.³⁹ However, as s 4(3) provides the core criteria for assessment, stakeholders raised concerns about the extent to which, and the way in which, family violence is considered in relation to this criterion.

34 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [2.2.5.30].

35 Ibid, [2.2.5.20].

36 Ibid, [2.2.5.20].

37 Ibid, [2.2.5.30].

38 Ibid, [2.2.5.30].

39 Ibid, [2.2.5.30].

6.34 It is therefore necessary to inform decision makers how family violence may be relevant to each of the criteria to ensure family violence is adequately considered in making determinations about couple status and particularly the assessment of living separately and apart under one roof.

6.35 The ALRC also recommends that consistent, regular and targeted training should be provided to relevant staff on the ways in which family violence may affect the interpretation and application of the criteria in s 4(3) of the *Social Security Act*, in accordance with Recommendation 5–2. This was supported by stakeholders.⁴⁰

Should the Act or the Guide be amended?

6.36 The ALRC has heard of difficulties faced by victims of family violence in proving separation under one roof. The ALRC therefore recommends that further guidance be provided to decision makers in the *Guide to Social Security Law* on how family violence may affect such determinations and 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.

6.37 Although many 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,⁴¹ the ALRC considers amending the Guide to reflect this is preferable to amending the Act. To do otherwise may lead to unintended consequences, diminish flexibility in decision-making and create inconsistencies with other Commonwealth laws. Stakeholders 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).⁴² However, FaHCSIA considered that the Guide already covered this issue.⁴³

6.38 In a joint submission, Professors Patricia Eastal and Derek Emerson-Elliott argued that the *Social Security Act* should be amended to require that, before deciding that a person is a member of a couple, decision makers must be ‘satisfied that both members have a reasonable equality of power in the partnership, or that if it is a

40 National Legal Aid, *Submission CFV 164*; FaHCSIA, *Submission CFV 162*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*; ADFVC, *Submission CFV 105*; Homeless Persons’ Legal Service, *Submission CFV 95*; WEAVE, *Submission CFV 85*.

41 ADFVC, *Submission CFV 71*; WRC (NSW), *Submission CFV 70*; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*; WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*; Homeless Persons’ Legal Service, *Submission CFV 40*; P Eastal and D Emerson-Elliott, *Submission CFV 05*.

42 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*; DEEWR, *Submission CFV 130*; ADFVC, *Submission CFV 105*; Homeless Persons’ Legal Service, *Submission CFV 95*; WEAVE, *Submission CFV 85*; ADFVC, *Submission CFV 71*; WRC (NSW), *Submission CFV 70*; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*; WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*; Council of Single Mothers and their Children (Vic), *Submission CFV 55*; P Eastal and D Emerson-Elliott, *Submission CFV 05*.

43 FaHCSIA, *Submission CFV 162*.

dominant/submissive partnership the submissive member retains the capacity to validly consent to the partnership'.⁴⁴ They strongly supported amendment to the *Social Security Act* to reflect the difficulty for victims of family violence as a result of the power imbalance in a violent relationship:

The relationship is in reality more that of a (psychological) hostage and captor relationship. As a result of this disempowerment, victims may be limited in their ability to make choices and limited capacity to change or even challenge the circumstances that they are in... The *Social Security Act* must be amended in order to require the decision maker to be satisfied that both members of a couple have a reasonable equality of power in the partnership.⁴⁵

6.39 In any decision-making process, the ALRC considers that it is important that there is flexibility, to ensure that law and policy are 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.

6.40 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 laws, and intestacy, under state and territory law. For example, if a person is considered not to be in a couple relationship and the partner were to die, what relevance would the factual determination for social security purposes have in the context of eligibility as a de facto partner for inheritance purposes?

6.41 Section 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*. 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 of separation under one roof, other examples would also need to be included. This may lead to a prescriptive list resulting in greater inflexibility in decision making.

6.42 Amending the s 4(3) criteria may also create an incentive for false or manipulated claims of family violence to access a higher 'single' rate of payment, thereby detracting from the overall purpose of social security law—to provide for those in genuine need. Accordingly, the ALRC considers that the level of verification of family violence in 'member of a couple' decisions should be appropriate—as discussed in Chapter 5.

6.43 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. The

44 P Eastal and D Emerson-Elliott, *Submission CFV 05*.

45 P Eastal and D Emerson Elliott, *Submission CFV 145*.

ALRC therefore considers that the emphasis in the *Guide to Social Security Law* should be placed on ensuring family violence is adequately considered in determining separation under one roof by including family violence as a circumstance where a person may be living separately and apart under one roof.

What sort of guidance should be included?

6.44 The case of *Kosarova v Secretary, Department of Education, Employment and Workplace Relations* considered 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.⁴⁶

6.45 The National Welfare Rights Network (NWRN) submitted that such guidance may be supported by reference to the principles enunciated in the case of *Kosarova* and by should provide that the decision maker should ‘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))’.⁴⁷

6.46 However, the NWRN considered that it should not be necessary to prove ‘extreme violence’ as described in *Kosarova* in order for family violence to be taken into account and that all forms of family violence—not only physical violence—need to be considered.

6.47 The Australian Association of Social Workers Queensland (AASW (Qld)) and the Welfare Rights Centre Inc Queensland (WRC Inc (Qld)) recommended that the *Guide to Social Security Law* should also include

examples showing the impact of family violence on each relationship ‘factor’ and also include suggestions for questions to assist in eliciting this information. For example, in relation to finances, questions should consider the level of decision making victims of family violence have had on family resources and the way in which this has impacted on them.⁴⁸

46 *Kosarova v Secretary, Department of Education, Employment and Workplace Relations* [2009] 888. The decision in *Kosarova* is yet to be incorporated into the *Guide to Social Security Law*.

47 National Welfare Rights Network, *Submission CFV 150*; WRC (NSW), *Submission CFV 70*.

48 AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*.

6.48 Stakeholders agreed that the *Guide to Social Security Law* should clearly state that family violence may be taken into account in a determination of separation under one roof.⁴⁹ Such guidance could include:

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.⁵⁰

6.49 In particular, the way in which financial resources are exploited within family violence situations needs to be better understood to allow for the treatment of income as separate and not pooled as a ‘household income’.⁵¹

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

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

‘Special reason’

6.50 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’.⁵² 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’.⁵³

6.51 Section 24 does not preclude family violence from being taken into consideration by a decision maker. 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 therefore recommends that further guidance as to how family violence may constitute a ‘special reason’ should be included in the

49 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*; DEEWR, *Submission CFV 130*; ADFVC, *Submission CFV 105*; Homeless Persons’ Legal Service, *Submission CFV 95*; WEAVE, *Submission CFV 85*; ADFVC, *Submission CFV 71*; Council of Single Mothers and their Children (Vic), *Submission CFV 55*; Homeless Persons’ Legal Service, *Submission CFV 40*.

50 ADFVC, *Submission CFV 71*.

51 AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*.

52 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011 [2.2.5.50].

53 Ibid.

Guide to Social Security Law. This was supported by stakeholders.⁵⁴ However, Eastal and Emerson-Elliott considered s 24 to be an inappropriate mechanism for decision making on ‘such a significant and basic issue as whether a relationship is genuinely that of a couple, or is that of captor and hostage’.⁵⁵

6.52 The ALRC notes that while Recommendation 6–1 may go some way to addressing concerns of family violence in ‘member of a couple’ decisions, for consistency, family violence should also be expressly considered in relation to the s 24 discretion.

6.53 The ALRC noted in the *Family Violence—Commonwealth Laws*, ALRC Discussion Paper 76 (2011) (Discussion Paper), that if reliance is to be placed on the discretion in s 24 for persons experiencing family violence, it needs to be adequately accessible.⁵⁶ In particular, the ALRC queried whether its use as an ‘option of last resort’ presents a barrier to those experiencing family violence from accessing the discretion.⁵⁷

6.54 Stakeholders mentioned that s 24 was rarely used for family violence and victims were unaware that they could invoke this discretion. One reason for its disuse appears to be lack of knowledge of the discretion itself—both by customers⁵⁸ and Centrelink officers.⁵⁹

6.55 The ALRC therefore recommends that information about the discretion be provided to customers as part of Recommendation 4–2 to ensure that customers are aware of its availability.

Unusual, uncommon or exceptional?

6.56 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.⁶⁰ 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.⁶¹

6.57 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?

54 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*; DEEWR, *Submission CFV 130*; ADFVC, *Submission CFV 105*; WEAVE, *Submission CFV 85*.

55 P Eastal and D Emerson Elliott, *Submission CFV 145*.

56 Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), Ch 6.

57 Ibid.

58 National Legal Aid, *Submission CFV 164*; WRC (NSW), *Submission CFV 70*.

59 National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*.

60 *Boscolo v Secretary, Department of Social Security* [1999] FCA 106.

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

- 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?⁶²

6.58 While the *Guide to Social Security Law* considers some common scenarios,⁶³ it does not provide family violence as an example of where the discretion might be exercised. Some stakeholders indicated that family violence was not adequately taken into consideration by the decision maker in exercising the discretion in s 24.⁶⁴ A number of cases serve to demonstrate how family violence has previously been considered in exercising the discretion under s 24.

6.59 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.⁶⁵

6.60 Similarly, in *Lynwood and Secretary, Department of Education, Employment and Workplace Relations*, the applicant was seen to have suffered from family violence from her husband over a long period. 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'.⁶⁶ Other cases have been determined in a similar manner.⁶⁷

6.61 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)'.⁶⁸

Alternatives for reform

6.62 Stakeholders recommended that family violence should be taken into account expressly in considering the special reason discretion in s 24 of the *Social Security*

62 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [2.2.5.50].

63 Ibid.

64 WRC Inc (Qld), *Submission CFV 66*; WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*; Council of Single Mothers and their Children (Vic), *Submission CFV 55*; P Easteal and D Emerson-Elliott, *Submission CFV 05*.

65 *Perry and Department of Family and Community Services* [2001] AATA 282 (9 April 2001).

66 *Lynwood and Secretary, Department of Education, Employment and Workplace Relations* [2011] AATA 213 (30 March 2011).

67 *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).

68 *Rolton v Department of Education, Employment and Workplace Relations* AAT No 2008/3542.

Act,⁶⁹ in particular to ‘require recognition by the decision maker of the disempowering effects of family violence and “battered women’s syndrome”’.⁷⁰

6.63 Eastael 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’.⁷¹

6.64 Similarly, the CSMC noted that, due to abuse experienced by victims of family violence and threats made 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’.⁷²

6.65 Eastael 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*’.⁷³ 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’.⁷⁴

6.66 The WRC Inc (Qld) argued that, while s 4 ‘provides a definition of what a member of a couple is, s 24 allows for a decision maker to state what a member of a couple is not’.⁷⁵ The Centre therefore 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 Centre 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.

6.67 The WRC (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.⁷⁶

6.68 The WRC Inc (Qld) 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.⁷⁷

69 ADFVC, *Submission CFV 71*; WRC (NSW), *Submission CFV 70*; WRC Inc (Qld), *Submission CFV 66*; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*; WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*; P Eastael and D Emerson-Elliott, *Submission CFV 05*.

70 WRC (NSW), *Submission CFV 70*.

71 P Eastael and D Emerson-Elliott, *Submission CFV 05*.

72 Council of Single Mothers and their Children (Vic), *Submission CFV 55*.

73 P Eastael and D Emerson-Elliott, *Submission CFV 05*.

74 Ibid.

75 WRC Inc (Qld), *Submission CFV 66*.

76 WRC (NSW), *Submission CFV 70*.

77 WRC Inc (Qld), *Submission CFV 66*.

6.69 However, throughout social security law and policy, references are made to modifying words such as ‘extreme’ or ‘special’. It is beyond the ALRC’s Terms of Reference to recommend that such words be deleted from social security legislation.

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

Independent

6.70 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.⁷⁸ It can also affect whether a person is paid a social security payment directly or through a parent.⁷⁹

6.71 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 presumption that parents with sufficient resources will provide financial and material support to their children.⁸⁰

6.72 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

6.73 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

78 *Social Security Act 1991* (Cth) ss 94, 540, 739, 1061PA.

79 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.2.3.20].

80 Senate Employment, Workplace Relations and Education Reference Committee, *Student Income Support Inquiry*, June 2005.

- (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.⁸¹

6.74 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.⁸²

6.75 The ALRC considers that family violence should be expressly included in the *Social Security Act* as one of the grounds upon which it is unreasonable for a person to live at home. The ALRC recognises that family violence may fall under either ‘extreme family breakdown’ or ‘serious risk’. However, examples of conduct contained in the family violence definition recommended in Chapter 3, may not be caught by ‘violence’, such as psychological or emotional abuse, deprivation of liberty, and exposing a child to family violence. ‘Family violence’ captures a wider range of conduct than ‘violence’, insofar as that conduct is violent, threatening, controlling, coercive or engenders fear.

6.76 Child abuse and neglect are also not expressly included in the existing interpretation of these provisions in the *Guide to Social Security Law*. Physical, psychological and sexual abuse are taken into account, however the ALRC considers child abuse and neglect should be expressly considered as a circumstance where it is unreasonable to live at home. This was supported by most stakeholders who responded to the Discussion Paper.⁸³ However, DEEWR considered that the current description already encapsulated these situations.⁸⁴

6.77 While the current description may encapsulate child abuse and neglect, for clarity, the ALRC recommends such an amendment be made.

6.78 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 inappropriate; and implies that family violence, child abuse and neglect may not harm a person’s physical or mental well-being in some cases. This is inconsistent with contemporary evidence about the effects of these factors on child developmental and health outcomes.

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

82 *Ibid* s 1067A(9).

83 National Legal Aid, *Submission CFV 164*; National Children’s and Youth Law Centre, *Submission CFV 156*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*; ADFVC, *Submission CFV 105*; Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*; Homeless Persons’ Legal Service, *Submission CFV 95*; WEAVE, *Submission CFV 85*.

84 DEEWR, *Submission CFV 130*.

6.79 In the ALRC's view, the very fact of family violence, child abuse or neglect may lead to 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.

6.80 This view was supported by a number of stakeholders.⁸⁵ The NWRN stated its support, 'because once family violence is established the risk posed by this is well known, the decision maker should not have to turn their mind to satisfaction of an additional requirement such as this'.⁸⁶ DEEWR suggested, however, that such changes to legislation could lead to unsubstantiated allegations of family violence with the sole purpose of obtaining income support.⁸⁷

6.81 The ALRC considers that appropriate safeguards could be put in place to guard against unsubstantiated claims—such as the level of verification required to support a claim of family violence. This is discussed in further detail in Chapter 5.

Serious risk to physical or mental well-being

6.82 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 states that 'severe neglect' may be a 'similar exceptional circumstance' of 'extreme family breakdown', a similar provision is not made for a 'serious risk to a person's physical or mental well-being'. The *Guide to Social Security Law* does provide, however, where there are allegations of child abuse or serious risk of abuse or neglect, referral should be made to a social worker.⁸⁸

6.83 The *Guide to Social Security Law* provides that indicators of 'serious risk' to a young person's physical or mental well-being 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.⁸⁹

6.84 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

85 National Legal Aid, *Submission CFV 164*; National Children's and Youth Law Centre, *Submission CFV 156*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*; ADFVC, *Submission CFV 105*; Homeless Persons' Legal Service, *Submission CFV 95*; WEAVE, *Submission CFV 85*.

86 National Welfare Rights Network, *Submission CFV 150*.

87 DEEWR, *Submission CFV 130*.

88 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.2.5.50].

89 *Ibid.*

reluctant to consider violence that is not overt and visible as serious enough to warrant qualification for independent YA [Youth Allowance].⁹⁰

6.85 The University of Queensland Union also raised 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’.⁹¹

Extreme family breakdown

6.86 The *Guide to Social Security Law* states that family breakdown must be ‘extreme’, and the existence of ongoing conflict alone is insufficient to consider a person independent under this criterion. Factors that may indicate extreme family breakdown are said to include evidence that the emotional or physical well-being of the person or another family member would be jeopardised if the person were to live at home.⁹²

6.87 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.⁹³ The *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’.⁹⁴

6.88 The NWRN raised concerns that the legislation refers to ‘family breakdown’, which overlooks the fact that families may remain intact, despite the persistence of damaging family violence.⁹⁵ However, the ALRC considers that if an amendment is made expressly to refer to family violence, it should be encapsulated under this limb by virtue of this amendment.

6.89 Stakeholders suggested that family violence needs to be recognised expressly as a circumstance when it may be unreasonable for a person to live at home.⁹⁶ 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.⁹⁷ Women Everywhere Advocating Violence Elimination (WEAVE) and the National Council of

90 University of Queensland Union, *Submission to the Senate Employment, Workplace Relations and Education References Committee Inquiry into Student Income Support* (2004).

91 Ibid.

92 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.2.5.40].

93 Ibid.

94 Ibid.

95 National Welfare Rights Network, *Submission CFV 150*.

96 North Australian Aboriginal Justice Agency, *Submission CFV 73*; ADFVC, *Submission CFV 71*; WRC (NSW), *Submission CFV 70*; WRC Inc (Qld), *Submission CFV 66*; WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*; Homeless Persons’ Legal Service, *Submission CFV 40*; P Eastaale and D Emerson-Elliott, *Submission CFV 05*.

97 ADFVC, *Submission CFV 71*; WRC (NSW), *Submission CFV 70*; WRC Inc (Qld), *Submission CFV 66*; WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*; Homeless Persons’ Legal Service, *Submission CFV 40*.

Single Mothers and their Children (NCSMC) considered that child abuse should be expressly considered.⁹⁸ For example, the Homeless Persons' 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.⁹⁹

6.90 The WRC (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.¹⁰⁰

6.91 Similarly, the WRC Inc (Qld) 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.¹⁰¹ 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'.¹⁰²

6.92 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'.¹⁰³

6.93 In light of these concerns, the ALRC recommends that the *Social Security Act* and the *Guide to Social Security Law* should expressly refer to family violence, child abuse or neglect as a circumstance where it may be unreasonable to live at home.

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

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

98 WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*.

99 Homeless Persons' Legal Service, *Submission CFV 40*.

100 WRC (NSW), *Submission CFV 70*.

101 WRC Inc (Qld), *Submission CFV 66*.

102 National Children's and Youth Law Centre, *Submission CFV 64*.

103 WEAVE, *Submission CFV 58*.

- (ii) because it would be unreasonable to expect the person to do so as there would be a serious risk to his or her physical or mental well-being due to violence, sexual abuse or other similar unreasonable circumstances.

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

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

Recommendation 6–5 The *Guide to Social Security Law* should expressly 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).

Continuous support

6.94 In addition to its being unreasonable to live at home, 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.¹⁰⁴

6.95 Stakeholders have identified three main concerns with the ‘continuous support’ requirement. First, the requirement may put a victim of 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.

6.96 To address these concerns, the ALRC recommends that DEEWR and Centrelink 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 the financial circumstances of their parents and the level of ‘continuous support’ available to them. This was supported by stakeholders.¹⁰⁵ However, the NWRN cautioned that the applicant should never be required to provide financial information about his or her

¹⁰⁴ *Social Security Act 1991* (Cth) ss 1067A(9), 1061PL.

¹⁰⁵ National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*; DEEWR, *Submission CFV 130*; Homeless Persons’ Legal Service, *Submission CFV 95*; WEAVE, *Submission CFV 85*.

parents in cases of family violence unless that information is in his or her direct possession or control.¹⁰⁶

6.97 Information-gathering powers under ss 192–195 of the *Social Security (Administration) Act* allow Centrelink, as delegates, 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.¹⁰⁷ 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.

6.98 The ALRC therefore considers that this review should also include consideration of the powers under s 192 of the *Social Security Act*—a suggestion made by a number of stakeholders who recommended that Centrelink use its powers under s 192 of the *Social Security Act* with a view to assisting a customer.¹⁰⁸ However, care should be taken to ensure that the use of such powers does not put the safety of the victim in further jeopardy.

Concerns with the ‘continuous support’ requirement

6.99 Continuous support is defined in the *Guide to Social Security Law* as ‘regular and ongoing assistance to the young person’s upkeep’.¹⁰⁹ The onus is on the applicant to provide relevant supporting information.

6.100 In relation to this requirement, stakeholders raised concerns that the bulk of the burden for establishing independence was placed on the young person;¹¹⁰ and that the ‘continuous support’ criterion does not look to the adequacy of support.¹¹¹

6.101 The WRC Inc (Qld) 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.¹¹² Similarly, the WRC (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’¹¹³ 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’.¹¹⁴

106 National Welfare Rights Network, *Submission CFV 150*.

107 Australian National Audit Office, *Centrelink Fraud Investigations* (2010).

108 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*.

109 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [1.1.C.350].

110 WRC (NSW), *Submission CFV 70*; WRC Inc (Qld), *Submission CFV 66*; National Children’s and Youth Law Centre, *Submission CFV 64*; Commonwealth Ombudsman, *Submission CFV 62*; WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*; Homeless Persons’ Legal Service, *Submission CFV 40*.

111 WRC (NSW), *Submission CFV 70*; WRC Inc (Qld), *Submission CFV 66*; WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*.

112 WRC Inc (Qld), *Submission CFV 66*.

113 WRC (NSW), *Submission CFV 70*.

114 National Children’s and Youth Law Centre, *Submission CFV 64*.

6.102 Accordingly, stakeholders 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.¹¹⁵

6.103 Potential solutions provided by stakeholders included waiver or exemptions from the continuous support requirement,¹¹⁶ shifting the onus onto parents or legal guardians to provide evidence of continuous support¹¹⁷ or that Centrelink use its powers under the *Social Security (Administration) Act* to collect such information.¹¹⁸

6.104 The ALRC considers that 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.

6.105 The WRC Inc (Qld), which 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’.¹¹⁹

6.106 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.

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

115 National Children’s and Youth Law Centre, *Submission CFV 156*; WRC (NSW), *Submission CFV 70*; WRC Inc (Qld), *Submission CFV 66*; National Children’s and Youth Law Centre, *Submission CFV 64*; WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*; Homeless Persons’ Legal Service, *Submission CFV 40*.

116 WRC Inc (Qld), *Submission CFV 66*.

117 WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*.

118 WRC (NSW), *Submission CFV 70*.

119 WRC Inc (Qld), *Submission CFV 66*.

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

7. Social Security—Proof of Identity and Residence Requirements

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Summary

7.1 Family violence is relevant to proof of identity and residence requirements attached to certain social security payments in a number of ways. In this chapter, the ALRC considers how these requirements in social security law and practice can be improved to protect the safety of victims of family violence.

7.2 The requirement to provide original proof of identity documents and tax file numbers can create a barrier for persons experiencing family violence in accessing social security payments and entitlements.¹ Similarly, residence requirements may mean that certain visa holders or newly arrived residents are unable to access independent financial assistance through the social security system and therefore may not have adequate financial support to enable them to leave a violent relationship.

7.3 The ALRC makes a number of recommendations in this chapter to address these barriers for victims of family violence.

¹ ADFVC, *Submission CFV 71*; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*; National Children’s and Youth Law Centre, *Submission CFV 64*; Multicultural Disability Advocacy Association, *Submission CFV 60*; WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*; Council of Single Mothers and their Children (Vic), *Submission CFV 55*; Homeless Persons’ Legal Service, *Submission CFV 40*.

Proof of identity

7.4 Section 8 of the *Social Security (Administration) Act 1999* (Cth) seeks to ensure that abuses of the social security system are minimised,² for example by requiring claimants and recipients to prove their identity when making new claims, or when renewing or altering claims.³ To be qualified for a social security payment, a low income health care card, or a Commonwealth seniors health card, a person must provide original proof of identity documents and, with limited exceptions, also provide a tax file number.⁴

7.5 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 is on the claimant.⁵ However, the Guide 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.⁶ ‘Persons experiencing domestic violence’ are among the list of persons able to use this alternate departmental form for proof of identity.⁷

Problems in proving identity

7.6 The Homeless Persons’ 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.⁸

7.7 Similarly, the National Children’s and Youth Law Centre submitted that, for a young person who has 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’.⁹

7.8 However, the Welfare Rights Centre NSW (WRC (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’.¹⁰

2 *Social Security (Administration) Act 1999* (Cth) s 8(a)(v); FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [2.2.1.10].

3 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [2.2.1.10].

4 *Social Security (Administration) Act 1999* (Cth) ss 8, 75; FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [2.2.1.10]; [8.1.3.20].

5 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [2.2.1.10].

6 *Ibid.*, [2.2.1.40].

7 *Ibid.*, [2.2.1.40].

8 Homeless Persons’ Legal Service, *Submission CFV 40*.

9 National Children’s and Youth Law Centre, *Submission CFV 64*.

10 WRC (NSW), *Submission CFV 70*.

7.9 In light of these concerns, some stakeholders recommended an automatic exemption for victims of family violence from providing original proof of identity documents,¹¹ while others considered that information about the availability of the exemption should be provided to persons experiencing violence.¹²

7.10 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. The ALRC considers that 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. The ALRC did not receive comment on whether this form was sufficient, although some stakeholders suggested that, rather than requiring a person experiencing family violence to provide a partner’s tax file number, Centrelink could use its delegated information-gathering powers under s 192 of the *Social Security (Administration) Act* to require the production of information, such as a partner’s tax file number.¹³

Information-gathering power

7.11 Section 192 of the *Social Security (Administration) Act* confers a general power on the Secretary of Families, Housing, Community Services and Indigenous Affairs (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 qualifies for a social security payment or a social security payment is payable.¹⁴ This power is generally delegated to Centrelink staff.

7.12 A number of stakeholders recommended that s 192 should be utilised to find a person’s tax file number or proof of identity documents, as this would save a great deal of unnecessary stress for the victim.¹⁵

7.13 However, care should be taken not to further jeopardise the safety of the victim through the use of such powers. For example, in situations where the person using family violence refuses to provide his or her income details, the Australian Association of Social Workers Queensland (AASW (Qld)) and the Welfare Rights Centre Inc Queensland (WRC Inc (Qld)) submitted that Centrelink might consider using s 192 to obtain this information from the Australian Taxation Office.¹⁶ Similarly, the National Welfare Rights Network (NWRN) considered that, as a coercive power, any use of it should be carefully considered and justified.¹⁷

11 ADFVC, *Submission CFV 71*; Homeless Persons’ Legal Service, *Submission CFV 40*.

12 ADFVC, *Submission CFV 71*; National Children’s and Youth Law Centre, *Submission CFV 64*; Council of Single Mothers and their Children (Vic), *Submission CFV 55*.

13 National Legal Aid, *Submission CFV 164*; WRC (NSW), *Submission CFV 70*; Council of Single Mothers and their Children (Vic), *Submission CFV 55*.

14 *Social Security (Administration) Act 1999* (Cth) s 192.

15 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*.

16 AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*.

17 National Welfare Rights Network, *Submission CFV 150*.

7.14 The ALRC is of the view that consideration should be given to using s 192 when, because of family violence concerns, it is not appropriate to expect a customer to provide a piece of information required for the assessment of a claim or entitlement.

7.15 In addition, the ALRC recommends that, as a mechanism available to people experiencing family violence, information about the alternate proof of identity form should be provided to customers to improve awareness of its existence, in accordance with Recommendation 4–2.

Tax file number

7.16 Tax file numbers may be requested from a person who resides in Australia and makes a claim for, or receives, a social security payment.¹⁸ 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.¹⁹

7.17 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.²⁰ A person may be granted a tax file number exemption—including an indefinite exemption—from providing their partner's tax file number, 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.²¹

7.18 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.²²

7.19 The ALRC considers that details about tax file number exemptions are suitably placed in the *Guide to Social Security Law*. However, the exemption is somewhat narrow, insofar as it refers to a risk of 'violence' and not 'family violence'. The ALRC recommends that the *Guide to Social Security Law* expressly refer to family violence in order to capture a broader range of conduct that is violent, threatening, controlling, coercive or engenders fear. This was supported by stakeholders.²³ This recommendation is complemented by Recommendations 3–1 and 5–1, which recommends including a consistent definition of family violence in the *Social Security Act 1991* (Cth) and the *Guide to Social Security Law*, respectively.

18 *Social Security (Administration) Act 1999* (Cth).

19 Ibid ss 8, 75; FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [2.2.1.10]; [8.1.3.20].

20 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [8.1.3.20].

21 *Social Security (Administration) Act 1999* (Cth) ss 76, 77; FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [8.1.3.20].

22 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [8.1.3.20].

23 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*; ADFVC, *Submission CFV 105*; Homeless Persons' Legal Service, *Submission CFV 95*; WEAVE, *Submission CFV 85*.

7.20 The Department of Education, Employment and Workplace Relations (DEEWR) stated that, in conjunction with FaHCSIA, it would consider extending the exemption period for a defined period. However, it however noted that an indefinite exemption period would have implications for eligibility and verifying partner income, and this could lead to an incorrect rate of payment.²⁴ Community and Public Sector Union (CPSU) members also raised concerns that an indefinite exemption may be excessive and suggested that a period of time to obtain proof of identity may be a better solution, as it would ultimately encourage the victim to move forward, rather than being exempt for life.²⁵

7.21 The ALRC notes that the *Guide to Social Security Law* refers to the possibility of an indefinite exemption in circumstances of violence. The ALRC recommends that a tax file number exemption—including the possibility of an indefinite exemption—be available to victims of family violence. The ALRC understands that it may not be appropriate to provide an indefinite exemption in all circumstances of family violence, but recommends that this be an option available as required by the circumstances of an individual case.

7.22 In addition, the ALRC recommends that information about the exemption from providing a partner's tax file number should be provided to customers, in accordance with Recommendation 4–2.

Why should family violence be expressly considered?

7.23 Stakeholders identified a number of concerns with the requirements to provide a partner's tax file number, when that person is experiencing or at risk of family violence. In particular, stakeholders were concerned with the statement in the *Guide to Social Security Law* that an exemption was not available 'where there is merely a refusal on the part of the partner to provide the information and there are no violence or health concerns'.²⁶ Both the NWRN and the Council of Single Mothers and their Children (CSMC) considered that this statement was too limiting because the refusal may be an act of family violence when it is considered in the context of a course of other conduct,²⁷ or could actually constitute a form of financial abuse.²⁸

7.24 An amendment to include family violence as a circumstance in which a tax file number exemption may be available addresses these concerns. The definition of family violence, as recommended in Recommendation 3–2, includes economic abuse which would encapsulate circumstances of financial abuse and would also include circumstances where withholding information forms part of the overall context of family violence.

24 DEEWR, *Submission CFV 130*.

25 CPSU, *Submission CFV 147*.

26 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [8.1.3.20].

27 National Welfare Rights Network, *Submission CFV 150*.

28 Council of Single Mothers and their Children (Vic), *Submission CFV 55*.

7.25 Other stakeholders raised concerns due to the element of control in family violence. ‘Withholding such vital information from the victim becomes another means of exerting control over them by the perpetrator’.²⁹ The Multicultural Disability Advocacy Association (MDAA) 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.³⁰

7.26 The AASW (Qld) and WRC Inc (Qld) stated that asking a victim to provide information about their partner’s finances that may not be readily available to them, could seriously compromise his or her safety if they are required to seek this.³¹

7.27 Similarly, the Homeless Persons’ Legal Service raised concerns that

A person who has been forced into unstable accommodation due to family violence may not be able to provide a partner’s tax file number, 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. Inability to receive social security due to an inability to provide a partner’s tax file number creates further obstacles for victims of family violence to secure stable and secure accommodation.³²

7.28 In light of these concerns, the ALRC considers it necessary that the *Guide to Social Security Law* expressly refer to family violence as a circumstance where a tax file number exemption may be available. Such an amendment would ensure that a victim’s safety is not compromised when seeking a tax file number from the person using family violence.

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

Residence requirements

7.29 As discussed in Chapter 5, an underlying principle of the social security system is residence—that in order to be entitled to receive social security payments, a threshold of Australian residence is required. Residence requirements for social security payments are generally divided into two stages. First, a person must be an ‘Australian resident’ and have satisfied any ‘qualifying residence requirement’; and, secondly, a person must have satisfied any necessary waiting period.

29 AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*.

30 Multicultural Disability Advocacy Association, *Submission CFV 60*.

31 AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*.

32 Homeless Persons’ Legal Service, *Submission CFV 95*.

7.30 In this section, the ALRC identifies a number of problematic issues for people experiencing family violence and makes a number of recommendations to address them.

Australian resident

7.31 To qualify for a social security payment or entitlement, a person must be either:

- an Australian citizen;
- a holder of a permanent visa; or
- a protected Special Category Visa holder.³³

7.32 Residential requirements are different for Special Benefit, Crisis Payment and family payments. 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.³⁴ For family payments, there are no residential requirements.

7.33 The Minister for 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.³⁵ 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.³⁶

7.34 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. This raises particular concerns for non-protected Special Category Visa holders.

Protected Special Category Visa holders

7.35 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.

7.36 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

33 *Social Security Act 1991* (Cth) s7(2); FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [2.2.4.10].

34 *Social Security (Administration) Act 1999* (Cth) ss 29, 30; FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.7.1.10]; [3.7.4.10].

35 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*.

36 FaHCSIA, *Social Security Payments Residence Criteria* (2011) <www.fahcsia.gov.au/sa/international/policy/Residence_Criteria> at 12 July 2011.

Australia, and likely to remain permanently. However, from that date, holders of Special Category Visas no longer satisfy the definition of Australian resident for social security purposes, unless they belong to a ‘protected’ group.

7.37 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
- commenced (or recommenced) residing in Australia within three months of that day.³⁷

7.38 The WRC Inc (Qld) provided an example where a client was not entitled to Special Benefit as she was a ‘non-protected Special Category Visa’ holder:

After leaving a violent relationship and subsequently losing her job, she was faced with the choice of returning to New Zealand or living in her car. She chose the latter, in order to be able to continue to see her children, who had remained in the care of the perpetrator.³⁸

7.39 The WRC (NSW) submitted a similar example by way of the following case study.³⁹

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.

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...

37 *Social Security Act 1991* (Cth); FaHCSIA, *Social Security Payments Residence Criteria* (2011) <www.fahcsia.gov.au/sa/international/policy/Residence_Criteria> at 12 July 2011.

38 AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*.

39 WRC (NSW), *Submission CFV 70*.

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...

Etera remains in Australia without income support or housing.

7.40 To address such concerns, the AASW (Qld) and WRC Inc (Qld) recommended a special category of visa be established for those who are victims of family violence and ought not to be expected to leave Australia. This visa would enable entitlement to Special Benefit—for example, for a victim who was parenting children and needed to remain in Australia in order for the children to continue to have access to both parents.⁴⁰

7.41 The NWRN has previously noted inequities in the inaccessibility of social security payments for non-protected Special Category Visa holders.⁴¹ New Zealanders, unlike other migrants, have indefinite work rights, and the right to remain here indefinitely, contributing to compulsory superannuation and tax while working. Even if their circumstances change, such that they face destitution, New Zealanders are not eligible for Special Benefit, unlike other newly arrived residents. The NWRN argued that it is appropriate that they be distinguished from other migrants and ought to have access to the same form of social security as Australian residents, recommending that the definition of Australian Resident be amended to include Special Category Visa holders.

7.42 In noting this situation, the Administrative Appeals Tribunal (AAT) in the decision of *Filipovski and Secretary, Department of Family and Community Services*,⁴² was of the view that it was harsh and hard to understand why New Zealanders are precluded from obtaining Special Benefit even if there has been a ‘substantial change of circumstances beyond their control’ and social security law provides relief to other newly arrived residents in those same circumstances.

7.43 Any amendment for this cohort of people will likely affect those not affected by family violence but also others who have experienced a ‘substantial change in circumstances’. While changes to entitlements would be beyond the ALRC’s Terms of Reference, given the particular difficulties and inequities they face, the ALRC recommends consideration be given to extending access to Special Benefit for non-protected Special Category Visa holders where they have experienced a ‘substantial change in circumstances beyond their control’. This may mean amending the definition of ‘Australian resident’ in s 7(2) of the *Social Security Act* to include non-protected Special Category Visa holders or amending the definition of a ‘protected Special Category Visa holder’ in s 7(2A).

40 AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*.

41 National Welfare Rights Network, *Submission to the Tax Forum* (2011).

42 *Filipovski and Secretary, Department of Family and Community Services* [2002] AATA 1148.

7.44 A further alternative suggested by the NWRN is that provision for income support to people experiencing family violence be included in Australia’s international social security agreements.⁴³ Australia has formal social security agreements with particular countries to ensure social security protection when people move between the agreement countries. While this would be a considerable undertaking, and would only cover those people from countries with which Australia has an agreement, it would ‘expand the availability of social security to people experiencing family violence who are not residentially qualified and offer additional protection to Australian citizens and residents who experience family violence while abroad in agreement countries’.⁴⁴

7.45 The ALRC notes that from 26 February 2011, New Zealand citizens who hold a Special Category Visa and who have lived continuously in Australia for at least 10 years will be able to access a once-only payment of Newstart Allowance, Youth Allowance or Sickness Allowance for up to six months. However, this does not address the concerns raised.

Temporary visa holders

7.46 Throughout the Inquiry, stakeholders expressed considerable concern about the limited ability for temporary visa holders to access income support.⁴⁵ These concerns were captured in a case study provided by Women Everywhere Advocating Violence Elimination (WEAVE):⁴⁶

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.

43 National Welfare Rights Network, *Submission CFV 150*.

44 Ibid.

45 Confidential, *Submission CFV 36*; Confidential, *Submission CFV 35*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*; WEAVE, *Submission CFV 31*; ADFVC, *Submission CFV 26*.

46 WEAVE, *Submission CFV 31*.

7.47 In Chapter 20, the ALRC makes a recommendation to create a new temporary visa for secondary visa holders who are victims of family violence (Recommendation 20–3). 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.

7.48 To ensure that persons holding this new temporary visa have access to independent financial assistance through income support, the ALRC recommends that these new temporary visas be included as a ‘specified subclass of visa’ to enable them to be recognised as an ‘Australian resident’ for the purposes of Special Benefit and, therefore, Crisis Payment. This was supported by stakeholders.⁴⁷ The ALRC considers that together these recommendations will address the concerns raised by the case study above.

Qualifying residence requirements

7.49 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:⁴⁸

- Age Pension (10 years);
- Disability Support Pension (10 years);
- Widow Allowance (two years); and
- Parenting Payment (two years).

7.50 A person may, however, have a ‘qualifying residence exemption’. Generally, refugees and former refugees and their family members have a qualifying residence exemption.⁴⁹ Holders of a visa of a subclass determined by the Minister for FaHCSIA are also exempt for certain payments.⁵⁰ However, exemptions do not extend to Age Pension or Disability Support Pension.

7.51 The purpose of the lengthy 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

47 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; ADFVC, *Submission CFV 105*; WEAVE, *Submission CFV 85*.

48 FaHCSIA, *Social Security Payments Residence Criteria* (2011) <www.fahcsia.gov.au/sa/international/policy/Residence_Criteria> at 12 July 2011.

49 *Social Security Act 1991* (Cth) ss 7(6), 7(6AA).

50 *Ibid* s 7(6AA); *Social Security (Class of Visas—Qualifying Residence Exemption) Determination 2009* (Cth); FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [1.1.Q.35]. 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.

considered necessary to protect Australian Government funds, which come from general revenue.⁵¹

7.52 However, a migrant 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 relationship. The ALRC notes that a person with disability is particularly vulnerable due to dependency on a carer—who may be the person using family violence—and difficulties in accessing services and support.

7.53 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.⁵²

7.54 The 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, for example equipment such as Post-School Options Programs, Home and Community Care and the Program of Appliances for Disabled People.⁵³ The MDAA also noted that the qualifying residence period for Disability Support Pension becomes more complicated if the person is in Australia as a secondary visa holder because the person is dependent on the ‘abusive partner for residence, communication, housing and financial support’.⁵⁴

7.55 Both the Australian Domestic and Family Violence Clearinghouse (ADFVC) and the MDAA supported making the qualifying residence period for Disability Support Pension and Age Pension comparable to other Centrelink social security payments.⁵⁵

7.56 The ALRC is concerned that such an amendment may, however, raise concerns of a two-tier system in that a similar provision does not 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. Similar concerns would arise if any exemptions were to be made available for victims of family violence as, currently, exemptions are provided on the basis of visa class. There is no determination power in the *Social Security Act* to enable a subclass of visa to be exempted from the qualifying residence period for Age Pension or Disability Support Pension. The ALRC notes that this is an area of concern and considers it appropriate that such residence periods be reviewed.

51 FaHCSIA, *Social Security Payments Residence Criteria* (2011) <www.fahcsia.gov.au/sa/international/policy/Residence_Criteria> at 12 July 2011.

52 ADFVC, *Submission CFV 71*.

53 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.

54 Multicultural Disability Advocacy Association, *Submission CFV 60*.

55 ADFVC, *Submission CFV 71*; Multicultural Disability Advocacy Association, *Submission CFV 60*.

Newly Arrived Resident's Waiting Period

7.57 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).⁵⁶ Generally, the '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.

7.58 Crisis Payment does not have a Newly Arrived Resident's Waiting Period.

Exemptions

7.59 In addition to the 'qualifying residence exemption', 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

⁵⁶ 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.

- Australian citizens and their immediate family members, and family members of a permanent resident who have at least two years of residence in Australia.⁵⁷

7.60 Victims of family violence who qualify for a social security payment or entitlement face a barrier in relation to the waiting period—a payability criterion. 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.

7.61 In the study, *Seeking Security*, the 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.⁵⁸

7.62 Some stakeholders suggested that the two year waiting period may be too long for victims of family violence⁵⁹ and recommended that it should either be abolished,⁶⁰ or minimised,⁶¹ in circumstances of family violence.

7.63 To create a waiver of the waiting period in circumstances of family violence would create concerns of a two-tier system and incentivisation and is therefore wider than the ALRC's Terms of Reference. In addition, any recommendation that victims of family violence be waived or exempted from the waiting period would alter the foundation of the residential system for social security—shifting residence requirements from a basis of visa class to one of individual circumstances. Such an amendment would also be systemic across the whole social security system and may lead to other unintended consequences. However, left unchanged, the ALRC recognises that this will leave some victims of family violence unable to access social security payments.

7.64 The ALRC therefore considers that access to Special Benefit is the best avenue to pursue as it is the only payment which is not dependent on visa class for residence requirements and is designed as a safety net payment. Meeting the residential requirements for Special Benefit will also enable a person to access Crisis Payment.

57 FaHCSIA, *Social Security Payments Residence Criteria* (2011) <www.fahcsia.gov.au/sa/international/policy/Residence_Criteria> at 12 July 2011.

58 ADFVC, *Submission CFV 71*.

59 Ibid; WRC (NSW), *Submission CFV 70*; Sole Parents' Union, *Submission CFV 63*; Multicultural Disability Advocacy Association, *Submission CFV 60*; WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*; Council of Single Mothers and their Children (Vic), *Submission CFV 55*.

60 Sole Parents' Union, *Submission CFV 63*; P Eastal and D Emerson-Elliott, *Submission CFV 05*.

61 P Eastal and D Emerson-Elliott, *Submission CFV 05*.

Special Benefit—substantial change in circumstances

7.65 Exemption from the waiting period for Special Benefit is slightly different than for other payments. 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;⁶²
- holds, or is the former holder of, a visa of a subclass exempted from the waiting period;⁶³ 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.

7.66 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.

7.67 However, as of 1 January 2012, holders of Provisional Partner visas,⁶⁴ 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.⁶⁵

7.68 As discussed above, the ALRC makes a recommendation in Chapter 20 to create a new temporary visa for victims of family violence.⁶⁶ To ensure that persons holding this new temporary visa have access to independent financial assistance, the ALRC considers it appropriate to include these new temporary visas as a ‘specified subclass of visa’ that are exempt from the waiting period for Special Benefit.

7.69 The ALRC recognises that victims of family violence who hold other classes of visa may not be able to meet the Australian resident requirement and are not declared under a ‘specified subclass of visa’.

62 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.7.2.20]; [3.7.1.20].

63 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).

64 Temporary Partner visa Subclasses 309, 310, 820 or 826.

65 DHS, *Budget 2011–12: Provisional Partner Visa Holders—Entitlement to Special Benefit* (2011); Social Security and Other Legislation Amendment Bill 2011 (Cth). As part of this measure, an Assurance of Support will no longer be required for some Provisional Partner Visa applicants.

66 Rec 20–3.

7.70 However, the waiting period also does not apply if the person has suffered a ‘substantial change in circumstances beyond his or her control’.⁶⁷ 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 or a medical report.⁶⁸

7.71 The *Guide to Social Security Law* notes that many changes in circumstances apply equally to non-sponsored and sponsored residents.⁶⁹ 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 recommendation to amend the *Guide to Social Security Law* to that effect. This was supported by stakeholders.⁷⁰

7.72 However, care must be taken to ensure that, when 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’.⁷¹ 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’.

7.73 Information about exemptions from the waiting period for Special Benefit on the basis of ‘substantial change in circumstances’ should be provided to customers in accordance with Recommendations 4–2 and 20–6 to ensure that victims of family violence are aware of the exemption.

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

⁶⁷ *Social Security Act 1991* (Cth) s 739A(7).

⁶⁸ FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.7.2.20].

⁶⁹ *Ibid.*, [3.7.2.20].

⁷⁰ National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*; ADFVC, *Submission CFV 105*; WEAVE, *Submission CFV 85*.

⁷¹ WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*.

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

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

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

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

8. Social Security—Determining Capacity to Work

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Summary

8.1 Certain social security payments are available for job seekers.¹ To qualify—and remain qualified—for such payments, the job seeker must satisfy activity and participation requirements outlined in an Employment Pathway Plan (EPP). To determine the content of these requirements for each job seeker, a process is in place to determine his or her capacity to work. The chapter outlines this process and considers barriers arising within the process for victims of family violence.

8.2 First, the chapter examines how the tools and processes used to determine a job seeker’s capacity to work may be improved to protect the safety of victims of family violence. The ALRC makes recommendations to improve the administration and content of these tools and processes such as the Job Seeker Classification Instrument

1 Including Newstart Allowance, Youth Allowance, Special Benefit and Parenting Payment.

(JSCI), Employment Services Assessments (ESAts) and Job Capacity Assessments (JCAs).

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

8.4 Finally, the ALRC makes a number of recommendations to ensure that a person’s experience of family violence is adequately considered in:

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

Determining capacity to work

8.5 Several tools and processes are in place to determine a person’s capacity to work and to recommend the content of a person’s activity test or participation requirements. These include: the JSCI; an ESAt or JCA; and Comprehensive Compliance Assessments (CCA).

8.6 Once a job seeker registers for activity or participation-tested income support, Centrelink, or in some cases a JSA provider, administers a questionnaire—the JSCI—to evaluate any barriers to work.

8.7 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 4.² The stream into which a job seeker is placed affects how much and what type of assistance he or she will receive.

8.8 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 ESAt or JCA. An ESAt or JCA is a more comprehensive assessment of a job seeker’s capacity to work than a JSCI. 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.³ In some circumstances, the assessment indicates whether a person may be eligible for an exemption from these requirements.⁴

2 The JSCI provides a relative and not an absolute measure of job seeker disadvantage in the labour market: DEEWR, *Correspondence* 26 July 2011.

3 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.2.1.10].

4 *Ibid.*, [3.2.1.45], [3.5.1.220].

8.9 When job seekers have been receiving participation payments for 12 months, they are re-assessed in a Stream Services Review, to determine whether they are still placed in the most appropriate stream or whether they should be transferred to the 'work experience phase'.⁵ Additional mechanisms for re-assessment include referral to an ESAt or JCA or, in the context of a JSCI, through a Change of Circumstances Reassessment (COCR).

8.10 When a person registers with Centrelink as an unemployed job seeker, the person will be required to register with a JSA provider of his or her choice unless it is determined that these services are not the most appropriate form of assistance for the job seeker.⁶ In some cases job seekers will register directly with a JSA provider rather than be referred by Centrelink. The DES system operates somewhat differently, as job seekers are usually referred to a DES provider following an ESAt or JCA.

8.11 The focus of the JSA system, as a whole, is on a job seeker's capacity and readiness to work. JSA delivery is provided by approximately 115 contracted employment service providers, known as JSA providers.⁷ 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. They 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 resumés, arranging work experience, or referring the job seeker to appropriate support services.

8.12 Different systems are available for job seekers with disability and Indigenous job seekers. The DES system provides employment services for job seekers with disability. DES comprises approximately 220 providers.⁸ 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.

8.13 Once registered with a provider, the job seeker and provider work cooperatively with Centrelink to negotiate an Employment Pathway Plan (EPP), setting out the job seeker's activity and participation requirements. Exemptions for a defined period, or suspensions from EPPs are available in certain circumstances.

5 An activity test or participation requirement may include a range of things, including a specific work experience activity requirement or an approved program of work for unemployment payment (Work for the Dole).

6 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.2.8.10].

7 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.

8 *Ibid.*, 11.

8.14 If a job seeker is having difficulty meeting activity test or participation requirements, Centrelink will use a CCA to determine the reasons. 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.⁹ JSA providers or Centrelink may also initiate a CCA at any other time they believe a job seeker’s circumstances warrant it.¹⁰

8.15 Possible outcomes from a CCA include: referral to an ESAt or JCA for further assessment; referral to DES; referral to another JSA service stream; a recommendation that the activities or requirements in the job seeker’s EPP be amended; referral to a social worker; no action where there is reasonable explanation for the past failures or recent compliance record is good; or application of a ‘Serious Failure’. The findings of a CCA are also used to inform future decisions about the job seeker’s requirements.

8.16 Stakeholders raised concerns with respect to victims of family violence in relation to many aspects of the process for determining capacity to work, including:

- the administration and content of the JSCI;¹¹
- referral processes to ESAt and JCA assessors;¹²
- the administration, content and outcomes of an ESAt or JCA assessment;¹³
- referral and allocation of JSA providers;¹⁴
- JSA service delivery;¹⁵ and
- the negotiation of, and exemptions from, EPPs.¹⁶

8.17 The ALRC makes a number of recommendations to address these concerns and ultimately, improve the safety of victims of family violence.

Job Seeker Classification Instrument

8.18 The JSCI is a questionnaire used to determine a job seeker’s relative level of disadvantage in the labour market and, therefore, the likely difficulty in obtaining

9 Where a job seeker fails to meet their activity test or participation requirements and does not have a reasonable excuse or, where the failure relates to attendance at an appointment or activity, the job seeker does not give prior notice of a reasonable excuse when they were able to do so, a failure may be applied. FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.1.13.10].

10 Ibid, [3.1.13.70].

11 AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*; M Winter, *Submission CFV 97*; WEAVE, *Submission CFV 92*; ADFVC, *Submission CFV 26*; WEAVE, *Submission CFV 14*; M Winter, *Submission CFV 12*.

12 M Winter, *Submission CFV 97*; WEAVE, *Submission CFV 14*; M Winter, *Submission CFV 12*.

13 AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*; M Winter, *Submission CFV 97*; WEAVE, *Submission CFV 14*; M Winter, *Submission CFV 12*.

14 National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*; M Winter, *Submission CFV 97*; WEAVE, *Submission CFV 92*.

15 WEAVE, *Submission CFV 14*.

16 Ibid; M Winter, *Submission CFV 12*.

employment.¹⁷ 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. 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. DEEWR considers that this streaming process is ‘essential to ensuring that ... resources are preferentially directed to those who are most in need’.¹⁸

8.19 Entry to Stream 4—the stream for the most disadvantaged job seekers—is based on an ESAt or JCA, discussed later in this chapter. There is also a process for reviewing assessments.

8.20 Stakeholders expressed a broad range of concerns about the JSCI, in particular indicating that it does not encourage job seekers to disclose sensitive information, such as family violence.¹⁹ In addition, two key aspects of the JSCI emerged as of central relevance to job seekers in this context:

- 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 when family violence is disclosed, may inadequately recognise the extent to which family violence is a barrier to employment.

Administration of the JSCI

8.21 The ALRC recommends that the JSCI should usually be conducted in private and in person, so that job seekers may freely disclose family violence.

8.22 The JSCI is ordinarily administered by Centrelink when a job seeker first registers for activity-tested income support. JSA or DES providers or ESAt/JCA assessors may also administer the JSCI in certain circumstances.²⁰ The JSCI may be administered in person, or by telephone interview.

8.23 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 accompanied by a nominee, including a family member, advocate, social worker or counsellor for support when the JSCI is conducted.²¹

17 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’: DEEWR, *Review of the Job Seeker Classification Instrument* (2009), app C. The review relied on consultations, qualitative research, cognitive testing of questions, and econometric analysis: DEEWR, *Review of the Job Seeker Classification Instrument* (2009), 5.

18 DEEWR, *Correspondence*, 15 June 2011.

19 ADFVC, *Submission CFV 26*; WEAVE, *Submission CFV 14*; M Winter, *Submission CFV 12*.

20 DEEWR, *Job Seeker Classification Instrument Guidelines, Version 1.6* (2011).

21 *Ibid.*, 9.

8.24 Several stakeholders expressed concerns about the administration of the JSCI,²² in particular suggesting that the way in which the JSCI is administered impedes the identification of sensitive issues, like family violence. Other concerns relate to:

- conducting the JSCI over the telephone, in public areas within Centrelink or in the presence of partners;²³
- the JSCI being premised on self-disclosure; and
- difficulties updating the JSCI.²⁴

8.25 A 2010 report noted the ‘barriers of understanding, communication and trust which are likely to affect a telephone interview’.²⁵ This may have a greater impact on job seekers from non-English speaking backgrounds.

8.26 Reflecting such concerns, the Australian Domestic and Family Violence Clearinghouse (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.²⁶

8.27 However, the DEEWR advised that:

The conduct of interviews by telephone is essential to ensuring the cost-effective delivery 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.²⁷

8.28 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.²⁸

22 WEAVE, *Submission CFV 14*; M Winter, *Submission CFV 12*; ADFVC, *Submission CFV 26*. 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).

23 ADFVC, *Submission CFV 26*.

24 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).

25 J Disney, A Buduls and P Grant, *Impacts of the new Job Seeker Compliance Framework: Report of the Independent Review* (2010), 23.

26 ADFVC, *Submission CFV 26*.

27 DEEWR, *Correspondence*, 15 June 2011.

28 Ibid.

8.29 Further DEEWR advised that the Employment Services Provider and DES Provider Guidelines either already address, or are being updated to address, these concerns.²⁹

8.30 More generally, some stakeholders emphasised the need for training of Centrelink staff administering the JSCI.³⁰

8.31 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. However, the ALRC considers that the administration of the JSCI over the telephone may discourage job seekers from sharing sensitive information. Similarly, the ALRC considers 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.

8.32 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 telephone.

8.33 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, independent advocate or similar. 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 culturally and linguistically diverse job seekers in particular, or which may arise as a result of the presence of the person using family violence or other family member.

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

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

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

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

²⁹ DEEWR, *Submission CFV 130*.

³⁰ Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*.

Content of the JSCI

8.34 The ALRC recommends that the JSCI should include a new family violence category to ensure that the JSCI captures all information relevant to a job seeker's disadvantage in the labour market.

8.35 The JSCI assesses 18 categories of information, or factors. Information about each of the following factors is gathered from a number of sources including the job seeker's record, an ESA/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.³¹

Family violence and the JSCI

8.36 Information about family violence is not collected as a separate category of information. However, as family violence may affect many categories—for example, a job seeker's living circumstances or access to transport—some of these existing factors may indirectly be related to their experiences of family violence. In addition, family violence may be raised as one aspect of a job seeker's 'personal characteristics'. For example, 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.³²

8.37 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 question is voluntary and job seekers can choose not to answer, however administrators are told that they should encourage job seekers to 'fully

31 DEEWR, *Description of JSCI Factors and Points*, 1.

32 DEEWR, *Explanation of the Job Seeker Classification Instrument Questions Advice, Version 1.8* (2011), 16.

disclose their circumstances to ensure they receive the most appropriate services'.³³ The *Explanation of the JSCI Questions Advice* emphasises that factors recorded in response to this category must be relevant to the personal characteristics 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.³⁴

8.38 Stakeholders expressed strong views about the need for the JSCI to consider family violence.³⁵ Women Everywhere Advocating Violence Elimination (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.³⁶

8.39 For example, the ADFVC expressed concern about how information about family violence is sought in the JSCI, and recommended the 'introduction of standard questions for raising family violence issues with clients'.³⁷ Similarly, 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, including the 'care load' of job seekers caring for dependent others.³⁸

It is common for children who have been exposed to violence to have more frequent physical and mental problems which affect their ability to attend childcare and school. Parents who are themselves recovering from violence are also responsible for getting children through nightmare, bedwetting, truancy, self-harming, anxiety and depression. Currently these demands are invisible to the system and vulnerable victims face system-induced problems as a result.³⁹

8.40 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'.⁴⁰ 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:

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

33 Ibid, 22.

34 Ibid, 22, 23.

35 ADFVC, *Submission CFV 26*; WEAVE, *Submission CFV 14*; M Winter, *Submission CFV 12*.

36 WEAVE, *Submission CFV 14*.

37 ADFVC, *Submission CFV 26*.

38 WEAVE, *Submission CFV 14*.

39 WEAVE, *Submission CFV 92*.

40 ADFVC, *Submission CFV 26*.

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.⁴¹

8.41 Stakeholders also emphasised that any questions about family violence should not be considered as universal screening and that clients should be given choice to answer such questions.⁴²

8.42 However, DEEWR expressed the view that due to the relatively small numbers of job seekers reporting family violence, it does not warrant a separate category, but rather should be considered as a ‘sub-category under personal factors’.⁴³

A new family violence category

8.43 The ALRC recommends that a new family violence category should be included in the JSCI. Ensuring that the JSCI captures all relevant information that may affect a job seeker’s disadvantage in the labour market and barriers to work is important to ensure they are placed in an appropriate employment services stream and provided with the necessary support to gain and retain employment. A new family violence category should better elicit information about family violence.

8.44 In creating a new category, consideration should be given to: safety concerns; caring responsibilities for children, particularly those who have experienced or witnessed family violence; and the impact of family violence on a job seeker’s housing, transport and health.

8.45 However, in creating a new category, it should not lead to a ‘medicalisation’ of family violence. This reflects concerns 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.⁴⁴

8.46 It is important that the impact of family violence without necessarily resulting in the categorisation of job seekers into higher streams. While being placed in a higher stream may result in the provision of necessary services or support, the ALRC has some concern about this 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.⁴⁵ In light of these concerns, the ALRC considers that DEEWR should consider the question of the weight or score attached to the new category in the context of the overall JSCI.

41 Ibid. See also R Braaf and I Meyering, *Seeking Security: Promoting Women’s Economic Wellbeing Following Domestic Violence* (2011).

42 AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*.

43 DEEWR, *Submission CFV 130*.

44 See, eg, WEAVE, *Submission CFV 14*; M Winter, *Submission CFV 12*.

45 This concern is linked in part to concerns expressed in relation to the JSA fee structure, however as outlined earlier in this chapter, this issue is beyond the scope of the Terms of Reference.

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

Employment Services Assessments and Job Capacity Assessments

8.47 On 1 July 2011, the JCA program was replaced with the ESAt. JCAs are now largely used for Disability Support Pension claims and reviews and are not primarily employment services driven.⁴⁶

8.48 Like a JCA, an ESAt is used, among other things, to determine a person’s capacity to work and identify barriers to employment.⁴⁷ 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.⁴⁸ In some circumstances, the assessment will indicate whether a person may be eligible for an exemption.⁴⁹ An ESAt will also identify unsuitable activities for a job seeker, such as where work may aggravate a pre-existing illness.⁵⁰

8.49 There are a range of outcomes available as a result of an ESAt. 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 a JSA provider and allocated to services Streams 1, 2 or 3, as determined by their JSCI score. ESAts also recommend activities for EPPs, the use of the Employment Pathway Fund (EPF), and access to services.

8.50 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.
- Non-Medical Condition ESAt—where no medical condition is identified.⁵¹

8.51 Previously, a JCA used Impairment Tables to determine the impact of any medical conditions or disabilities a job seeker has on ability to work and whether the

46 DEEWR, *Correspondence* 26 July 2011.

47 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.2.1.10]; [1.1.J.10].

48 Ibid, [3.2.1.10].

49 Ibid, [3.2.1.45]; [3.5.1.220].

50 Ibid, [1.1.U.55].

51 DEEWR, *Employment Services Assessment* <www.deewr.gov.au/Employment/Programs/Pages/ESAt.aspx> at 14 July 2011.

job seeker can benefit from employment assistance.⁵² JCAs were 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.⁵³ However, as of 1 July 2011, ESAts and JCAs are conducted by health and allied health professionals employed by a single Government provider under the Department of Human Services (DHS) portfolio.⁵⁴ This move to a single Government provider may address some concerns about the experience and consistency of ESAt and JCA assessors.

8.52 Prior to the introduction of ESAts, stakeholders criticised the way JCAs were conducted, arguing, among other things, that there was a need for JCAs to better capture the needs of victims of family violence without treating only the medical manifestations of family violence.⁵⁵ The introduction of ESAts—which introduce a non-medical condition ESAt—may address some of these concerns.

8.53 This section considers:

- whether a ‘significant barrier to work’ under the JSCI should automatically trigger referral to an ESAt or JCA; and
- the ways in which an ESAt or JCA can consider the impact of family violence.

Referral to an ESAt or JCA

8.54 A job seeker will be referred to an ESAt usually 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’.⁵⁶

8.55 Centrelink has primary responsibility for identifying and initiating referrals for an ESAt or JCA for job seekers in Streams 1–3.⁵⁷ 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*.⁵⁸

52 DEEWR, *Correspondence* 26 July 2011; Centrelink, *Information About Assessment Services Fact Sheet* (2011).

53 DHS, *Job Capacity Assessment Review: Summary Paper* (2008), 5, 33.

54 DEEWR, *Employment Services Assessment* <www.deewr.gov.au/Employment/Programs/Pages/ESAt.aspx> at 14 July 2011.

55 WEAVE, *Submission CFV 14*; M Winter, *Submission CFV 12*.

56 DEEWR, *Correspondence*, 15 June 2011.

57 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.

58 DEEWR, *Referral for an Employment Services Assessment Guidelines, Version 1.5* (2011). A job seeker may also be referred for an ESAt or JCA 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 is 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 or employment assistance needs: FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011.

Referral as a ‘significant barrier to work’

8.56 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.⁵⁹ Some stakeholders suggested that family violence should automatically constitute a ‘significant barrier to work’ and therefore result in referral to a JCA.⁶⁰ Other stakeholders suggested that the JCA is ‘inadequate’ in dealing with job seekers who are experiencing family violence.⁶¹

8.57 DEEWR noted that this referral decision is currently made by a Centrelink social worker and that to have an automated referral may lead to resourcing issues.⁶²

8.58 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.

8.59 Stakeholders 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’⁶³ and referral should be an option discussed with the individual job seeker—including the benefits and possible consequences of such a referral.⁶⁴

8.60 Accordingly, the ALRC does not consider it appropriate that family violence automatically constitute a ‘significant barrier to work’. To do so goes against the principle of ‘autonomy/self-agency’ discussed in Chapter 2 and creates a ‘one-size fits all’ model which may have unintended consequences.

ESAt and JCA assessors

8.61 ESAts and JCAs are 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.⁶⁵

8.62 Prior to 1 July 2011, JCA assessors were required to complete online modules in order to be certified to conduct JCAs. The ALRC is not aware how training and education will be conducted under the new system.

8.63 In submissions to this Inquiry, stakeholders expressed concerns about JCA assessors, in particular with respect to their lack of knowledge or understanding of

59 DEEWR, *Description of JSCI Factors and Points*, 13.

60 M Winter, *Submission CFV 97*; WEAVE, *Submission CFV 14*.

61 M Winter, *Submission CFV 12*.

62 DEEWR, *Submission CFV 130*.

63 WEAVE, *Submission CFV 14*.

64 AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*.

65 J Disney, A Buduls and P Grant, *Impacts of the new Job Seeker Compliance Framework: Report of the Independent Review* (2010), 24.

family violence, and their tendency to focus on isolated medical aspects of the job seeker's circumstances rather than conduct the JCA in a more holistic manner.⁶⁶

8.64 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.⁶⁷

8.65 Similarly, PhD candidate Myjenta Winter found there was no consideration of family violence even when women had medical certificates verifying serious mental health conditions because of violence. Winter argued that family violence and sexual assault need to be recognised as having immense impacts on women and children's mental and physical health for years, and contributes to the development of serious illnesses.⁶⁸

8.66 The Australian Association of Social Workers Queensland (AASW (Qld)) and the Welfare Rights Centre Inc Queensland (WRC Inc (Qld)) recommended enhanced training for assessors to be able to assess a victim's readiness to work.⁶⁹ Stakeholders also expressed the view that JCA assessors should have compulsory training in relation to family violence.⁷⁰

8.67 A range of other concerns were expressed in consultations, including the inappropriateness of a JCA in circumstances of family violence, given the often fluctuating impact of family violence on a job seeker's ability to work.

8.68 The ALRC considers the introduction of a Non-Medical ESAt 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, it has yet to be assessed in practice. The ALRC therefore recommends that in any review of the ESAt, DHS should examine the particular impact of the ESAt on people experiencing family violence.

8.69 Referring job seekers who disclose family violence to assessors with particular speciality or experience in family violence may address some of the concerns raised by stakeholders. However, this might require additional resources,⁷¹ increase delays and present difficulties in terms of access to those assessors, particularly in rural and remote areas. In addition, as family violence may be just one barrier and not necessarily a person's primary barrier to work, it would be preferable to stream a job seeker according to their primary barrier—ensuring that secondary barriers are still addressed.

66 See, eg, M Winter, *Submission CFV 12*.

67 WEAVE, *Submission CFV 14*.

68 M Winter, *Submission CFV 97*.

69 AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*.

70 See, eg, WEAVE, *Submission CFV 14*; M Winter, *Submission CFV 12*.

71 DEEWR, *Submission CFV 130*.

8.70 As DHS is now the single provider of all assessors, this may add consistency to the assessment process. However, the ALRC recommends that DHS provide training to assessors to enable them to identify and respond to the concerns of people experiencing family violence.

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

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

JSA, DES and IEP providers

8.71 Once a job seeker is placed in a particular stream, the role of JSA and DES providers is to assist individual job seekers to gain sustainable employment including connecting job seekers to skills development and training opportunities. 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.

8.72 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.

8.73 Integrated Indigenous employment services are also available through the JSA network, in conjunction with the IEP and, in areas with poor labour markets, Community Development Employment Projects.

Employment Services Deeds and the tender process

8.74 JSA and DES delivery is provided by employment service providers who are contracted by DEEWR under Employment Services Deeds due to expire on 30 June 2012. ‘Different versions of the Deed were prepared to reflect the different combination of services’.⁷²

8.75 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 2011–2012 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

72 DEEWR, *Employment Procurement Services* <www.deewr.gov.au/employment/employmentservicesprocurement> at 20 June 2011.

new providers. This mix is designed to maintain the stability of the current model, while ensuring the highest quality employment services for job seekers.⁷³

8.76 These tender processes may provide avenues through which the Government could require providers to consider and address family violence-related issues in this area.

8.77 Concerns have been raised about the structure and operation of the JSA system—in particular 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 issues extend beyond the scope of the Terms of Reference for this Inquiry.

8.78 WEAVE suggested that providers should be required to have policies which commit them to the safety of people attending the service and annual training in best practice in identifying and responding to family violence.⁷⁴

8.79 However, DEEWR considered that the current Deed is very clear on tailoring services to job specific needs—including those who face multiple non-vocational barriers (such as family violence) to employment. However, family violence is not expressly referred to. The ALRC therefore considers it would be beneficial for tender documents to require providers to consider the existence of family violence when tailoring service responses.

8.80 The IEP is separately tendered by DEEWR to support ‘activities that will develop the capacity of employers, Indigenous Australians and their communities to increase opportunities through employment, business and other development activities’.⁷⁵ Assistance is available either directly from DEEWR or through two panels of providers. IEP providers are selected by DEEWR through an open tender process. Panel Guidelines form part of the contract for services purchased by the Department. The ALRC considers that it may be appropriate for tender documents, Panel Guidelines or contracts for IEP services to include an understanding of how family violence can be a barrier to employment for Indigenous Australians.

Training

8.81 The need for training of JSA, DES and IEP provider staff is vital to ensuring that the employment service system is able to respond to and protect job seekers experiencing family violence.

8.82 A number of stakeholders emphasised the need for education and training for JSA providers.⁷⁶ For example, WEAVE suggested that providers should be required to participate in such training

73 DEEWR, *Job Services Australia Industry Information Paper* (2011).

74 WEAVE, *Submission CFV 92*.

75 DEEWR, *Indigenous Employment Program 2009–1012 Program Guidelines*, July 2009.

76 CPSU, *Submission CFV 147*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*; M Winter, *Submission CFV 97*; WEAVE, *Submission CFV 92*.

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 clients' confidence to disclose.⁷⁷

8.83 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'.⁷⁸

8.84 The ALRC considers it is necessary and appropriate that participants in the JSA, DES and IEP systems, in particular provider staff receive consistent training, with a particular focus on the potential effect family violence may have on work capacity and barriers to employment. 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.

8.85 However, DEEWR does not prescribe the training that JSA, DES and IEP providers are required to give to their staff. Rather, providers are contracted to deliver employment services. In addition, JSA and DES providers are committed to observe the Employment Services Code of Practice.⁷⁹ The ALRC therefore recommends that DEEWR require providers to ensure that all JSA, DES and IEP staff receive regular, consistent and targeted training to ensure that the existence of family violence is appropriately and adequately considered.

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

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

⁷⁷ WEAVE, *Submission CFV 14*.

⁷⁸ Northern Rivers Community Legal Centre, *Submission CFV 08*.

⁷⁹ The Code of Practice forms part of the Employment Services Deeds. DEEWR, *Employment Services Deed 2009-2012: SS NEIS* (2009); DEEWR, *Disability Employment Services Deed 2010-2012* (2010).

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| <ul style="list-style-type: none">(a) the nature, features and dynamics of family violence, including its impact on particular job seekers such as Indigenous peoples; those from culturally and linguistically diverse backgrounds; those from lesbian, gay, bisexual, trans and intersex communities; older persons and people with disability.(b) the potential impact of family violence on a job seeker’s capacity to work and barriers to employment;(c) appropriate referral processes; and(d) the availability of support services. |
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Providers—processes and responses

8.86 JSA and DES providers include a range of for-profit and not-for-profit organisations of differing sizes that operate in geographical employment service areas. This section of the chapter outlines how improvements could be made to the processes and responses of providers to enhance the safety of victims of family violence, including:

- 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

8.87 Each JSA provider is given a ‘business share’, the guarantee of being specified percentage of the referrals of job seekers in a particular area.⁸⁰ Upon referral to a provider, 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.⁸¹ 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.

8.88 Job seekers usually remain with the same JSA provider while looking for work, however in some circumstances they may change providers. For example, a job seeker may change provider where the job seeker changes address and cannot access the provider’s office, or requests to change provider in circumstances where the job seeker:

80 J Disney, A Buduls and P Grant, *Impacts of the new Job Seeker Compliance Framework: Report of the Independent Review* (2010), 11.

81 DEEWR, *Request for Tender for Employment Services 2009–2012* (2008) 12.

- is unable to maintain a reasonable and constructive servicing relationship with the provider;
- 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.⁸²

8.89 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.⁸³ For example, WEAVE submitted that, in its experience, ‘victims have gone to [providers] and found their perpetrator in the same seminar’.⁸⁴

8.90 DEEWR suggested that the current arrangements do not preclude a job seeker in such a situation from changing providers. DEEWR advised that a job seeker could change providers where he or she demonstrated that he or she would receive better services from another JSA provider that could enhance employment prospects or could reach a mutual agreement with the current and potential JSA provider.⁸⁵ However, the National Welfare Rights Network (NWRN) submitted that the scenario of a person experiencing family violence being registered with the same JSA or DES provider as the person using family violence does not fit into any of the current circumstances for changing providers.⁸⁶

8.91 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, the victim should be entitled to change JSA or DES providers.

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

Identifying family violence-related safety concerns

8.92 In light of the barriers to disclosure of family violence noted in Chapter 1, there may be a need to identify safety concerns through the JSA or DES systems.⁸⁷ The

82 Ibid. [2.4.3]; DEEWR, *Submission CFV 130*.

83 ADFVC, *Submission CFV 26*; WEAVE, *Submission CFV 14*.

84 WEAVE, *Submission CFV 14*.

85 DEEWR, *Submission CFV 130*.

86 National Welfare Rights Network, *Submission CFV 150*.

87 The ALRC discusses in Chapter 4 the need for Child Support Agency, Family Assistance Office and Centrelink staff to identify family violence-related safety concerns.

ALRC has heard that, in some cases, a job seeker may disclose family violence to a JSA or DES provider, without necessarily having previously disclosed family violence to a government agency such as Centrelink.

8.93 Disclosure of family violence may occur at a number of stages of the JSA or DES provider service delivery, including: formulation of a job seeker's EPP; the administration of the JSCI; in the general course of the provider assisting the job seeker to obtain relevant education or training.

8.94 The primary benefits of by JSA or DES providers promoting the disclosure of 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.

8.95 In the context of the JSA system, WEAVE submitted that providers:

like to argue that domestic violence cases have been screened out so they don't need to do anything ... JSPs [job service providers] 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.⁸⁸

8.96 A range of other stakeholders supported the introduction of some form of risk identification for family violence in the context of the pre-employment system.⁸⁹ For example, the ADFVC recommended 'the introduction of standard questions for raising family violence issues with clients'.⁹⁰

8.97 Instead of 'screening', the AASW (Qld) and WRC Inc (Qld) submitted that clients should be given information about what family violence is and how it may affect them, their options, entitlements, exemptions and pathways to support.⁹¹

8.98 While there was strong support for Centrelink employing risk identification of family violence-related safety concerns, the NWRN raised some notable differences between Centrelink and providers identifying safety concerns. For example,

providers will generally have limited, perhaps even inadequate levels of skills, knowledge and capacity to deal appropriately with many of the critical issues around family violence ... Employment consultants are not social workers, nor do many

88 WEAVE, *Submission CFV 14*.

89 CPSU, *Submission CFV 147*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*; M Winter, *Submission CFV 97*; WEAVE, *Submission CFV 92*; WEAVE, *Submission CFV 14*; M Winter, *Submission CFV 12*.

90 ADFVC, *Submission CFV 26*.

91 AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*.

possess the required skills and expertise that are required to deal with family violence in an appropriate manner.⁹²

8.99 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 the proactive identification of family violence by JSA or DES provider staff, it may facilitate consideration of the impact of family violence on a job seeker, and ultimately assist the job seeker to gain or retain employment. The tender process, Employment Services Deeds or Codes of Practice are areas through which proactive identification of family violence-related safety concerns could be required.

8.100 Regular, consistent and targeted training should be given to provider staff who conduct such risk identification. Monitoring and evaluation should also be built into the process to ensure that screening increases the disclosure of family violence, and that it assists job seekers experiencing family violence and does no harm to vulnerable individuals. Monitoring and evaluation should also be conducted routinely and the outcomes made publicly available.

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

Referrals

8.101 Any identification of family violence-related safety concerns 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.⁹³

8.102 The current response is referral back to a Centrelink social worker. A range of existing DEEWR material given to JSA and DES providers includes information about the appropriate response where a job seeker discloses 'domestic violence, family grief or trauma', in which case

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 being disclosed while the JSCI is being conducted, the JSA provider should complete and submit the JSCI.⁹⁴

92 National Welfare Rights Network, *Submission CFV 150*.

93 WEAVE, *Submission CFV 14*.

94 DEEWR, *Job Seeker Classification Instrument Guidelines, Version 1.6* (2011), 11; DEEWR, *Conducting the Job Seeker Classification Instrument Job Aid* (2011).

8.103 WEAVE commented that there is a low level of awareness among providers regarding the availability of Centrelink social workers.⁹⁵

8.104 Referral to social workers allows job seekers to have their eligibility for exemptions from activity and participation requirements considered and facilitates connections to support services. However, particularly as referral to a Centrelink social worker may lead to a cycle of referrals, the ALRC considers that referral to other expert services should also be made available.

8.105 The ALRC considers that information about such referrals should form part of the training set out in Recommendations 5–2 and 8–7.

Information sharing and privacy

8.106 When employment agencies share information about their clients, particularly information about family violence, they should have strict privacy safeguards.

8.107 Information sharing between 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 creates 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.

8.108 In Chapter 4, the ALRC recommends that DHS should consider developing a ‘safety concerns’ flag to be placed on a customer’s file when family violence-related safety concerns are identified. The ALRC recommends further that, in developing such a flag, it should be shared between relevant DHS programs and other relevant departments or agencies upon the informed consent of the customer.⁹⁶

8.109 The ALRC understands that there are information-sharing protocols and arrangements already in place between some of these agencies and providers⁹⁷ and that, in addition, some information-sharing systems under the Human Services portfolio are being integrated as part of the Service Delivery Reform.⁹⁸ The Employment Services Deeds also contain 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 1988* (Cth), as if they were an agency.⁹⁹

8.110 However, in considering the sharing of personal information about job seekers between agencies and providers, there is a need to ensure that information is shared when it will assist the job seeker and that privacy concerns associated with such

95 National Welfare Rights Network, *Submission CFV 150*.

96 Rec 4–4.

97 DEEWR, *Submission CFV 130*—certain information is shared on the Employment Services System (ESS)—a program providing a secure electronic environment that allows providers to manage their job seekers and case loads. Due to privacy legislation, not all information is shared across Centrelink and the ESS.

98 See Ch 4.

99 See, eg, DEEWR, *Employment Services Deed 2009–2012: SS NEIS* (2009) cl 5C; DEEWR, *Disability Employment Services Deed 2010–2012* (2010) cl 3C.

sharing are addressed. For example, when sensitive personal information, such as family violence, is disclosed, this may raise issues of consent.

8.111 Stakeholders expressed particular concern about ensuring the confidentiality of job seeker information. WEAVE 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?’¹⁰⁰

8.112 The NSW Women’s Refuge Movement raised one circumstance where a person’s safety was compromised by a provider:

The woman, who was being accommodated by one of our member refuges previous [provider] had disclosed to the perpetrator’s sister not only the town the woman had moved to but also that she was staying at the refuge. The perpetrator then proceeded to make threats (involving the use of firearms) against the woman’s safety and the safety of the refuge staff on numerous occasions. The woman has since left Australia as a result of the very real threat to her safety.¹⁰¹

8.113 Stakeholders agreed that appropriate privacy safeguards should be in place with any information-sharing arrangement.¹⁰² A balance must be struck between ensuring information is shared when 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.¹⁰³

8.114 The ALRC does not specify the exact content or type of information-sharing arrangements that should exist. However, Centrelink, DEEWR, JSA, DES, IEP providers and ESAt and JCA assessors—through DHS—should 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. The information-sharing arrangements between DEEWR, Centrelink, DHS, the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), the Family Assistance Office and the Child Support Agency FAO and CSA, referred to in Chapter 4, are relevant to the arrangements made or developed in this context.

8.115 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* as well as any associated requirements under Employment Services Deeds.

100 WEAVE, *Submission CFV 14*.

101 NSW Women’s Refuge Movement Working Party, *Submission CFV 120*.

102 National Welfare Rights Network, *Submission CFV 150*; Office of the Australian Information Commissioner, *Submission CFV 142*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*; NSW Women’s Refuge Movement Working Party, *Submission CFV 120*; M Winter, *Submission CFV 97*; WEAVE, *Submission CFV 92*.

103 Office of the Australian Information Commissioner, *Submission CFV 142*.

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

Systems or programs for job seekers experiencing family violence

8.116 There are a number of other system responses to disclosures of family violence, including potential access by providers to funds under the 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.¹⁰⁴

8.117 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. However, the ALRC understands that some JSA providers have measures in place, on an informal basis, to assist job seekers experiencing family violence to gain and retain employment.

8.118 The ALRC suggested in the *Family Violence—Commonwealth Laws*, ALRC Discussion Paper 76 (2011) (Discussion Paper) 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 envisaged 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 person using family violence attending the workplace.¹⁰⁵

8.119 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 particular, the ADFVC suggested the development of a targeted job placement program that

104 DEEWR, *Job Services Australia: Stream Services* <www.deewr.gov.au/Employment/JSA/EmploymentServices/Pages/streamServices.aspx> at 4 July 2011.

105 Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), Proposal 15–3.

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.¹⁰⁶

8.120 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’.¹⁰⁷

8.121 The NWRN considered such arrangements might be beneficial, but noted that specialist providers may not be located in sufficient numbers and locations.¹⁰⁸ Other stakeholders disagreed with such a proposal, claiming that such arrangements would further stigmatise, isolate and marginalise people,¹⁰⁹ and may lead to them being ‘stuck in low paid, unstable jobs’ which have a detrimental impact on their physical and mental health.¹¹⁰

8.122 In light of concerns of stakeholders, the ALRC does not recommend specialist programs and systems for job seekers experiencing family violence. The ALRC considers that an individual tailored approach—such as accessing the EPF—would be a more appropriate response.

Activity tests, participation requirements and EPPs

8.123 Job seekers receiving Newstart Allowance, Youth Allowance, Special Benefit and Parenting Payment have an activity test or participation requirements to qualify—and remain qualified—for the payment.¹¹¹ 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 become ready for work in the future’.¹¹² Similarly, 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’.¹¹³

8.124 Generally, job seekers must be ‘actively seeking and willing to undertake any paid work that is not unsuitable’.¹¹⁴ This usually requires job search, paid or voluntary work, study or other activities.¹¹⁵ Different requirements may apply for job seekers

106 ADFVC, *Submission CFV 26*.

107 WEAVE, *Submission CFV 14*.

108 National Welfare Rights Network, *Submission CFV 150*.

109 AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*; WEAVE, *Submission CFV 92*.

110 M Winter, *Submission CFV 97*.

111 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [1.1.A.40].

112 *Ibid.*, [1.1.A.40].

113 *Ibid.*, [3.5.1.160].

114 *Ibid.*, [3.2.9.20]; [1.1.U.55].

115 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 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. *Ibid.*, [3.2.9.10]; [3.2.8.20].

who have a partial capacity to work, early school leavers, those who are principal carers, and those aged 55 or over.¹¹⁶

8.125 A person who does not meet the activity test or participation requirements may have a ‘failure’ imposed, which may affect their social security payments.

Employment Pathway Plans

8.126 All activities and participation requirements are contained in an EPP.¹¹⁷ An EPP is an individual agreement negotiated between a customer and his or her job services provider or Centrelink. Any activity in an EPP must improve the person’s skills and experience and, therefore, prospects of obtaining suitable paid work, assist the person in seeking suitable work, and if the job seeker is an early school leaver, be exclusively education or training.¹¹⁸

8.127 JSA and DES providers 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.¹¹⁹

Tailoring an EPP

8.128 The ALRC recommends that Centrelink customer service advisers should expressly consider family violence when tailoring an individual job seeker’s EPP.

8.129 The content of an EPP varies for different payments.¹²⁰ 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.¹²¹ 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.¹²²

8.130 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,

116 *Social Security Act 1991* (Cth) s16B; FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.2.9.20].

117 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.2.9.20]; [3.5.1.160]; [3.2.8.10].

118 *Ibid.*, [3.2.8.10].

119 *Ibid.*, [3.2.8.30].

120 *Ibid.*, [3.2.8.10]; [3.2.9]; [3.5.1 PP].

121 *Ibid.*, [3.2.8.30].

122 *Ibid.*, [1.1.E.103].

- 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.¹²³

8.131 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.¹²⁴

8.132 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.¹²⁵

8.133 Stakeholders expressed concerns that EPPs are given to victims of family violence ‘off the shelf’, lack genuine negotiation, have limited flexibility, and do not adequately reflect the person’s individual circumstances or the existence of family violence.¹²⁶ 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 social security payments.

8.134 The ALRC considers that, in recognition of the theme of self-agency discussed in Chapter 2, a genuine conversation should take place between the job services provider or Centrelink and the customer to ensure that the content of an EPP connects the job seeker with requisite services, training and work opportunities. In particular, the ALRC recommends 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. This was supported by stakeholders.¹²⁷

8.135 JSA and DES providers may also set the content of a job seeker’s EPP. Recommendations 8–6 and 8–7 should ensure that family violence is better considered when a provider is tailoring a job seeker’s EPP.

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

123 Ibid, [3.2.8.50]; [3.5.1.160].

124 Ibid, [3.2.8.50].

125 Ibid, [3.2.8.10].

126 National Welfare Rights Network, *Submission CFV 150*; M Winter, *Submission CFV 97*; WRC (NSW), *Submission CFV 70*.

127 National Welfare Rights Network, *Submission CFV 150*; DEEWR, *Submission CFV 130*; ADFVC, *Submission CFV 105*; M Winter, *Submission CFV 97*; WEAVE, *Submission CFV 85*.

Exemptions

8.136 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, when:

- 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;¹²⁸
- 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;¹²⁹ or
- there are ‘special circumstances’ beyond the person’s control and it would be unreasonable to expect compliance.¹³⁰

8.137 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’;¹³¹ 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.¹³²

8.138 In determining whether a person is eligible for an exemption on these grounds, primary regard is to be given to a Centrelink social worker’s assessment.¹³³

8.139 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.¹³⁴

8.140 Stakeholders raised concerns about awareness of exemptions and extensions to exemptions by both Centrelink staff and customers, the accessibility of exemptions, and the adequacy of the length of exemptions.

128 *Social Security Act 1991* (Cth) ss 501E, 502C, 542, 542F, 544E, 602B, 607C.

129 *Social Security Act 1991* (Cth) ss 501E, 502C, 501E, 542, 542F, 544E, 602B, 607C; *Social Security (Special Circumstances Regarding a Person’s Family) (DEWR) Determination 2006* (Cth).

130 *Social Security Act 1991* (Cth) ss 542H, 603A.

131 *Social Security (Special Circumstances Regarding a Person’s Family) (DEWR) Determination 2006 (Cth)*; FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.5.1.280].

132 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.7.5.30]; [3.2.11.40]; [3.5.1.250].

133 *Ibid.*, [3.5.1.280]; [3.2.11.70].

134 *Ibid.*, [3.2.11.70]; [3.5.1.280].

Accessibility of exemptions

8.141 Stakeholders raised concerns about the lack of knowledge by customers, Centrelink staff and JSA providers in relation to exemptions—and extensions to exemptions—from activity tests, participation requirements and EPPs.¹³⁵ Customers and JSA members are not routinely advised and are poorly informed about exemptions from job seeker participation requirements.¹³⁶ WEAVE, for example, reported 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.¹³⁷

8.142 On the other hand, the WRC Inc (Qld) 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.¹³⁸

8.143 The National Council of Single Mothers and their Children (NCSMC) and the NWRN noted with concern the low level of exemptions provided to people experiencing family violence in light of the fact that one in three women experience physical violence and about one in five women experience sexual violence in their lifetime.¹³⁹

8.144 In order to address these concerns, stakeholders recommended training for Centrelink and JSA staff and enhanced information provision to customers about exemptions and extensions.¹⁴⁰

8.145 The ALRC therefore recommends that information about exemptions and extensions should be included as part of the information provided to all customers as set out in Recommendation 4–2. This allows individuals to choose whether they wish to apply for an exemption. 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. It is important that the social security system does not presume a ‘one-size-

135 ADFVC, *Submission CFV 71*; WRC (NSW), *Submission CFV 70*; WRC Inc (Qld), *Submission CFV 66*; Commonwealth Ombudsman, *Submission CFV 62*; Council of Single Mothers and their Children (Vic), *Submission CFV 55*; M Winter, *Submission CFV 51*; M Winter, *Submission CFV 12*.

136 ADFVC, *Submission CFV 71*; WEAVE, *Submission CFV 14*.

137 WEAVE, *Submission CFV 14*.

138 WRC Inc (Qld), *Submission CFV 66*.

139 According to data provided to Senate Estimates questions on notice in March 2011, 61,590 social security recipients were exempt from the activity test for a variety of reasons. The main reason was temporary illness or injury (62%). Domestic violence and relationship breakdowns accounted for just 0.086%. National Welfare Rights Network, *Submission CFV 150*; National Council of Single Mothers and their Children, *Submission CFV 119*; *Debates Senate—Education, Employment and Workplace Relations Committee*, 31 May 2011, 22–29.

140 ADFVC, *Submission CFV 71*; Council of Single Mothers and their Children (Vic), *Submission CFV 55*; M Winter, *Submission CFV 12*.

fits-all’ response, nor assume that the system knows what is best for an individual’s circumstances.

Length of exemption periods

8.146 The ALRC considers that DEEWR should review the length, 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.

8.147 Stakeholders raised concerns about the length of exemption periods available for victims of family violence. Some suggested that the exemption period be extended to reflect more accurately the demands on people who are experiencing or leaving family violence.¹⁴¹ Some stakeholders noted anecdotally that exemptions are rarely granted for the full 16 weeks,¹⁴² 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.¹⁴³

8.148 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.¹⁴⁴

8.149 Winter argued further that the ‘current policy focuses only on the separation point and needs to acknowledge the continuance of post-separation violence’.¹⁴⁵

8.150 The ADFVC recommended the exemption be extended to at least six months,¹⁴⁶ while others recommended a 12 month exemption for principal carers in line with the recommendations of the Participation Review Taskforce.¹⁴⁷

8.151 Winter submitted that ‘[m]ostly principal carers are denied exemptions for caring for children who have experienced violence’¹⁴⁸ and that ‘[t]he current exemptions do not acknowledge violence against children. Principal carers of children

141 National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*; ADFVC, *Submission CFV 105*; M Winter, *Submission CFV 97*; ADFVC, *Submission CFV 71*; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*; Council of Single Mothers and their Children (Vic), *Submission CFV 55*; M Winter, *Submission CFV 51*.

142 M Winter, *Submission CFV 51*.

143 WEAVE, *Submission CFV 14*.

144 M Winter, *Submission CFV 12*.

145 M Winter, *Submission CFV 97*.

146 ADFVC, *Submission CFV 71*.

147 M Winter, *Submission CFV 97*; M Winter, *Submission CFV 51*. See Participation Review Taskforce, *Participation Review Taskforce Report* (2008), Australian Government.

148 M Winter, *Submission CFV 12*.

who have been abused are only eligible for a maximum 13 week special circumstances exemption'.¹⁴⁹

8.152 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'.¹⁵⁰

8.153 However, DEEWR considered that sufficient flexibility already exists in policy to enable an adequate length of exemption.¹⁵¹

8.154 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. Winter disagreed, stating that victims are often not referred to other support mechanisms.¹⁵²

8.155 There are also different exemption periods that are available to principal carers than to other social security recipients. In order to ensure consistency it may be necessary that the length of exemption available to all victims of family violence be the same—that is, 16 weeks.

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

Moving to an area of lower employment prospects

8.156 Unemployment payments are designed as a safety net 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.¹⁵³ Moving to areas of high unemployment can disadvantage job seekers and limit their opportunities for work.¹⁵⁴ 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.

149 M Winter, *Submission CFV 51*.

150 WEAVE, *Submission CFV 14*.

151 DEEWR, *Submission CFV 130*.

152 M Winter, *Submission CFV 97*.

153 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.2.1.35].

154 *Ibid*, [3.2.1.35].

8.157 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’.¹⁵⁵

8.158 While DEEWR considered that current policy was sufficiently flexible to allow exemptions to be granted to victims of family violence,¹⁵⁶ stakeholders indicated that customers were generally not aware of the types of exemptions available and that family violence is often not recognised as an ‘extreme circumstance’.¹⁵⁷ Stakeholders recommended that information about it be provided to victims of family violence.¹⁵⁸

8.159 The ALRC considers that the current definition of ‘extreme circumstance’ in the *Guide to Social Security Law* is sufficiently flexible to allow exemptions to be granted to victims of family violence. However, the ALRC recommends that information about the exemption should be provided as part of the information provided to customers in accordance with Recommendation 4–2. Further, training about the exemption should be provided to relevant staff in accordance with Recommendation 5–2.

Unemployment Non-Payment Period

8.160 The ALRC recommends that DEEWR review the classes of persons who can have an Unemployment Non-Payment Period ended if serving that period would result in financial hardship.¹⁵⁹

8.161 An Unemployment Non-Payment Period—a 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.¹⁶⁰ 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.¹⁶¹ 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’.¹⁶² Access to safe, secure and adequate housing also means having a right to remain, or a reasonable expectation to remain, in their accommodation.¹⁶³

155 *Social Security Act 1991* (Cth) ss 553B, 634, 745N.

156 DEEWR, *Submission CFV 130*.

157 National Welfare Rights Network, *Submission CFV 150*; WEAVE, *Submission CFV 85*.

158 AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*; ADFVC, *Submission CFV 105*.

159 *Social Security (Administration) (Ending Unemployment Non-Payment Periods--Classes of Persons) (DEEWR) Specification (No 1) 2009* (Cth).

160 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.1.13.80].

161 *Ibid.*, [3.1.13.80]; *Social Security (Administration) (Ending Unemployment Non-Payment Periods--Classes of Persons) (DEEWR) Specification (No 1) 2009* (Cth).

162 *Social Security (Administration) (Ending Unemployment Non-Payment Periods--Classes of Persons) (DEEWR) Specification (No 1) 2009* (Cth); FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.1.13.80].

163 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.1.13.80].

8.162 The NWRN stated that, although the current guidelines may be taken to include victims of family violence, ‘this would be much clearer if the instrument and the *Guide to Social Security Law* referred to family violence expressly as a circumstance in which an unemployment non-payment period should be ended’.¹⁶⁴

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

Reasonable excuse

8.163 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.¹⁶⁵

8.164 Failure to comply with such administrative requirements can lead to non-payment, unless the person can demonstrate a ‘reasonable excuse’.¹⁶⁶ 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’ and a penalty may apply. Such penalties may apply to Newstart Allowance, Youth Allowance, Parenting Payment, Austudy and Special Benefit.¹⁶⁷ Penalties range from a reduction in the person’s payment, to non-payment for eight weeks.¹⁶⁸

8.165 In the context of ‘reasonable excuse’, the *Guide to Social Security Law* currently refers to ‘domestic violence’ as a criminal offence.¹⁶⁹ 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. This may mean that a victim of family violence has their payments suspended and cannot access independent financial assistance.

164 National Welfare Rights Network, *Submission CFV 150*.

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

166 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.1.13.90].

167 *Social Security Act 1991* (Cth) ss 500J, 550, 550B, 572A, 576A, 615, 631, 745H.

168 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.1.13.10].

169 *Ibid.*, [3.1.13.90].

8.166 The ALRC therefore considers that the *Guide to Social Security Law* should expressly refer to family violence as a ‘reasonable excuse’ to ensure that the full range of violent conduct is included. This was supported by submissions to the Discussion Paper.¹⁷⁰ DEEWR noted that this already occurs in practice but indicated a willingness to review the description of family violence under the reasonable excuse provisions in the *Guide to Social Security Law*.¹⁷¹ This is complemented by Recommendations 3–1 and 3–2 which propose a broad definition of family violence for the purposes of social security law.

8.167 In addition, the ALRC is concerned about the lack of knowledge about the ‘reasonable excuse’ provisions among victims of family violence,¹⁷² 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 Recommendation 4–8.

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

170 National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*; DEEWR, *Submission CFV 130*; ADFVC, *Submission CFV 105*; M Winter, *Submission CFV 97*; WEAVE, *Submission CFV 85*.

171 DEEWR, *Submission CFV 130*.

172 Commonwealth Ombudsman, *Submission CFV 62*.

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

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Summary

9.1 This chapter considers mechanisms that are built into social security law and practice to assist victims of family violence, and others. These mechanisms include:

- Crisis Payment;
- urgent payments; and
- nominee arrangements.

9.2 In particular, the ALRC considers a number of barriers for victims of family violence in accessing Crisis Payment and urgent payments and makes recommendations to overcome them to provide better protection for victims of family violence—including removing the requirement for Crisis Payment that either the victim or the person using family violence must have left the ‘home’.

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

Access to Crisis Payment

9.4 ‘Crisis Payment’ is a one-off payment, equivalent to one week of a person’s eligible fortnightly social security 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.

9.5 There may be people who have experienced, or are experiencing, family violence but are unable to access Crisis Payment for a range of reasons. Overall, stakeholders agreed that there needed to be more information available to customers about Crisis Payment.¹ The ALRC therefore recommends that information about Crisis Payment be provided to customers, in accordance with Recommendation 4–2.

9.6 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;
- the nexus with the home and the corresponding definition of ‘extreme circumstance’; and
- the seven day claim period.

Requirement to be on, or eligible for, income support

9.7 Due to the nature of Crisis Payment as an emergency payment, the ALRC recommends that the Australian Government consider making Crisis Payment available to those in severe financial hardship, without the additional need to be on, or eligible for, income support. The ALRC considers that this would address concerns that some victims of family violence who are in severe financial hardship are unable to access Crisis Payment. The criterion of severe financial hardship could still be maintained.²

9.8 Crisis Payment requires an individual either to be currently in receipt of, or to be eligible for, income support. This requirement can limit the accessibility of Crisis Payment for victims of family violence. For example, 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’.³

1 ADFVC, *Submission CFV 71*; WRC Inc (Qld), *Submission CFV 66*; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*; Commonwealth Ombudsman, *Submission CFV 62*; WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*; Council of Single Mothers and their Children (Vic), *Submission CFV 55*; Homeless Persons’ Legal Service, *Submission CFV 40*.

2 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.7.4.10].

3 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*.

9.9 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.⁴ However, the Department of Families, Community Services and Indigenous Affairs (FaHCSIA) did not support such an amendment.⁵

9.10 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 who have no independent income.⁶ 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’.⁷

9.11 This requirement may also limit the accessibility of Crisis Payment for those seeking it upon release from gaol or psychiatric confinement;⁸ humanitarian entrants;⁹ or other extreme circumstances forcing departure from home such as a person’s house being burnt down.¹⁰

9.12 If such an amendment were made to Crisis Payment for family violence, and not for other circumstances in which Crisis Payment is available, it may lead to a two-tiered structure for Crisis Payment. While similar problems may be encountered with other categories of Crisis Payment, it is beyond the ALRC’s Terms of Reference to make recommendations of general application. However, amending other categories may help prevent family violence—improvements to Crisis Payment for those exiting prison may mean that they are ‘less likely to fall into old behaviours of being violent towards their former or current partners’.¹¹

Why not access Special Benefit instead?

9.13 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 are unable to earn a sufficient livelihood for themselves and their dependants.¹² One criterion for qualification is that a person is unable to receive any other social security pension or benefit.¹³ This may mean that a person who is experiencing family violence could access Special Benefit where they do not qualify for Crisis Payment.

4 Confidential, *Submission CFV 165*; Good Shepherd Youth & Family Service, *Submission CFV 132*; ADFVC, *Submission CFV 71*; WRC (NSW), *Submission CFV 70*; WRC Inc (Qld), *Submission CFV 66*; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*; WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*; Homeless Persons’ Legal Service, *Submission CFV 40*.

5 FaHCSIA, *Submission CFV 162*.

6 WRC Inc (Qld), *Submission CFV 66*.

7 ADFVC, *Submission CFV 71*.

8 *Social Security Act 1991* (Cth) s 1061JG.

9 *Ibid* s 1061JI.

10 *Ibid* s 1061JH.

11 WRC (NSW), *Submission CFV 70*.

12 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [1.2.6.10].

13 *Ibid*, [1.2.6.10].

9.14 However, as discussed in Chapter 7, there are concerns about residential requirements for Special Benefit. There are a number of additional concerns about access to Special Benefit which were raised by the National Welfare Rights Network (NWRN).¹⁴ However, to address these broad concerns would go beyond the ALRC's Terms of Reference as they would have an impact on more than just victims of family violence.

Nexus with the 'home'

9.15 Crisis Payment for family violence is only available where either the victim of family violence leaves the 'home', or the person using family violence is removed from, or leaves, the 'home'.¹⁵ This requirement poses difficulties for victims of family violence in accessing Crisis Payment. For example, a person's home may not fit within the relevant definition of 'home'; the violence may occur post-separation; or a person may not be able to leave the violent home without access to independent financial assistance such as Crisis Payment.

9.16 In light of these difficulties, the ALRC recommends that the *Social Security Act* be amended to remove the nexus to the home requirement. The ALRC considers it more appropriate that a person be 'subject to' or 'experiencing' family violence rather than requiring the victim of family violence or the person using family violence to have left the home. The advantage of such an amendment is that it reflects the nature of the violence rather than focusing on the relationship or where the violence occurs. This received strong stakeholder support.¹⁶

What is the 'nexus with the home' requirement?

9.17 For victims of family violence to be able to access Crisis Payment, one of the following circumstances must apply. 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'.¹⁷ The claiming period begins when the person, having left home, decides that he or she cannot return home as a result of the 'extreme circumstance'.¹⁸

9.18 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

14 National Welfare Rights Network, *Submission CFV 150*.

15 *Social Security Act 1991* (Cth) ss 1061JH, 1061JHA.

16 Confidential, *Submission CFV 165*; National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*; Good Shepherd Youth & Family Service, *Submission CFV 132*; ADFVC, *Submission CFV 105*; Homeless Persons' Legal Service, *Submission CFV 95*; WEAVE, *Submission CFV 85*.

17 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.7.4.20].

18 *Social Security Act 1991* (Cth) s 1061JH; FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.7.4.20].

family violence actually lived with the victim in the home immediately before being removed. The claiming period begins when the family member leaves.¹⁹

9.19 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 moored boat. A ‘home’ does not include a refuge, overnight hostel, ‘squat’ or other temporary accommodation.²⁰

What concerns are raised due to this requirement?

9.20 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.²¹ In particular, stakeholders identified the following scenarios that may affect the safety of a victim of family violence.

9.21 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.²²

9.22 Secondly, although a person may have been forced to leave a 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 tracks him or her to the new home.²³ As noted in one submission, ‘[p]ost separation violence is a very common and serious form of family violence’.²⁴

9.23 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.²⁵ Similarly, the North Australian Aboriginal Justice Agency (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.²⁶

19 *Social Security Act 1991* (Cth) s1061JHA; FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.7.4.25].

20 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.7.4.25].

21 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*; Commonwealth Ombudsman, *Submission CFV 62*.

22 Commonwealth Ombudsman, *Submission CFV 62*.

23 *Ibid.*

24 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*.

25 Commonwealth Ombudsman, *Submission CFV 62*.

26 North Australian Aboriginal Justice Agency, *Submission CFV 73*.

9.24 Another example given by the Commonwealth Ombudsman is set out in the following case study:²⁷

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.

9.25 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'.²⁸

9.26 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. Similarly, a person with disability who is a victim of family violence may be unable to leave the home due to modifications that have been made to the home that are essential for daily life.

9.27 Accordingly, the ALRC recommends that the *Social Security Act* be amended to remove the nexus with the home requirement for Crisis Payment. The ALRC notes that this may lead to an unintended consequence whereby the person using family violence can then use economic abuse against the victim to access the money received through Crisis Payment as they may still be under the same roof. However, due to instances of post-separation violence—including economic abuse—this could occur regardless of this amendment.

Claim period for Crisis Payment

9.28 The *Social Security Act* requires that claims for Crisis Payment be made within seven days of an 'extreme circumstance'.²⁹ The ALRC is concerned that the seven day claim period is too short and may operate to restrict access to Crisis Payment for victims of family violence where it is applied too strictly. In addition, a person experiencing family violence may not reach a 'crisis' point until his or her finances have been exhausted. This may be longer than seven days. The ALRC therefore recommends that the Australian Government should review the claim period and the point at which the claiming period begins, to allow sufficient time to claim.

27 Commonwealth Ombudsman, *Submission CFV 62*.

28 Sole Parents' Union, *Submission CFV 63*.

29 *Social Security Act 1991* (Cth) ss 1061JH, 1061JHA.

9.29 While FaHCSIA did not support the proposal to review the seven day claim period,³⁰ it was supported by most stakeholders.³¹ Most stakeholders submitted that the current claim period of seven days was too short.³² 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:

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 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.'³³

9.30 The Australian Association of Social Workers Queensland (AASW (Qld)) and the Welfare Rights Centre Inc Queensland (WRC Inc (Qld)) recommended that the claim period be extended to 13 weeks,³⁴ while the NWRN suggested it should be increased to 21 days.³⁵ The ADFVC recommended extending the period to six months.³⁶

9.31 The ALRC recognises that this recommendation, if implemented, may create a two-tier system for other circumstances in which Crisis Payment is available. However, revising what may constitute an 'extreme circumstance' for Crisis Payment for family violence may address this concern. For example, an 'extreme circumstance'—and therefore the claiming period—may occur when a victim exhausts their finances due to family violence or requires independent financial assistance to leave a violent relationship.

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

30 FaHCSIA, *Submission CFV 162*.

31 Confidential, *Submission CFV 165*; National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*; ADFVC, *Submission CFV 105*; Homeless Persons' Legal Service, *Submission CFV 95*; WEAVE, *Submission CFV 85*.

32 ADFVC, *Submission CFV 71*; WRC (NSW), *Submission CFV 70*; WRC Inc (Qld), *Submission CFV 66*; WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*; Council of Single Mothers and their Children (Vic), *Submission CFV 55*; Homeless Persons' Legal Service, *Submission CFV 40*.

33 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*.

34 AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*.

35 National Welfare Rights Network, *Submission CFV 150*; WRC (NSW), *Submission CFV 70*.

36 ADFVC, *Submission CFV 71*.

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

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

Urgent payments

9.32 Where a social security recipient is in severe financial hardship due to ‘exceptional and unforeseen circumstances’, an urgent payment of the person’s next fortnightly payment may be made.³⁷ ‘Exceptional and unforeseen circumstances’ are stated to include removal expenses or bond money, where relocation becomes necessary, such as ‘family breakdown’ and separation.³⁸ The *Guide to Social Security Law* does not expressly refer to family violence as an ‘exceptional and unforeseen circumstance’. Urgent payments result in a lower subsequent payment on the recipient’s usual payment delivery day.

9.33 Although family violence may be considered as ‘family breakdown’, there is an overarching concern that victims of family violence may be refused an urgent payment merely because the family violence is ‘foreseen’—‘[p]eople have been denied urgent payments in cases where they could easily foresee the violence occurring’.³⁹

9.34 The ALRC considers it would be constructive to amend the *Guide to Social Security Law* expressly to refer to family violence as a separate example of a 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.

9.35 As an alternative to listing family violence as a separate circumstance, the NWRN suggested that the word ‘unforeseen’ be removed as a requirement.⁴⁰ However, such a recommendation is beyond the Terms of Reference, as it would affect all circumstances in which an urgent payment might be available.

37 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [8.4.2.10].

38 Ibid, [8.4.2.10].

39 WRC Inc (Qld), *Submission CFV 66*.

40 National Welfare Rights Network, *Submission CFV 150*.

9.36 The Commonwealth 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, 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’.⁴¹

9.37 In response to such concerns, the ALRC recommends 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.

9.38 These recommendations were supported by most stakeholders who responded to these issues.⁴² Community and Public Sector Union (CPSU) members however cautioned that there is a ‘big risk’ in urgent payments:

Advancing people’s payment only means that on their normal ‘pay day’ they receive less than usual which instead of helping can exacerbate the problem.⁴³

9.39 However, the ALRC considers that the requirement to demonstrate severe financial hardship in addition to family violence should be sufficient to address this concern. In addition, the ALRC notes that persons who disclose family violence would be referred to a Centrelink social worker who would be able to discuss such issues with the customer. The recommendations made in Chapter 4 regarding the provision of information and referral to support services for victims of family violence complements this.

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

41 Commonwealth Ombudsman, *Submission CFV 62*.

42 National Legal Aid, *Submission CFV 164*; FaHCSIA, *Submission CFV 162*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*; ADFVC, *Submission CFV 105*; Homeless Persons’ Legal Service, *Submission CFV 95*; WEAVE, *Submission CFV 85*; ADFVC, *Submission CFV 71*; WRC (NSW), *Submission CFV 70*; WRC Inc (Qld), *Submission CFV 66*; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*; Commonwealth Ombudsman, *Submission CFV 62*; WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*; Homeless Persons’ Legal Service, *Submission CFV 40*; P Eastale and D Emerson-Elliott, *Submission CFV 05*.

43 CPSU, *Submission CFV 147*.

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

Nominee arrangements

9.40 Part 3A of the *Social Security (Administration) Act 1999* (Cth) provides for the appointment of nominees for both correspondence and payment of social security.⁴⁴ 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.⁴⁵ For victims of family violence, nominee arrangements can be useful for protecting their income support when they are in transitory accommodation or have no fixed address.

9.41 However, there is a potential for economic abuse of the principal by the nominee. 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’,⁴⁶ some stakeholders raised concerns about the appropriateness, and level of knowledge, of nominee arrangements among nominees and principals. Stakeholders also raised concerns about:

- safeguards to determine a person’s suitability and capacity to fulfil the requirements of a nominee;⁴⁷
- a lack of recognition of other legal forms of authority,⁴⁸ which may create inconsistencies and confusion;⁴⁹
- the lack of review and assessment as to whether the nominee arrangement is in the principal’s best interest or entered into willingly;⁵⁰ and
- lack of penalties attached to the duties of a nominee.⁵¹

44 *Social Security (Administration) Act 1999* (Cth) ss 123B, 123C.

45 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008), [70.96].

46 Elder Abuse Prevention Unit, Older Person’s Programs, Lifeline Community Care Queensland, *Submission CFV 77*.

47 *Ibid*; WRC (NSW), *Submission CFV 70*.

48 Commonwealth Ombudsman, *Submission CFV 62*.

49 WRC (NSW), *Submission CFV 70*.

50 Commonwealth Ombudsman, *Submission CFV 62*. 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.

51 Elder Abuse Prevention Unit, Older Person’s Programs, Lifeline Community Care Queensland, *Submission CFV 77*. 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. 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.

9.42 Not all nominees will be a family member of the principal. Therefore, economic abuse or duress in nominee arrangements will not be ‘family violence’ in all circumstances. To provide certain safeguards for nominee arrangements between family members and not for others would create a two-tier system. Similarly, to provide stronger penalties for family members who are nominees would create a two-tier system and could also 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.

9.43 The ALRC recommends that the *Guide to Social Security Law* should be amended to provide that, where a delegate is determining a person’s ‘capability to consent’ to a nominee arrangement, the delegate should consider the effect of family violence on the person’s capability. This was supported by stakeholders.⁵²

9.44 The ALRC also outlines below other safeguards that may help to protect victims of family violence who are in nominee arrangements but does not make any recommendations in that regard.

Safeguards against abuse

9.45 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—including written consent and signatory arrangements;⁵³
- ensuring the capacity of the principal to consent to a nominee arrangement;⁵⁴
- responsibilities and capabilities of nominees;⁵⁵
- revocation of nominee arrangements;⁵⁶ and
- penalties.⁵⁷

9.46 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.

52 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*; ADFVC, *Submission CFV 105*; Homeless Persons’ Legal Service, *Submission CFV 95*; WEAVE, *Submission CFV 85*.

53 *Social Security (Administration) Act 1999* (Cth) s 123D(2), (3). FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [8.5.1]; [8.5.2].

54 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [8.5.1]; [8.5.2].

55 *Social Security (Administration) Act 1999* (Cth) s 123O(1); FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [8.5.3].

56 *Social Security (Administration) Act 1999* (Cth) ss 123E(1), 123E(1A), 123E(2), 123K, 123L.

57 *Ibid* ss 123E, 123L.

9.47 To determine that 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.⁵⁸

9.48 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.⁵⁹

What other safeguards might protect victims of family violence?

9.49 Centrelink arrangements for nominee appointments, reviews and penalties may allow economic abuse by a family member holding a nominee authority to go unnoticed.⁶⁰

9.50 Stakeholders suggested a number of additional safeguards that might act to protect against economic abuse in nominee arrangements, including:

- additional checks⁶¹—such as checks for criminal record, bankruptcy, debt and character references—before a nominee is appointed;⁶²
- 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;⁶³

58 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [8.5.1]; [8.5.2].

59 Ibid, [8.5.1]; [8.5.2].

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

61 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*.

62 Elder Abuse Prevention Unit, Older Person’s Programs, Lifeline Community Care Queensland, *Submission CFV 77*.

63 Ibid.

- requirements for nominees to keep their financial dealings separate from the principal's entitlement, as well as maintaining receipts and records of expenditure;⁶⁴ and
- informing any person holding a power of attorney or enduring guardian of the nominee arrangement.⁶⁵

9.51 The Commonwealth 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'.⁶⁶ 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.⁶⁷ Further, Advocacy for Inclusion considered that where a person is represented by one person for a number of arrangements, this should act as an alert to a customer service adviser that the person is isolated and may be subject to abuse.⁶⁸

9.52 However, to make recommendations in light of the above would be beyond the Terms of Reference for this Inquiry.

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

Overpayment

9.53 In delivering social security payments and entitlements, Centrelink is responsible for ensuring customer payments are correct and fraud is minimised.⁶⁹ If a person is overpaid a social security pension, allowance or benefit, even when not at fault, the amount overpaid is a debt to Centrelink⁷⁰ and can lead to criminal prosecution.⁷¹

9.54 The social security system allows for flexible arrangements in repayment of debts and, in some circumstances, debt waiver. Discretion to waive a debt may be used where a person can demonstrate that 'special circumstances' exist; and that he or she or another person did not 'knowingly' make a false statement or 'knowingly' omit to

64 Ibid.

65 WEAVE, *Submission CFV 58*; National Council of Single Mothers and their Children, *Submission CFV 57*.

66 Commonwealth Ombudsman, *Submission CFV 62*.

67 Elder Abuse Prevention Unit, Older Person's Programs, Lifeline Community Care Queensland, *Submission CFV 77*.

68 Advocacy for Inclusion, *Consultation*, by telephone, 26 September.

69 Australian National Audit Office, *Centrelink Fraud Investigations* (2010), 17.

70 *Social Security Act 1991* (Cth) s 1223.

71 *Criminal Code Act 1995* (Cth) s 135.2(1).

comply with the *Social Security Act*, its predecessor, or the *Social Security (Administration) Act*.⁷²

9.55 Concerns were raised by stakeholders that this provision did not enable Centrelink to waive a debt of a person who had been coerced through family violence into misrepresenting their income or couple status in order to receive a higher rate of payment. This is because the person using family violence holds the requisite knowledge. The ALRC therefore recommends an amendment to s 1237AAD of the *Social Security Act* to ensure that such circumstances do not prevent a person's debt being waived. The ALRC also recommends that the *Guide to Social Security Law* include examples of what does not constitute 'knowledge' such as family violence through economic abuse or duress.

9.56 In addition, to ensure that family violence is specifically considered in debt waiver, the ALRC recommends that family violence be listed as a 'special circumstance' under s 1237AAD in the *Guide to Social Security Law*.

Recovery of debts

9.57 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 including payment by instalments;
- garnisheeing of a person's wages or bank account; or
- legal proceedings.⁷³

9.58 Some provision is already made for arrangements for repayment of debt under s 1234 of the *Social Security Act* which enables a debtor to enter into a repayment arrangement by instalment. Temporary write off is also available under s 1236(1A)(b) of the *Social Security Act* on the ground that a person has no capacity to pay. Unlike waiver, write-off does not extinguish the debt.⁷⁴

9.59 A debtor is taken to have capacity to repay unless recovery would result in the debtor being in severe financial hardship which is assessed on the debtor's individual circumstances.⁷⁵

9.60 The WRC Inc (Qld) raised a concern where a person has a debt, but is unable to repay it due to family violence. The Centre suggested that a debtor in such circumstances should be able to suspend the debt repayment for a period of time on the

72 *Social Security Act 1991* (Cth) s 1237AAD.

73 *Ibid* s 1230C; FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [6.7.2.10].

74 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [6.7.3.10].

75 *Ibid* [6.7.3.10].

grounds of family violence. This would enable a person to leave an abusive relationship and seek advice.⁷⁶

9.61 Other stakeholders agreed that flexible arrangements for repayment of a social security debt should be made available to victims of family violence.⁷⁷ Suggestions included suspending payment of debt for a specified period of time;⁷⁸ full or partial waiver;⁷⁹ or reduction of instalment payments.⁸⁰

9.62 The NWRN recommended that the *Guide to Social Security Law* should be amended to provide ‘that if a person is in financial hardship or requires all available funds to respond to family violence then they should be considered to have no capacity to pay’. Alternatively the NWRN recommended a specific provision providing for temporary write off whilst a person is experiencing family violence.⁸¹

9.63 The ALRC considers that the current provisions for debt repayment and write-off in the *Social Security Act* are flexible enough to encompass circumstances of family violence. The ALRC recommends, however, that DHS should provide customers with information about debt repayment methods and write-off, in accordance with Recommendation 4–2. The ALRC also recommends that information about debt waiver in special circumstances be provided to victims of family violence. Such early provision of information will enable victims of family violence to access advice early to claim waiver on the basis of duress or coercion.

Waiver of debt

9.64 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*.⁸²

Family violence as a ‘special circumstance’

9.65 The *Guide to Social Security Law* states that ‘special circumstances’ are circumstances that are unusual, uncommon or exceptional—‘special enough

76 WRC Inc (Qld), *Submission CFV 66*.

77 National Welfare Rights Network, *Submission CFV 150*; CPSU, *Submission CFV 147*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*; ADFVC, *Submission CFV 105*; Homeless Persons’ Legal Service, *Submission CFV 95*; WEAVE, *Submission CFV 85*.

78 ADFVC, *Submission CFV 105*; Homeless Persons’ Legal Service, *Submission CFV 95*.

79 Homeless Persons’ Legal Service, *Submission CFV 95*.

80 Ibid.

81 National Welfare Rights Network, *Submission CFV 150*.

82 *Social Security Act 1991* (Cth) s 1237AAD.

circumstances ... that make it desirable to waive'.⁸³ 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.⁸⁴

9.66 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, decision-making capacity and financial circumstances.⁸⁵ The *Guide to Social Security Law* does not expressly direct the decision maker to consider family violence in determining whether circumstances are 'special'.

9.67 Stakeholders agreed that 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*.⁸⁶ In particular, National Legal Aid considered that such an amendment may address the concern about circumstances where a person has been pressured by a violent partner to claim payments as a single person or not to declare income.⁸⁷ Therefore, to ensure that family violence is specifically considered in debt waiver, the ALRC recommends that family violence be listed as a 'special circumstance' under s 1237AAD in the *Guide to Social Security Law*.

'Knowingly' make false statements

9.68 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'⁸⁸—that victims of family violence may be required to repay a debt which was incurred due to duress or coercion by a family member. Stakeholders 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.⁸⁹ The question is what is the best way to ensure that such a scenario is covered by the waiver provision, without creating unintended consequences.

83 Davy and Secretary, Department of Employment and Workplace Relations [2007] AATA 1114; FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [6.7.3.40].

84 Davy and Secretary, Department of Employment and Workplace Relations [2007] AATA 1114; FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [6.7.3.40].

85 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [6.7.3.40].

86 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; C O'Donnell, *Submission CFV 135*; National Council of Single Mothers and their Children, *Submission CFV 119*; ADFVC, *Submission CFV 105*; Homeless Persons' Legal Service, *Submission CFV 95*; WEAVE, *Submission CFV 85*.

87 National Legal Aid, *Submission CFV 164*.

88 National Welfare Rights Network, *Redressing the Balance of Risk and Responsibility Through Active Debt Prevention Strategies* (2009).

89 ADFVC, *Submission CFV 71*; WRC (NSW), *Submission CFV 70*.

9.69 In the *Family Violence—Commonwealth Laws*, ALRC Discussion Paper 76 (2011) (Discussion Paper), the ALRC proposed that s 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’.⁹⁰ Most stakeholders agreed with this proposal,⁹¹ however, some raised concerns. The NRWN and National Legal Aid also raised concerns that the proposal would not cover circumstances where a partner or family member was acting under duress.⁹²

9.70 The AASW (Qld) and WRC Inc (Qld) raised concerns about victims of family violence who ‘knowingly’ misinformed Centrelink due to coercion from a violent partner. They therefore recommended ‘knowingly’ be removed from the section.⁹³ The AASW (Qld) and WRC Inc (Qld) considered further that the *Guide to Social Security Law* should contain guidelines as to what ‘desirable’ means.⁹⁴

9.71 The *Guide to Social Security Law* states that knowledge must be actual and not merely constructive knowledge.⁹⁵ It does not refer to examples of family violence that may impinge on a person’s knowledge. 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.⁹⁶ 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.⁹⁷

9.72 The ALRC considers that it would be beneficial, for clarity, to include examples in the *Guide to Social Security Law* of what does not constitute ‘knowledge’ such as family violence through economic abuse or duress.

9.73 On the other hand, Professors Eastale and Emerson-Elliott argued that the words ‘or another person’ should be removed from s 1237AAD to cover circumstances such as those in the case of *Watson v Secretary, Department of Family and Community Services*.⁹⁸ In *Watson*, 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

90 Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), Proposal 8–6.

91 FaHCSIA, *Submission CFV 162*; National Council of Single Mothers and their Children, *Submission CFV 119*; Homeless Persons’ Legal Service, *Submission CFV 95*; WEAVE, *Submission CFV 85*.

92 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*.

93 AASW (Qld) and WRC Inc (Qld), *Submission CFV 136*.

94 *Ibid.*

95 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [6.7.3.40]; *Re Callaghan and Secretary, Department of Social Security* (1996) 45 ALD 435.

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

97 *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.

98 *Watson v Secretary, Department of Family and Community Services* [2002] AATA 311. P Eastale and D Emerson-Elliott, *Submission CFV 05*.

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.

9.74 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. National Legal Aid provided similar case studies.⁹⁹

9.75 The ALRC does not consider that removing the words ‘or another person’ would remedy this situation. To do so might mean that where a nominee has ‘knowingly’ made a false statement or omitted to comply with the *Social Security Act* the debt would not be recoverable. There may also 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.

9.76 The ALRC therefore considers it to be more appropriate to qualify the term ‘or another person’ with the words ‘acting as an agent for the debtor’. Adding the words ‘acting as an agent for the debtor’ would cover the circumstances raised in *Watson*, as Mr Watson was not acting as an agent for Mrs Watson. In *Watson* it was found that Mrs Watson did not have the necessary *mens rea* due to duress, however, Mr Watson did. The ALRC therefore considers that this current interpretation of ‘knowingly’ would cover situations of duress.

9.77 The ALRC considers that these recommendations should ensure that circumstances of duress and coercion by a person using family violence do not lead to a debt repayment. The ALRC is reluctant to propose a broader amendment to s 1237AAD itself as to do so may limit the flexibility intended to be provided by the section 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.¹⁰⁰

9.78 The ALRC also considers that care should be taken to ensure that family violence is verified to avoid false claims of family violence made to avoid repayment of a debt.

99 National Legal Aid, *Submission CFV 164*.

100 *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.

9.79 Section 101 of *A New Tax System (Family Assistance) Administration Act 1999* mirrors s 1237AAD of the *Social Security Act*. The ALRC is of the view that if s 1237AD is amended, as recommended, the Australian Government should consider a mirror amendment to s 101 of *A New Tax System (Family Assistance) Administration Act*.¹⁰¹

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

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

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

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

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

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

101 See National Welfare Rights Network, *Submission CFV 150*. Family assistance legislation is discussed in Chapters 13–14.

Part C—Income Management

Chapter

10. Income Management—Social Security Law

10. Income Management—Social Security Law

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Summary

10.1 ‘Income management’ is an arrangement under the *Social Security (Administration) Act 1999* (Cth) by which a proportion of a person’s social security and parenting payments is quarantined to be spent only on particular goods and services, such as food, housing, clothing, education and health care. 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*.

10.2 The chapter briefly explains the nature and the history of the income management regime and then examines the appropriateness of compulsory income management for people experiencing family violence. The ALRC concludes that the complexity of family violence and the intertwining of family violence with 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. Accordingly, the ALRC recommends that people experiencing family violence should not be subject to compulsory income management and examines alternative

approaches. In particular, the ALRC examines the voluntary income management model under the *Social Security (Administration) Act* and the Cape York Welfare Reform model. The ALRC ultimately recommends that the Australian government should create a flexible and voluntary form of income management—an ‘opt-in and opt-out’ model—to better meet the needs and protect the safety of people experiencing family violence.

10.3 Following discussion of compulsory and voluntary income management, the ALRC examines practical issues arising in relation to accessing income managed funds. The ALRC considers that ensuring victims of family violence are able to access and control their income management account—whether through a BasicsCard, voucher or other form of payment or credit—is consistent with the underlying principles of accessibility and self-agency articulated in Chapter 2 of the Report. In particular, the limited definition of ‘priority needs’ is contrary to these principles and poses particular difficulties for victims of family violence. The ALRC therefore recommends that the Australian Government should amend the definition of ‘priority needs’ in s 123TH of the *Social Security (Administration) Act* to include travel or other crisis needs for people experiencing family violence.

The operation of income management

Overview

10.4 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. Under income management, a percentage of a person’s welfare payment is quarantined for use in purchasing particular goods and services such as food and housing, defined as ‘priority needs’.¹

10.5 Payment amounts subject to income management are paid into a separate, notional, account held by welfare recipients called ‘income management accounts’.² In order to access funds in income management accounts, welfare recipients may be issued with a stored value card, vouchers, or receive other payments or credits for use in purchasing goods and services.³ Stored value cards, vouchers or other payments or credits may not be used to purchase excluded goods or services, which include alcoholic beverages, tobacco products, pornographic material and gambling services.⁴

10.6 The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) has primary responsibility for the Australian Government’s 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

1 See *Social Security (Administration) Act 1999* (Cth) s 123TH for a definition of ‘priority needs’.

2 Ibid ss 123TC, 123WA.

3 Ibid pt 3B, div 6, subdiv B.

4 Ibid s 123TI.

delivery of services and now includes Centrelink within its portfolio.⁵ DHS is responsible for national service delivery strategy for income management.

Staged introduction

The model used as part of the ‘Northern Territory Emergency Response’

10.7 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, ‘to promote socially responsible behaviour and help protect children’.⁶ 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, their associated outstations and 10 town camp regions of the Northern Territory’.⁷ The object was ‘to improve the well-being of certain communities in the Northern Territory’.⁸

10.8 The Australian Government implemented income management legislation as a ‘special measure’ for the purposes of the *International Convention on the Elimination of All Forms of Racial Discrimination*⁹ and s 8 of the *Racial Discrimination Act 1975* (Cth).¹⁰ Invoking the ‘special measure’ provision was necessary because the legislation had a disproportionate effect on Indigenous people in its application to persons living in a ‘declared relevant Northern Territory area’. As commented by FaHCSIA in the evaluation of the NTER released in November 2011:

One of the most controversial aspects of the NTER was the introduction of compulsory income management. Income management was initially imposed according to place of residence, and only communities on Aboriginal-owned areas within the Northern Territory were selected.¹¹

Other Australian income management measures

10.9 Other income management measures that have been introduced include:

- the Cape York Welfare Reform (CYWR) model—which is discussed later in this chapter;
- the Child Protection Scheme of Income Management (CPSIM) in parts of Western Australia from late 2008;

5 T Plibersek, *The Human Services Portfolio* <http://www.mhs.gov.au/the_human_services_portfolio.php> at 22 July 2011.

6 Social Policy Research Centre, *Evaluation Framework for New Income Management* (2010), prepared for FaHCSIA, 31, Appendix A.

7 For a description of the background, see *Ibid*, 31–32, Appendix A.

8 *Northern Territory National Emergency Response Act 2007* ((Cth)) s 5.

9 *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).

10 *Northern Territory National Emergency Response Act 2007* ((Cth)) s 132. See also Explanatory Memorandum, *Social Security and Other Legislation (Welfare Payment Reform) Bill 2007* (Cth), 1.

11 FaHCSIA, *Northern Territory Emergency Response Evaluation Report 2011* (2011), 11. See also 32.

- voluntary income management (voluntary IM) in parts of Western Australia from late 2008; and
- the Improving School Enrolment and Attendance through Welfare Reform Measure (SEAM) in parts of the Northern Territory from early 2009.¹²

The new income management model

10.10 In 2010 the income management regime was amended,¹³ following legal challenges to the NTER legislation on the basis of racial discrimination.¹⁴ On 1 July 2010, the Australian Government introduced a new welfare reform phase—known as the new income management model (New IM).¹⁵ The Government’s plan was that, ‘[o]ver time, and drawing on evidence from implementation experience in the NT, it may progressively be rolled out more broadly across Australia’.¹⁶

10.11 Implementation has progressed as follows: from 9 August 2010 income management applies in the Barkly region; from 30 August 2010 in Alice Springs, Katherine, East Arnhem Land and other outback areas; from 20 September 2010 in outback areas; and from 4 October 2010 in Darwin and Palmerston. New IM has been implemented in urban and rural areas such as Alice Springs, the Barkly region, Darwin, East Arnhem, Katherine, and Palmerston, and now applies to the whole of the Northern Territory.¹⁷

10.12 From 1 July 2012, aspects of the income management regime will operate in five new communities across Australia: Bankstown (NSW), Logan and Rockhampton (Qld), Playford (SA) and Shepparton (Vic).¹⁸ This is described as place-based income management and will apply to people assessed as vulnerable welfare payment

12 Social Policy Research Centre, *Evaluation Framework for New Income Management* (2010), prepared for FaHCSIA, 31–34, Appendix A.

13 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of the Racial Discrimination Act) Act 2010* (Cth).

14 For example, in the High Court case of *Wurridjal v Commonwealth* (2009) 237 CLR 309 Kirby J observed that the *Northern Territory National Emergency Response Act 2007* (Cth) ‘expressly removes itself from the protections in the *Racial Discrimination Act 1975* (Cth) and hence, from the requirement that Australia, in its domestic law, adhere to the universal standards expressed in the *International Convention on the Elimination of All Forms of Racial Discrimination*, to which Australia is a party’: [213]. See L Buckmaster, J Gardiner-Garden and M Thomas, *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009: Bills Digest* (2010), Department of Parliamentary Services—Parliament of Australia, which explains changes to the *Social Security Act 1991* (Cth), *A New Tax System (Family Assistance) Act 1999* (Cth) and *Veterans’ Entitlements Act 1986* (Cth).

15 Social Policy Research Centre, *Evaluation Framework for New Income Management* (2010), prepared for FaHCSIA, 7, [2].

16 *Ibid.*, 6, [1].

17 *Ibid.*, 7, [2].

18 Australian Government, *Building Australia’s Future Workforce: trained up and ready for work* (2011), 27.

recipients, persons who are referred for CPSIM by the relevant child protection authority and persons who volunteer to be income managed.¹⁹

Stop Press: Stronger Futures

10.13 In November 2011, the Australian Government introduced the Stronger Futures in the Northern Territory Bill 2011 (Cth), and its companion, the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth) into the House of Representatives. It simultaneously released the *Stronger Futures in the Northern Territory: Policy Statement*. The Bills ‘form a part of [the Government’s] next steps in the Northern Territory’.²⁰

10.14 The Stronger Futures Bill is intended to replace the *Northern Territory National Emergency Response Act* and contains three key measures—‘the tacking alcohol abuse measure, the land reform measure and the food security measure’.²¹ It also provides for an independent review of the measures after seven years of operation and the measures will sunset 10 years after commencement. The Consequential and Transitional Provisions Bill proposes to repeal the *Northern Territory National Emergency Response Act* and contains savings and transitional provisions associated with the repeal.

10.15 In addition, the Government introduced elements of the Social Security Legislation Amendment Bill 2011 (Cth), which applies beyond the Northern Territory, in order to provide ‘greater flexibility in for the operation of income management so it can be implemented in’ five new sites.²² It also contains proposed reforms to allow recognised state or territory authorities to refer individuals for income management as well as measures in relation to school enrolment and attendance.

10.16 All three Bills were referred to the Senate Community Affairs Legislation Committee, which is due to report on 29 February 2012.

Income management measures

10.17 Income management measures are targeted at specified groups of income support payment recipients. As explained in FaHCSIA’s *Guide to Social Security Law*, income management operates by redirecting ‘a proportion of income support and family assistance payments, and 100% of lump sum payments of eligible income support recipients, to facilitate the expenditure of money on life essentials and in the best interests of children’.²³

19 FaHCSIA, *Better Futures, Local Solutions: place-based income management* (2011) <www.fahcsia.gov.au/sa/families/progserv/welfarereform/pages/place_based_income_mgt.aspx> at 25 November 2011.

20 Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November, 6 (J Macklin—Minister for Families, Housing, Community Services and Indigenous Affairs).

21 Explanatory Memorandum, Stronger Futures in the Northern Territory Bill 2011 (Cth).

22 Explanatory Memorandum, Social Security Legislation Amendment Bill 2011 (Cth).

23 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [11.1.1.10] The types of payment are described by reference to category. For example, a person may be subject to the vulnerable welfare payment recipients measure if, among other things, in receipt of a

10.18 The income management measures are as follows:

- child protection measure;²⁴
- vulnerable welfare payment recipients measure;²⁵
- parenting/participation measure—including the long-term welfare payment recipients measure²⁶ and disengaged youth measure;²⁷
- school enrolment and school attendance measures;²⁸
- Queensland Commission measure;²⁹ and
- voluntary income management measure.³⁰

10.19 The *Guide to Social Security Law* explains that income management measures are targeted to specified groups of income support payment recipients, comprising people:

- referred for income management by child protection authorities;
- assessed by a delegate of the Secretary (in practice, a Centrelink social worker), as requiring income management for reasons that include vulnerability to financial crisis or economic abuse;
- aged 15 to 24 years old who have been receiving Youth Allowance, New Start Allowance, Special Benefit or Parenting payment for more than 13 weeks out of the last 26 weeks (disengaged youth);
- aged 25 years old and above (and younger than age pension age), who have been in receipt of Youth Allowance, New Start Allowance, Special Benefit or Parenting payment for more than 52 weeks out of the last 104 weeks (long-term welfare payment recipients); and
- who have been referred to income management by the Queensland Families Responsibilities Commission under the CYWR model.³¹

10.20 In addition, people who are not in any of the target groups, and reside in a declared area, may volunteer to have their income support and family assistance payments income managed.³²

'category H welfare payment', defined in s 123TC. See FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [11.1.1.50].

24 *Social Security (Administration) Act 1999* (Cth) s 123UC.

25 *Ibid* s 123UCA.

26 *Ibid* s 123UCC.

27 *Ibid* s 123UCB.

28 *Ibid* ss 123UD, 123UE. These measures have not yet been implemented.

29 *Ibid* s 123UF.

30 *Ibid* s 123UFA.

31 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [11.1.1.20].

32 *Ibid*.

10.21 Under the income management measures, a relevant person may be income managed either compulsorily or voluntarily. Voluntary income management is a separate measure from the other income management measures.³³ People who are income managed under the participation/parenting measure can apply for an exemption from income management. However, people who are on income management under the child protection or vulnerable welfare payment recipient measures are not able to apply for an exemption.³⁴

10.22 Under compulsory income management (compulsory IM), an individual's income support and family assistance payments are income managed at 50% (under the participation/parenting and vulnerable measure) or 70% (under the child protection measure), and all lump sum and advance payments are income managed at 100%.³⁵

Income management and family violence

10.23 FaHCSIA states that income management is 'part of the Australian Government's commitment to reforming the welfare system', ensuring that 'income support payments are spent in the best interests of children and families and helps ease immediate financial stress'.³⁶ The objects of income management, as set out in the *Social Security (Administration) Act*, are to:

- (a) reduce immediate hardship and deprivation by ensuring that the whole or part of certain welfare payments is directed to meeting the priority needs of the:
 - (i) recipient of the welfare payment; and
 - (ii) recipient's children (if any); and
 - (iii) recipient's partner (if any); and
 - (iv) any other dependants of the recipient; [and to]
- (b) ensure that recipients of certain welfare payments are given support in budgeting to meet priority needs;
- (c) reduce the amount of certain welfare payments available to be spent on alcoholic beverages, gambling, tobacco products and pornographic material;
- (d) reduce the likelihood that recipients of welfare payments will be subject to harassment and abuse in relation to their welfare payments;
- (e) encourage socially responsible behaviour, including in relation to the care and education of children;
- (f) improve the level of protection afforded to welfare recipients and their families.³⁷

33 *Social Security (Administration) Act 1999* (Cth) s 123UM.

34 Exemptions are considered further below.

35 Information on the welfare payments that are covered by New IM are found in the legislation and on the home pages of relevant Australian Government agencies and in the *Guide to Social Security Law*. See also FaHCSIA, *New Income Management Fact Sheets* (2011) <www.facs.gov.au/sa/families/pubs/income_factsheet/Pages/factsheet_1.aspx> at 16 November 2011.

36 FaHCSIA, *Better Futures, Local Solutions: place-based income management* (2011) <www.fahcsia.gov.au/sa/families/progserv/welfarereform/pages/place_based_income_mgt.aspx> at 25 November 2011.

37 *Social Security (Administration) Act 1999* (Cth) s 123TB. The former objects provision was repealed by *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of the Racial Discrimination Act) Act 2010* (Cth) sch 2 pt 2 cl 27.

10.24 In this chapter the ALRC identifies where these policy objectives may not be being met in the context of people experiencing family violence. 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 IM to victims of family violence;
- applying voluntary IM to victims of family violence; and
- practical issues that victims of family violence face in accessing necessary funds.

Compulsory income management

10.25 This section of the chapter considers the appropriateness of compulsory IM as a means to improve the safety of victims of family violence. It does so by examining how the assessment of ‘indicators of vulnerability’ in the ‘vulnerable welfare payment recipients measure’ 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 and family violence

10.26 As noted above, one way a person is subject to compulsory IM is if the person meets the criteria under s 123UCA of the *Social Security (Administration) Act*, including that the Secretary (or delegated Centrelink staff)³⁸ has determined them to be a ‘vulnerable welfare payment recipient’.³⁹ In determining whether a person is a ‘vulnerable welfare payment recipient’, the Secretary must comply with certain decision-making principles set out in a legislative instrument.⁴⁰ That instrument—the *Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2010* (Principles)—requires the Secretary to consider whether:

- the person is experiencing an indicator of vulnerability; and
- whether the person is applying appropriate resources to meet some or all of the person’s relevant priority needs; and
- if the person is experiencing an indicator of vulnerability—whether income management under section 123UCA is an appropriate response to that indicator of vulnerability; and
- whether income management under s 123UCA of the Act will assist the person to apply appropriate resources to meet some or all of the person’s priority needs.⁴¹

38 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [11.4.2.10].

39 *Social Security (Administration) Act 1999* (Cth) ss 123TC, 123UGA.

40 *Ibid* s 123UGA(2).

41 *Social Security (Administration) (Vulnerable Welfare Payment Recipient) Principles 2010* (Cth), pt 2, cl 5(1).

10.27 The Principles provide the following examples of indicators of vulnerability:

- (a) financial exploitation;
- (b) financial hardship;
- (c) failure to undertake reasonable self-care; or
- (d) homelessness or the risk of homelessness.⁴²

10.28 The Principles further illustrate what may satisfy three of these matters.⁴³ For example, a person is said to be experiencing ‘financial exploitation’, if another person:

- (a) has acquired; or
- (b) has attempted to acquire; or
- (c) is attempting to acquire;

possession of, control of or the use of, or an interest in, some or all of the first person’s financial resources, through the use of undue pressure, harassment, violence, abuse, deception, duress, fraud or exploitation.⁴⁴

10.29 While there is no express reference to family violence as an indicator of vulnerability, both the Principles and the *Guide to Social Security Law* recognise a number of links between indicators of vulnerability and family violence.⁴⁵ For example, in addition to the definition in the Principles, the Guide explains 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.⁴⁶

10.30 While the determination to impose compulsory IM may be triggered by the particular indicators—of which family violence is not a specific trigger in itself—family violence may be the overall context and cause of particular indicators of vulnerability, either individually or together. For example, ‘financial exploitation’ may amount to economic abuse and, in the context of the core definition of family violence set out in Chapter 3, may fit within the examples of the kinds of behaviour that may amount to family violence. ‘Homelessness’—another indicator of vulnerability—may also be the result of escaping family violence.

10.31 Family violence may be so caught up in the vulnerability indicators that income management may often be triggered in that context—and this in turn exacerbates a reluctance to disclose it. While FaHCSIA stressed that assessments to place persons into the ‘vulnerable stream’ of income management are made by Centrelink social

42 Ibid, pt 1, cl 3(2).

43 Ibid, pt 1, cls 3(3) (‘financial exploitation’); 3(4) (‘financial hardship’); 3(5) (‘homelessness or risk of homelessness’). There is no definition of ‘failure to undertake reasonable self-care’.

44 Ibid, pt 1, cl 3(3).

45 Ibid, pt 1, cl 3(3), (5); FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [11.4.2.20].

46 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [11.4.2.20].

workers ‘drawing on all their professional experience and skills including factoring in issues of domestic and family violence’,⁴⁷ the National Welfare Rights Network (NWRN) submitted that:

The experience of family violence is so interwoven with existing vulnerability factors that it is necessary to completely exempt a person or persons experiencing family violence from being subject to Compulsory Income Management. This is necessary to avoid people experiencing family violence from being reluctant to disclose their circumstances to Centrelink for fear of being ‘marked’ for income management.⁴⁸

10.32 Indigenous organisations made similar observations.⁴⁹ The Central Australian Aboriginal Legal Aid Service (CAALAS), for example, suggested that the vulnerability measures ‘are likely to trigger compulsory income management for those experiencing family violence’.⁵⁰ The Aboriginal and Torres Strait Islander Women’s Legal and Advocacy Service reported that, in its experience, ‘child safety intervention and family violence often occur simultaneously’.

If there is family violence in a household this may trigger a child safety investigation and a finding that due to exposure to violence the child is at risk of harm.⁵¹

10.33 The wider question that this poses in this Inquiry is, therefore, whether the imposition of income management is an appropriate response to improve the safety of victims of family violence. The specific issue is whether there should be any change to the vulnerability indicators.

10.34 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 living on low income welfare payments often require support services, not ‘merely’ financial management.⁵² The NWRN commented that one of the difficulties in the context of family violence is that the assessment of vulnerability, in leading to the imposition of income management, ‘is blurring the roles of providing support and enforcing compliance and punitive measures’.⁵³ The need is for an appropriate supportive response. National Legal Aid submitted that

In the immediate short term it should be recognised that family violence alone and symptoms of that violence, should not warrant compulsory income management, including by way of the ‘vulnerable welfare payment recipient’ category being applied. Such recognition could facilitate some people who have experienced family violence to seek assistance and support from appropriate sources, such as Centrelink

47 FaHCSIA, *Submission CFV 162*.

48 National Welfare Rights Network, *Submission CFV 150*. See also: Good Shepherd Youth & Family Service, *Submission CFV 132*.

49 CAALAS, *Submission CFV 107*; North Australian Aboriginal Justice Agency, *Submission CFV 73*. 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.

50 CAALAS, *Submission CFV 107*.

51 Aboriginal & Torres Strait Islander Women’s Legal & Advocacy Service, *Submission CFV 103*.

52 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 risk of homelessness’ should be removed as an indicator of vulnerability.

53 National Welfare Rights Network, *Submission CFV 150*.

social workers, without the threat of being income managed by reason of vulnerability.⁵⁴

10.35 In *Family Violence and Commonwealth Laws—Social Security Law*, ALRC Issues Paper 39 (2011), 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.⁵⁵

10.36 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.⁵⁶ NWRN, for example, submitted that ‘any system of compulsory income management based on vulnerability is going to cause people experiencing family violence to be reluctant to disclose to Centrelink’.⁵⁷ 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.⁵⁸

Exemptions

Availability

10.37 Exemptions are only available for one stream of compulsory IM: the participation/parenting measure, which applies to people under the Disengaged Youth and Long-term Welfare Payment Recipient Measures.⁵⁹ That is, an exemption is not available under the ‘vulnerable’ stream, the child protection stream or the Cape York Reform model—however a person subject to income management on one of these bases ‘may ask the decision maker to review their circumstances’.⁶⁰

10.38 The Australian Government has explained:

For people subject to income management under the disengaged youth and long-term welfare recipient categories, ... exemptions from income management are based on the demonstration of socially responsible behaviour. For people without dependent children, the exemption criteria are related, in general terms, to evidence being provided of engagement in study or a sustained pattern of employment. For those with

54 National Legal Aid, *Submission CFV 164*.

55 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, Issues Paper 39 (2011), Questions 38 and 39. The responses are explored more fully in Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), ch 13.

56 Aboriginal & Torres Strait Islander Women’s Legal & Advocacy Service, *Submission CFV 103*; CAALAS, *Submission CFV 78*; North Australian Aboriginal Justice Agency, *Submission CFV 73*; ADFVC, *Submission CFV 71*; WRC (NSW), *Submission CFV 70*; WRC Inc (Qld), *Submission CFV 66*; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*; WEAVE, *Submission CFV 58*; Council of Single Mothers and their Children (Vic), *Submission CFV 55*.

57 National Welfare Rights Network, *Submission CFV 150*.

58 *Ibid*; WRC (NSW), *Submission CFV 70*.

59 *Social Security (Administration) Act 1999* (Cth) ss 123UGB, 123UGC, 123UGD.

60 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [11.1.14.10].

dependent children, the exemption criteria are related to the provision of evidence of responsible parenting.⁶¹

10.39 The relevant provisions are s 123UGC (a person with no dependent children) and s 123UGD (a person with dependent children). The availability of these exemptions is subject to meeting a range of conditions in these statutory provisions. For example, a person on income management may qualify for an exemption under s 123UGD if, amongst other things, the person has a ‘school age child’⁶² who is enrolled and attending school, or participating in other prescribed activities, and the Secretary is ‘satisfied that there were no indications of financial vulnerability in relation to the person during the 12-month period ending immediately before the test time’.

10.40 Section 123UGB(2) of the Act provides for the possibility of another exemption category. It provides that the Minister may, by way of legislative instrument, specify ‘a class of persons to be exempt welfare payment recipients’—that is, with respect to disengaged youth and long-term welfare payment recipients.⁶³ The Secretary may then determine a person to be such an ‘exempt welfare payment recipient’.⁶⁴

10.41 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:

- 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. 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
 - ... meet ... workforce participation requirements for those who are not a principal carer of a child.⁶⁵

The review process for exemptions

10.42 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).⁶⁶ If the ARO decides not to exempt the person

61 Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth) 14.

62 This is a defined term in the Act. See *Social Security (Administration) Act 1999* (Cth) s 123UGC.

63 This is clear from the title of the subdivision. See *Ibid* pt 3B div 2 subdiv BB.

64 *Ibid* s 123UGB(1).

65 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [11.1.14.10].

66 Commonwealth Ombudsman, *Centrelink: The Right of Review: Having Choices—Making Choices* (2011), 5.

from income management, a person can seek review before the Social Security Appeal Tribunal.⁶⁷

Problems in the context of family violence

10.43 In the Discussion Paper, *Family Violence—Commonwealth Laws*, DP 76 (2011) the ALRC proposed that the *Social Security (Administration) Act* 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 IM.⁶⁸

10.44 This evoked a strong response from stakeholders, the majority of whom did not support the policy of compulsory IM or its continuation as a general matter, or specifically to people experiencing family violence.⁶⁹ The Federation of Ethnic Communities' Councils of Australia (FECCA), for example, submitted that for people experiencing family violence, compulsory IM fails to address 'the specific needs, distinct challenges and barriers' for victims and their family.⁷⁰

10.45 Particular themes that emerged, in research and in submissions and consultations, included:

- the importance of self-agency;
- the importance of community involvement;
- reluctance to disclose, due to a fear of imposition of income management;
- concerns about 'labelling';
- safety concerns;

67 *Social Security (Administration) Act 1999* (Cth) s 142. Under the NTER, amendments were made to the Act which provided that the Social Security Appeal Tribunal 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 repealed that section (s 144(ka)) thus providing 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. Decisions of the Social Security Appeal Tribunal may be appealed to the Administrative Appeals Tribunal and the Federal Court of Australia.

68 Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), Proposal 13–1.

69 National Welfare Rights Network, *Submission CFV 150*; Indigenous Law Centre, *Submission CFV 144*; Equality Rights Alliance—Women's Voices for Gender Equality, *Submission CFV 143*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 138*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*; Good Shepherd Youth & Family Service, *Submission CFV 132*; Federation of Ethnic Communities' Councils of Australia, *Submission CFV 126*; National Council of Single Mothers and their Children, *Submission CFV 119*; CAALAS, *Submission CFV 107*; Aboriginal & Torres Strait Islander Women's Legal & Advocacy Service, *Submission CFV 103*; Aboriginal & Torres Strait Islander Women's Legal Service North Queensland, *Submission CFV 99*. The following submissions in response to the Issues Paper, Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Social Security Law*, Issues Paper 39 (2011), were to similar effect: CAALAS, *Submission CFV 78*; North Australian Aboriginal Justice Agency, *Submission CFV 73*; ADFVC, *Submission CFV 71*; WRC (NSW), *Submission CFV 70*; WRC Inc (Qld), *Submission CFV 66*; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*; Sole Parents' Union, *Submission CFV 63*; WEAVE, *Submission CFV 58*; Council of Single Mothers and their Children (Vic), *Submission CFV 55*.

70 Federation of Ethnic Communities' Councils of Australia, *Submission CFV 126*.

- problems with exemptions; and
- tensions with respect to human rights.

Self-agency

10.46 The ALRC considers that the compulsory element in this form of income management runs counter to the theme of self-agency identified as a central theme in this Inquiry and, therefore, that compulsory IM is not an appropriate response for victims of family violence. Stakeholders argued strongly to similar effect—a problem arising from coercive and controlling conduct should not be met with a similar response. For example, the Good Shepherd Youth and Family Service, submitted that:

Family violence, the exercise of power and control of one person over another, is an attack on the individual autonomy, agency, and freedom of the victim. In this context, 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 stop-gap and at worst a further abuse.⁷¹

10.47 Disempowerment was an issue identified by other stakeholders. The Australian Domestic and Family Violence Clearinghouse (ADFVC) argued it would disempower people already experiencing family violence and only lead to more hardship for them.⁷² The New South Wales Women’s Refuge Movement described income management as ‘secondary victimisation’:

Women who experience domestic and family violence are subjected to a range of controlling behaviours by perpetrators. The use of compulsory income management has the potential to further disempower women by removing any control they may have over their own income.⁷³

10.48 A report released by the Equality Rights Alliance in 2011, *Women’s Experiences of Income Management in the Northern Territory*, highlights serious concerns for people experiencing family violence who seek help from Centrelink as crisis assistance.⁷⁴ The report identified that women who sought help to flee an abusive relationship, on applying for and then receiving the crisis payment, only weeks later were placed onto compulsory IM under the Vulnerable Welfare Recipient Measure.⁷⁵ This raises serious issues for the safety and protection of victims and their children, when they fear being income managed.

10.49 The Equality Rights Alliance also referred to the disempowering effect of income management. In their submission the group referred to a quote included in their 2011 report from a domestic violence crisis support worker:

Some like having Centrelink pay their bills, but they’re not learning how to manage their money. It’s disempowering women. Basic livings skills courses teach than, it

71 Good Shepherd Youth & Family Service, *Submission CFV 132*.

72 ADFVC, *Submission CFV 71*. See also: R Braaf and I Barrett Meyering, *Seeking Security: Promoting Women’s Economic Wellbeing Following Domestic Violence* (2011), prepared for the ADFVC, 11.

73 NSW Women’s Refuge Movement, *Submission CFV 120*.

74 Equality Rights Alliance, *Women’s Experience of Income Management in the Northern Territory* (2011), 35.

75 Ibid.

empowers women. The women can stop the course if they already have those skills. Not many women have a problem adapting to having money after having lived with an abuser who gives them so little to live on.⁷⁶

10.50 Stakeholders drew attention to the lack of autonomy for people experiencing family violence under the income management regime.⁷⁷ 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.⁷⁸ The Equality Rights Alliance noted that 82% of respondents to their survey would remain on income management if a more flexible voluntary model were offered.⁷⁹

10.51 Stakeholders also emphasised the importance of choice—even in situations of family violence. While economic abuse may be a particular manifestation of family violence, 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.⁸⁰ Similarly, the study of Braaf and Barrett Meyering, for the ADFVC, reported that:

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 or 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 finances. Indeed, women in the study appeared to be managing their finances well, although were greatly hampered by their low income exacerbated by, for example, ex-partners' failure to meet childcare obligations and also by large costs often associated with the violence, such as relocation, medical and legal expenses.⁸¹

10.52 A further illustration was provided in the submission from the Good Shepherd Youth and Family Service, which noted that, in their experience, women who have experienced family violence, especially single mothers, have generally high levels of financial skill in juggling living costs on low and limited budgets.⁸²

10.53 The key issue is the ability of the person to make a choice about the appropriate response. As commented by the Equality Rights Alliance, '[e]nsuring that women experiencing family violence are not subject to Compulsory Income Management

76 Equality Rights Alliance—Women's Voices for Gender Equality, *Submission CFV 143*.

77 CAALAS, *Submission CFV 78*; ADFVC, *Submission CFV 71*; WRC (NSW), *Submission CFV 70*; WRC Inc (Qld), *Submission CFV 66*; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*; Council of Single Mothers and their Children (Vic), *Submission CFV 55*.

78 AASW (Qld) and WRC Inc (Qld), *Submission CFV 138*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*; Good Shepherd Youth & Family Service, *Submission CFV 132*; Aboriginal & Torres Strait Islander Women's Legal Service North Queensland, *Submission CFV 99*.

79 Equality Rights Alliance—Women's Voices for Gender Equality, *Submission CFV 143*.

80 CAALAS, *Submission CFV 78*.

81 R Braaf and I Barrett Meyering, *Seeking Security: Promoting Women's Economic Wellbeing Following Domestic Violence* (2011), prepared for the ADFVC, 100.

82 Good Shepherd Youth & Family Service, *Submission CFV 132*.

would be an improvement, and would not prevent women participating in Voluntary Income Management if they find it helpful'.⁸³

Community involvement

10.54 The Aboriginal and Torres Strait Islander Social Justice Commissioner argued that the critical step for substantial improvement for Indigenous peoples is to be major stakeholders in all stages of policy and legislative development impacting upon them.⁸⁴

10.55 Until the late 1970s, the New Zealand Government implemented 'social welfare' policy for Maori communities in order to reverse overcrowded housing, poverty and other socio-economic malaise; due to official assimilation policies.⁸⁵ The result was 'a large scale welfare agency of increasingly diminished value',⁸⁶ with statistics suggesting that 'the Maori were more likely than the general population to end up underemployed, poorly educated, imprisoned, or impoverished'.⁸⁷ However, from 1977, a new culturally-inclusive model sought to address Maori disadvantage through increased self-determination, innovative community development and voluntary self-help, which combined the strengths of Maori and Pakeha (non-Indigenous).⁸⁸ This initiative was met with '[w]idespread enthusiasm' and 'acceptance', with one commentator noting that 'the community development philosophy ... serv[ed] the vested interests of the Maori, the Government and the Department of Maori Affairs'.⁸⁹

10.56 The New Zealand Government's approach up until 1977 could be said to be based upon a 'public service model'; arguably the Australian Government's income management policy has been based on a similar model. However, the New Zealand Government's approach from 1977—which was more popularly received—was 'grounded in the philosophy of self-determination and community development'.⁹⁰

10.57 Similarly, as submitted to the ALRC in this Inquiry, a failure to consult, and measures which deny individual choice, rather than enhancing choice, risk being ineffectual or regarded as punitive.⁹¹

Reluctance to disclose

10.58 Barriers to disclose family violence are summarised in Chapter 1. In the context of income management, the prospect of the compulsory imposition of income

83 Equality Rights Alliance—Women's Voices for Gender Equality, *Submission CFV 143*.

84 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010* (2011), 10, 12, 22.

85 A Fleras, 'From Social Welfare to Community Development: Maori Policy and the Department of Maori Affairs in New Zealand' (1984) 19(1) *Community Development Journal* 32, 32–34.

86 *Ibid.*, 32.

87 *Ibid.*, 33.

88 *Ibid.*, 34–38.

89 *Ibid.*, 38.

90 *Ibid.*, 38.

91 Aboriginal & Torres Strait Islander Women's Legal Service North Queensland, *Submission CFV 99*. The National Council of Single Mothers and their Children also raised concerns that income management policy was developed in the absence of consultation with single parents, relevant service providers, key peak bodies and alliances: National Council of Single Mothers and their Children, *Submission CFV 119*.

management was identified as a specific reason leading to failure to disclose family violence.

10.59 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.⁹² Victims of family violence may therefore ‘choose’ to stay in an abusive relationship rather than to leave, out of fear that disclosure to agencies may affect their social security payments.⁹³ The NSW Women’s Refuge Movement submitted, for example, that

Lack of economic independence is a ‘major factor influencing a woman’s decision to remain with a violent partner’. CIM, whilst potentially restricting the ability of the perpetrator to misuse the income, also restricts the victim’s control over her income, does nothing to improve her financial independence and may further restrict her capacity to leave the violence.⁹⁴

10.60 The National Council of Single Mothers and their Children argued that compulsory IM financially penalises women who seek help from Centrelink, and they feared that income management may therefore ‘serve as a barrier for women disclosing violence, leaving abusive partners and reduce their ability to protect self and child at a time of crisis’.⁹⁵

10.61 These issues are exacerbated where English is not the first language. For example, the Ombudsman commented that:

any expansion of voluntary IM must be accompanied by comprehensive communication tools and material in a broad range of languages, and be supported by the use of Indigenous language interpreters.⁹⁶

10.62 The AASW (Qld) and Welfare Rights Centre Inc Queensland (WRC Inc (Qld)) identified a connection between reluctance to disclose and a feeling that victims would not be believed:

They need to have their safety concerns believed and validated through all system interventions. Importantly victims need to be treated with dignity and respect, provided with all the necessary information to allow them to make choices for themselves which can assist them to move on from violence and abuse. ... [T]here needs to also be a shift from a culture of ‘disbelief’ of an individual’s experiences of family violence, to one of willingness to believe. This creates a more meaningful platform from which key Government departments such as Centrelink, can then engage with individuals.⁹⁷

92 National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 138*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*; Aboriginal & Torres Strait Islander Women’s Legal & Advocacy Service, *Submission CFV 103*; WRC (NSW), *Submission CFV 70*; WRC Inc (Qld), *Submission CFV 66*.

93 NSW Women’s Refuge Movement, *Submission CFV 120*; WEAVE, *Submission CFV 58*.

94 NSW Women’s Refuge Movement, *Submission CFV 120*.

95 National Council of Single Mothers and their Children, *Submission CFV 119*.

96 Commonwealth Ombudsman, *Correspondence*, 28 October 2011.

97 AASW (Qld) and WRC Inc (Qld), *Submission CFV 138*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*.

10.63 The Equality Rights Alliance Report included information on the interaction with Centrelink and the response to family violence, which is referred to in the group's submission to this Inquiry. In particular, 84% of respondents chose 'I do not want to tell Centrelink if I have problems', while only 14% chose 'I feel safe talking to Centrelink'.

It is of great concern that such a high proportion of women on Income Management do not feel that they could talk to Centrelink about problems that might include financial vulnerability or family violence. In addition, some women have said that they decided not to apply for a Centrelink crisis payment to escape family violence because it might trigger a referral for Income Management under the Vulnerable Welfare Payment Recipient Measures.⁹⁸

10.64 The group submitted that removing compulsory IM 'will not prevent women from participating in the program voluntarily, should they find it helpful' and that 'women are not required to identify themselves to Centrelink staff as experiencing family violence if they do not feel safe to do so'.⁹⁹

Labelling

10.65 The fear of being labelled as subject to income management was identified in the evaluation by FaHCSIA of the operation of the NTER, that reported in November 2011, which noted that the 'abrupt imposition' of things like income management 'broke trust and made some people feel that they had been unfairly labelled'.¹⁰⁰ FECCA stated that its 'stance against the imposition of Income Management' was 'primarily because of its ability to stigmatise, inadvertently discriminate and impede culturally familiar practices, such as shopping at local markets'.¹⁰¹ FECCA emphasised the 'impact of stigma and community shame' of compulsory IM, where BasicsCard holders 'face isolation from their communities due to the limitations of what shopping outlets and community activities are financially accessible under the scheme'.¹⁰²

10.66 The sense of the 'punitive' character of compulsory income management was also identified by the NSW Women's Refuge Movement.¹⁰³

Safety concerns

10.67 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.¹⁰⁴ The AASW (Qld) and WRC Inc (Qld) submitted that the imposition of income management was 'a form of re-victimisation which carries the risk of putting the victim further in danger, due to either

98 Equality Rights Alliance—Women's Voices for Gender Equality, *Submission CFV 143*.

99 Ibid.

100 FaHCSIA, *Northern Territory Emergency Response Evaluation Report 2011* (2011), 4.

101 Federation of Ethnic Communities' Councils of Australia, *Submission CFV 126*.

102 Ibid.

103 NSW Women's Refuge Movement, *Submission CFV 120*.

104 North Australian Aboriginal Justice Agency, *Submission CFV 73*.

the lack of funds to take independent action of retribution from the perpetrator'.¹⁰⁵ As another 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.¹⁰⁶

10.68 In order to improve safety stakeholders identified the need for better education and training.¹⁰⁷ National Legal Aid, for example, commented that

More community and service provider education, training and tools regarding family violence and the operation of income management should be developed. Centrelink staff should be familiar with appropriate service providers to whom people can be referred to address the family violence and related issues.¹⁰⁸

10.69 The NSW Women's Refuge Movement pointed to the inconsistency with

many of the principles and policy directions contained within many of the Government's other policy frameworks including the *National Plan to Reduce Violence Against Women and their Children* and the *Homelessness White Paper: the Road Home*. Both policy frameworks emphasise the need to improve coordination between agencies and ensuring that victims of family violence or other people experiencing homelessness should be able to disclose their experiences and receive appropriate responses by any agency through direct support or referral pathways. The *Road Home* refers to this as having 'no wrong door'. CIM effectively 'closes the door'.¹⁰⁹

Exemptions

10.70 While New IM is intended to operate within the *Racial Discrimination Act*, stakeholders identified that it still operates in a way that has a disproportionate impact on Indigenous people. The NWRN submitted that the income management exemptions are 'one-sided' and that, in relation to the 'discretionary area of decision-making' in the form of the granting of exemptions from income management, 'discrimination and paternalism appear rife'. Further, the network argued that 'at its core the exemptions policy appears to be discriminatory in its application':

As of March 2011, there were 2,130 persons granted an exemption from income management. Seventy-five per cent were non-Indigenous and just 25 per cent were Indigenous.

105 AASW (Qld) and WRC Inc (Qld), *Submission CFV 138*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*.

106 Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*.

107 For example: National Legal Aid, 2011 #3593}; Equality Rights Alliance—Women's Voices for Gender Equality, *Submission CFV 143*; WEAVE, *Submission CFV 58*.

108 National Legal Aid, *Submission CFV 164*.

109 NSW Women's Refuge Movement, *Submission CFV 120*.

Put another way, non-Indigenous welfare recipients, who make up just 4 per cent of the entire population on quarantined payments in the NT, accounted for three quarters of all exemptions granted.¹¹⁰

10.71 The Commonwealth Ombudsman, in a general review of Centrelink's internal review model, has highlighted the complexity involved for a welfare recipient to have a matter reviewed by Centrelink.¹¹¹ The Ombudsman found that:

Prioritisation of reviews exists in some instances, but does not uniformly consider the complexity of the case, vulnerability of the customer, and severity of the decision consequence for the customer.¹¹²

10.72 The Ombudsman also pointed out that communication difficulties surround the exemption process—of particular concern in relation to

communicating with people from Indigenous and multicultural communities and the limitations of telecommunication systems (as the majority of the financial vulnerability decisions are made after phone contact with customers).¹¹³

10.73 The Equality Rights Alliance Report revealed that a range of problems surround the access to exemptions, which include welfare recipients not knowing how to obtain an exemption, the belief that exemptions were too difficult to access, minimal or no skills in English, provided with incorrect information by third parties and an adherence to inflexible exemption requirements.¹¹⁴ In their submission the group stated that understanding how the system works

Is particularly important for women who do not speak English as their first language, do not have strong written literacy skills, or have no previous experience of the Australian social welfare system. Women who are reliant on income support payments for the first time in their lives, or who do not easily understand the complexity of the system as explained in standard Centrelink letters, will need Centrelink staff to explain the system to them, possibly more than once, in order to understand how to best manage within the rules.¹¹⁵

10.74 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 difficulty of meeting the requirements for exemption 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.

110 National Welfare Rights Network, *Submission CFV 150*.

111 See Commonwealth Ombudsman, *Centrelink: The Right of Review: Having Choices—Making Choices* (2011).

112 *Ibid.*, 31.

113 Commonwealth Ombudsman, *Correspondence*, 28 October 2011.

114 Equality Rights Alliance, *Women's Experience of Income Management in the Northern Territory* (2011), 36–37.

115 Equality Rights Alliance—Women's Voices for Gender Equality, *Submission CFV 143*.

10.75 A number of stakeholders supported an unqualified exemption from compulsory IM for people experiencing family violence.¹¹⁶ The NWRN submitted that a ‘general exception’ should be established and that ‘information acquired during the course of addressing an instance of family violence is never used in support of a determination of compulsory income management’.¹¹⁷

10.76 CAALAS suggested 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.¹¹⁸ NAAJA considered that the exemption process is time consuming, in particular the review and appeal process.¹¹⁹

10.77 NAAJA also 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.¹²⁰

Human rights concerns

10.78 The AASW (Qld) and WRC Inc (Qld) pointed to the ‘inherent tensions’ concerning ‘fundamental human rights’ which underpin the ALRC’s conceptual framework for the Inquiry:

Striving for social justice is a key value of social workers and our experience is that [compulsory income management] in fact perpetuates social injustice.¹²¹

10.79 They also submitted that

Violence against women and children is a complex issue that is steeped in a long history of dispossession, oppression, coercion and disconnection from country and kin. Any sustainable and effective strategy needs to be holistic and take a ‘bottom up’ approach, where it is developed by the communities, with the support and resources of government and other services.¹²²

10.80 Another stakeholder argued that ‘fundamental principles of justice and human rights to dignity are undermined by compulsory IM applied across any whole population group (now amended to be on geographic and demographic grounds rather than racial grounds, but still applying to whole groups)’.¹²³

10.81 The vulnerable position of people experiencing family violence, and the complex needs for their safety and protection, suggest that a different response is

116 National Welfare Rights Network, *Submission CFV 150*; CAALAS, *Submission CFV 78*; North Australian Aboriginal Justice Agency, *Submission CFV 73*; ADFVC, *Submission CFV 71*; WRC (NSW), *Submission CFV 70*; WRC Inc (Qld), *Submission CFV 66*; Sole Parents’ Union, *Submission CFV 63*; WEAVE, *Submission CFV 58*; Council of Single Mothers and their Children (Vic), *Submission CFV 55*.

117 National Welfare Rights Network, *Submission CFV 150*.

118 CAALAS, *Submission CFV 78*.

119 North Australian Aboriginal Justice Agency, *Submission CFV 73*.

120 Ibid.

121 AASW (Qld) and WRC Inc (Qld), *Submission CFV 138*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*.

122 AASW (Qld) and WRC Inc (Qld), *Submission CFV 138*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*.

123 Good Shepherd Youth & Family Service, *Submission CFV 132*.

required. The ALRC considers the development of such flexibility in the context of voluntary IM models, discussed below.

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

Voluntary income management

Social Security (Administration) Act model

10.82 The *Social Security (Administration) Act* includes an option of voluntary IM, under which a person may enter into a written agreement with the Secretary agreeing to be subject to the income management regime throughout the period in force¹²⁴ (which must be at least 13 weeks).¹²⁵ The agreement remains in force until it is terminated, or the period in force expires.¹²⁶ When a recipient applies to terminate the voluntary agreement, the recipient cannot make a new voluntary agreement for a period of 21 days.¹²⁷

10.83 Under voluntary IM, all lump sum and advance payments are income managed at 100%,¹²⁸ while other regular payments are income managed at 50%.

Cape York Welfare Reform model

10.84 The CYPWR model is ‘a different approach to welfare’,¹²⁹ based on ‘conditional welfare’.¹³⁰ It is being trialled in the Cape York communities of Aurukun, Coen, Hope Vale, and Mossman Gorge¹³¹ and associated outstations. It is a partnership between the four communities, the Australian Government, the Queensland Government and the Cape York Institute for Policy and Leadership. The reforms run from 1 July 2008 up to and including 31 December 2011 and ‘aim to create incentives

124 *Social Security (Administration) Act 1999* (Cth) s 123UM.

125 FaHCSIA, *Voluntary Income Management (VIM)* (2011) <www.fahcsia.gov.au/sa/families/pubs/income_factsheet/Documents/factsheet_8.pdf> at 21 July 2011.

126 *Social Security (Administration) Act 1999* (Cth) s 123UN(1)(b)(ii) (duration); s 123UO (termination).

127 *Ibid* s 123UO(4).

128 FaHCSIA, *Voluntary Income Management (VIM)* (2011)

<www.fahcsia.gov.au/sa/families/pubs/income_factsheet/Documents/factsheet_8.pdf> at 21 July 2011.

129 Social Policy Research Centre, *Evaluation Framework for New Income Management* (2010), prepared for FaHCSIA, 33, Appendix A [A4].

130 Cape York Institute for Policy and Leadership, *Welfare Reform* <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.

131 FaHCSIA, *Income Management for Cape York Welfare Reform* <www.fahcsia.gov.au/sa/families/pubs/CapeYorkWelfareReform/Pages/IncomeManagement.aspx> at 12 August 2011.

for individuals to engage in the real economy, reduce passivity and re-establish positive social norms'.¹³²

10.85 The legislative framework of the CYWR model is set out in the *Family Responsibilities Commission Act 2008* (Qld) (the *FRC Act*). The *FRC Act* establishes the Families Responsibilities Commission (FRC), which has the power to make decisions about agency notices concerning matters such as school enrolment and attendance, and child safety and welfare matters.¹³³

10.86 The FRC has power to hold a conference about agency notices to discuss the matter with the person, after which the FRC may decide to make a referral to Centrelink for income management.¹³⁴ The FRC may require a person to be subject to income management for at least three months, but not more than one year;¹³⁵ advising Centrelink as to how much of a person's income may be managed—this is 'likely to be 60 or 75 per cent of regular fortnightly payments and all of any advance and lump sum payments'.¹³⁶

10.87 The main difference between the CYWR model and the *Social Security (Administration) Act* model is that the CYWR model 'does not include blanket quarantining of benefits',¹³⁷ but implements both voluntary and compulsory IM regimes. Another notable difference is in s 109(2) of the *FRC Act* which provides:

The commissioner must amend or end the agreement, as requested by the person, unless the commissioner is satisfied the amendment or ending would be detrimental to the interests, rights and wellbeing of children, and other vulnerable persons living in a welfare reform community area.

10.88 As noted by FaHCSIA, it differs 'from some of the measures of income management operating in the Northern Territory in that it involves individualised conferencing resulting from various triggers'.¹³⁸

10.89 Other differences include:

- the commissioners of the FRC recognise customary practice and take into account the customs and traditions of the individual;¹³⁹
- appointed 'local commissioners' are representative of their community¹⁴⁰ and satisfy the 'good standing' criteria for appointment;¹⁴¹

132 Social Policy Research Centre, *Evaluation Framework for New Income Management* (2010), prepared for FaHCSIA, 33, Appendix A [A4].

133 *Family Responsibilities Commission Act 2008* (Qld) ss 10(1)(a), 40, 41, 42.

134 *Ibid* s 69.

135 *Ibid* s 69(1)(b)(iv).

136 FaHCSIA, *Income Management for Cape York Welfare Reform* <www.fahcsia.gov.au/sa/families/pubs/CapeYorkWelfareReform/Pages/IncomeManagement.aspx> at 12 August 2011. Baby Bonus is managed at 100% and through 13 fortnightly instalments: Centrelink, *Cape York Voluntary Income Management* (2011) <www.centrelink.gov.au/internet/internet.nsf/publications/ind173.htm> at 16 November 2011.

137 Cape York Institute for Policy and Leadership, *Welfare Reform* <www.cyi.org.au/welfarereform.aspx> at 22 July 2011. See also: Indigenous Law Centre, *Submission CFV 144*.

138 FaHCSIA, *Submission CFV 162*.

139 *Family Responsibilities Commission Act 2008* (Qld) ss 5(2)(c), 63(a).

- 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 interests of the person, a child of the person or another member of the person’s family’ in the decision-making process;¹⁴²
- the person or welfare recipient may participate in decision to income manage—for example, the FRC holds conferences with community members to enable the person to enter into a Family Responsibilities Agreement and prepare a ‘case plan’;¹⁴³ and
- under the *FRC Act*, income management is applied as ‘a last resort’.¹⁴⁴

10.90 The CYWR model is generally consistent with recommendations in the *National Plan to Reduce Violence Against Women and Their Children 2010–2022* (the *National Plan*) 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.¹⁴⁵ The Royal Commission also recommended that Indigenous communities be self-determining and resolve violence within their own communities.¹⁴⁶ The CYWR 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.¹⁴⁷

10.91 These reports and studies emphasised the importance of individual agency and community involvement—consistent with the principle of self-agency/autonomy central to this Inquiry. Many submissions expressed qualified support for voluntary IM measures, provided they are flexible and focused on the individual needs of people experiencing family violence, and within their control.¹⁴⁸ As submitted by the AASW (Qld) and WRC Inc (Qld):

limited voluntary income management is entirely different to compulsory income management and it does have the potential to provide support for those who want it. Any such system needs to be developed and implemented with great sensitivity to the particular circumstances of people experiencing family violence and only on a strong

140 Ibid s 12(4).

141 Ibid s 18.

142 Ibid s 108(1).

143 Ibid s 68.

144 P Billings, ‘Social Welfare Experiments in Australia: More Trials for Aboriginal families?’ (2010) 17 *Journal of Social Security Welfare* 164, 175.

145 FaHCSIA, *National Plan to Reduce Violence Against Women and Their Children—Including the First Three-year Action Plan* (2011), 20–22.

146 P Memmott and others, *Violence in Indigenous Communities* (2001), prepared for the Crime Prevention Branch, Australian Government Attorney-General’s Department, 18.

147 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities: Key Issues* (2006), 124.

148 CAALAS, *Submission CFV 107*; Aboriginal & Torres Strait Islander Women’s Legal & Advocacy Service, *Submission CFV 103*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 138*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*; Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, Council of Single Mothers and their Children (Vic), *Submission CFV 55*.

evidence base. Until such time as a thorough, independent assessment of the impact of current voluntary income management arrangements has been conducted, there should be no moves to extend this.¹⁴⁹

How voluntary is ‘voluntary’?

10.92 The ALRC considers that the compulsory element of income management hinders access to welfare and support for victims of family violence and that a more flexible voluntary approach provides a more measured response that includes a focus on individual autonomy for people experiencing family violence. In the Discussion Paper the ALRC suggested that the CYWR model provided an instructive model for the Australian Government and the administering agencies of welfare reform, because of its 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 CYWR 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.

10.93 On this basis the ALRC suggested that the CYWR model could provide 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.

10.94 This received support from stakeholders. For example, National Legal Aid commented that the Cape York experience ‘might be informative’.

The priority should be to identify all issues and the best response to those issues, which might then avert the need for income management. Whilst this approach would require front-end resourcing, it could also avert the need for resource intensive applications for exemption.¹⁵⁰

10.95 Stakeholders strongly supported a more flexible income management model, commenting, for example, that:

- any model should be flexible;¹⁵¹
- a more flexible voluntary IM model would enable women to regain management of their money;¹⁵²
- an alternative approach to income management may be beneficial to Indigenous women experiencing domestic violence as a mandatory income management regime may discourage reporting;¹⁵³

149 AASW (Qld) and WRC Inc (Qld), *Submission CFV 138*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*.

150 National Legal Aid, *Submission CFV 164*.

151 CAALAS, *Submission CFV 107*; Aboriginal & Torres Strait Islander Women’s Legal & Advocacy Service, *Submission CFV 103*.

152 Equality Rights Alliance—Women’s Voices for Gender Equality, *Submission CFV 143*.

- many people would like to utilise voluntary IM, but they would like more control over the percentage of the managed payments and the ability to opt-in and opt-out at their own discretion;¹⁵⁴
- the effectiveness and consequences of the CYWR model should be rigorously evaluated through the communities where this model has been introduced and any further expansion needs to be informed by robust empirical data conducted by an independent research organisation and findings to be made public for further comment.¹⁵⁵

10.96 The ALRC recognises that it is important to offer a flexible welfare policy to address the needs and safety of the welfare recipient and his or her children for people experiencing family violence. In addition, the ALRC considers that further research and evaluation of the various voluntary measures will assist to identify the relationship between family violence and appropriate responses.

10.97 Submissions from many stakeholders did not support the current voluntary IM regime because it was not flexible for people experiencing family violence, and that it was not a truly ‘voluntary’ scheme, in form or substance. The controversial aspect of income management is not only the compulsory regime but also the voluntary provisions.

10.98 A number of stakeholders commented on the problems that exist under the voluntary measure under the *Social Security (Administration) Act* model. 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 for 13 weeks before being able to exit.

10.99 A number of stakeholders were also critical of the way in which the CYWR model is working, namely that:

- it does not allow for flexibility and is not an appropriate model;¹⁵⁶ and
- it is not supported without further information and assessment of its impact on communities and also raises systemic issues as a welfare model.¹⁵⁷

10.100 Some responses from stakeholders stated that voluntary IM under the CYWR model also seeks to impose restrictions.¹⁵⁸ For example, the AASW (Qld) and WRC Inc (Qld) submitted that,

153 Indigenous Law Centre, *Submission CFV 144*. See above.

154 Commonwealth Ombudsman, *Correspondence*, 28 October 2011.

155 AASW (Qld) and WRC Inc (Qld), *Submission CFV 138*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*; Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*.

156 Equality Rights Alliance—Women’s Voices for Gender Equality, *Submission CFV 143*; CAALAS, *Submission CFV 107*.

157 Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*.

158 AASW (Qld) and WRC Inc (Qld), *Submission CFV 138*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*; Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*.

While in essence income management is voluntary, there are instances where this is not the case particularly where someone has been referred to the income case management team by, for example, the Department of Communities (Child Safety Services) in these communities. The unintended consequences of this require further evaluation.¹⁵⁹

10.101 CAALAS pointed out that:

while the Cape York Welfare Reform model creates a more flexible administration of income management (by allowing the Family Responsibilities Commission to take into account the best interests of the person, their children and families in deciding to refer a person for voluntary income management), it does not create extra flexibility for an individual in terms of how voluntary income management will work for them. ... It is not an appropriate model upon which to base any amendment of the voluntary income management measure.¹⁶⁰

10.102 The Aboriginal and Torres Strait Islander Women’s Legal Services NQ Inc stated that they did not support the CYWR model ‘without further information and assessment of the impact on the communities and individuals’.

In our experience, any system which seeks to impose restrictions, unless by consent of the individual/s affected, risks producing fractured communities and may be perceived as punitive action by the decision-makers (especially if local) rather than supportive measures. Further, such a system is open to abuse where there are long-standing disagreements between families or individuals.¹⁶¹

10.103 Voluntary IM under the *Social Security (Administration) Act* and the CYWR models have some ‘voluntary’ characteristics, but neither is fully ‘voluntary’ as there is an inflexibility for a person to ‘opt-in and opt-out’ of these systems when they choose. However, many submissions expressed qualified support for voluntary IM measures, provided they are flexible and focused on the individual needs of people experiencing family violence.¹⁶²

‘Opt-in and opt-out’ model

10.104 The ALRC recommends that the *Social Security (Administration) Act 1999* should be amended to create an ‘opt-in and opt-out’ income management model that is voluntary and flexible. Stakeholders supported this approach, on the basis that it would encourage the disclosure of family violence,¹⁶³ and still ensure that the complex needs of victims and their safety are provided for,¹⁶⁴ and that it had the potential to offer dignity and choice in the very complex system of social security compliance.¹⁶⁵

159 AASW (Qld) and WRC Inc (Qld), *Submission CFV 138*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*.

160 CAALAS, *Submission CFV 107*.

161 Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*.

162 CAALAS, *Submission CFV 107*; Aboriginal & Torres Strait Islander Women’s Legal & Advocacy Service, *Submission CFV 103*; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*, Council of Single Mothers and their Children (Vic), *Submission CFV 55*.

163 Indigenous Law Centre, *Submission CFV 144*.

164 Good Shepherd Youth & Family Service, *Submission CFV 132*.

165 WRC Inc (Qld), *Submission CFV 66*.

10.105 CAALAS, for example advocated for reform of voluntary IM

to allow individuals to enter into, and exit from, a voluntary income management agreement at any time, and to allow voluntarily income managed individuals to determine the percentage of their income that is income managed including the percentage of any lump sum payments.¹⁶⁶

10.106 The ALRC considers that the development of such an ‘opt-in and opt-out’ income management model needs to include a number of key aspects, such as:

- ways to ensure that individuals understand the consequences of voluntary IM, particularly where victims of family violence may be experiencing trauma or have language barriers;
- ways in which the community may be involved, to ensure appropriate support for individuals; and
- other measures, such as financial counselling, which may support and strengthen the effectiveness of any voluntary IM measures.

10.107 The ADFVC submitted that a system of voluntary IM 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.¹⁶⁷

10.108 The Commonwealth Ombudsman reported that it received general feedback from people and representative organisations that

many people would like to utilise voluntary IM, but they would like more control over the percentage of their payments that are managed and their ability to opt-in and opt-out at their own discretion.¹⁶⁸

10.109 The Aboriginal and Torres Strait Islander Women’s Legal and Advocacy Service Aboriginal Corporation argued that any type of voluntary IM should be flexible—‘the social security recipient should have the capacity to make an informed decision’.¹⁶⁹

Future reform—the need for further evidence

10.110 Many submissions recognised the importance of evidence-based policies, and the ALRC considers that the development of a new voluntary model of income management should be informed by the development of an appropriate evidence base.

166 CAALAS, *Submission CFV 107*. See also CAALAS, *Submission CFV 78*.

167 ADFVC, *Submission CFV 71*. The availability of financial counselling was also encouraged by: CAALAS, *Submission CFV 78*.

168 Commonwealth Ombudsman, *Correspondence*, 28 October 2011.

169 Aboriginal & Torres Strait Islander Women’s Legal & Advocacy Service, *Submission CFV 103*,

The Ombudsman, for example, commented that ‘[i]t is evident that more analysis and understanding is required to better inform the development of policies in this field’.¹⁷⁰

10.111 Considerable research and evaluation has already been undertaken and this provides a foundation upon which further evaluations may be conducted.

10.112 In May 2010 Jumbunna Indigenous House of Learning responded to the proposed introduction of the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009. In doing so, it provided a detailed outline of government identified sources and other relevant reports prepared between June 2008 and November 2009. It noted the ‘absence of any baseline data when the NTER commenced, and the limits to data collected during its operation’.¹⁷¹

10.113 As outlined in FaHCSIA’s submission, in September 2010 ORIMA Research released a report following evaluation of the trials of two income management measures in the metropolitan area of Perth—CPSIM; and voluntary IM. The three overarching research objectives of the evaluation were to assess the impact of income management in improving child wellbeing, on financial capability of individuals and to assess the effectiveness of implementation.¹⁷² The evaluation found that income management ‘has generally had positive impacts on the wellbeing of individuals, children and families’.¹⁷³ In particular it found that:

- 6 in 10 income managed clients thought that income management had made their lives better.
- Generally stakeholders though that CPSIM and voluntary IM has positive impacts on the wellbeing of children. However some also reported negative impacts.
- In the 12 months prior to income management, 74% of respondents indicated that they had been unable to pay for at least one essential item (such as food, utilities, rent) in the previous 12 months, this decreased to around 50% during the income management period.
- Stakeholders tended to report that income management had had a positive impact on family relationships.¹⁷⁴

10.114 In its submission, the Equality Rights Alliance referred to its own contribution to developing an evidence base—their report based on data gathered

170 Commonwealth Ombudsman, *Correspondence*, 28 October 2011.

171 T Priest with E Cox, *A Response to the Proposed Introduction of the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009: Why the Proposed Bill Should Be Delayed* (May 2010), prepared for Jumbunna Indigenous House of Learning, 5.

172 ORIMA Research, *Evaluation of the Child Protection Scheme of Income Management and Voluntary Income Management Measures in Western Australia* (2010), prepared for FaHCSIA, 8.

173 *Ibid.*, 9.

174 *Ibid.* See also FaHCSIA, *Submission CFV 162*.

during May and June 2011.¹⁷⁵ The report sample group included over 180 women on income management—‘the largest number of women on Income Management in any study’ of which they were aware.¹⁷⁶ What this report concluded was that the qualitative data indicates that compulsory Income Management is ‘not improving the safety of some women experiencing family violence’. An example from the report is quoted:

A domestic violence crisis worker said that some general stores still allow women to book up an account, including alcohol and cigarettes under pressure from an abusive partner, and pay it off once a fortnight using their BasicsCard. Some women in abusive relationships are asked by their partner to trade their BasicsCard for cash at a much lower value than what is on their card. She says these women say they are reluctant to talk to Centrelink about getting help to leave the relationship because they know they have broken the rules for using the BasicsCard, and don’t want to be in even more trouble with Centrelink. Administrative problems with rent payments made by Centrelink to NT Housing also affect the women’s access to NT Housing crisis support services.

‘Women needing crisis accommodation can’t get on the priority housing list (at NT Housing) if their rent is in arrears. Affects domestic violence crisis situations if Centrelink are not getting the rent paid. In a recent situation, a woman had to go back to the community where her abuser lives because of this’ — Quote from a domestic violence crisis support worker.¹⁷⁷

10.115 In November 2011, the report on the evaluation of the NTER conducted by the Australian Institute of Criminology, the Australian Institute of Health and Welfare, the Australian Institute of Family Studies, the Australian Council for Educational Research, Allen Consulting Group, Colmar Brunton Social Research, and KPMG was released. The report was ‘not intended to provide policy advice or suggest what should be done next; rather, it provides an assessment of outcomes to date’.¹⁷⁸ The study aimed to

examine whether the measures, both individually and collectively, have been effective and comprehensive and have led to improved and sustainable outcomes in safety, health, education and employment.¹⁷⁹

10.116 The evaluation found that ‘[i]ncome management was supported by many people in the communities who believed that it was bringing about positive outcomes, especially for children’.¹⁸⁰

Under the [2010] changes, income management was extended across the Northern Territory and was focused on the long-term unemployed, disengaged youth, people considered vulnerable by a Centrelink social worker, and people referred by a child protection worker. NTER residents could be exempted from income management following the 2010 changes.

175 Equality Rights Alliance, *Women’s Experience of Income Management in the Northern Territory* (2011).

176 Equality Rights Alliance—Women’s Voices for Gender Equality, *Submission CFV 143*.

177 *Ibid.* The Alliance also referred to survey data that 70% of respondents did not feel safer since they had received BasicsCard, observing that ‘while further research is needed to better understand the relationship between safety and income management, there is clearly a link’.

178 FaHCSIA, *Northern Territory Emergency Response Evaluation Report 2011* (2011), iii.

179 *Ibid.*, iii.

180 *Ibid.*, 6.

After the change to the program, many people who had been forced onto income management were taken off it. Of those released from compulsory income management at least 59 per cent had chosen to go onto voluntary income management by the end of 2010. Some participants have been able to save for and purchase major household items, such as washing machines or new refrigerators. Some are using income management as the basis of a household saving program.¹⁸¹

10.117 The report notes however some difficulties with the limitations on available data.

While the report does have a strong focus on data, it is important to understand that there are only around 45,000 Indigenous Australians resident in the NTER communities. It can be difficult at times to observe trends in some outcome data for what is a relatively small population over a four-year period. It is also important to understand that the NTER is a very complex policy response that has many elements. It is not always possible to identify the additional impact of individual measures because so many changes, both NTER and other measures, were introduced at a similar time.¹⁸²

10.118 A number of stakeholders in this Inquiry pointed to a lack of empirical evidence about the impact of income management on people experiencing family violence.¹⁸³ For example, the Welfare Rights Centre (NSW) highlighted its concern that:

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.¹⁸⁴

10.119 It also emphasised the importance of further evidence-based research to identify and recommend any progressive improvements from amended income management policy.

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.¹⁸⁵

10.120 The AASW suggested that, prior to further expanding and revising income management that research based on a robust evidence base for any model and to identify the intended and unintended consequences of income management.¹⁸⁶ National Legal Aid added:

181 Ibid, 32.

182 Ibid, iii.

183 National Legal Aid, *Submission CFV 164*; ADFVC, *Submission CFV 71*; WRC (NSW), *Submission CFV 70*; WRC Inc (Qld), *Submission CFV 66*; Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care, *Submission CFV 65*; WEAVE, *Submission CFV 58*.

184 WRC (NSW), *Submission CFV 70*.

185 Ibid.

186 AASW (Qld) and WRC Inc (Qld), *Submission CFV 138*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*.

there is a lack of evidence based research as to the effectiveness of current income management schemes including their impact on people experiencing or attempting to escape/escaping from family violence. We therefore suggest that there is a need for independent evaluation of the impact of income management schemes including on people experiencing family violence, and in particular the consequences for their safety.¹⁸⁷

10.121 FaHCSIA indicated that the NTER evaluation, released in November 2011, just before the reporting date for this Inquiry, ‘will inform future consideration of policy and legislative issues related to domestic violence’.¹⁸⁸ The ALRC considers that such evaluations provide an important contribution to developing an evidence base to inform future reforms in relation to income management. Further evaluations, particularly in relation to the ‘voluntary’ models 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, as well as key agencies. The ALRC notes in this regard that DHS in its submission stated that,

Should the Australian Government commission an independent assessment of voluntary income management on people experiencing family violence, DHS would participate and assist with any subsequent implementation.¹⁸⁹

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

Income management accounts—improving access

10.122 Payment amounts subject to income management are paid into a separate, notional, account held by welfare recipients called ‘income management accounts’.¹⁹⁰ In order to access funds in their income management account, a welfare recipient may be issued with a stored value card, vouchers, or receive other payments or credits for use in purchasing goods and services.¹⁹¹ The focus of this section is on stored PIN-protected stored value cards called ‘BasicsCards’ that may be used at approved merchants, and restricted and unrestricted direct payments.¹⁹² Stored value cards,

187 National Legal Aid, *Submission CFV 164*.

188 FaHCSIA, *Submission CFV 162*.

189 DHS, *Submission CFV 155*.

190 *Social Security (Administration) Act 1999* (Cth) ss 123TC, 123WA.

191 *Ibid* pt 3B, div 6, subdiv B. See *Social Security (Administration) Act 1999* (Cth) s 123TH for a definition of ‘priority needs’.

192 *Social Security (Administration) Act 1999* (Cth) ss 123YM, (restricted direct payments); 123YO (unrestricted direct payments). Restricted Direct Payments may be made for a specific purpose into the welfare recipient’s bank account or, with their consent, to a third party and are generally used where the recipient is subject to compulsory income management. Such payments are usually used where payment is cash is required and an alternative is not available. Unrestricted Direct Payments are made, where required, to reduce the percentage of income management ‘quarantined’ in relation to child protection and

vouchers or other payments or credits may not be used to purchase excluded goods or services, which include alcoholic beverages, tobacco products, pornographic material and gambling services.¹⁹³

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

Difficulties with the account system and BasicsCards

10.124 There are a number of difficulties faced by welfare recipients in accessing funds in their income management account. These difficulties are exacerbated in rural and remote areas and, in many cases, where a welfare recipient is experiencing family violence.

General difficulties

10.125 In the course of an Inquiry by the Senate Standing Committee on Community Affairs into proposed welfare reform legislation in 2010, the NWRN identified a range of general difficulties and unintended consequences arising in the context of income management, including in relation to the account system. These included:

- difficulties accessing funds while interstate;
- delays in the transfer of funds; and
- assessment and reassessment of priority needs by Centrelink which can be time consuming, invasive and demeaning, because the recipient must seek permission to purchase goods and services not defined as priority needs.¹⁹⁴

voluntary income managed individuals: see, eg, FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [11.1.3.80]; [11.1.3.90].

193 *Social Security (Administration) Act 1999* (Cth) s 123TI.

194 National Welfare Rights Network, *Submission to Senate Standing Committee on Community Affairs, Inquiry into Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 and the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 along with the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009* (2010), 26.

10.126 Such concerns were repeated in this Inquiry.¹⁹⁵ In addition, in the course of this Inquiry many stakeholders raised additional issues with respect to the operation of BasicsCard, including:

- general lack of understanding or information about the operation of the system;¹⁹⁶
- difficulties in obtaining account balances, specifically due to limited access to appropriate balance reading facilities and technology—‘inability to readily access an account balance has obvious implications for victims of family violence, particularly those who require immediate and urgent access to funds’;¹⁹⁷
- reduced choice and convenience in purchasing goods and services due to limited BasicsCard merchants—impacting on, for example, ability to purchase traditional medicines or foods that meet ‘cultural dietary needs at better prices than those on offer in major supermarkets’;¹⁹⁸
- impact on cultural resource sharing practices involving monetary contributions—for example, for Indigenous communities during ‘sorry business’ where cash is contributed to the deceased’s family;¹⁹⁹

10.127 A quote from an Indigenous woman in Alice Springs provided in the Equality Rights Alliance’s submission captures some of these difficulties:

Basic Card no good. Hard to remember PIN. Don't understand how it works. Hard to understand how much money. People in shops not nice, no good, if not enough money to pay for food. Where the money goes, I don't know.²⁰⁰

Definition of ‘priority needs’

10.128 ‘Priority needs’ under s 123TH of the *Social Security (Administration) Act 1999* include:

- food and non-alcoholic beverages;

195 Equality Rights Alliance—Women’s Voices for Gender Equality, *Submission CFV 143*; Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*; CAALAS, *Submission CFV 78*.

196 National Legal Aid, *Submission CFV 164*.

197 CAALAS, *Submission CFV 78*.

198 Equality Rights Alliance—Women’s Voices for Gender Equality, *Submission CFV 143*. See also Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*.

199 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. See, eg, Northern Territory Council of Social Service, *Submission to Senate Standing Committee on Community Affairs, Inquiry into Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 and the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 along with the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009* (2010), 5.

200 Equality Rights Alliance—Women’s Voices for Gender Equality, *Submission CFV 143*.

- clothing and footwear;
- basic personal hygiene items;
- housing, utilities and basic household items;
- health;
- child care and development;
- education, training and employment-related items; and
- public transport services and the maintenance, acquisition and repair of a car, motorbike or bicycle where used wholly or partly for purposes in connection with the above needs.

10.129 To the extent that a welfare recipient's reasonably foreseeable priority needs have been met, they can seek access to unspent funds for other purposes, except for obtaining an excluded good or service.²⁰¹ However, where there are unspent funds, and to the extent not already possible, s 123TH should be amended to provide for access to funds for the purposes of travel in order to leave a violent relationship, or to fund other needs arising in circumstances of crisis where a recipient is experiencing family violence. This approach was largely supported by stakeholders.²⁰² 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 'may limit a victim's ability to travel or find alternative accommodation'.²⁰³

10.130 DHS noted in its submission that s 123TH already lists public transport services and the acquisition, repair, maintenance or operation of car, motorbike or bike as priority needs.²⁰⁴ However, as highlighted by the Equality Rights Alliance, 'not all service stations accept BasicsCard, and women do not always have the capacity to check which service stations on their route accept BasicsCard before they need to leave home'.²⁰⁵ Similarly, the Indigenous Law Centre emphasised that current arrangements, including the BasicsCard

may inhibit the ability of women in a violent relationship to leave the situation due to restrictions on funds to purchase petrol or to cover other expenses necessary to escape violent situations including funds for temporary accommodation particularly on weekends.²⁰⁶

10.131 National Legal Aid provided a useful case study illustrating the difficulties arising from the current restrictions for a person fleeing family violence:

201 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [11.1.3.100].

202 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*.

203 CAALAS, *Submission CFV 78*.

204 DHS, *Submission CFV 155*.

205 Equality Rights Alliance—Women's Voices for Gender Equality, *Submission CFV 143*.

206 Indigenous Law Centre, *Submission CFV 144*.

Case Study

R was a 24 year old woman born to an Aboriginal mother. R lived with her mum in a town camp in Central Australia. R had a three year old toddler (J) to N. R was on parenting payments and was compulsorily income managed under the 2007 Northern Territory Emergency Response measures. R and N had broken up when J was 11 months old.

N had become increasingly jealous of R and seriously physically assaulted her on several occasions. At one stage he hurt her so badly that she had to stay in hospital for three nights. He also stalked her and sent her extremely disturbing text messages from public payphones. Several complex court matters including breaches of Domestic Violence Orders, major indictable offences and Family Court matters resulted from N's actions. He was imprisoned as a result of the offences.

One day R's family members warned her that N was about to be released from prison. R decided that she needed leave the Northern Territory with J urgently as she was convinced that N would find her and kill her. A domestic violence support agency worked to find R a place in a secure women's shelter in another State. So urgent was the matter that no consideration was given to the effect of moving interstate on her income managed social security benefits.

R arrived at her secure location and discovered that she could not use her Basics Card at the shops. It took several days of liaising with Centrelink to reverse her income management. R was frightened to tell Centrelink about her exact circumstances as she was still worried that N might find out what she had been saying.

The funds in her income management account were not automatically released, but paid out in instalments over several weeks. During that time R found it very difficult to buy her groceries and the other items needed to set up her new life. She felt significant shame when she tried to buy some new clothes from a shop and her Basics Card did not work. She couldn't buy phone credit to call her mother which was distressing for her. The workers at the shelter did not know anything about income management and couldn't assist her.²⁰⁷

10.132 The Ombudsman observed that the extension of the definition of priority needs to include travel or other crisis needs 'is in keeping with the broader objectives of IM as detailed in s 123TB of the *Social Security (Administration) Act 1999*'.²⁰⁸

10.133 The ALRC does not make a specific recommendation in relation to BasicsCard, as the ALRC anticipates that if an opt-in and opt-out voluntary IM system is developed in line with Recommendation 10–2, then the BasicsCards will be reviewed in due course as part of that implementation process. However, the ALRC does recommend that the Australian Government amend the definition of 'priority needs' to include travel and other crisis needs for people experiencing family violence.

Other issues

Making of restricted and unrestricted direct transfers

10.134 In the course of the Inquiry, some stakeholders expressed the view that restricted and unrestricted direct transfers should be made in circumstances where a

207 National Legal Aid, *Submission CFV 164*.

208 Commonwealth Ombudsman, *Correspondence*, 28 October 2011.

welfare recipient is experiencing family violence in order to allow improved access to funds. For example, CAALAS suggested that rather than using such transfers as a ‘means of last resort’, they should be utilised to ‘facilitate the immediate transfer of income managed funds to a person’s bank account or in cash in situations of crisis’.²⁰⁹ The ALRC suggests that this matter could be considered in the course of any Government moves to introduce an opt-in and opt-out voluntary IM system.

Residual funds

10.135 In the case of a deceased welfare recipient, several issues arise in relation to disbursement of the balance of their income management account. There are a number of ways in which the residual amount of the deceased’s account can be paid.²¹⁰ For welfare recipients who die without a will (intestate), or who have not identified a person to administer and distribute the residual funds in their income management account, the funds may remain in the person’s account.²¹¹

10.136 However, in such circumstances, the disbursement of the deceased’s funds may provide ongoing safety and protection to their children or other family members.²¹²

10.137 Where possible, disbursement of the balance of an income management account held by a deceased welfare recipient should be paid to their surviving children, particularly in circumstances involving family violence. The ALRC considers that a review of the relevant laws and processes in respect of disbursement of income management accounts, including nominee authority and will arrangements, may assist in ensuring this occurs.

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

209 CAALAS, *Submission CFV 78*.

210 *Social Security (Administration) Act 1999* (Cth) ss 123WL, 123WM; FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011 at [11.1.11.80].

211 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011 at [11.1.11.80].

212 This is particularly so given evidence suggests that in drafting their will, Indigenous people often nominate their children, either biological or under Aboriginal customary law of kinship, rather than their spouse, as their beneficiary. See, eg, R Ayres, ‘Indigenous Wills Project, Indigenous Law Bulletin’ (2011) 7(22)5.

Part D—Child Support and Family Assistance

Chapters

11. Child Support Frameworks
12. Child Support—Issues Management and Informal Carers
13. Child Support and Family Assistance—Reasonable Maintenance Action Exemptions
14. Family Assistance

11. Child Support Frameworks

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Summary

11.1 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 recommends reforms regarding the interpretative frameworks contained in child support policy—in particular, about including a definition of family violence and a statement of its nature, features and dynamics in the child support policy guide.

Child support

The child support scheme

11.2 The child support scheme was established in 1988 to enforce children’s rights to be supported by both their parents.¹ 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).

11.3 The Department of Human Services (DHS) administers child support legislation through its Child Support Program, which was fully integrated into DHS on 31 October 2011.² In its interface with customers and the public, DHS uses the terminology ‘the Child Support Agency’ (CSA) to refer to the Child Support Program, and for accessibility, the ALRC also adopts this terminology.³ The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) develops, implements and monitors child support policy.⁴

11.4 Both parents of a child may apply for child support and, in certain circumstances, non-parent carers may also be eligible for child support.⁵ The CSA uses a legislative formula to assess how much child support a parent should pay. The assessment takes into account both parents’ income, the care arrangements, and the number of dependent children, including children from other relationships.⁶ Payees may choose to collect child support privately, or for the CSA to collect and transfer child support payments on their behalf.⁷

Legislative interactions

11.5 The child support scheme interacts with the family law and family assistance systems. By way of summary, in relation to the interaction with family law, parenting arrangements are the basis of a person’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.⁸

1 Commonwealth, *Parliamentary Debates*, Senate, 17 February 1988, 165 (P Walsh—Minister for Finance).

2 DHS, *Correspondence* 14 November 2011. See, eg, DHS (Human Services Budget 2010–11: Portfolio Budget Statements—Portfolio Overview) <www.humanservices.gov.au> at 21 November 2011.

3 See, eg, Child Support Agency website <www.csa.gov.au> at 7 March 2011 (including forms available on this website); Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011.

4 FaHCSIA, *Overview* <www.fahcsia.gov.au> at 21 July 2011.

5 The child support eligibility of non-parent carers is discussed in Ch 12.

6 *Child Support (Assessment) Act 1989* (Cth) pt 5.

7 *Child Support (Registration and Collection) Act 1988* (Cth) s 24A.

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

11.6 The child support scheme also interacts with the primary family assistance payment, Family Tax Benefit (FTB) Part A,⁹ at two major points. The first is the ‘reasonable maintenance action’ requirement in family assistance legislation, which obliges eligible parents to apply for, and collect—or elect for the CSA to collect—child support. The second is an alignment in the legislative schemes regarding the ‘percentage of care’—a component of both child support and family assistance calculations. The reasonable maintenance action test and the percentage of care are described below.

Alternatives to child support assessments

11.7 Child support agreements registered with the CSA are an alternative to child support assessments by the CSA. As with an assessment, payees may choose to collect child support privately or through the CSA. Another alternative to a child support assessment, where payees receive not more than the base rate of FTB Part A, is ‘self-administration’ of child support.¹⁰ This refers to a private arrangement between parents that does not involve the CSA.

11.8 In *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011) (Discussion Paper), the ALRC examined child support agreements and self-administration of child support in some detail.¹¹ In summary, the ALRC is of the view that legislative safeguards applicable to child support agreements appear adequate to protect family violence victims against financial exploitation.¹² However, self-administration of child support is likely to be unsuitable in many cases where family violence is present. Family violence victims may collect less child support than they are entitled to, or no child support at all, due to fear, pressure or coercion. Private arrangements may also provide a platform for continuing control or abuse.¹³

Scope of the Inquiry

Terms of Reference

11.9 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.¹⁴ Chapter 12 considers how the safety of victims of family violence may be improved by reforms in the area of child support.

11.10 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 wider than the Terms of Reference. Alternatively, recommending

9 Family Assistance Office website <www.familyassist.gov.au> at 16 February 2011. FTB Part A is described in Ch 14.

10 Child Support Agency, *Facts and Figures 08–09* (2009), [1.6].

11 Discussion Paper Ch 10.

12 *Child Support (Assessment) Act 1989* (Cth) ss 80C(2), 80E(2)(b) provides such safeguards.

13 Discussion Paper Ch 10.

14 The full Terms of Reference are set out at the front of this Report and are available on the ALRC website at <www.alrc.gov.au>.

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.

11.11 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.¹⁵

11.12 Systemic issues that are beyond the Terms of Reference are identified below. Stakeholders have also raised numerous compelling issues of a systemic nature in their submissions.¹⁶

Matters outside the Inquiry

Avoidance of child support obligations

11.13 Some payers may avoid their child support obligations by minimising the income that is factored into the child support assessment.¹⁷ 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, discussed in Chapter 12.

11.14 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’,¹⁸ and an extension of other forms of family violence.¹⁹ It may also, in itself, constitute economic abuse.

11.15 Avoiding child support obligations is also an issue that affects a broad range of payees, including those who may not be victims of family violence. The systemic reforms that would be required to address this issue are beyond this Inquiry’s Terms of Reference.²⁰ The ALRC does, 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.²¹

The percentage of care

11.16 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

15 See discussion of ‘system integrity’ in Ch 2.

16 See, eg, Commonwealth Ombudsman, *Submission CFV 54*.

17 See, eg, H McKenzie and K Cook, ‘The Influence of Child Support and Welfare on Single Parent Families’ (2007) 45 *Just Policy* 13, 15.

18 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.

19 *Ibid*, 26.

20 The full Terms of Reference are set out at the front of this Report and are available on the ALRC website at <www.alrc.gov.au>.

21 See Ch 12.

child support payments and FTB.²² 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 each other, and with family law.

11.17 The ALRC has broadly identified two systemic issues in relation to the percentage of care. First, 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). 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.²³ Maintaining or increasing family assistance may also provide such motivation.

11.18 Manipulation of care arrangements to alter the child support assessment may affect victims of family violence, as well as a broader range of CSA and Family Assistance Office (FAO) customers. 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. In addition, reforms to ensure family violence is suitably considered in determining parenting arrangements should be—and have been—aimed at the family law system.

11.19 The second systemic issue concerns the rules for determining the percentage of care. Both the percentage of care rules, and stakeholders' concerns about the rules, were described in more detail in the Discussion Paper.²⁴

11.20 By way of background, since amendments to child support and family assistance legislation came into effect on 1 July 2010, the FAO and the CSA determine percentages of care in the same way. Percentage of care determinations are based on the actual care that is occurring, and each agency will apply a percentage of care determined by the other agency.²⁵ Prior to 1 July 2010, the CSA generally made care percentage determinations in accordance with oral or written agreements, parenting

22 *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 14.

23 AIFS have considered whether child support is relevant to positions adopted by parents in relation to parenting arrangements under the *Family Law Act*: 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.

24 Discussion Paper Ch 11.

25 *Child Support (Assessment) Act 1989* (Cth) ss 50(3), 54K; *A New Tax System (Family Assistance) Act 1999* (Cth) ss 35B(3), 35T. Actual care is generally based on the number of nights a person has cared for a child over a 12-month period: *Child Support (Assessment) Act 1989* (Cth) s 54A (1); *A New Tax System (Family Assistance) Act 1999* (Cth) s 35J(1); Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011, [2.2.1]; FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [1.1.C.100].

plans or court orders (where in place).²⁶ The FAO based the percentage of care on the child's 'living arrangements'.²⁷

11.21 The shift to percentage of care determinations based on actual care would, on the face of it, appear to benefit customers in cases where actual care does not correspond to court orders or previous agreements. Evidence regarding the pre-July 2010 child support system suggests that parents were reluctant to update court orders or agreements—particularly where they had experienced family violence—and accepted the often detrimental child support consequences of having assessments based on outdated care orders or agreements.²⁸

11.22 However, an unfortunate consequence of care percentages based on actual care is that it may financially benefit, or even encourage, parents who contravene court orders. On the other hand, the interim determination provisions in the child support and family assistance legislation, discussed below, may operate to discourage contravention of orders.²⁹

11.23 Stakeholders also raised concerns about the availability of interim determinations.³⁰ The CSA and FAO may make interim determinations about percentage of care in certain circumstances where written agreements, parenting plans and court orders are not being complied with.³¹ However, there is no legislative 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.

11.24 Aspects of the CSA and FAO procedure for determining percentages of care, when parents dispute the care that is occurring, also appear problematic. When parents cannot resolve disputes about the care that is occurring, the agencies make a determination based on evidence provided by the parents.³² Such reliance on parents to provide evidence to establish care patterns may be burdensome and intrusive, as discussed below in relation to CSA investigations.

11.25 *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme (Child Support Guide)* provides that, when conflicting evidence cannot be reconciled, the CSA will determine the percentage of care on the balance of

26 *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).

27 'Living arrangements' was not defined in the legislation. *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).

28 See Discussion Paper, Ch 11; Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), 228–29.

29 The Commonwealth Ombudsman reported that while it had received complaints that the emphasis on actual care encourages contravention of court orders, the interim care determination provisions may discourage non-compliance: Commonwealth Ombudsman, *Submission CFV 54*.

30 Discussion Paper Ch 12. See AASW (Qld), *Submission CFV 46*; WRC Inc (Qld), *Submission CFV 43*.

31 *Child Support (Assessment) Act 1989* (Cth) s 54C; *A New Tax System (Family Assistance) Act 1999* (Cth) pt 3 div1 subdiv E.

32 Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011, [2.2.1]; FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [2.1.1.30].

probabilities. In the ‘rare circumstances’ the CSA cannot reach a conclusion, it assumes that the state of affairs at the time of the assessment is continuing, and the percentage of care will not change.³³ It is unclear how the CSA makes a determination where there has not been a prior assessment. Further, the practice of reverting to previous care percentage determinations appears unsatisfactory. The *Family Assistance Guide* does not outline the applicable procedure for the FAO in these circumstances. However, given that the family assistance rules and child support rules are aligned regarding percentage of care, it is likely that FAO procedures are similar to CSA procedures in this regard.

Use of investigatory powers

11.26 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.³⁴ The ALRC understands that, in practice, the CSA does not usually actively investigate cases. This means that parents may need to collect evidence, or investigate the other parent’s circumstances, themselves. Where parents are unable to do this, they may be financially disadvantaged.³⁵

11.27 Stakeholders have expressed concern about the lack of CSA investigations in the context of percentage of care determinations—both where levels of care are, and are not, in dispute.³⁶ They have indicated that reliance on parents to provide confirmation regarding levels of care, or evidence about levels of care, has the potential to put victims of violence and their children at risk,³⁷ and 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.³⁸

11.28 Another context in which concerns about the lack of CSA investigations have arisen is change of assessment (or ‘departure’) determinations. A parent or carer may apply to the CSA for a change to their child support assessment in ‘special circumstances’.³⁹ The CSA or a court may change the assessment, if satisfied that one or more grounds, as specified in the legislation, exist; it is ‘just and equitable’ for the child, the payer and the payee; and it is ‘otherwise proper’.⁴⁰ The CSA may also initiate a change of assessment on limited grounds, as discussed in Chapter 12.

33 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011, [2.2.1].

34 *Child Support (Assessment) Act 1989* (Cth) ss 29, 66D, 160, 161, 162A; *Child Support (Registration and Collection) Act 1988* (Cth) ss 120, 121A.

35 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.

36 Discussion Paper, Ch 11. See Commonwealth Ombudsman, *Submission CFV 54*; AASW (Qld), *Submission CFV 46*; National Council of Single Mothers and their Children, *Submission CFV 45*. See also National Legal Aid, *Submission CFV 81*; Council of Single Mothers and their Children, *Submission CFV 44*; Bundaberg Family Relationship Centre, *Submission CFV 04*.

37 Council of Single Mothers and their Children, *Submission CFV 44*.

38 Commonwealth Ombudsman, *Submission CFV 54*.

39 *Child Support (Assessment) Act 1989* (Cth) ss 98B, 98C(1), 117.

40 *Ibid* ss 98C(1), 117.

11.29 The *Child Support (Assessment) Act* provides that the CSA may, but is not required to, conduct inquiries and investigations in making change of assessment determinations.⁴¹ In practice, the ALRC understands that the CSA does not actively investigate these cases, which may disadvantage parents who may not have the capacity or resources to investigate the financial circumstances of the other parent themselves. Victims of family violence, in particular, may be ill-equipped to investigate the assets and income of persons who have used violence against them.

11.30 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.⁴² However, the ALRC considers that a broader review of the CSA's investigatory role may be timely, particularly given the 2010 legislative changes regarding the rules for determining percentages of care.

Legal and policy framework

Objectives of the child support scheme

11.31 Associate Professor Bruce Smyth has described the policy 'backbone' of the child support scheme as being 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.⁴³

11.32 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'.⁴⁴ 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

41 Ibid 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* <www.csa.gov.au/guidev2> at 1 November 2011.

42 The full Terms of Reference are set out at the front of this Report and are available on the ALRC website at <www.alrc.gov.au>.

43 B Smyth, 'Child Support Policy in Australia—Back to Basics?' (2004) (67) *Family Matters* 42, 43.

44 *Child Support (Assessment) Act 1989* (Cth) s 4(1).

- 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’.⁴⁵

11.33 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’.⁴⁶

11.34 Both Acts state that Australia should be positioned to give effect to its international obligations.⁴⁷ 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’.⁴⁸

11.35 In the report, *Delivering Quality Outcomes: Report of the Review of Decision Making and Quality Assurance Processes of the Child Support Program*, David Richmond 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.⁴⁹

Policy and procedural resources

11.36 The legislative framework of the child support scheme is accompanied by the CSA’s policy guide—referred to in this Report as the *Child Support Guide*.⁵⁰ The CSA’s Policy Advice section produces and edits the *Child Support Guide*.⁵¹ CSA staff are expected to follow the *Child Support Guide*;⁵² 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.⁵³

45 Ibid s 4(2)

46 *Child Support (Registration and Collection) Act 1988* (Cth) s 3(1).

47 *Child Support (Assessment) Act 1989* (Cth) s 4(e); *Child Support (Registration and Collection) Act 1988* (Cth) s 3(c).

48 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011, [6.10.1].

49 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].

50 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011.

51 Ibid, [The Guide Home].

52 Ibid, [The Guide Home].

53 See *Re Confidential and Social Security Appeals Tribunal* (2010) 118 ALD 620, [6]–[7].

11.37 The *Child Support Guide* is complemented by Procedural Instructions—step-by-step guides for CSA staff.⁵⁴ Procedural Instructions are internal, electronically controlled, and subject to ongoing updates.⁵⁵

Interactions with family assistance

11.38 Child support cannot be discussed in isolation from family assistance.⁵⁶ 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.⁵⁷

11.39 Parents eligible for child support who receive more than the base rate of 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.⁵⁸ This is known as the ‘reasonable maintenance action’ requirement. Exemptions are available, including in cases of family violence. Exemptions are discussed in more detail in Chapter 13.

11.40 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 50 cents for every dollar of child support, above an exempted amount, until the base rate of FTB Part A is reached.⁵⁹

11.41 The Ministerial Taskforce noted that the reasonable maintenance action requirement and the maintenance income test

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.⁶⁰

11.42 Centrelink administers family assistance payments on behalf of the FAO. In this role, it ensures that persons eligible for more than the base rate of FTB Part A ‘take

54 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].

55 The following Procedural Instructions and electronic resources have been provided to the ALRC: DHS, *PI—Update Customer and Assessment Information*, 5 July 2011; DHS, *PI—Opting Out and/or Discharge Arrears*, 5 July 2011; DHS, *PI—Ending Assessments*, 5 July 2011; DHS, *PI—Change of Assessment*, 5 July 2011; DHS, *PI—SSAT*, 5 July 2011; DHS, *Security Incident Management*, 5 July 2011; DHS, *PI—Capacity to Pay*, 7 June 2011; DHS, *Common Module—Family Violence*, 7 June 2011.

56 Family assistance legislation is discussed in more detail in Ch 14.

57 Ministerial Taskforce on Child Support, *In the Best Interests of Children—Reforming the Child Support Scheme* (2005), [4].

58 *A New Tax System (Family Assistance) Act 1999* (Cth) sch 1 cl 10. FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.1.5.30]. See also [3.1.6.70].

59 See Centrelink, *Maintenance Income Test* <www.centrelink.gov.au> at 22 July 2011.

60 Ministerial Taskforce on Child Support, *In the Best Interests of Children—Reforming the Child Support Scheme* (2005), [4.2.2].

reasonable action to obtain child support’, and it adjusts the FTB payments of people receiving child support payments.⁶¹

11.43 A further point of interaction between child support and family assistance legislation is the determinations of percentages of care, discussed above.

Interactions with family law

11.44 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. It is essentially an administrative scheme.

11.45 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.⁶² In determining a child’s best interests, the court must consider two ‘primary’ and 13 ‘additional’ considerations.⁶³ 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.⁶⁴

11.46 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.⁶⁵ 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.⁶⁶

11.47 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 *Family Violence—A National Legal Response*.⁶⁷ At the time of writing, the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 is before the Senate. The Bill contains a number of amendments to the *Family Law Act*, aimed at improving protections for children and families at risk of

61 Child Support Agency, *Facts and Figures 08–09* (2009), [1.5.3].

62 *Family Law Act 1975* (Cth) s 60CA.

63 *Ibid* s 60CC.

64 *Ibid* s 60CC(2).

65 *Ibid* s 60CC(2)(j) and (k).

66 *Ibid* s 60CG.

67 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).

family violence and abuse.⁶⁸ This includes an amendment that provides that when there is inconsistency in the primary considerations, the court should give greater weight to protecting the child from harm as a result of abuse, neglect or family violence.⁶⁹

Other reviews

11.48 This Inquiry is one of a number of contemporary initiatives regarding child support and family violence. The CSA Family Violence 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
- 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.⁷⁰

11.49 In 2010, MyriaD Consulting delivered a report on family violence and the CSA: *Final Evaluation Report in the CSA Family Violence Project*. This report is not publicly available.⁷¹

Child support and family violence

Conceptual framework

11.50 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

68 Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth), 1; Commonwealth *Parliamentary Debates*, House of Representatives, 24 March 2011, 3140 (R McClelland—Attorney-General), 3140.

69 Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 para 60CC(2)(2A).

70 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].

71 Other reports on the child support scheme mentioned in the Discussion Paper are the 2010 review by Richmond 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: *Ibid*; Ministerial Taskforce on Child Support, *In the Best Interests of Children—Reforming the Child Support Scheme* (2005).

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 up possibilities for pressure and coercion.

11.51 The overarching objective of this Inquiry 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*.⁷² The ALRC's proposed reforms aim to increase the CSA's ability to fulfil this policy goal.

11.52 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).⁷³ 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 recommended 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.

11.53 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 receive less overall income than if they received child support payments.⁷⁴ 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.

11.54 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 recommendations 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.

11.55 An important aspect of this goal is appropriate issues management of child support cases involving family violence.⁷⁵ A number of recommendations regarding issues management are set out in Chapter 4, including a key recommendation to give

72 Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011, [6.10.1].

73 Family violence and exemptions are discussed in Ch 13.

74 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, 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.

75 See Ch 4 for a discussion of issues management. Also as discussed in that chapter, DHS is currently trialling 'Case Coordination' service delivery. The approach discussed in this chapter and Chapter 12 regarding family violence may complement, or form part of, Case Coordination service delivery.

customers information about how family violence is relevant to their child support matter. This should enable customers to make informed decisions about whether it is safe to apply for child support, and increase awareness of resources and services that can improve their safety should they do so, such as, for example, CSA collection of child support. Other key recommendations relevant to improving issues management are those regarding identification of family violence-related safety concerns (for example, through screening), staff training and interagency information sharing about safety concerns.

11.56 Equally important are Chapter 12's recommended 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.

11.57 The overall effect of these recommendations 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 coercive action.

11.58 These recommendations 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 recommendations also promote a seamless and effective approach by the CSA, Centrelink and the FAO, in particular, through responsive issues management and interagency information-sharing.

Issues management approach

11.59 The child support scheme primarily adopts an issues 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.

11.60 An issues 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.

11.61 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].⁷⁶

11.62 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.

11.63 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.

Common interpretative framework

Definition of family violence

11.64 The ALRC considers that the *Child Support Guide* should be amended to provide a definition of family violence consistent with that recommended for child support legislation and other Commonwealth legislation, as well as certain state and territory legislation.⁷⁷ The child support legislation does not currently include a definition of family violence—as discussed in Chapter 3. However, the *Child Support Guide* provides a broad definition of family violence, as well as definitions of behaviours that may be involved in family violence, such as: physical abuse; sexual abuse; emotional abuse; verbal abuse; social abuse; economic abuse; and spiritual abuse.⁷⁸

11.65 The ALRC has recommended that a similar and consistent definition of family violence—adapted as suitable for the various legislative schemes—be included in the *Child Support (Assessment) Act*, the *Child Support (Registration and Collection) Act*, and other Commonwealth legislation.⁷⁹ The ALRC considers that this recommendation should be complemented by a consistent definition in the *Child Support Guide*. Most submissions responding to the Discussion Paper supported this approach.⁸⁰

⁷⁶ DHS, *Common Module—Family Violence*, 7 June 2011.

⁷⁷ 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), the ALRC and the NSW Law Reform Commission recommended that the consistent definition of family violence be adopted in the *Family Law Act 1975* (Cth), state and territory family violence laws and, in limited circumstances, state and territory criminal laws: Recs 5–1, 6–1, 6–4.

⁷⁸ Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011, [6.10.1].

⁷⁹ Rec 3–1, 3–2.

⁸⁰ The ALRC proposed this amendment to the *Child Support Guide* in the Discussion Paper at Proposal 9–1(a). It was supported by the following stakeholders: ADFVC, *Submission CFV 104*; Aboriginal & Torres Strait Islander Women's Legal Service North Queensland, *Submission CFV 99*; Women's Information and Referral Exchange, *Submission CFV 94*; Confidential, *Submission CFV 89*. See also National Legal Aid, *Submission CFV 164*; WEAVE, *Submission CFV 85*.

11.66 The ALRC considers that this should enhance consistency across the policy and legislative bases of the child support scheme, and across jurisdictions. This should provide victims with clarity and the certainty that family violence will be recognised and treated similarly in different legal and administrative contexts. It also provides a consistent training-basis for staff—particularly those who work across legislative regimes, such as Centrelink social workers. Further, consistent and similar definitions across legislation and guidelines may foster a shared understanding across agencies, jurisdictions, courts and tribunals.

Nature, features and dynamics

11.67 The ALRC considers that the *Child Support Guide* should contain a statement regarding the nature, features and dynamics of family violence, as discussed in Chapter 3. This reform is consistent with the recommendations of *Family Violence—A National Legal Response*. In that report, the ALRC and the New South Wales Law Reform Commission recommended that provisions regarding the nature, features and dynamics of family violence should be contained in state and territory family violence legislation. The Commissions also recommended that the *Family Law Act* should be amended to include a similar provision.⁸¹

11.68 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, the ALRC considers that there is value in including such a statement in the *Child Support Guide*—a measure generally supported by stakeholders who commented on this issue.⁸² DHS stated that

there are sections of the community that are more vulnerable to family violence due to power imbalances based on Indigenous status, culture, sexuality, disability or age. The department agrees that a clear understanding of the features, dynamics and experience of family and domestic violence is crucial for customer service staff and that this information should be included in policy documents, procedures and training materials.⁸³

11.69 A joint submission by Domestic Violence Victoria and others submitted 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’.⁸⁴

11.70 Including a statement of the nature, features and dynamics of family violence in the *Child Support Guide* would serve an important educative function—

81 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 7–3. Ch 3 sets out the form of this statement.

82 The ALRC proposed this amendment to the *Child Support Guide* in the Discussion Paper at Proposal 9–1(b). It was supported by the following stakeholders: National Legal Aid, *Submission CFV 164*; ADFVC, *Submission CFV 104*; Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*; Women’s Information and Referral Exchange, *Submission CFV 94*; Confidential, *Submission CFV 89*. See also WEAVE, *Submission CFV 85*.

83 DHS, *Submission CFV 155*.

84 Joint submission from Domestic Violence Victoria and others, *Submission CFV 59*.

complementing recommendations in relation to training in Chapter 4—and provide a contextual basis for issues management and safety concern identification. Such a measure also complements recommendations regarding definitions in Chapter 3, by establishing a common interpretative framework around family violence across agencies and legal frameworks. As discussed in Chapter 3, the form of the statement should be altered to best suit the presentations of family violence, and the particular risks victims may face, in each particular legal framework.

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

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

12. Child Support—Issues Management and Informal Carers

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Introduction

12.1 This chapter addresses two key issues in the child support context: improving the safety of family violence victims within the child support scheme; and the child support eligibility of informal carers—in particular, where they care for children who have experienced family violence (including abuse) in their parents' or legal guardians' home.

12.2 The recommended reforms in this chapter are presented in two sets. The first set focuses on appropriate management by the Child Support Agency (CSA) of child support cases involving customers with family violence-related safety concerns. The recommended reforms relate primarily to providing referrals to, and consulting with, customers who have disclosed family violence at certain key points (intervention points) in a child support case. Intervention points for screening, 'risk identification',

or other methods of identifying safety concerns, are also considered. These recommendations complement those in Chapter 4 regarding identification of safety concerns and information sharing.

12.3 The second set of reforms aims to remove legislative barriers to child support faced by informal carers (often grandparents), especially where children are in informal care as a result of family violence. The ALRC recommends that the Australian Government consider repealing the limitation on informal carers' child support eligibility. If the limitation is not repealed, the ALRC recommends that the Australian Government should broaden the eligibility criteria for child support in cases where informal carers are caring for children who have experienced family violence in their parents' or guardians' home.

Issues management

Family violence and child support scheme participation

12.4 Appropriate issues management in the child support context should take into account ways in which family violence may affect participation in the child support scheme. As discussed in Chapter 11, a parent who is a victim of family violence may fear continued interaction with the other parent and avoid situations that provide opportunities for continuing control. Additionally, CSA-initiated actions against a person who has used violence may inflame, create or reignite conflicts, and open up possibilities for pressure and coercion.

12.5 In some cases, it will be necessary for victims of family violence to opt out of the child support scheme by obtaining exemptions from the 'reasonable maintenance action' requirement, thereby forgoing child support payments.¹ However, the ALRC considers that appropriate issues management may, in many cases, increase the ability of victims to participate in the child support scheme.

12.6 At the time of writing, the Department of Human Services (DHS) is running a pilot program regarding family violence 'risk identification' and is also trialling a new service delivery approach called 'Case Coordination' to provide integrated and intensive support to customers 'facing disadvantage or complex challenges'. DHS stated:

The support and assistance offered will vary depending on customers' needs, from simple referrals to services such as training programs or information about other services, to intensive support involving multiple coordinated appointments with non-government and local community services, such as for homelessness issues associated with family violence.²

12.7 As discussed in Chapter 4, the ALRC uses the term 'issues management' in this Report to refer to the customer interface of the CSA (and other agencies). However, the ALRC's recommended reforms may complement, or form part of, DHS Case Coordination service delivery.

1 As discussed in Chs 11 and 13.

2 DHS, *Submission CFV 155*. More information about these programs is provided in Ch 4.

Referrals and consultation

12.8 ALRC recommendations aim to improve the safety of family violence victims within the child support scheme through appropriate management of child support cases. There are two key strategies underpinning these reforms. First, the CSA should consult with victims of family violence, and consider their concerns, prior to initiating significant action against the other party. Secondly, the CSA should refer payees to Centrelink social workers, or other expert service providers, when payees have disclosed family violence, and make requests or elections in their child support case that may indicate ongoing pressure or coercion, or fear of the other party. This complements Recommendation 4–3, which provides that customers should be provided with referrals when they disclose family violence to an agency.

12.9 The ALRC considers that this two-pronged approach would improve safety by:

- facilitating the CSA’s existing policy aim to ‘avoid, as far as possible, actions which could contribute to family violence’;³ and
- giving family violence victims opportunities to access supports, through suitable referrals, that assist them to take protective steps, or otherwise address safety concerns.

12.10 A consequent benefit of this two-pronged approach is that, by improving safety, the accessibility of the child support scheme should also be improved. Victims of family violence may be more likely to participate in the scheme if they are aware that they will be consulted, and have time to take necessary protective measures, prior to significant CSA-initiated action against the other party.

12.11 Referrals to expert service providers may also assist a payee to continue to participate in the child support scheme, for example, by assisting to secure protection that enables continued participation. This should improve the financial position of these payees and their children. Centrelink social workers and other expert service providers may provide information and support to enable payees to make informed decisions about their child support case. They may also grant, or assist an application for, exemptions from the reasonable maintenance action requirement, when it is unsafe for victims to receive child support payments.⁴

12.12 Particular intervention points when the CSA should consult customers, provide referrals, or identify safety concerns—for example, through screening or risk identification, are discussed in detail below. The ALRC has ensured that the lists of particular intervention points contained in recommendations are non-exhaustive, so that further intervention points may be added, perhaps informed by the risk identification pilot.⁵ Some stakeholders have suggested other possible intervention

3 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011, [6.10.1].

4 See Chs 11 and 13 regarding the reasonable maintenance action requirement and exemptions from this requirement.

5 DHS has stated that this pilot may help identify such points: DHS, *Submission CFV 155*.

points.⁶ However, in making these recommendations, the ALRC has been mindful that ‘multiple risk assessments could be frustrating for customers and resource intensive for the department’.⁷

12.13 Generally, the ALRC considers that the CSA should consult with customers who have disclosed family violence, and consider their concerns, prior to initiating the following actions against the other party: change of assessment (or ‘departure’) determinations; court actions to recover child support debt; and departure prohibition orders (DPOs).⁸ This approach attracted support from most stakeholders who commented on it, including National Legal Aid (NLA), Women’s Information and Referral Exchange (WIRE), and Women Everywhere Advocating Violence Elimination (WEAVE).⁹ NLA commented that Legal Aid staff have experienced

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.¹⁰

12.14 DHS observed that:

certain actions taken by DHS as part of its administration of the child support scheme can represent family violence trigger points for some customers. The benefit of risk identification and information provision at these points is that the Child Support program may in some cases be able to consider alternative forms of action.¹¹

12.15 The ALRC also considers that CSA staff should refer payees who have disclosed family violence to Centrelink social workers or other expert service providers when the payee makes an election or request that may indicate family violence-related safety concerns, including where a payee elects or requests: to end a child support assessment (case); to end CSA collection of child support or arrears; or that the CSA terminate, or not commence, enforcement action or DPOs. These intervention points should be in addition to the provision of referrals when customers disclose family violence-related safety concerns.¹² Referrals at the point of disclosure are provided for in the DHS internal procedural resource, *Common Module—Family Violence*.¹³ In Chapter 4 of this Report, it is recommended that *The Guide: CSA’s Online Guide to the*

6 For example, Women’s Information and Referral Exchange, *Submission CFV 94*; National Legal Aid, *Submission CFV 81*; Commonwealth Ombudsman, *Submission CFV 54*.

7 DHS, *Submission CFV 155*.

8 This reflects Proposal 9–5 of the Discussion Paper, which proposed that this practice should be articulated in the *Child Support Guide*.

9 National Legal Aid, *Submission CFV 164*; Women’s Information and Referral Exchange, *Submission CFV 94*; Confidential, *Submission CFV 89*, WEAVE, *Submission CFV 85*. ADFVC stated that ‘expert case managers should be brought in to assist when family violence is disclosed’: ADFVC, *Submission CFV 104*. The Lone Fathers Association stated that this approach, and others the ALRC has made regarding issues management, ‘require careful safeguards’: Lone Fathers Association Australia, *Submission CFV 109*.

10 National Legal Aid, *Submission CFV 81*.

11 DHS, *Submission CFV 155*.

12 Rec 4–3.

13 DHS, *Common Module—Family Violence*, 7 June 2011.

Administration of the New Child Support Scheme (Child Support Guide) set out the procedure regarding referrals upon disclosure of safety concerns.¹⁴

12.16 In *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011) (Discussion Paper), the ALRC proposed that referrals of CSA customers who disclose family violence-related safety concerns should be to Centrelink social workers.¹⁵ This approach was supported by a number of stakeholders.¹⁶ WIRE submitted that the customer should not be obligated to receive services.¹⁷ The Australian Domestic and Family Violence Clearinghouse (ADFVC) considered that referrals should be made with the customers' agreement.¹⁸ The ALRC agrees that customers should be encouraged, but not obliged, to receive services from expert service providers to whom they are referred, and this appears consistent with current CSA practice in relation to referrals.

12.17 Some stakeholders stressed the importance of referrals to service providers other than Centrelink social workers. The Aboriginal and Torres Strait Islander Women's Legal Services NQ (ATSIWLSNQ) considered that Indigenous women should 'be given the benefit of culturally appropriate referrals including referral to legal support where appropriate'.¹⁹ NLA stated that:

in such circumstances customers should also be referred for legal advice to ensure that they are able to understand their options and make informed choices; including in relation to obtaining protective orders and other measures that may be appropriate in the particular circumstances.²⁰

12.18 DHS stressed the importance of referrals to professional or highly skilled workers, stating that the role of unqualified staff should be 'limited to containment and immediate referral'.²¹ It also submitted that referrals should not be confined to Centrelink social workers:

It is not correct to presume that every customer who presents with or identifies a family violence issue requires a higher level of intervention through a social worker. In some circumstances lower level responses, such as information provision, may be appropriate, and in some situations customers may be receiving suitable assistance through other organisations in the family violence sector and only financial assistance is sought from DHS.²²

12.19 DHS also stated that, whatever the referral option, 'risk identification' (that is, screening, or a screening-like procedure) should be 'accompanied by the immediate availability of someone qualified to carry out a more complex screening and assessment, and to provide support and advocacy'. In the child support context, DHS

14 Rec 4–3.

15 Discussion Paper, Proposal 9–3.

16 National Legal Aid, *Submission CFV 164*; ADFVC, *Submission CFV 104*; Women's Information and Referral Exchange, *Submission CFV 94*; WEAVE, *Submission CFV 85*.

17 Women's Information and Referral Exchange, *Submission CFV 94*.

18 ADFVC, *Submission CFV 104*.

19 Aboriginal & Torres Strait Islander Women's Legal Service North Queensland, *Submission CFV 99*.

20 National Legal Aid, *Submission CFV 164*.

21 DHS, *Submission CFV 155*.

22 Ibid.

stated that customers are offered immediate referral to an ‘expert service, including external professional counsellors’.²³

12.20 The ALRC considers that it is appropriate to refer customers who have disclosed family violence at the identified intervention points to expert service providers—including, but not limited to, Centrelink social workers.²⁴ Customers should, however, be referred to Centrelink social workers when they take certain actions—including actions that constitute intervention points—that may affect their compliance with the reasonable maintenance action requirement and their Family Tax Benefit (FTB) Part A.²⁵ This appears to be existing practice—as discussed below, certain Procedural Instructions and sections of the *Child Support Guide* provide that the CSA should refer customers to Centrelink social workers in such circumstances.

Identifying safety concerns

12.21 In order for the CSA to act on family violence-related safety concerns, such concerns must first be identified. Recommended reforms regarding referral and pre-action consultation therefore require complementary measures. In Chapter 4, the ALRC recommends that the CSA and other agencies should take steps to identify customers’ safety concerns upon or following applications for child support, social security or family assistance. As discussed in that chapter, steps to identify safety concerns may take the form of, for example, screening, ‘risk identification’ (a screening or screening-like procedure currently being piloted by DHS), or other methods to prompt or promote disclosure. Chapter 4 provides more information about methods for identifying safety concerns and the DHS Risk Identification Pilot.²⁶

12.22 The ALRC considers that the CSA should identify safety concerns about family violence at other points in child support cases, as well as at the initial application for child support. These intervention points can generally be characterised as: upon payee actions that may indicate family violence-related safety concerns; and prior to significant action initiated by the CSA. Identifying safety concerns at these intervention points directly facilitates the recommended approach in relation to referrals and pre-action consultation.

12.23 Events that may indicate family violence-related safety concerns are when a payee requests to: end a child support assessment (child support case); or end CSA collection of child support or arrears. Significant CSA-initiated actions which may prompt family violence-related safety concerns include: change of assessment determinations, court actions to recover child support debt and DPOs.

23 Ibid.

24 This issue is also discussed in Ch 4.

25 See Chs 11 and 13 for discussion of the reasonable maintenance action requirement and the interaction of child support and Family Tax Benefit Part A. Ch 13 describes the role of Centrelink social workers in this context.

26 As discussed in Ch 4, although the ALRC proposed ‘screening’ at these points, DHS has submitted that it would not define the model proposed by the ALRC as ‘screening’, as it did not include questioning customers regarding the existence of family violence. The ALRC does not make a recommendation regarding the precise form of safety concern identification.

12.24 Stakeholders supported screening at these points.²⁷ DHS also considered that screening should be part of a risk assessment framework that considers:

- ‘customer responses or behaviour which might indicate family and domestic violence’; and
- ‘screening questions at certain key administrative events linked to greater risk of family and domestic violence’.²⁸

12.25 This approach corresponds with the intervention points for safety concern identification recommended by the ALRC in this chapter.

Safety concern flags

12.26 Recommendation 4–4, regarding interagency information sharing about ‘safety concern flags’, also complements recommendations contained in this chapter. The existence of a safety concern flag should inform the CSA of whether a customer has previously disclosed family violence to an agency. Safety concern flags thereby facilitate recommendations in this chapter about providing referrals, and pre-action consultation, to victims of family violence.²⁹

Targeting recommendations

12.27 In the Discussion Paper, the ALRC framed its proposals about safety concern identification, referrals and pre-action consultation with reference to the *Child Support Guide*, rather than the DHS Procedural Instructions, an internal electronic resource for CSA staff. In part this was because Procedural Instructions are not publicly available. In its submission, DHS responded that the Procedural Instructions

already include information and consideration of family violence trigger points, which will be revised as appropriate to reflect the changes in the definition of family violence and new practices around family violence. Procedural instructions and training are considered effective tools to outline these requirements rather than the *Child Support Guide*.³⁰

12.28 While information may be more easily updated and is perhaps more usefully situated for staff in Procedural Instructions, in the ALRC’s view these matters affect the personal safety of family violence victims. Such significant information should be contained in publicly-articulated policy—that is, the *Child Support Guide*—rather than contained in one or more Procedural Instructions.

27 Including National Legal Aid, *Submission CFV 164*; Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*; Women’s Information and Referral Exchange, *Submission CFV 94*; WEAVE, *Submission CFV 85*.

28 DHS, *Submission CFV 155*.

29 The CSA’s existing Sensitive Issues Indicators—described in Ch 4—may also fulfil this role. Sensitive Issues Indicators are more limited than the recommended safety concern flag, insofar as they record disclosures made to the CSA only. The ALRC has recommended that DHS should consider implementing information sharing regarding the safety concern flag between DHS programs and agencies: Rec 4–4.

30 DHS, *Submission CFV 155*.

12.29 The ALRC also considers that including this information in the *Child Support Guide* would improve transparency about CSA management of issues and cases with respect to family violence. It should also improve general awareness, among customers and their advocates, about measures in place to protect the safety of victims of family violence, including existing measures within the child support scheme. Improving awareness of these measures is an important component of increasing the overall accessibility of the child support scheme for victims.

12.30 However, the ALRC does not consider it necessary for the *Child Support Guide* to contain detailed procedural information about these matters. Detailed procedural information may be more appropriately situated in Procedural Instructions and other internal resources, which may complement more general information contained in the *Child Support Guide*.

Intervention points: actions taken by payee

Ending a child support assessment

12.31 In limited circumstances, payees may end a child support assessment (child support case). Victims of family violence may be pressured or coerced to end a child support assessment. The CSA has identified family violence as a common reason for a payee to end an assessment.³¹

12.32 Although payees may end a child support assessment pursuant to the *Child Support (Assessment) Act 1989* (Cth), the CSA cannot accept this election without Centrelink approval when payees receive more than the base rate of FTB Part A.³² Centrelink does not generally approve elections to end assessments when payees receive more than the base rate of FTB Part A, except where it grants payees exemptions from the reasonable maintenance action requirement.³³ Generally, an election to end an assessment cannot be reversed, but payees may make new applications for a child support assessment.³⁴

12.33 The Procedural Instruction, *Ending Assessments*, provides that payees receiving more than the base rate of FTB Part A, who elect to end child support assessments, should be referred to Centrelink, and, where they disclose family violence, actively referred for an appointment with a Centrelink social worker.³⁵ Similarly, the *Child Support Guide* provides that payees receiving more than the base rate of FTB Part A, who are considered at risk of family violence, should be referred to Centrelink social

31 DHS, *PI—Ending Assessments*, 5 July 2011, [2.1]

32 *Child Support (Assessment) Act 1989* (Cth) ss 151, 151A; Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011, [2.10.2], [6.10.1], FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.1.6.40]. 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.

33 See Chs 11 and 13 for discussion of exemptions from the reasonable maintenance action test and the interaction of child support and FTB Part A.

34 Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011, [2.10.2].

35 DHS, *PI—Ending Assessments*, 5 July 2011, [2.1.1].

workers for risk assessments.³⁶ However, the *Child Support Guide* and *Ending Assessments* do not provide guidelines to refer payees who do not receive more than the base rate of FTB Part A, when they end child support assessments due to family violence.³⁷

12.34 The ALRC considers that the *Child Support Guide* and relevant procedural resources should provide that *all* payees who have disclosed family violence—including payees who receive no, or no more than the base rate of, FTB Part A—should be provided with referrals to Centrelink social workers, or other expert service providers, upon a request or election to end an assessment.

12.35 Payees' elections to end assessments, when they receive no, or no more than, the base rate of FTB Part A, do not affect government expenditure in the form of increased family assistance. However this recommendation would have other significant benefits. As discussed above, Centrelink social workers and other expert service providers may provide supports, and further referrals, to assist payees to improve their safety, and to remain within the child support scheme—where appropriate. Expert service providers may also advise victims that, if their safety concerns are addressed or diminish over time, they may apply for a new child support assessment.

12.36 The ALRC considers that a request or election to end a child support assessment should also be an intervention point for safety concern identification for all payees. This should facilitate referrals to Centrelink social workers and expert service providers where family violence is disclosed.

Electing private collection

12.37 Payees may choose to collect child support payments from the payer privately, or to have the CSA collect and transfer payments. The ALRC considers that in family violence cases, CSA collection of child support payments may be the more suitable method, as it minimises both the need for direct inter-party contact about child support, and payers' opportunities for non-compliance with their child support obligations.

12.38 Payees choose CSA collection or private collection when they apply for child support.³⁸ As discussed below, payees may also elect to change collection methods. The CSA encourages private collection. In its 2007–2008 annual report, DHS noted that the 'CSA is committed to encouraging and supporting parents to manage their child support responsibilities independently through private collection arrangements'.³⁹ 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:

36 Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011, [6.10.1].

37 Ibid [6.10.1]; DHS, *PI—Ending Assessments*, 5 July 2011, [2.1.1].

38 Child Support Agency website <www.csa.gov.au> at 7 March 2011, 'Application for Child Support Assessment'. See also *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.

39 DHS, *Annual Report 2008–2009*, pt 3.

- 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.⁴⁰

12.39 Private collection may be suitable for many parents, particularly those in low-conflict cases. 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.⁴¹

12.40 Some stakeholders expressed the view that CSA collection of child support payments is more suitable than private collection, and should be encouraged, in family violence cases.⁴² There are two key reasons for CSA collection in these circumstances.

12.41 First, collection methods used by the CSA can minimise payers' ability to avoid child support obligations. Child support avoidance, in the family violence context, may be linked with ongoing control and economic abuse.⁴³ The CSA's methods of collecting child support payments include deductions from: salaries and wages; tax refunds; social security pensions and benefits; and family tax benefits.⁴⁴

12.42 Secondly, 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.⁴⁵ By minimising inter-party contact about child support, CSA collection may improve the safety of victims of family violence.

12.43 Further, victims may elect to collect privately due to fear of, or coercion by, a person who has used violence. As a result of fear or 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.⁴⁶ This may lead to financial disadvantage for payees and their children.

12.44 The Commonwealth Ombudsman expressed concern about reports 'that some payees with private collect arrangements acquiesce to payers' coercion and agree to

40 DHS, *PI—Opting Out and/or Discharge Arrears*, 5 July 2011, [Overview].

41 Department of Human Services, *Annual Report 2008–2009*, pt 3.

42 See National Legal Aid, *Submission CFV 81*; AASW (Qld), *Submission CFV 46*; Council of Single Mothers and their Children, *Submission CFV 44*.

43 The link between avoidance of child support and family violence is discussed in Ch 13.

44 *Child Support (Registration and Collection) Act 1988* (Cth) ss 43,72,72AA, 72AB.

45 I Evans, *Battle-Scars: Long-Term Effects of Prior Domestic Violence* (2007), 34.

46 *Ibid.*, 33. The availability of partial exemptions, where victims privately collect less than the assessed amount of child support, is discussed in Ch 13.

hide the fact that they are not collecting their full entitlement to child support'.⁴⁷ The Sole Parents' Union stated that some victims

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 child support collected, or they settle for minimum family tax benefit.⁴⁸

12.45 An ADFVC study also identified the issue of victims collecting privately—and not collecting the full assessed amount—as an issue of concern.⁴⁹

12.46 NLA suggested that an election to collect privately, or to end collection by the CSA, should, of itself, prompt family violence screening, and that appropriate referrals should be made when screening leads to concern regarding the appropriateness of private collection.⁵⁰

12.47 In the ALRC's view, child support collection is a CSA-provided service, and information about its relevance in family violence cases should be provided to customers at the application stage, in accordance with Recommendation 4–2. The recommendations contained in this chapter and Chapter 4, about identifying family violence-related safety concerns and providing referrals, also provide opportunities for targeted delivery of this information at the initial application stages of child support cases, and at other relevant points.

12.48 Given the Chapter 4 recommendations, it is unnecessary to recommend further intervention points to provide for:

- safety concern identification when payees elect to collect privately in their child support application; and
- referrals to expert service providers when payees who have disclosed family violence elect to collect privately in their child support application.

Safety concern identification and referrals when a payee lodges a child support application are provided for in Recommendations 4–1 and 4–3.

12.49 However, as these recommended measures apply at the initial application stage, they do not capture circumstances where payees change from CSA collection to private collection. These circumstances are discussed below.

Ending CSA collection

12.50 In cases involving family violence, payees may end CSA collection due to fear or coercion by the other parent. Payees who have previously elected for CSA collection of child support may elect to change to private collection, and vice versa.⁵¹ Payees may

47 Commonwealth Ombudsman, *Correspondence*, 28 October 2011.

48 Sole Parents' Union, *Submission CFV 52*.

49 ADFVC, *Submission CFV 53*.

50 National Legal Aid, *Submission CFV 81*.

51 *Child Support (Registration and Collection) Act 1988* (Cth) ss 25, 38, 38A. This is discussed in more detail in the Discussion Paper at Ch 11.

also elect for the CSA not to collect unpaid amounts of child support (arrears) when they end CSA collection, after they end CSA collection, or when they are no longer eligible for child support.⁵² When CSA collection of child support payments is ongoing, payees cannot elect for the CSA to end collection of arrears.⁵³

12.51 Victims of family violence may end CSA collection of child support payments and arrears for the same reasons they may choose to collect privately at an initial point. The Australian Association of Social Workers Queensland Branch (AASW (Qld)) stated that a victim may end CSA collection (or choose private collection initially) in acquiescence to the demands of person who uses violence ‘as an act of protection for herself and her children in order to contain the violence’.⁵⁴ The ADFVC also indicated that ending CSA collection was an issue of concern.⁵⁵

12.52 The Procedural Instruction, *Opting Out and/or Discharge Arrears* also recognises that family violence is a ‘risk point’ when payees end CSA collection of child support payments and when payees end collection of child support arrears.⁵⁶ In the ALRC’s view, payees ending CSA collection—including collection of arrears—should be an intervention point for identification of safety concerns and referral.

12.53 *Opting Out and/or Discharge Arrears* addresses referrals. When an election to end CSA collection has been made by a FTB-receiving payee, the CSA must encourage further discussions with Centrelink about the effects of the election, to support them in making an ‘informed choice’.⁵⁷ Where CSA 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.⁵⁸

12.54 In relation to a payee’s election to end CSA collection of arrears, the *Child Support Guide* and *Opting Out and/or Discharge Arrears* also emphasise the importance of referring payees to Centrelink for advice regarding the consequences for FTB payments.⁵⁹

52 Ibid s 38A; Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011, [5.6.1]; DHS, *PI—Opting Out and/or Discharge Arrears*, 5 July 2011, [3.1.2]. Conversely, payees who elect to change from private collection to CSA collection may apply for the CSA to collect arrears accumulated in the three-month period preceding the election, up to a nine-month period in ‘exceptional circumstances’: *Child Support (Registration and Collection) Act 1988* (Cth) s 28A. See also the Discussion Paper, Ch 9.

53 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011, [5.7.1].

54 AASW (Qld), *Submission CFV 46*.

55 ADFVC, *Submission CFV 53*.

56 DHS, *PI—Opting Out and/or Discharge Arrears*, 5 July 2011, [1], [3], [3.2].

57 Ibid, [3.2].

58 Ibid, [3.2].

59 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011, [5.6.1]; DHS, *PI—Opting Out and/or Discharge Arrears*, 5 July 2011, [4].

12.55 Although the CSA must accept a payee's election to end CSA collection,⁶⁰ *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'.⁶¹

12.56 NLA has submitted that an election to collect privately, or end collection by the CSA, should, of itself, prompt family violence screening. It also stated that appropriate referrals should be made when screening leads to concern regarding the appropriateness of private collection.⁶²

12.57 The ALRC agrees, and also considers that existing CSA procedure regarding referrals to Centrelink social workers when payees end CSA collection of child support payments and arrears is appropriate. The ALRC recommends that this approach should be extended so that payees who receive no, or no more than the base rate of, FTB Part A are also referred to Centrelink social workers or other expert service providers. Expert service providers, in addition to providing the supports described above, may ensure payees understand that they have the option to re-elect CSA collection of child support when their safety concerns are addressed.

12.58 The ALRC also recommends that the CSA should take steps to identify family violence-related safety concerns when payees elect to end CSA collection. This should facilitate referrals to appropriate services where payees end, or consider ending, CSA collection of child support payments or arrears, as a result of safety concerns.

Intervention points: actions taken by the CSA

CSA-initiated change of assessment

12.59 As discussed in Chapter 11, a 'change of assessment' (referred to in the *Child Support (Assessment) Act* as 'departure determination') may be initiated on the application of a party to the case, or by the CSA. A CSA-initiated change of assessment has the potential to compromise safety when it is initiated against a person who has used family violence.

12.60 The CSA may initiate a change of assessment due to 'special circumstances',⁶³ where the assessment results in 'an unjust and inequitable' determination of child support due to 'the income, earning capacity, property and financial resources of either parent'.⁶⁴ The CSA must be satisfied that it is 'just and equitable' and 'otherwise proper' to make the change of assessment determination.⁶⁵ The CSA refers to this process as 'Capacity to Pay' (CTP).

60 *Child Support (Registration and Collection) Act 1988* (Cth) s 38A.

61 DHS, *PI—Opting Out and/or Discharge Arrears*, 5 July 2011, [1].

62 National Legal Aid, *Submission CFV 81*.

63 *Child Support (Assessment) Act 1989* (Cth) s 98K. Change of assessments applications initiated by parents is discussed in Ch 11.

64 *Ibid* s 98L.

65 *Ibid* s 98L(1).

12.61 The *Child Support (Assessment) Act* provides that the CSA must notify the parties in writing that it is considering making the change of assessment determination, and serve on the parties a summary of the relevant information.⁶⁶ It must also inform the parties that they may reply to the summary and, if they do reply, serve a copy on the other party.⁶⁷ 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.⁶⁸

12.62 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. 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.⁶⁹ 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.⁷⁰

12.63 DHS stated:

Change of Assessment teams regularly consult with customers prior to instigating any significant action against the other party. This contact is also used to inform the customer of any potential impact on their benefits, income etc. Where there is already an indication of family violence, these customers are contacted to discuss any possible exacerbation of the violence based on the likely outcome. This does not preclude an adverse finding against the violent party. The aim will be to provide extra time for the party at risk to take steps to minimize their risk by consulting with police or counselors.⁷¹

12.64 Such pre-action consultation appears appropriate, and the ALRC considers that the *Child Support Guide* should provide information about this approach, to improve awareness about, and transparency around, this practice. In particular, the *Child Support Guide* should provide that the CSA should consult customers who have disclosed family violence and consider their safety concerns prior to initiating change of assessment determinations. The ALRC also considers that the CSA should take steps to identify family violence-related safety concerns prior to initiating departure, so that cases where such action may compromise safety may be readily identified. The recommendations in Chapter 4 regarding identification of safety concerns and safety concern flags should also facilitate this consultative approach.

66 Ibid s 98M.

67 Ibid ss 98M, 98N.

68 Ibid s 98P.

69 DHS, *PI—Capacity to Pay*, 7 June 2011, [1.2.1], [1.2.1.1].

70 Ibid, [1.2].

71 DHS, *Submission CFV 155*.

Court enforcement

12.65 Enforcement action initiated by the CSA against child support payers is a relevant consideration in the family violence context for three key reasons. First, a number of stakeholders have linked CSA debt enforcement and risks to safety in family violence cases.⁷² For example, the Commonwealth Ombudsman commented that legal action, such as seizing and selling assets, may ‘inflare the situation and place the payee in danger’.⁷³ The ADFVC, which has conducted recent research on the impact of family violence on women’s financial security and safety, 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.⁷⁴

12.66 A second and related issue is that CSA enforcement measures may, in family violence cases, create a barrier to the accessibility of the child support scheme. The Commonwealth Ombudsman commented that:

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.⁷⁵

12.67 Finally, enforcement measures may prompt payers who use family violence to pressure or coerce payees to end CSA collection. As discussed above, payees may end enforcement of arrears by ending CSA collection of child support.

12.68 Child support payments in cases registered for CSA collection are ‘debts due to the Commonwealth’ and recoverable by the CSA.⁷⁶ The CSA may take action to pursue arrears in a number of courts, including state and territory magistrates courts, the Family Court or the Federal Magistrates Court.⁷⁷ The CSA is required, under s 47 of the *Financial Management and Accountability Act 1997* (Cth), to pursue recovery of all registered child support debts, unless the debt is ‘not legally recoverable’, or it is uneconomical to pursue its recovery.⁷⁸

12.69 Although the CSA takes these actions in its own right,⁷⁹ s 113(2) of the *Child Support (Registration and Collection) Act 1988* (Cth) provides that the CSA may take such steps it considers appropriate to keep a payee informed of CSA action to recover child support debts. Despite this provision, the Commonwealth Ombudsman reports that complaints it receives ‘from payees about CSA collection tend to reveal a pattern

72 Commonwealth Ombudsman, *Submission CFV 54*; ADFVC, *Submission CFV 53*; National Council of Single Mothers and their Children, *Submission CFV 45*; Council of Single Mothers and their Children, *Submission CFV 44*.

73 Commonwealth Ombudsman, *Submission CFV 54*.

74 ADFVC, *Submission CFV 53*.

75 Commonwealth Ombudsman, *Submission CFV 54*.

76 *Child Support (Registration and Collection) Act 1988* (Cth) ss 30(1), 113(1).

77 *Ibid* ss 113(1), 104. Parents may also take court action to enforce child support: *Child Support (Registration and Collection) Act 1988* (Cth) ss 113(1)(b)(ii), 113A.

78 See Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011, [5.7.1]

79 *Child Support (Registration and Collection) Act 1988* (Cth) s 117(1).

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’.⁸⁰ The Commonwealth Ombudsman submitted that the CSA should utilise s 113(2) to:

let payees know about particular collection activities, such as a [Departure Prohibition Order] or legal action, or the reasons for not pursuing such actions. While this information would be of particular concern to a victim of family violence, it also enables a payee to carefully consider whether it is in their interests to pursue collection from the payer through taking their own legal action. This would be of benefit to the general payee population.⁸¹

12.70 A recommendation to this effect would be beyond the Terms of Reference. The ALRC does, however, make the family violence-specific recommendation that the CSA should inform and consult with payees who have disclosed family violence of anticipated enforcement action. This enables the CSA to give effect to its policy aim to ‘avoid, as far as possible, actions which could contribute to family violence’.⁸² For example, the CSA may defer enforcement action until the payee has taken protective steps to ensure his or her safety.

12.71 The ALRC also considers that referrals to a Centrelink social worker, or another expert service provider, should be made when a payee who has disclosed family violence elects to end CSA collection of child support arrears, as discussed above, or requests that the CSA terminate, or not begin, enforcement action. This may assist in ensuring that necessary supports and referrals are provided to the payee.

12.72 To complement these measures, the ALRC considers that the CSA should contact the payee to identify safety concerns before initiating court enforcement actions against the payer. Identifying safety concerns at this point, and on entry to the child support scheme, increases the likelihood that payees who may be put at risk by these actions are identified by the CSA.

12.73 Taken together, these measures should give payees at risk of family violence the opportunity to raise safety concerns, and to take necessary steps to protect their safety before enforcement action is initiated. These measures should also discourage victims from opting out of the child support scheme when they consider that CSA collection activity goes ‘too far’.⁸³

12.74 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*. Nonetheless, the DHS submission reflects a level of flexibility in the administration of this provision:

Although there is a legal requirement to pursue collection, where family violence is an issue alternative action can be considered. In cases where family violence is identified, the Child Support program will contact the affected parent to advise them

80 Commonwealth Ombudsman, *Submission CFV 54*.

81 *Ibid.*

82 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011, [6.10.1].

83 Commonwealth Ombudsman, *Submission CFV 54*.

of the intended action and advise them of the options available, for example, electing to end collection or seeking an exemption from Centrelink.⁸⁴

12.75 Inserting an additional ground in s 47 of the *Financial Management and Accountability Act*, to the effect that debts may not be pursued where doing so may cause risks to safety, may better enable the CSA to meet its policy aim of avoiding actions which could contribute to family violence. While amendment of the *Financial Management and Accountability Act* is not within the ambit of this Inquiry, the ALRC suggests that the Australian Government give consideration to such an amendment.⁸⁵

Departure prohibition orders

12.76 The CSA may also make a departure prohibition order (DPO) against a child support debtor, preventing him or her from leaving Australia.⁸⁶ 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’ failed to make payments.⁸⁷ A person may apply for a ‘Departure Authorisation Certificate’ to authorise him or her to leave the country.⁸⁸

12.77 Like CSA-initiated court action to recover child support debt, DPOs have the potential to increase risks for victims of family violence. In family violence cases, DPOs have the potential to inflame conflict and compromise safety. The Commonwealth Ombudsman has commented that it has 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.⁸⁹

12.78 Further, while there is no apparent mechanism for a payee to elect that a DPO be revoked, payers who have used violence may coerce or threaten a victim to request the CSA to revoke the DPO.

12.79 The ALRC therefore considers that the approach recommended above in relation to court recovery of debt is appropriate for cases in which DPOs may be, or have been, made against a payer. That is, the ALRC recommends that the CSA should:

- identify family violence-related safety concerns prior to initiating DPOs;
- consult with payees who have disclosed family violence, and consider concerns regarding the risk of family violence, prior to initiating DPOs;

84 DHS, *Submission CFV 155*.

85 The full Terms of Reference are set out at the front of this Report and are available on the ALRC website at <www.alrc.gov.au>.

86 *Child Support (Registration and Collection) Act 1988* (Cth) s 72D.

87 *Ibid* s 72D(c).

88 *Ibid* s 72K.

89 Commonwealth Ombudsman, *Submission CFV 54*.

- refer payees who have disclosed family violence to Centrelink social workers or other services providers when they request that the CSA terminate, or not commence, DPOs.

CSA-initiated private collection

12.80 Child support legislation provides that, in certain circumstances, the CSA may require payees to collect privately. This CSA-initiated action differs from others described in this chapter, as the *Child Support Guide* indicates that this provision will not be applied in cases involving family violence. This eliminates the need for pre-action consultation in cases where customers have disclosed family violence. The ALRC considers, however, that the existing policy safeguards to prevent the application of this provision in family violence cases may be improved.

12.81 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'.⁹⁰ The *Child Support Guide* provides that it is inappropriate to require private collection where there has been a 'history of family violence', and where a person has 'previously been exempted from having to take reasonable maintenance action'.⁹¹ It is unclear how victims of family violence are identified where they have not previously obtained an exemption.

12.82 The Commonwealth Ombudsman stated that this provision has been 'used sparingly' by the CSA since its 1999 introduction, and 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.⁹²

12.83 Although the CSA-initiated private collection provision may be used rarely, while the legislative provision is in place, the ALRC considers that further measures are required to ensure that the CSA identifies payees who have experienced violence or have safety concerns. Recommendations regarding the identification of safety concerns at the initial stage of a child support case (and at other intervention points) and 'safety concern flags' partially address this issue as the CSA may check this status before initiating private collection.

12.84 The ALRC also considers that payees should be granted the opportunity to raise 'a history of family violence' and any family violence-related safety concerns with the CSA, before it initiates private collection. The ALRC therefore recommends that the CSA should take steps to identify family violence-related safety concerns prior to

90 *Child Support (Registration and Collection) Act 1988* (Cth) s 38B(1).

91 Child Support Agency, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011, [5.6.2].

92 Commonwealth Ombudsman, *Submission CFV 54*.

requiring a payee to collect child support privately pursuant to s 38B(1) of the *Child Support (Registration and Collection) Act*.⁹³

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

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

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

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

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

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

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

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

93 The ALRC proposed this in the Discussion Paper: Proposal 9–6.

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

Informal carers

Child support eligibility

12.85 Child support legislation limits the child support eligibility of carers who are not parents or legal guardians (‘informal carers’).⁹⁴ This limitation may be undesirable, and also potentially inconsistent with the objects set out in the child support legislation.⁹⁵ The ALRC recommends that the Australian Government should consider repealing the limitation that applies to informal carers’ child support eligibility.

12.86 Generally, parents and legal guardians are eligible for child support if they provide at least 35 % of care (‘shared care’) for a child. For a legal guardian who is not a parent, the CSA will rely on a court order providing that a child is to live with a non-parent carer to determine whether the carer is eligible for child support.⁹⁶ This rule applies to family law orders, and state and territory child protection orders where the carer is a relative of the child.⁹⁷

12.87 Pursuant to s 7B(2) of the *Child Support (Assessment) Act*, 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) states 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
- (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’.

94 This Report refers to non-parent carers and non-legal guardian carers as ‘informal carers’. This terminology is used within the family assistance framework, although it has slightly different meanings across different contexts.

95 The objects are set out in Ch 11.

96 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011, [2.1.2].

97 *Child Support (Assessment) Act 1989* (Cth) s 26A 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* <www.csa.gov.au/guidev2> at 1 November 2011, [2.1.2].

12.88 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.⁹⁸ 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’.⁹⁹

12.89 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 the following 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.¹⁰⁰

12.90 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’.¹⁰¹ 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.¹⁰²

12.91 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’.¹⁰³

The nature of informal care

12.92 Informal carers are usually relatives, and most commonly grandparents.¹⁰⁴ Indigenous children may live in informal kinship care arrangements,¹⁰⁵ and most

98 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011, [2.1.1].

99 Ibid, [2.1.1].

100 Ibid, [2.1.1].

101 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011, [2.1.1].

102 Ibid, [2.1.1].

103 Ibid, [2.1.1].

104 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.

105 See D Higgins, L Bromfield and N Richardson, *Enhancing Out-of-Home Care for Aboriginal and Torres Strait Islander Young People* (2005), prepared for the Australian Institute of Family Studies.

studies ‘indicate that the majority of informal kinship carers are grandparents’.¹⁰⁶ Other informal kinship carers may be aunts, uncles, older siblings and unrelated friends.¹⁰⁷

12.93 The Australian Bureau of Statistics (ABS) notes that, in 2009–2010, there were 16,000 Australian families in which grandparents were raising children 17 years and younger.¹⁰⁸ 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.¹⁰⁹

12.94 There are a number of reasons why children may be in their grandparents’ care, including: family violence; drug or alcohol misuse; child abuse or neglect; incarceration or death of a parent; and problems arising from mental or physical illness or intellectual disability.¹¹⁰ 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’, or have health problems.¹¹¹

12.95 Where parents cannot care for their children, there are benefits to relatives such as grandparents caring for children. These benefits have been described as ‘reducing separation trauma, providing greater stability, preserving significant attachments, reinforcing cultural identity, and preserving the family unit’.¹¹²

12.96 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.¹¹³

12.97 Grandparents may spend their retirement savings and superannuation on raising their grandchildren, and may find their ‘employment and retirement plans thrown into chaos’.¹¹⁴ 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.¹¹⁵ Limited financial

106 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.

107 *Ibid.*, vi.

108 Australian Bureau of Statistics, *Family Characteristics, Australia*, 4442.0 (2009–10).

109 FaHCSIA, *Correspondence*, 14 April 2011.

110 E Baldock, ‘Grandparents Raising Grandchildren because of Alcohol and Other Drug Issues’ (2007) (76) *Family Matters* 70; 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, [3.3.1], [5.3], [6.5.2].

111 Council on the Ageing National Seniors, *Grandparents Raising Grandchildren* (2003), prepared for the Minister for Children & Youth Affairs, [6.3.2], [6.5.4].

112 B Horner and others, ‘Grandparent-headed Families in Australia’ (2007) (76) *Family Matters* 76, 77.

113 E Baldock, ‘Grandparents Raising Grandchildren because of Alcohol and Other Drug Issues’ (2007) (76) *Family Matters* 70, 75.

114 Council on the Ageing National Seniors, *Grandparents Raising Grandchildren* (2003), prepared for the Minister for Children & Youth Affairs, [6.2.2].

115 *Ibid.*, [6.2.2].

resources and high legal costs may impede them from obtaining court orders regarding children's care arrangements.¹¹⁶

The limitation may be unjustified and undesirable

12.98 The limitation on child support eligibility may disadvantage informal carers, and also 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.¹¹⁷ It is also arguably inconsistent with other objects of the Act, including that carers should have levels of financial support for children 'readily determined without the need for court proceedings'.¹¹⁸ A recommendation to repeal the limitation is beyond the scope of this Inquiry. However, the ALRC recommends that the Australian Government consider such a repeal.

12.99 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 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.¹¹⁹

12.100 The Commonwealth Ombudsman, referring to the Explanatory Memorandum, has suggested that the legislative limitation on informal carers' entitlement is an exception to the principal object of the *Child Support (Assessment) Act*, as it 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.¹²⁰

116 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'.

117 *Child Support (Assessment) Act 1989* (Cth) s 4(1).

118 *Ibid* s 4(2)(c). See also s 4(2)(d).

119 Explanatory Memorandum, *Child Support Legislation Amendment Bill 2001* (Cth), sch 9.

120 Commonwealth Ombudsman, *Submission CFV 54*. See also National Legal Aid, *Submission CFV 81* and Bundaberg Family Relationship Centre, *Submission CFV 04*. 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.

12.101 In the Discussion Paper, the ALRC proposed that the limitation on the child support eligibility for non-parent carers should be repealed. In its response, DHS expressed concern that repealing the limitation

could potentially allow individuals who are not providing any real care to apply for a child support assessment, for example, when children are older their friends could attempt to apply as their carers.¹²¹

12.102 DHS also expressed the view that the limitation is consistent with the objects of the legislation—and of the scheme as settled by DHS and FaHCSIA. It noted that one of these objects is to ‘emphasise parental responsibility (not limited to financial) where there is no risk to the child’.¹²² This object is not listed amongst the objects of the child support legislation.

12.103 As noted above, a recommendation to repeal the limitation is beyond the scope of this Inquiry. While such legislative change may affect informal carers of children who have experienced family violence, it would also affect a broader population of informal carers. Indeed, it is likely to be most relevant to those providing informal care for reasons unrelated to family violence, as family violence cases may already be captured by the ‘serious risk’ exception in s 7B(3) of the *Child Support (Assessment) Act*. Whether s 7B(3) adequately captures cases where children experience family violence in their parents’ home is another issue, and is considered below.

12.104 Although the ALRC does not make a recommendation to repeal the limitation, there may be merit in doing so. The limitation 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 benefit significantly by being raised by relatives. Further, the limitation may further disadvantage informal carers already facing financial disadvantage caused or compounded by unplanned-for child-raising. There is also an apparent discrepancy between the limitation and the principal object of the *Child Support (Assessment) Act*. For these reasons, the ALRC recommends this issue should be further considered by the Australian Government.¹²³

121 DHS, *Submission CFV 155*. Generally, with the exception of the Commonwealth Ombudsman, this approach did not attract support in submissions: Commonwealth Ombudsman, *Submission CFV 54*.

122 DHS, *Submission CFV 155*.

123 A relevant factor in making this recommendation is that the reasonable maintenance action requirement, discussed in Chs 11 and 13, does not apply to informal carers: FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.1.5.60]. The ALRC considers that application of the reasonable maintenance action requirement to informal carers may also contribute to financial disadvantage.

Broader criteria for eligibility

12.105 If the limitation is to be maintained in the legislation, the criteria in s 7B(3)(b) of the *Child Support (Assessment) Act* require amendment.¹²⁴ 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. Several stakeholders have commented that this is a barrier to child support for informal carers.¹²⁵ For example, NLA stated that the requirements of ‘serious’ risk and ‘extreme’ family breakdown may present ‘too high a barrier’ to child support for informal carers, leaving them ‘the very challenging option of either withdrawing their support for the child or suffering financial hardship’.¹²⁶

12.106 In the ALRC’s view, the term ‘violence’ should be accompanied by ‘family violence’ in s 7B(3)(b). ‘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 that may not be caught by ‘violence’ include psychological or emotional abuse, deprivation of liberty, and exposing a child to family violence. This approach is complemented by Recommendations 3–1 and 3–2, which set out a definition of family violence for child support legislation.

12.107 The section is also too limited in relation to child abuse and neglect of a child, which are not expressly included in s 7(3)(b). The provision takes into account physical abuse of a child—caught by ‘violence’—and sexual abuse. The ALRC considers this section should be amended to expressly include child abuse and neglect.

12.108 The ALRC also considers that the ‘serious risk’ element of s 7B(3) is inappropriate. 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 serious risk of harm. This requires judgment as to whether there is risk of harm, and whether such a risk is serious. The requirement for such judgment implies that child abuse, family violence and neglect may not harm children’s physical or mental wellbeing in some cases. 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.

12.109 The ALRC therefore recommends that s 7B(3)(b) should be amended to:

- expressly take into account circumstances where there has been, or there is a risk of, family violence, child abuse and neglect; and

124 The form of the amendments recommended by the ALRC were supported by WEAVE and NLA: National Legal Aid, *Submission CFV 164*; WEAVE, *Submission CFV 85*. See also FaHCSIA, *Submission CFV 162*. The Lone Fathers Association cautioned that the provisions should be ‘handled with care’: Lone Fathers Association Australia, *Submission CFV 109*. DHS preferred this approach to the repeal of the limitation on informal carers’ child support eligibility: DHS, *Submission CFV 155*.

125 National Legal Aid, *Submission CFV 81*; Sole Parents’ Union, *Submission CFV 52*; Bundaberg Family Relationship Centre, *Submission CFV 04*.

126 National Legal Aid, *Submission CFV 81*.

- remove the requirement for the Registrar to be satisfied of ‘a serious risk to the child’s physical or mental wellbeing’.

12.110 NLA submitted that the CSA should provide legal referrals for carers in these circumstances.¹²⁷ The ALRC agrees that such referrals are appropriate. The recommendations in Chapter 4 should facilitate the identification of family violence, when informal carers apply for child support, and the provision of appropriate referrals when family violence is disclosed.

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

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

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

127 National Legal Aid, *Submission CFV 164*.

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

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Summary

13.1 This chapter discusses the major point of intersection between the child support and family assistance legislative schemes: the ‘reasonable maintenance action’ requirement. 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 (FTB) Part A. Family assistance policy recognises that this requirement may affect victims of family violence, and the *Family Assistance Guide* provides for exemptions.

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

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

Reasonable maintenance action

13.4 *A New Tax System (Family Assistance) Act 1999* (Cth) (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.¹ This is referred to as taking ‘reasonable maintenance action’ or the ‘maintenance action test’ (often abbreviated to ‘MAT’). To comply with this requirement, a person must apply for child support, where eligible. He or she must also opt for the Child Support Agency (CSA) to collect payments, or collect the full amount of child support payments.²

13.5 If a person does not take reasonable maintenance action, the Family Assistance Office (FAO) will reduce FTB Part A payments for the child to the base rate.³ There is therefore a financial consequence if such action is not pursued.⁴

13.6 As discussed in Chapter 12, 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. To this end, the reasonable maintenance action requirement is complemented by the ‘maintenance income test’, which operates to reduce FTB Part A by 50 cents for every dollar of child support, above an exempted amount, until the base rate of FTB Part A is reached.

Exemptions from reasonable maintenance action

What are exemptions?

13.7 Exemptions are the key protective strategy for victims of family violence in both child support and family assistance contexts. They enable victims to opt out of the child support scheme where obtaining child support would compromise their safety. It is therefore important that exemptions are readily accessible to victims.

13.8 Victims of family violence may obtain an exemption from the requirement to take reasonable maintenance action. Exemptions are available to relieve a person from the requirement to apply for child support from the other parent, and to end an existing child support assessment (child support case).⁵ There are a number of grounds for exemptions. Grounds relevant for victims of family violence are: ‘violence or fear of violence’, and ‘harmful or disruptive effect’ on the payee or payer (including cases of

1 *A New Tax System (Family Assistance) Act 1999* (Cth) sch 1 cl 10. See also *Child Support (Assessment) Act 1989* (Cth) ss 151, 151A. FTB Part A is described in Ch 14.

2 FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.1.5.30]. See also [3.1.6.70]: ‘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. Failure will result in their FTB Part A being reduced to the base rate for the child’.

3 *A New Tax System (Family Assistance) Act 1999* (Cth) sch 1 cl 10; FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.1.5.30]. See also [3.1.5.50], [3.1.6.70]. The role of the FAO is described in Ch 14.

4 Parents eligible for child support have 13 weeks after separation to apply for child support or obtain an exemption to avoid a reduction in the FTB Part A rate.

5 When a payee is eligible for child support, the CSA cannot accept his or her election to end a child support assessment without Centrelink approval. See Ch 12.

rape or incest).⁶ Measures to improve the accessibility of exemptions are discussed below.

Exemptions and child support accessibility

13.9 While it is crucial that exemptions are accessible, 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.⁷ This is particularly important as, when an exemption is granted, lack of child support payments may not be fully compensated by an increase in benefits—resulting in less overall income.⁸ Generally, family violence contributes to ongoing poverty for victims, and the lack of child support may compound this financial disadvantage.⁹

13.10 Measures to increase the accessibility of exemptions should therefore complement, rather than undermine, reforms to improve accessibility of the child support scheme for family violence victims. A major theme of this section of the Report is to improve the issues management of child support to better protect the safety of family violence victims. This approach should facilitate victims' participation in the child support scheme. It should also limit the uptake of exemptions on grounds of family violence to those cases where victims make an informed decision that exemptions are the best strategy to ensure their safety.

13.11 Existing policy in the *Family Assistance Guide* regarding the role of the social worker and Indigenous Service Officers (ISOs) complements this approach. The *Family Assistance Guide* provides that, where customers are reluctant or refuse to apply for child support, they should be referred to social workers or Indigenous Service Officers. Social workers and ISOs ensure that customers understand that:

- child support is for the financial benefit of the child and the parent caring for the child,
- 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.¹⁰

6 FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.1.5.70].

7 This conflicts with the principle of self-agency discussed in Ch 2.

8 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.

9 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. 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.

10 FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.1.5.100].

13.12 The *Family Assistance Guide* also 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'.¹¹

13.13 Such consultations with social workers and ISOs also provide a platform to give victims of family violence information about other measures available that may improve their safety within the child support scheme, including those recommended in this Report.¹² This may assist victims to make informed choices in relation to their participation in the child support scheme.

Exemptions not in legislation

13.14 The requirement to take reasonable maintenance action is imposed by the *Family Assistance Act*. However, exemptions from this requirement are not set out in the Act. Exemption policy is instead contained in the *Family Assistance Guide* and, to a lesser extent, *The Guide: CSA's Online Guide to the Administration of the New Child Support Scheme (Child Support Guide)*.

13.15 The ALRC considers that 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. While the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) did not support this approach,¹³ it was generally supported by stakeholders.¹⁴ For example, Welfare Rights Centre NSW commented that 'a legislated exemption is preferred for reasons of clarity and certainty'.¹⁵

13.16 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.

13.17 In *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011) (Discussion Paper), the ALRC proposed that specified grounds for exemptions, including family violence, should also be included in the *Family Assistance Act*. In its final consideration, the ALRC considers that it is unnecessary for the Act to include the grounds for exemptions—particularly as this may introduce inflexibility in the administration of the Act. However, the *Family Assistance Guide* should expressly

11 Ibid, [3.1.5.100].

12 For example, the recommended measure regarding CSA consultation with victims of family violence before taking significant action against the other party: Rec 12–4.

13 FaHCSIA, *Submission CFV 162*.

14 This reform was proposed in the Discussion Paper: Proposal 11–1. It was supported by: National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 139*; Lone Fathers Association Australia, *Submission CFV 109*; Aboriginal & Torres Strait Islander Women's Legal Service North Queensland, *Submission CFV 99*; Women's Information and Referral Exchange, *Submission CFV 94*; WEAVE, *Submission CFV 85*.

15 WRC (NSW), *Submission CFV 70*.

include family violence as grounds for an exemption from the reasonable maintenance action requirement, and this is discussed further below.

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

Accessibility of exemptions

13.18 The ALRC has considered a number of measures to improve the accessibility of exemptions for family violence victims, requests for which are determined by Centrelink.¹⁶ The CSA and Centrelink refer persons who may be eligible for exemptions to Centrelink social workers. ISOs may also grant exemptions.¹⁷ 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.

13.19 The evidence required to support an exemption from the reasonable maintenance action requirement, as provided for in the *Family Assistance Guide*, is of a relatively low threshold.¹⁸ Third party verification, where possible in letter form, may be provided by a variety of sources, such as: health professionals; community agencies; legal practitioners; police; relatives; or friends. Further, the *Family Assistance Guide* provides that social workers and ISOs should assist by fully exploring avenues for verification. It is also implied that exemptions may be available when verification is not possible.¹⁹

13.20 While the evidentiary requirements to support an application for an exemption do not appear onerous, exemptions may be inaccessible to victims of family violence for other reasons. Family violence victims may be ‘uninformed or not aware’ of the

16 Centrelink administers family assistance payments on behalf of the FAO, as discussed in Ch 14. In this role, it administers the reasonable maintenance action requirement.

17 FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.1.5.70]. Multicultural Service Officers—who perform a role alongside social workers and ISOs—are not mentioned in this context.

18 In Ch 11 of the Discussion Paper, the ALRC outlined why this relatively low evidentiary threshold is appropriate.

19 FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.1.5.100]. The *Family Assistance Guide* states that the social worker should complete an electronic document indicating, among other things, ‘why verification is not possible’.

availability of exemptions.²⁰ Reviews of exemptions have also been identified as a factor that potentially deters victims from seeking exemptions.²¹

13.21 The ALRC considers the reforms recommended in Chapter 4 should increase awareness about exemptions. In particular, agency identification of family violence-related safety concerns, and inter-agency information sharing about ‘safety concern flags’, should remove barriers to the accessibility of exemptions. These measures will increase the likelihood that those eligible for exemptions are identified and provided with targeted information. Other Chapter 4 recommendations 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;
- referral of all customers who disclose family violence to Centrelink social workers or other expert service providers; and
- training for agency customer service staff, Centrelink social workers and ISOs in relation to advising customers on the impact of family violence on their case.

13.22 The ALRC also considers that providing more publicly-accessible information about exemption reviews should go some way to addressing concerns that this procedure acts as a barrier to exemptions.²² Improving awareness about the nature and frequency of exemption reviews among customers and their advocates should improve the accessibility of exemptions.

13.23 A further measure that may improve the accessibility of exemptions is explicitly listing family violence as circumstances where a Centrelink social worker may grant an exemption. As mentioned above, the *Family Assistance Guide* provides that Centrelink social workers may grant exemptions on grounds of violence, or fear of violence. The ALRC considers that this ground should be supplemented, or replaced, by reference to family violence, including fear of family violence.

13.24 This measure may improve the accessibility of exemptions, as ‘family violence’ captures a broader range of conduct than ‘violence’—insofar as that conduct is violent, threatening, controlling, coercive or causes fear. This recommended reform is complemented by Recommendations 3–1, 3–2 and 14–1(a), which would set out a definition of family violence in family assistance legislation and the *Family Assistance Guide*. It is also complemented by Recommendations 14–1(b) and 4–6, which state that

20 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.

21 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.

22 Permanent exemptions are not recommended, due to the financial and social benefits to victims that may flow from periodic review of exemptions. For an exploration of this issue, see Discussion Paper, Ch 11.

the *Family Assistance Guide* should include a description of, and staff should receive training about, the nature, features, and dynamics of family violence.

13.25 Another barrier to the accessibility of exemptions may be a lack of information about exemption-related procedures affecting victims of family violence. Information about the nature of 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.²³ The *Child Support Guide* states that reviews determine ‘whether the parents’ circumstances have changed and, if so, whether the exemption is still appropriate’.²⁴

13.26 The *Family Assistance Guide* also contains only limited information regarding the duration of exemptions granted on grounds of violence or fear of violence, and the frequency of reviews. 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. Further information is provided according to the type of exemption. Exemptions granted on grounds of violence or fear of violence are not specifically listed, and therefore fall under the category ‘other circumstances’, for which the time period provided is ‘as applicable’.²⁵

13.27 In the ALRC’s view, the *Family Assistance Guide* should provide more information about the review process, and the duration of exemptions granted on grounds of violence or fear of violence.²⁶ This approach was generally supported by stakeholders.²⁷ For example, the Australian Association of Social Workers Queensland (AASW (Qld)) and Welfare Rights Centre commented that ‘the clearer and simpler the process is and the extent to which this is then articulated to people will greatly benefit all concerned’.²⁸ The ALRC considers that this approach ensures consistency and transparency in the administration of exemptions, and should improve the accessibility of exemptions for victims of violence.

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

23 FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.1.5.70].

24 Child Support Agency, *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme* <www.csa.gov.au/guidev2> at 1 November 2011, [6.10.1].

25 FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.1.5.90].

26 This was proposed in the Discussion Paper: Proposal 11–2.

27 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; Lone Fathers Association Australia, *Submission CFV 109*; ADFVC, *Submission CFV 104*; Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*; Women’s Information and Referral Exchange, *Submission CFV 94*; Confidential, *Submission CFV 89*; WEAVE, *Submission CFV 85*. FaHCSIA notes that the amendments have been already undertaken, however the relevant sections of the *Family Assistance Guide* do not appear to have been amended to provide this information at the time of writing: FaHCSIA, *Submission CFV 162*.

28 AASW (Qld) and WRC Inc (Qld), *Submission CFV 139*.

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

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

Partial exemptions

13.28 Partial exemptions may be available to victims of family violence when they collect less than the full amount of child support. As discussed above, unless a payee collecting privately 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. If the payee does not comply, his or her FTB Part A is reduced to the base rate. The FAO assumes that the payee is collecting the full amount of child support, unless advised otherwise.²⁹

13.29 As stated in Chapter 12, victims may elect to collect privately, and collect less than the assessed amount, due to fear or coercion. Consequently, the application of the reasonable maintenance action test in these circumstances may particularly affect them. Where victims do not disclose that they are collecting less than the full assessed amount of child support, they may be otherwise disadvantaged by having their FTB calculated according to a higher child support income than they are actually receiving.

13.30 Partial exemptions should therefore be accessible to victims of family violence. However, a general lack of awareness about partial exemptions may affect their accessibility. In the Discussion Paper, the ALRC noted that stakeholders appeared unaware of partial exemptions. The ALRC stated that this was unsurprising, as partial exemptions were not explicitly or adequately provided for in the *Family Assistance Guide*.³⁰ While partial exemptions are provided for in the Centrelink e-Reference, this is not a publicly-available resource.³¹

13.31 The ALRC considers that the *Family Assistance Guide* should be amended to make clear the availability of partial exemptions. This proposal attracted support from the range of stakeholders who commented on this issue, including National Legal Aid, the Lone Fathers Association, and Women Everywhere Advocating Violence

29 FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.1.6.70]. The Commonwealth Ombudsman has provided a useful summary of how this works in practice, quoted in Ch 11 of the Discussion Paper: Commonwealth Ombudsman, *Submission CFV 54*.

30 Discussion Paper, Ch 11.

31 FaHCSIA, *Correspondence*, 29 June 2011, provided the relevant extract from the E-Reference: 007.32510 *Customer not receiving full child support entitlement privately*.

Elimination Inc (WEAVE).³² Additionally, FaHCSIA, in correspondence with the ALRC, considered that the *Family Assistance Guide* could be clearer in outlining that payees with an exemption may privately collect less than the full amount of assessed child support, and stated that it would update the text.³³ On 20 September 2011, FaHCSIA amended the *Family Assistance Guide* to provide:

A partial exemption may be granted in cases where the individual has a fear of violence or there is risk of harmful or disruptive effects if they were to pursue the collection of the full entitlement or to transfer collection method to the CSA. The individual is not required to end the child support assessment; the partial exemption enables them to collect whatever they can privately without failing the maintenance action test. Individuals in this situation will be referred to a social worker for assessment who may grant the partial exemption.

This effectively means an individual with a partial exemption is able to collect less than 100% of their entitlement. In these circumstances, the individual's rate of FTB Part A will be based on the amount of child support received, not the amount of the child support assessment.³⁴

13.32 The ALRC strongly supports the inclusion of this information in the *Family Assistance Guide*. It should increase awareness about, and therefore improve the accessibility of, partial exemptions. As a result of this amendment to the Family Assistance Guide, a recommendation to this effect is unnecessary.

13.33 In conjunction with this amendment to the Family Assistance Guide, the ALRC considers that customers should generally be informed of partial exemptions, and that this should be a component of the exemption-related information to be provided to customers in accordance with Recommendation 4–2. Targeted information about partial exemptions should also be provided by Centrelink social workers to payees who have disclosed family violence, particularly when they end CSA collection. This provision of information is facilitated by Recommendation 12–2, which provides that payees who elect to end an assessment or CSA collection should be referred to Centrelink social workers, and also Recommendation 4–3, which provides that all customers who disclose family violence should be referred to Centrelink social workers.

13.34 Proposed reforms regarding identifying family violence-related concerns should also assist the provision of targeted information about partial exemptions, insofar as they would facilitate referrals to Centrelink social workers. In particular, the ALRC recommends in Chapter 12 that the CSA should identify family violence-related concerns when payees request to end a child support assessment, or elect to end CSA collection of child support.³⁵

32 National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 139*; Lone Fathers Association Australia, *Submission CFV 109*; ADFVC, *Submission CFV 104*; Aboriginal & Torres Strait Islander Women's Legal Service North Queensland, *Submission CFV 99*; Women's Information and Referral Exchange, *Submission CFV 94*; Confidential, *Submission CFV 89*; WEAVE, *Submission CFV 85*.

33 FaHCSIA, *Correspondence*, 29 June 2011.

34 FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [3.1.5.50].

35 Rec 12–1.

14. Family Assistance

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Summary

14.1 The Commonwealth has provided family allowances since 1941.¹ 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 Report, these are referred to as the *Family Assistance Act* and the *Family Assistance (Administration) Act* respectively.

14.2 Chapter 13 and, to a lesser extent Chapter 11, examine family assistance laws largely in their interaction with child support laws. This chapter discusses the family assistance framework and the ways that it addresses family violence, focusing on the two primary family assistance payments—Family Tax Benefit (FTB) and Child Care Benefit (CCB).

14.3 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 recommended reforms in that chapter regarding identifying family violence-related safety concerns (through screening, ‘risk identification’ and other measures),

1 P Whiteford and G Angenent, *The Australian System of Social Protection: An Overview* (2001), 12.

information provision and referrals address, to a large extent, many of the family violence issues that were raised in this Inquiry.²

14.4 This chapter recommends further reforms specifically targeted at family assistance law and policy, particularly in relation to CCB. Family assistance legislation provides for increased CCB in certain circumstances. The recommended reforms seek to improve accessibility to increased CCB in cases of family violence (including child abuse). The ALRC recommends that this be achieved by amending family assistance legislation to lower the eligibility threshold for increased rates of CCB where children are at risk of abuse.

Family assistance framework

Purpose

14.5 Family assistance legislation was introduced to ‘simplify the structure and delivery of assistance for families’³ by establishing one body to administer a consolidated set of payments, which all have ‘similar eligibility rules’.⁴ This body is the Family Assistance Office (FAO)—the ‘delivery point’ for family assistance payments.⁵

14.6 Family assistance payments play a significant role in supporting low-income families,⁶ and comprise a range of types, including: FTB;⁷ baby bonus;⁸ maternity immunisation allowance;⁹ CCB;¹⁰ child care rebate;¹¹ and FTB advance.¹² 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.¹³ FTB is the ‘centrepiece’ of family assistance.¹⁴

14.7 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,

2 See, in particular, Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Child Support and Family Assistance*, Issues Paper 38 (2011).

3 Commonwealth, *Parliamentary Debates*, Senate, 24 May 1999, 5170 (I Campbell).

4 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1999, 6417 (W Truss—Minister of Agriculture, Fisheries and Forestry).

5 FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [1.3].

6 See Australian Institute of Health and Welfare, *Australia’s Welfare 2005* (2005), 75.

7 *A New Tax System (Family Assistance) Act 1999* (Cth) pt 3 div 1.

8 *Ibid* pt 3 div 2.

9 *Ibid* pt 3 div 3.

10 *Ibid* pt 3 div 4.

11 *Ibid* pt 3 div 5.

12 *Ibid* s 3(1), definition of ‘family assistance’.

13 Family Assistance Office, *What Payments We Offer* <www.familyassist.gov.au/payments/> at 16 February 2011.

14 Ministerial Taskforce on Child Support, *In the Best Interests of Children—Reforming the Child Support Scheme* (2005), [4.1].

the legislation should be interpreted in a way that is most beneficial to applicants/recipients as a whole'.¹⁵

Administration

14.8 The FAO operates within Centrelink and Medicare Australia, and Centrelink administers family assistance payments on behalf of the FAO.¹⁶ The FAO is under the governance of the Department of Human Services (DHS).¹⁷ 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.¹⁸ Although Centrelink administers family assistance payments, 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.¹⁹

14.9 The *Family Assistance Guide* is available online at the FaHCSIA website.²⁰ As noted in Chapters 5 and 12, 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.

Introducing a common interpretative framework

14.10 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.²¹

14.11 Recommendation 3–1 states that family assistance legislation should provide a definition of family violence consistent with other specified Commonwealth laws. The ALRC also considers that the *Family Assistance Guide* should include:

- a definition of family violence as discussed in Chapter 3; and

15 FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [1.4].

16 Ibid, [1.3]; Child Support Agency website <www.csa.gov.au> at 7 March 2011.

17 FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [1.3].

18 FaHCSIA, *Annual Report 2009–10* (2010), Ch 3.

19 FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [1.3].

20 Ibid.

21 FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [1.1.D.235].

- a description of the nature, features and dynamics of family violence, also as discussed in Chapter 3.²²

14.12 Such an amendment to the *Family Assistance Guide* was supported by major stakeholders—including FaHCSIA, which is the department responsible for the *Family Assistance Guide*, as noted above.²³ The National Welfare Rights Network (NWRN) stated that it is ‘highly desirable to achieve a common interpretative framework across different legislative schemes’.²⁴

14.13 The ALRC considers that these additions to the *Family Assistance Guide* are desirable for the reasons set out in relation to *The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme (Child Support Guide)* in Chapter 11. The illustrative categories of family violence in the definition, and the statement regarding the nature, features and dynamics of family violence, should be tailored to each legal framework to reflect the presentations of family violence, and the particular risks victims may face, in that context.

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

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

Family Tax Benefit

What is Family Tax Benefit?

14.14 FTB is an income-tested payment for eligible parents and carers. FTB is paid for dependent children under the age of 16 and, in certain circumstances, for dependent children over the age of 16.²⁵ Parents and carers must provide at least 35% of a child’s

22 This amendment to the *Family Assistance Guide* was proposed in Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011) (Discussion Paper): Proposal 12–1.

23 FaHCSIA, *Submission CFV 162*.

24 National Welfare Rights Network, *Submission CFV 150*. See also: AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*; ADFVC, *Submission CFV 104* and WEAVE, *Submission CFV 85*. The Lone Fathers Association Australia opposed such an amendment, for reasons discussed in Ch 3: Lone Fathers Association Australia, *Submission CFV 109*.

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 (FTB Parts A and B are described below). Generally, the dependent children must be in full-time study. *A New Tax System (Family Assistance) Act 1999* (Cth) ss 17B, 22, sch 1 cl 29(3). FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [2.1.1.10].

care to receive FTB.²⁶ When more than one person provides care for a child, and they are not members of the same couple, FTB payments can be shared.²⁷

14.15 FTB includes two parts: FTB Part A and FTB Part B. FTB Part A is the ‘primary payment designed to help with the cost of raising children’.²⁸ 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.

14.16 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.²⁹

14.17 The ALRC has identified several ways that FTB-related legislation and policy may affect victims of family violence, namely in relation to:

- 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 take reasonable maintenance action (that is, to apply for child support, and collect—or elect that the CSA collect—child support payments), discussed in Chapters 11 and 13.³⁰

Issues management

14.18 Chapter 4 discusses appropriate issues management of family violence cases by agencies. This is applicable in a family assistance context, and the ALRC considers that the package of reforms proposed in Chapter 4 should improve the safety of family violence victims who are FTB recipients or applicants. In particular, the ALRC has recommended that relevant agencies should:

- identify customers’ family violence-related safety concerns, through screening, ‘risk identification’ or other methods;
- provide information to customers about how family violence is relevant to their family assistance matters; and
- refer customers to Centrelink social workers or other expert service providers when safety concerns are identified.³¹

26 *A New Tax System (Family Assistance) Act 1999* (Cth) s 22(7).

27 *Ibid* s 59, sch 1 cl 11.

28 Family Assistance Office website <www.familyassist.gov.au> at 16 February 2011.

29 *A New Tax System (Family Assistance) Act 1999* (Cth) sch 1 pt 4; FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [1.1.2]. The secondary income earner is the member of the couple with a lower income.

30 Ch 12 of the Discussion Paper explored the further issue of FTB payment to informal carers—that is, carers who are neither parents nor legal guardians—of children who have experienced family violence. The reforms recommended in Ch 4 should improve safety, and enhance the accessibility of FTB, for this group.

31 Recs 4–1, 4–2, 4–3.

14.19 In Chapter 4, the ALRC also recommended multifaceted training that should improve staff skills and their knowledge base, including about:

- advising customers on the impact of family violence on their case or claim;
- responding to disclosures of family violence, including by providing appropriate referrals;
- the nature, features and dynamics of family violence, and its impact on victims, in particular those from high risk and vulnerable groups.³²

14.20 Consistent legislative and policy-based definitions of family violence, recommended in Chapter 3 and throughout this Report, complement and facilitate the above training-related recommendations.

14.21 Although the focus here is on FTB—as the primary family assistance payment³³—this package of reforms should improve safety for family assistance-recipients generally.³⁴

Exemptions from tax file number requirements

14.22 Persons at risk of violence may be exempt from requirements about providing their partners' tax file numbers (TFNs). The ALRC considers that this exemption, contained in the *Family Assistance Guide*, should explicitly refer to 'family violence'. The reforms contained in Ch 4 should also increase awareness about—and therefore accessibility of—the exemption.

14.23 The *Family Assistance (Administration) Act* provides that an individual applying for FTB must provide both a TFN and a TFN for his or her partner during the relevant payment period.³⁵ 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.³⁶ 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.³⁷

14.24 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.³⁸ In particular, an indefinite exemption may be granted when the applicant has a

32 Recs 4–5, 4–6.

33 Family Assistance Office website <www.familyassist.gov.au> at 16 February 2011.

34 The Discussion Paper provides an illustration of how this package of reforms should improve the safety of victims eligible for the baby bonus: Ch 12.

35 *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) ss 3(1), 7.

36 *Ibid* s 8(4)–(5).

37 *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.

38 FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [4.1.1.20].

well based reason to believe that as a result of their request to the partner for TFN information:

- 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.³⁹

14.25 The *Family Assistance Guide* provides that these cases are determined on request. Requests are referred to a social worker or an Indigenous Service Officer (ISO) for advice and assistance.⁴⁰

14.26 The ALRC considers that the exemption in the *Family Assistance Guide* is too narrow, insofar as it refers to ‘violence’, rather than ‘family violence’. Most stakeholders who commented on this issue considered that family violence should be explicitly included as a reason for an indefinite exemption from the requirement to provide a partner’s tax file number.⁴¹ For example, NWRN submitted that ‘it is appropriate that the *Guide* refer expressly to family violence in order to adequately capture the forms that family violence may take beyond physical violence’.⁴² FaHCSIA also supported this amendment, and stated that it will consider it as part of the review process of the *Family Assistance Guide*.⁴³

14.27 The ALRC therefore recommends that the *Family Assistance Guide* should expand the term ‘violence’ to explicitly refer to ‘family violence’. This would capture a broader range of conduct, insofar as that conduct is violent, threatening, controlling, coercive or intending to cause fear. This proposed reform is complemented by Recommendations 3–1, 3–2 and 14–1(a), which would set out a definition of family violence in family assistance legislation and the *Family Assistance Guide*. It is further complemented by Recommendations 14–1(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.

14.28 Stakeholders also commented that victims of family violence may be unaware of the exemption.⁴⁴ 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.⁴⁵

14.29 The ALRC considers that the reforms in Chapter 4 should increase awareness about, and therefore the accessibility of, the exemption to TFN requirements. In

39 Ibid.

40 Ibid.

41 This was proposed in the Discussion Paper: Proposal 12–2.

42 National Welfare Rights Network, *Submission CFV 150*. The following stakeholders also supported this reform: AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*; ADFVC, *Submission CFV 104*; Women’s Information and Referral Exchange, *Submission CFV 94*; Confidential, *Submission CFV 89*; WEAVE, *Submission CFV 85*.

43 FaHCSIA, *Submission CFV 162*.

44 AASW (Qld), *Submission CFV 46*; WRC Inc (Qld), *Submission CFV 43*. See also ADFVC, *Submission CFV 53*.

45 Commonwealth Ombudsman, *Submission CFV 54*.

particular, Recommendation 4–2 provides that all customers should be informed of how family violence is relevant to family assistance, and should be given information about exemptions.

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

Child Care Benefit

What is Child Care Benefit?

14.30 CCB is an income-tested payment that assists eligible parents and carers with the cost of child care. Other CCB objectives are 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’.⁴⁶ CCB is particularly relevant in the family violence context as increased amounts of CCB are available when children are at risk of ‘serious abuse or neglect’.⁴⁷

14.31 CCB is available to parents or carers responsible for child care costs where their children attend ‘approved child care services’⁴⁸—that is, services approved for the purposes of family assistance law.⁴⁹ The FAO website states that approved child care services meet certain standards and requirements, including ‘having a licence to operate, qualified and trained staff, being open certain hours, and meeting health, safety and other quality standards’.⁵⁰

14.32 Approved care may be provided by: long day care services; family day care services; in-home care services; occasional care services; and outside school hours care services.⁵¹

14.33 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.⁵² All eligible parents and carers may receive up to 24 hours CCB per week for care provided by an approved child care service.⁵³ Parents

46 FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [1.2.4].

47 *A New Tax System (Family Assistance) Act 1999* (Cth) pts 3–4.

48 This term is used in both *A New Tax System (Family Assistance) Act 1999* (Cth) and *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth).

49 *Ibid* s 195(1). *A New Tax System (Family Assistance) Act 1999* (Cth) addresses eligibility for CCB at pt 3 div 4.

50 Family Assistance Office website <www.familyassist.gov.au> at 16 February 2011.

51 *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) s 194. CCB is also available in certain circumstances when child care is provided by a person approved as a ‘registered carer’ by the FAO, for example, a grandparent, friend, relative or nanny: see Discussion Paper, Ch 12.

52 *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; FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [1.2.4].

53 *A New Tax System (Family Assistance) Act 1999* (Cth) s 53(3).

and carers may receive up to 50 hours per week where they meet a ‘work/training/study test’,⁵⁴ or other conditions provided for in the legislation.⁵⁵ Parents or carers generally lodge a claim for CCB with the FAO,⁵⁶ although in certain circumstances the approved child care service may lodge the claim, as described below.

14.34 The FAO is responsible for determining eligibility for, and calculating, CCB. The Department of Education, Employment and Workplace Relations (DEEWR) administers CCB to families through the FAO, and administers payment of CCB to approved child care services.⁵⁷

Child at risk of serious abuse or neglect

14.35 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 CCB,⁵⁸ or, where a 24-hour limit would have applied, raise the limit to 50 hours.⁵⁹ The FAO may also pay CCB at a higher rate.⁶⁰

14.36 The higher rate of CCB is described in the *Family Assistance Guide* and elsewhere—although not in family assistance legislation—as the Special Child Care Benefit (SCCB).⁶¹ Increased weekly hour limits for CCB due to risk are sometimes also called SCCB, in particular by DEEWR, both in its submission and correspondence regarding this Inquiry, and in its publication *Special Child Care Benefit for Children at Risk: Fact Sheet for Approved Child Care Services*.⁶²

14.37 The higher rate and increased weekly hours of CCB are available only in the form of reduced child care fees.⁶³ Lump sums at the end of the financial year are not available for these benefits. An approved child care service may approve the higher rate of CCB or increase weekly hour limits for a maximum of 13 weeks.⁶⁴ The service may apply to the FAO for approval of further periods of the higher rate or increased weekly hour limits of CCB.⁶⁵ The additional weekly hours can be paid at the higher rate.⁶⁶

54 Ibid s 54(2), (3).

55 Ibid s 54.

56 Family Assistance Office, *Information Booklet About Your Claim for Family Assistance*.

57 DEEWR, *Child Care Service Handbook, 2010–2011* (2010), 3–4.

58 *A New Tax System (Family Assistance) Act 1999* (Cth) s 55.

59 Ibid s 54.

60 Ibid s 76(1). The higher rate of CCB may also be available to families experiencing hardship. This Report considers the higher rate of CCB only in relation to children at risk of abuse.

61 FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [2.6.3.20].

62 DEEWR, ‘Special Child Care Benefit for Children at Risk: Fact Sheet for Approved Child Care Services’ (2011). However, the *Family Assistance Guide* provides that increased weekly limits of CCB due to risk is not the same as SCCB. This indicates that there may be differences in the use of terminology across departments: FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [2.6.3.10], [2.6.3.20].

63 *A New Tax System (Family Assistance) Act 1999* (Cth) ss 54(10), 55(6), 73.

64 Ibid ss 54, 55, 77.

65 Ibid ss 54, 55, 81; DEEWR, *Child Care Service Handbook, 2010–2011* (2010), 162, 208.

66 DEEWR, *Child Care Service Handbook, 2010–2011* (2010), 194, 196.

14.38 The higher rate and increased weekly hours of CCB have a protective function. DEEWR 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,⁶⁷ 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.⁶⁸

14.39 The protective function is also explained in the Explanatory Memorandum, which states that, even though a child may be at risk, a decision may not necessarily be made to increase the weekly hours of CCB, unless increased weekly hours help the ‘risk situation’. It provides the following example:

a child may be at risk only on Mondays because of the particular drinking habits of one member of the family. If the child already attends care on Mondays, there is no purpose served in approving additional hours of care for the child.⁶⁹

14.40 In relation to the higher rate of CCB, the Explanatory Memorandum states that this is ‘an important element in persuading the child’s carer to place the child into care and therefore away from the at risk situation’, and that ‘[t]he idea is that the service would exercise the discretion if satisfied that the availability of a higher rate would assist the ... at risk situation’.⁷⁰

14.41 The ALRC considers that the eligibility threshold of ‘serious abuse’ appears at odds with the protective function described above. In accordance with the *Family Assistance Act*, even if a higher rate, or an increased weekly limit, of CCB, may address a risk of abuse to a child, such increased amounts of CCB will not be available unless the risk faced by the child is one of ‘serious abuse’. This 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. Further, it implies that some forms of abuse of a child are not ‘serious’.

14.42 Most stakeholders commenting on this issue generally considered that the word ‘serious’ should be removed from the legislative eligibility requirement of ‘serious

67 Ibid, 194, 196; Department of Education, Employment and Workplace Relations, *Special Child Care Benefit for Children at Risk: Fact Sheet for Approved Child Care Services*.

68 Department of Education, Employment and Workplace Relations, *Special Child Care Benefit for Children at Risk: Fact Sheet for Approved Child Care Services*.

69 Explanatory Memorandum, A New Tax System (Family Assistance and Related Measures) Bill 2000 (Cth), 29.

70 Ibid, 24, 38. See also DEEWR, *Submission CFV 118*.

abuse or neglect'.⁷¹ For example, Welfare Rights Centre NSW (WRC NSW) submitted that the 'serious abuse' requirement is flawed.⁷²

14.43 The DEEWR submission presented a different position, and stated that 'serious' should be retained in the legislation:

'Serious' as a descriptor, assists decision makers to further understand and apply SCCB policy. It is not a barrier to access SCCB but ensures that approval is evidence based, appropriate and funding is delivered to those truly in need.⁷³

14.44 DEEWR also noted that removing the term serious 'would have significant fiscal implications to Child Care Benefit appropriations and would require additional modelling and funds to support it'.⁷⁴

14.45 The ALRC agrees that there may be a need for a qualifying mechanism in the *Family Assistance Act* or the *Family Assistance Guide* to ensure that approved service providers' decisions are thoroughly considered and evidence based, CCB is delivered to those most in need, and the provisions operate within fiscal boundaries. However, for the reasons outlined above, the ALRC does not consider that the qualifying mechanism constituted by the 'serious abuse' threshold is appropriate. If the Australian Government and relevant departments consider that a qualifying mechanism is required, a different formulation should be inserted into the legislation or the *Family Assistance Guide*.

14.46 The WRC NSW and the NWRN have suggested that such a qualifying mechanism may instead apply to the level of the risk of abuse, rather than the nature of the abuse.⁷⁵ Another option may be for legislation to require that the approved service provider has 'reasonable grounds' to consider that a child is at risk of abuse or neglect. An advantage of the latter approach is that it reflects, to some extent, the mandatory reporting provisions of many states and territories.⁷⁶

Definition of abuse

14.47 Neither family assistance legislation nor the *Family Assistance Guide* defines the terms 'abuse' or 'serious abuse'. The *Child Care Service Handbook 2010–2011* 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

71 The ALRC proposed this approach in the Discussion Paper: Proposal 12–4. It was supported by National Legal Aid, *Submission CFV 164*; National Welfare Rights Network, *Submission CFV 150*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*; ADFVC, *Submission CFV 104*; Women's Information and Referral Exchange, *Submission CFV 94*; Confidential, *Submission CFV 89*; WEAVE, *Submission CFV 85*.

72 WRC (NSW), *Submission CFV 70*.

73 DEEWR, *Submission CFV 118*.

74 Ibid.

75 National Welfare Rights Network, *Submission CFV 150*; WRC (NSW), *Submission CFV 70*.

76 See D Higgins and others, *Mandatory reporting of child abuse* (2010), prepared for the Australian Institute of Family Studies.

and Neglect?'.⁷⁷ 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 or emotional harm to a child or young person. Such behaviours may be intentional or unintentional and can include acts of omission (ie, neglect) and commission (i.e., abuse).⁷⁸

14.48 The resource sheet also describes five main types of child abuse and neglect: physical abuse; emotional maltreatment; neglect; sexual abuse; and witnessing family violence.⁷⁹

14.49 While this is a comprehensive definition, the ALRC considers that the applicable definition of abuse should be given greater visibility, as understandings of what constitutes abuse informs decision making regarding increased amounts of CCB. The ALRC therefore considers that the *Family Assistance Guide* should provide a definition of abuse.⁸⁰ Stakeholders generally agreed that the *Family Assistance Guide* should provide such a definition.⁸¹

14.50 The definition of abuse provided in the *Family Assistance Guide* may be based on the definition provided by the National Child Protection Clearinghouse, to which approved child care services are currently referred. This would not change existing practice, but should increase the visibility of the definition, and consequently transparency around the administration of increased CCB for children at risk of abuse. It should also improve consistency in decision making in this area, by addressing 'the potential for varying application' of this term.⁸²

14.51 Including a definition in the *Family Assistance Guide* may also assist parents and carers, child care services, and the FAO in considering eligibility and determining claims for increased rates and weekly hour limits of CCB—particularly if the definition is reflected in the CCB-related resources produced by DEEWR.

14.52 As an alternative to the above definition, if the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 is passed, and the

77 DEEWR, *Child Care Service Handbook, 2010–2011* (2010), 197. The *Child Care Service Handbook 2010–2011* provides 'guidance and assistance to approved child care services': Ibid, iii.

78 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.

79 Ibid.

80 The ALRC proposed this in the Discussion Paper: Proposal 12–5. This also proposed that neglect should be defined. Although the ALRC considers that neglect should be defined in the *Family Assistance Guide*, such a recommendation is outside the scope of this Inquiry.

81 National Legal Aid, *Submission CFV 164*; AASW (Qld) and WRC Inc (Qld), *Submission CFV 137*; ADFVC, *Submission CFV 104*; Women's Information and Referral Exchange, *Submission CFV 94*; Confidential, *Submission CFV 89*; WEAVE, *Submission CFV 85*. However, the NWRN considered that the term should be given its ordinary meaning, 'informed by guidance which should be set out in the *Family Assistance Guide*': National Welfare Rights Network, *Submission CFV 150*.

82 The Commonwealth Ombudsman considered that the term 'serious abuse' had such potential, and considered it should be defined in policy or law: Commonwealth Ombudsman, *Submission CFV 54*. It did not comment on the term 'abuse', but in the ALRC's consideration, the point is also applicable in this context.

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). In National Legal Aid's comments on this issue, it referred to the Bill and submitted that the 'definition of abuse should be common across Commonwealth jurisdictions'.⁸³ This would provide the advantages of consistency and shared understanding of abuse across Commonwealth legal frameworks. At the time of writing, the Bill is before the Senate.

14.53 The ALRC has not recommended that 'serious abuse' be defined, given its recommendation that the word serious should be removed from family assistance legislation in relation to increased CCB.

Exceptional circumstances

14.54 The *Family Assistance Act* provides that increased weekly limits in relation to CCB are available in certain circumstances, including where a child is at risk of serious abuse or neglect—as discussed above, and in 'exceptional circumstances'. In summary, a person may obtain CCB for more than 24 hours as an exception from the 'work/training/study test', or for more than 50 hours, due to 'exceptional circumstances'.⁸⁴

14.55 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'.⁸⁵ It sets out a non-exhaustive list of exceptional circumstances, including circumstances such as hospitalisation, jury duty or volunteer work in an emergency or disaster.⁸⁶ The list does not specifically include family violence. However, 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'.⁸⁷

14.56 In *Family Violence and Commonwealth Laws Discussion Paper 76* (2011), the ALRC considered that there may be merit in the *Family Assistance Guide* specifically listing family violence in its list of exceptional circumstances for eligibility for increased weekly limits of CCB. The ALRC considered that this may assist victims of family violence during periods when accessing higher levels of child care may assist them to improve their safety, for example, when victims need to attend court.⁸⁸

14.57 However, DEEWR has advised that approved services can apply the SCCB provisions for families in these circumstances (as noted above, DEEWR's use of the term SCCB captures increased weekly limits of CCB hours as well as the higher SCCB rate). DEEWR stated that a purpose of SCCB is to act as an 'early intervention service

83 National Legal Aid, *Submission CFV 164*. See discussion in Ch 3.

84 This is explained in detail in Ch 12 of the Discussion Paper.

85 FaHCSIA, *Family Assistance Guide* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [1.1.E.50].

86 *Ibid.*

87 DEEWR, *Child Care Service Handbook, 2010–2011* (2010), 158.

88 Discussion Paper Ch 12.

to support vulnerable families and children’, and this accommodates family violence situations. It also stated that it is

happy to expand upon SCCB policy information in the Child Care Services Handbook and the SCCB factsheet to ensure that services understand and are aware that domestic violence fall[s] into SCCB criteria.⁸⁹

14.58 The ALRC therefore considers that, as victims of family violence may already access higher weekly limits of CCB, and also the higher CCB rate, it is unnecessary to make a recommendation in this regard. The ALRC further considers that the expansion of policy information, in addition to the recommendations in Chapter 4, may increase awareness regarding the availability of increased amounts of CCB in family violence cases.

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

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

89 DEEWR, *Correspondence*, 24 October 2011.

Part E— Employment

Chapters

15. Employment Law—Overarching Issues and a National Approach
16. *Fair Work Act 2009* (Cth)
17. The National Employment Standards
18. Occupational Health and Safety Law

15. Employment Law—Overarching Issues and a National Approach

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Summary

15.1 This chapter examines the intersections between family violence and Commonwealth employment law and, together with Chapters 16–18, recommends reforms to employment-related legislative, regulatory and administrative frameworks to improve the safety of people experiencing family violence. Prior to making specific recommendations, the ALRC outlines a suggested strategy for phased implementation of reforms in this area.

15.2 The ALRC’s key recommendation in this chapter is that the Australian Government should initiate a coordinated and whole-of-government national education and awareness campaign around family violence and its impact in the employment

context. The ALRC also examines issues associated with disclosure of family violence—including verification of family violence and privacy issues—and recommends that the Office of the Australian Information Commissioner and Fair Work Ombudsman should develop or revise guidance materials with respect to privacy obligations arising from disclosure of family violence in an employment context. In addition, the ALRC makes a number of recommendations in relation to research and data collection, focusing on the role of the Department of Education, Employment and Workplace Relations, Fair Work Australia and other bodies.

Family violence and employment

Workplaces—our new communities?

15.3 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, as the line between private and public—or family life and work—is increasingly unclear, ‘with the effects of one sphere positively or negatively influencing the other’.¹ As one stakeholder in this Inquiry commented during a consultation, ‘workplaces are becoming our new communities and therefore they must be a place for change’.²

15.4 Two thirds of Australian women who report violence by a current partner are in paid employment.³ The results of the National Domestic Violence and the Workplace Survey conducted in 2011 on behalf of the Australian Domestic and Family Violence Clearinghouse (ADFVC) emphasise the extent of the impact of family violence in an employment context. The survey found that, of those who reported experiencing family violence:

- nearly half the respondents reported that the violence affected their capacity to get to work—the major reason being physical injury or restraint; and
- in the last 12 months, 19% reported that family violence continued in the workplace, with 12% indicating it occurred in the form of abusive phone calls and emails, and 11% stating that it occurred by way of the violent person attending the workplace.⁴

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

3 Australian Bureau of Statistics, *Personal Safety Survey*, Catalogue No 4906.0 (2005), 11, 34.

4 ADFVC, *ADFVC National Domestic Violence and the Workplace Survey* (2011). The survey sample was 3,611 respondents of which 81% were women and 90% were either a member of the National Tertiary Education Union or the NSW Nurses Association.

15.5 Similarly, 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.⁵ 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’.⁶

The effect on employees

15.6 Many people experiencing 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 often in casual and part-time employment.⁷

15.7 Where people experiencing 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.⁸ 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.⁹ Client-initiated and external violence largely occurs in client-service based organisations, for example banks and retail shops, that may provide ‘accessibility for partners or ex-partners to be targeted at their place of work’.¹⁰

15.8 Within these categories, employees experiencing family violence may be affected by family violence in an employment context in numerous ways, including:

- by stalking or harassment at a place of work, or receipt of harassing telephone calls or emails;
- by having their work actively undermined as a result of having work property, such as paperwork or uniforms, hidden or destroyed;

5 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). See also: ILO (Bureau for Gender Equality), *Gender-based violence in the world of work: Overview and selected annotated bibliography*, Working Paper 3 (2011), 13.

6 J Stanton and G Jervis, ‘Domestic Violence and the Workplace’ (2010) (7) *National Safety Magazine* 36.

7 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).

8 S Murray and A Powell, *Working It Out: Domestic Violence Issues in the Workplace* (2008), 3.

9 The ADFVC survey results indicate 12% of those who reported experiencing family violence work in the same workplace as the person using family violence: ADFVC, *ADFVC National Domestic Violence and the Workplace Survey* (2011).

10 S Murray and A Powell, *Working It Out: Domestic Violence Issues in the Workplace* (2008), 4.

- through facing difficulties attending work as a result of the person using family violence promising to mind children, then refusing to do so,¹¹ physically preventing the victim from leaving the house, or preventing access to transport;¹²
- where working from home, being prevented from work or facing interference; or
- in the case of someone using family violence, using work time or resources to facilitate violent behaviour.¹³

15.9 There may also be broader consequences, including:

- sleep deprivation, stress and reduced concentration affecting relations with colleagues and work performance and safety;¹⁴
- effects on co-workers, including increased workloads due to absenteeism or dealing with disruptions, such as harassing phone calls in the workplace;¹⁵ and
- in the most extreme cases, workplace family violence-related homicide.¹⁶

15.10 As a result, family violence can have a significant effect on employees, co-workers and workplaces and, more broadly, workplace productivity and safety.

Benefits of employment for victims

15.11 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 they initially gain employment,¹⁷ employment is a key factor in enabling victims to

11 The ADFVC survey results indicate 22% of those who reported experiencing family violence and who reported that the violence affected their capacity to get to work cited refusal or failure to show up to care for children by the person using family violence as the cause: ADFVC, *ADFVC National Domestic Violence and the Workplace Survey* (2011).

12 The ADFVC survey results indicate 67% of those who reported experiencing family violence and who reported that the violence affected their capacity to get to work cited physical injury or restraint by the person using family violence as the cause: *Ibid.*

13 For discussion of each of these issues 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 ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

14 The ADFVC survey results indicate 16% of those who reported experiencing family violence in the last 12 months reported a negative effect on work performance arising from being distracted, tired or unwell: ADFVC, *ADFVC National Domestic Violence and the Workplace Survey* (2011)

15 See, eg, ILO (Bureau for Gender Equality), *Gender-based violence in the world of work: Overview and selected annotated bibliography*, Working Paper 3 (2011), 13.

16 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.

17 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).

leave violent relationships,¹⁸ providing longer-term benefits associated with financial security.¹⁹

15.12 The importance of financial security and independence through employment has been emphasised by Elizabeth Broderick, the Sex Discrimination Commissioner:

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.²⁰

15.13 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 people experiencing family violence.²¹

Social and economic costs

15.14 In addition to the negative effects of family violence on employees and the positive effects of employment, family violence also generates an enormous economic and social cost, with broader implications for employers and the economy.

15.15 Family violence is projected to cost the Australian economy an estimated \$15.6 billion in 2021–22.²² In 2004, it reportedly cost the corporate and business sectors over \$1.5 billion through direct costs.²³ Where family violence affects employees in the workplace, or leads to their leaving employment, individual employers face costs associated with:

- absenteeism—including administration costs;
- decreased productivity;

18 S Potton, *Pathways: How Women Leave Violent Men* (2003), 71.

19 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.

20 E Broderick, 'Launch of Domestic Violence Clauses' (Paper presented at Launch of UNSW Domestic Violence Clause, Sydney, 15 April 2010).

21 The full Terms of Reference are set out at the front of this Report and are available on the ALRC website at <www.alrc.gov.au>.

22 See Ch 1. 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.

23 See, eg, Victorian Community Council Against Violence, *Family Violence is a Workplace Issue: Workplace Models to Prevent Family Violence* (2004).

- recruitment following staff turnover—estimated as 150% of an employee’s salary annually;²⁴ and
- training for new employees and loss of corporate knowledge.²⁵

15.16 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 people experiencing it who are employed, ensuring the employment law system appropriately identifies, responds to and addresses family violence, is central to achieving these aims.

Disclosure

15.17 People experiencing family violence may wish to disclose family violence to individuals and representatives within the employment law system—such as co-workers, human resources personnel, managers/supervisors, 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.²⁶

15.18 As a result, workplaces have the potential to play a key role in supporting and protecting the safety of people experiencing family violence. However, victims may be reluctant to disclose family violence.

Barriers to disclosure

15.19 In the context of the employment law system, there are particular manifestations of the general barriers identified in *Family Violence—A National Legal Response*, ALRC Report 114 (2010) and in Chapter 1 of this Report, as well as a range of additional barriers.

15.20 Forty-five per cent of respondents to the ADFVC survey who indicated they had experienced family violence in the previous 12 months reported that they had discussed

24 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.

25 ADFVC, *Why Domestic Violence Entitlements Makes Economic Sense: The Economic Costs of Domestic Violence on the Workplace*. For US research see, eg, 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. Generally, see also ILO (Bureau for Gender Equality), *Gender-based violence in the world of work: Overview and selected annotated bibliography*, Working Paper 3 (2011), 13, 14.

26 See, eg, Women’s Health Victoria, *Submission CFV 133*.

the violence with someone at work, but that they had disclosed to a work colleague or friend rather than supervisor, human resources representative or union representative.²⁷

15.21 Stakeholder responses to this Inquiry 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.²⁸ In particular, stakeholders suggested that employees fear that an ‘employer may lose confidence in the ability of the victim’,²⁹ following disclosure of family violence. Stakeholders also emphasised that privacy concerns inhibit disclosure.³⁰ The Australian Services Union, for example, emphasised the barrier presented by ‘lack of assuredness around privacy’.³¹

15.22 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.³²

15.23 Organisational culture and its impact on disclosure was also discussed in some submissions and may go some way to explaining why disclosure is predominantly to a work colleague or friend, rather than management. For example, Women’s Health Victoria expressed the view that:

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.³³

15.24 Employees from particular groups or communities may face additional barriers or have different concerns preventing disclosure of family violence.³⁴ For example, an Indigenous person experiencing family violence may be reluctant to disclose it in a context where they work in an organisation with family or kin, or in a business in a small community.³⁵ An employee who is a member of a same-sex couple, but who is

27 ADFVC, *ADFVC National Domestic Violence and the Workplace Survey* (2011).

28 See, eg, National Network of Working Women’s Centres, *Submission CFV 20*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*; Women’s Health Victoria, *Submission CFV 11*. See also 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).

29 ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

30 ACTU, *Submission CFV 39*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; AASW (Qld), *Submission CFV 17*; Redfern Legal Centre, *Submission CFV 15*; Women’s Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

31 ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

32 ADFVC, *Submission CFV 26*.

33 Women’s Health Victoria, *Submission CFV 11*.

34 See, eg, Federation of Ethnic Communities’ Councils of Australia, *Submission CFV 126*.

35 See, eg, Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*, which discusses general barriers to disclosure faced by Indigenous women.

not ‘out’ at work, may fear stigmatisation or discrimination on the basis of his or her sexuality, as well as experiences of family violence.³⁶

15.25 Addressing systemic social, economic and cultural factors perpetuating family violence is a principal way to reduce barriers to disclosure. The ALRC acknowledges the work done by the Australian Government in this respect, including in particular, the *National Plan to Reduce Violence against Women and their Children (the National Plan)*.³⁷ In addition, the ALRC also considers that the introduction of national initiatives such as those outlined later in this chapter, 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.

Responding to disclosure

15.26 Where an employee discloses family violence in a workplace context there is a need to ensure that disclosure is dealt with sensitively and appropriately. In order to ensure this occurs, family violence-related measures as well as workplace instruments and policies must clearly outline the obligations and responsibilities of those to whom an employee has disclosed, and be tailored to meet the needs of individual workplaces and employees within those workplaces. The ALRC considers that information and guidance provided as part of the national education and awareness campaign will assist in ensuring sensitive and appropriate workplace responses.

15.27 The impact of disclosure of family violence as a trigger for risk assessment, a concern raised by some stakeholders, is a matter for particular workplaces to address in enterprise agreements, workplace policies or similar. Similarly, where the disclosure of family violence may affect particular groups of employees that is a matter for employer organisations, unions and workplaces to consider and respond to appropriately.³⁸ 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.³⁹

Phases of reform

15.28 Throughout this Inquiry, the ALRC has heard a range of views about how the employment law framework in Australia might be reformed to improve the safety of people experiencing family violence.

36 LGBTI Community Roundtable, *Consultation*, Sydney, 28 September 2011.

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

38 For example, 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 ALRC understands that disclosure of a domestic violence assault (though not an apprehended violence order) triggers a risk assessment process: ADFVC, *Submission CFV 26*.

39 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).

15.29 While implementation is ultimately a matter for government, the ALRC suggests that it would be most appropriate to implement the reforms outlined in Chapters 15–18 by way of a whole-of-government five-phase approach as outlined below. The ALRC emphasises that none of the phases are mutually exclusive, nor must they necessarily be sequential. Phases One and Two, in particular, are intended to continue throughout the implementation period and beyond, although the strategies as part of those phases may need to be reviewed and updated where appropriate. It is also vital that any such strategy include a ‘clear timeline’.⁴⁰

15.30 The ALRC suggests implementation should incorporate the following phases:

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



Diagram: A phased approach to reform.

40 AEU, *Submission CFV 125*.

15.31 The ALRC considers that such an approach is appropriate for a number of reasons. First, despite important work done by the Government and community organisations, awareness about, and recognition of, the possible impact of family violence in an employment context could be improved. Without associated understanding, and in some cases attitudinal change—by employees, employers and others within the employment law system—attempts to reform the employment law framework are unlikely to be effective.

15.32 Secondly, the *Fair Work Act*, as the pillar of the framework, is a relatively recent piece of legislation that significantly changed the Australian employment law landscape. Its introduction followed extensive stakeholder consultation, and its provisions and interpretation remain controversial. As a result, rather than recommending wholesale changes to the Act at this point in time, the ALRC suggests that, in many cases, it is more appropriate to recommend that the issues raised in this Report be considered in the course of upcoming reviews—such as those in relation to modern awards, as well as the Post-Implementation Review of the *Fair Work Act* scheduled for 2012.

15.33 Finally, given the complexity of this issue and the potentially pervasive effect of family violence on many aspects of employment, it is clear that a considered, multifaceted and whole-of-government approach is required to effect meaningful change and to increase the safety of people experiencing family violence.

15.34 While suggesting a phased approach, the ALRC emphasises the importance of capitalising on the momentum towards change embodied by the increasing discussion of family violence and employment law at a national level, the inclusion of family violence clauses in enterprise agreements, and changes to modern awards in some states.

Phase One—improved understanding

15.35 Phase One consists of three key aspects. First, the ALRC recommends that the Australian Government initiate a national education and awareness campaign about the effect of family violence in an employment context—aimed at increasing ‘awareness amongst employees, employers and the community’.⁴¹ The campaign, the details of which are outlined later in this chapter, must be coordinated, adequately resourced and ongoing throughout the phases of implementation of reform in this area.

15.36 Secondly, given the relative lack of research and data with respect to family violence in an employment law context and its importance in providing an evidence base for use in the course of the reviews in Phases 3–5, the ALRC recommends a number of research approaches and data collection mechanisms. These include research, monitoring and evaluation by the ADFVC and other bodies, Fair Work Australia (FWA) research and Department of Education, Employment and Workplace Relations (DEEWR) utilisation of existing databases.

41 ACCL, *Submission CFV 128*.

15.37 Thirdly, the ALRC suggests that, as a preliminary step, implementation of the recommendations contained in this Report aimed at the government and statutory bodies, such as FWA, the Fair Work Ombudsman (FWO), Safe Work Australia, the Office of the Australian Information Commissioner (OAIC) and the Australian Human Rights Commission (AHRC), are vital to ensuring systemic change. These recommendations encompass the development or revision of guidance material and Codes of Practice, education and training, process reviews, as well as research and data collection.⁴²

Phase Two—family violence clauses

15.38 As outlined in Chapter 16, there has been a move to include family violence clauses in enterprise agreements, with several agreements around Australia now containing such clauses and the Australian Government expressing its support for their inclusion.⁴³ The ALRC considers the inclusion of such clauses is likely to serve an important educative function and increase the safety of employees experiencing family violence.

Phase Three—modern award reviews

15.39 Beginning in 2012 there will be several reviews of modern awards. First, FWA is required to undertake an initial review of modern awards to be conducted from 1 January 2012.⁴⁴ 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. 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’.⁴⁵

15.40 The ALRC suggests that these reviews provide a timely and constructive opportunity during which to consider the inclusion of family violence-related terms in modern awards.

Phase Four—Post-Implementation Review of the *Fair Work Act*

15.41 By 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 regulatory impacts of the legislation and whether the Act is meeting its objectives.⁴⁶

42 See, eg, Recs 15–2, 15–3, 15–4, 16–2, 16–3, 16–5, 16–8, 18–1, 18–2, 18–3.

43 ‘The government supports enterprise bargaining on domestic violence clauses in Commonwealth Government agency agreements’: G Marcus, ‘Interview with Hon Kate Ellis, Federal Minister for Status of Women’ (2011) 44 *Australian Domestic and Family Violence Clearinghouse Newsletter* 12.

44 *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) sch 5, s 6.

45 Explanatory Memorandum, Fair Work Bill 2008 (Cth), [600].

46 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 *Ibid*, 360; and DEEWR, *Agency Budget Statement 2011–2012* (2011) Outcome 5, 130.

15.42 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, at some point, amendments to a range of provisions under the *Fair Work Act* may be necessary. The ALRC is of the view that the PIR is likely to provide an appropriate forum in which the ALRC's discussion of the issues relating to family violence, in the context of the Act, may be considered.

Phase Five—review of the NES

15.43 Amendment to the NES would involve a significant change to the *Fair Work Act* framework following the extensive consultations surrounding the introduction of the Act. With this, and similar considerations discussed in Chapter 17 in mind, the ALRC considers that, rather than recommending changes to the NES in this Report, the NES should be reviewed following implementation of some (but not necessarily all) of the reforms discussed in Phases 1–4.

15.44 The ALRC has formed the view, however, that further consideration of extending the right to request flexible working arrangements and entitlement to additional paid leave for family violence-related purposes is warranted, given the importance of minimum statutory entitlements in protecting people experiencing family violence. The ALRC suggests that phased implementation of the reforms in this Report, particularly those aimed at increasing awareness, establishing an evidence base, and the negotiation of enterprise agreements and development of workplace policies capturing family violence, is likely to inform any review of the NES.

National education and awareness campaign

15.45 A central theme that has emerged in the course of this Inquiry is the need for increased awareness and effective education and training about family violence in an employment context. A proper appreciation and understanding of the nature, features and dynamics of family violence, and its potential impact on employees and the workplace, is fundamental to ensuring that the employment law system is able to respond appropriately to the needs of those experiencing family violence and to protect their safety.

15.46 As a result, the ALRC recommends that the Australian Government initiate a national education and awareness campaign in relation to family violence and its impact in the employment context. Such a campaign would complement the proposals made by the ALRC in Chapters 15–18 and has received stakeholder support.⁴⁷

15.47 The ALRC considers that such a campaign can play an important role within the framework established by the *National Plan*.⁴⁸ For example, several of the strategies under the *National Plan* aimed at ensuring that communities are safe and free from violence are relevant in the employment context. They involve, among other things: promoting community ownership and engagement, including by workplaces;

47 See, eg, Ai Group, *Submission CFV 141*; ADFVC, *Submission CFV 124*; ADFVC, *Submission CFV 26*.

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

promoting ‘positive and equitable workplace cultures’; and developing ‘workplace measures to support women experiencing and escaping’ from family violence.⁴⁹

15.48 The rationale for an ongoing national education and awareness campaign includes:

- the need for recognition that family violence is a whole-of-government, business and community responsibility;
- limited current awareness and understanding about family violence as an employment issue in some sections of the community; and
- the need for awareness and understanding followed by education and training to support rights and entitlements.

15.49 The national campaign should complement rather than substitute the implementation of legislative and workplace entitlements in the course of the other phases outlined in this Report.

Key stakeholders and approaches

15.50 The ALRC considers that a national campaign should be funded by the Australian Government and be based on a coordinated whole-of-government approach involving all key stakeholders and participants in the employment law system, including: employees, employers, unions, employer organisations, government agencies and departments, family violence support services and legal services. Bodies such as the FWO and Safe Work Australia should also play a key role in the campaign.

15.51 Stakeholders have voiced concerns about the lack of government coordination and the short-term focus of current government-funded initiatives in this area. The ALRC emphasises the need for a whole-of-government approach to education and increasing awareness in this area. This approach should be gender-neutral, coordinated, and focused on family violence and its impact in the employment context, as distinct from other forms of violence, bullying or harassment.

15.52 There are a number of key existing Australian approaches which, combined in a coordinated way, could provide a useful basis for the national education and awareness campaign. These include:

- a rights and entitlements approach—focusing on the development of rights and entitlements as well as best practice guidance material;
- primary prevention—focusing on changes to attitudes, including through business and industry partnerships and a workplace accreditation framework; and

⁴⁹ One of the immediate national initiatives to achieve this strategy was to provide funding to the ADFVC, discussed in more detail below. See, National Council to Reduce Violence Against Women, *National Plan to Reduce Violence Against Women and Their Children (2010-2022)* (2011), Commonwealth of Australia, Outcome One, Strategies 1.1–1.3, 3.1, 4.3.

- community and business partnerships—focusing on changing workplace attitudes and culture.

15.53 A number of state and territory family violence initiatives have also included education about workplace family violence prevention strategies.⁵⁰

Rights and entitlements approach

15.54 The key example of an existing rights and entitlements approach is the Domestic Violence Workplace Rights and Entitlements Project coordinated by the ADFVC, using funding provided by DEEWR to the Centre for Gender-Related Violence Studies at the University of New South Wales (UNSW) for a period of 18 months. This project involves:

- briefing unions and employers nationally and promoting the adoption of family violence clauses in enterprise agreements and other workplace instruments;
- developing model workplace information, policies and plans to assist in the informed introduction of family violence clauses as well as training resources for staff, human resources personnel, union delegates and supervisors;⁵¹
- 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 clauses and other instruments.⁵²

15.55 The ADFVC’s work creates a solid foundation for ongoing work at a national level in order to implement reforms aimed at addressing family violence and its impact in the employment context. The ALRC considers the ADFVC has the expertise to play a key and ongoing role in any national campaign.

Primary prevention

15.56 In addition to rights and entitlements, and in light of the focus of the *National Plan* on primary prevention, the ALRC considers that primary prevention based programs and strategies, such as the White Ribbon Workplace Program, could play an important role in any national education and awareness campaign.

15.57 The White Ribbon Campaign is the largest global male-led primary prevention strategy based movement which aims to stop violence against women.⁵³ In early 2011, White Ribbon received ‘one-off’ funding from the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) through the General Equality

50 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 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.

51 See, eg, ADFVC, *Domestic Violence and the Workplace: Employee, Employer and Union Resources*.

52 ADFVC, *Domestic Violence Workplace Entitlements Project Factsheet*.

53 White Ribbon, *Submission CFV 112*.

for Women program for a period of four years to establish a Workplace Program. The aim of the Workplace Program is to set up a National Business and Industry Partnerships program to work with businesses and industrial organisations. The program aim is to establish and maintain a national workplace approach to creating long-term sustainable change in attitudes to violence and to implement workplace strategies. The program has a number of components, the main goals being to develop: a White Ribbon Workplace Accreditation Framework; Workplace National Recognition Strategy; and Ambassador Program.

15.58 The program also aims to develop an evaluation strategy for monitoring and evaluating development and progress as part of the program. The ALRC understands that White Ribbon is currently in the preliminary stages of developing the program, including through consultation with an established Reference Group.⁵⁴

Community and business partnerships

15.59 The ALRC also considers there is a role for partnership-based approaches and training, such as those advocated by organisations like CEO Challenge, in any national education and awareness campaign.

15.60 By way of example, CEO Challenge is a charity based in Queensland that creates partnerships between businesses and violence prevention services to give stability to women and children fleeing family violence. It provides a range of corporate education and training sessions in recognising and responding to family violence. CEO Challenge does not receive government funding.⁵⁵ Through the partnership program, businesses take an active role in providing support and resources to community-based prevention services such as refuges, shelters and offender programs. In return, awareness about the impact of family violence is said to be raised and ‘CEOs and their people become educated to recognise and respond to violence’.⁵⁶

The role of statutory bodies

15.61 Government departments such as DEEWR and FaHCSIA, and statutory bodies such as FWA, FWO, Safe Work Australia and the Equal Opportunity for Women in the Workplace Agency (EOWA) have a key role to play in the campaign. The ALRC makes a number of recommendations about FWA, FWO and Safe Work Australia throughout Part E this Report.

15.62 In addition, the ALRC suggests that EOWA could play an important role in any national education and awareness campaign. EOWA is a statutory authority with a role in administering the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) and focuses on assisting organisations to achieve equal opportunity for women,

54 White Ribbon, *Consultation*, Sydney, 28 September 2011.

55 CEO Challenge website <<http://ceochallengeaustralia.org>> at 17 November 2011.

56 CEO Challenge, *Partnerships That Work: A Strategic Approach to Corporate-Community Engagement*, Booklet, 2.

including through education.⁵⁷ EOWA has a number of initiatives through which it could play a role in any national education and awareness campaign, including:

- taking family violence-related developments, policies, entitlements and training into account as part of the ‘Employer of Choice’ citation;
- playing a role in data collection by including family-violence related questions relating to employment initiatives and opinion data in surveys conducted of organisations reporting to EOWA; and
- conducting research and providing information about family violence as a key issue for women in the workplace.⁵⁸

The role of unions and employer organisations

15.63 Both unions and employer organisations have played, and will play, a crucial role in recognition of family violence and its impact in the employment context.⁵⁹ Both have also played an active role in the ALRC’s Inquiry.⁶⁰

15.64 Unions and employer organisations have expressed differing views on many of the issues raised. Some employer organisations have not expressed support for such measures, in large part because family violence was not seen by them as an employment issue.⁶¹ However, many unions and employer organisations have expressed support for non-regulatory measures such as the initiation of a national education and awareness campaign.⁶²

Nature of the campaign

15.65 The development and delivery of any national campaign needs to be tailored to meet the particular needs of employees, employers and businesses of all sizes as well as specific groups within the community. The focus of the campaign should be on family violence, as distinct from other forms of violence that may occur in the workplace.⁶³

57 EOWA, *Consultation*, Sydney, 10 October 2011; EOWA website <www.eowa.gov.au> at 17 November 2011.

58 EOWA, *Consultation*, Sydney, 10 October 2011.

59 The ILO suggests that ‘strong commitment of both trade unions and management is instrumental in progressively reducing the incidence of workplace violence’: ILO (Bureau for Gender Equality), *Gender-based violence in the world of work: Overview and selected annotated bibliography*, Working Paper 3 (2011), 14.

60 AFEI, *Submission CFV 158*; CPSU, *Submission CFV 147*; Ai Group, *Submission CFV 141*; ACCI, *Submission CFV 128*; CCIWA, *Submission CFV 123*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 113*; ACTU, *Submission CFV 100*; Business SA, *Submission CFV 98*; ACTU, *Submission CFV 39*; ACCI, *Submission CFV 19*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

61 AFEI, *Submission CFV 158*.

62 Ai Group, *Submission CFV 141*; ACCI, *Submission CFV 128*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 113*; ACTU, *Submission CFV 100*.

63 ADFVC, *Submission CFV 124*.

15.66 Stakeholders have outlined a range of initiatives that the ALRC suggests could usefully form part of the national education and awareness campaign, including:

- education and training in workplaces around Australia, including of employees, employers, and their representatives;
- development of 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 an employment issue.⁶⁴

15.67 While the content of the national education and awareness campaign should be developed in consultation with stakeholders and involve significant community consultation and involvement, the ALRC suggests 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 employees, workplaces and the economy;
- responding to disclosures of family violence—both individual and organisational best practice responses;
- relevant rights and entitlements—both existing and the potential for new entitlements;
- verification of family violence where necessary to access entitlements; and
- privacy issues arising from disclosure of family violence.

15.68 It could also include assistance, information and support for particular groups who have specific needs or perspectives such as:

- employees experiencing family violence;
- employees generally and their representatives, including unions;
- employers and employer organisations—with a focus on responding to family violence, including consideration of adapting workplace responses to suit particular business needs and realities; and
- Indigenous employees and employers, members of culturally and linguistically diverse communities, people with disability and members of the lesbian, gay, bisexual, trans and intersex community, all of whom may face particular issues with respect to family violence in an employment context.

⁶⁴ Ibid; ACTU, *Submission CFV 39*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; National Network of Working Women's Centres, *Submission CFV 20*; Women's Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

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

Issues arising from disclosure

Privacy and confidentiality

15.69 A key challenge is to ensure that measures likely to lead to disclosure of family violence contain appropriate privacy safeguards regarding the handling of that personal information. This is particularly important given that concerns about privacy appear to be a central barrier to disclosure of family violence in the context of employment.

15.70 There are several key issues with respect to privacy and confidentiality: general obligations under the *Privacy Act 1988* (Cth) and the *Fair Work Act*; the employee records exemption under the *Privacy Act*; and the need for guidance material and workplace policies regarding the protection of employees' personal information. The ALRC ultimately recommends that the OAIC and the FWO should, in consultation with unions and employer organisations, develop or revise guidance material with respect to privacy obligations arising in relation to disclosure of family violence in an employment context.

The Privacy Act and the Fair Work Act

15.71 Where employees experiencing family violence disclose family violence to employers or others, issues of privacy arise.

15.72 The principal piece of federal legislation governing information privacy in Australia is the *Privacy Act 1988*, 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.⁶⁵

15.73 There is limited privacy protection for private sector employees under either the *Privacy Act* or the *Fair Work Act*. However, the *Fair Work Act* does contain some provisions with respect to employer obligations in relation to employee records.⁶⁶ For example, s 107 of the *Fair Work Act* notes that personal information disclosed to an

⁶⁵ 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 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 completed an inquiry into the exposure drafts in October 2011. The Government has indicated that it will consider the exemptions under the *Privacy Act 1988*: Australian Government, *Enhancing National Privacy Protection—Australian Government First Stage Response to the Australian Law Reform Commission Report 108 For Your Information: Australian Privacy Law and Practice* (2009).

⁶⁶ 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.

employer for the purposes of accessing leave under the NES may be regulated by the *Privacy Act*. 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.⁶⁷ 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,⁶⁸ and in relation to individual flexibility arrangements, include a copy of the agreement.⁶⁹ 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

15.74 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.⁷⁰ 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.

15.75 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.⁷¹ This exemption is usually referred to as the ‘employee records exemption’.

15.76 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’.⁷²

15.77 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.⁷³ Specifically, the ALRC stated that there is a lack of adequate privacy 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

67 Ibid s 535; *Fair Work Regulations 2009* (Cth) ch 3, pt 3–6, div 3.

68 *Fair Work Regulations 2009* (Cth) reg 3.36.

69 Ibid reg 3.38.

70 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.

71 *Privacy Act 1988* (Cth) ss 7(1)(ee), 7B(3).

72 *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].

73 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008), Rec 40–1.

over employees to provide personal information to their employers. 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*.⁷⁴

15.78 Stakeholders in this Inquiry expressed differing views with respect to the employee records exemption. As outlined in the *Family Violence—Commonwealth Laws*, ALRC Discussion Paper 76 (2011), stakeholders such as the Australian Chamber of Commerce and Industry opposed its removal,⁷⁵ however the OAIC and others supported the removal of the exemption to ‘better protect and support those experiencing family violence’.⁷⁶

15.79 Concerns about privacy may result in employees being reluctant to disclose family violence. 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. In light of the ALRC’s previous exposition of this issue and the Australian Government’s commitment to considering whether the employee records exemption should be retained,⁷⁷ rather than making a recommendation in this Report, the ALRC simply reiterates the views expressed in *For Your Information*.

Guidance material and workplace policies

15.80 In this Report, the ALRC makes a number of recommendations likely to increase disclosure of family violence by employees in an employment context, for example to access leave or flexible working arrangements. A number of stakeholders 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.⁷⁸

15.81 As a result, the development or revision of existing workplace approaches and policies may be required to ensure that information about family violence is handled sensitively and appropriately. While, in many cases, workplaces may already have

74 Ibid, Ch 40.

75 ACCI, *Submission CFV 19*. See also Ai Group, *Submission CFV 141*; CCIWA, *Submission CFV 123*; Business SA, *Submission CFV 98*.

76 Office of the Australian Information Commissioner, *Submission CFV 142*. See also: ADFVC, *Submission CFV 124*; Redfern Legal Centre, *Submission CFV 15*.

77 Australian Government, *Enhancing National Privacy Protection—Australian Government First Stage Response to the Australian Law Reform Commission Report 108 For Your Information: Australian Privacy Law and Practice* (2009).

78 AASW (Qld), *Submission CFV 17*; Redfern Legal Centre, *Submission CFV 15*.

adequate privacy policies in place, the ALRC considers that additional guidance may be necessary.⁷⁹

15.82 The OAIC and the FWO currently produce a variety 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.⁸⁰ The ALRC recommends that the OAIC and FWO, in consultation with unions and employer organisations, should develop or revise guidance for employers which, as well as ensuring compliance with obligations arising under the *Privacy Act*, specifically safeguards the personal information of employees who have disclosed family violence.⁸¹

15.83 While some stakeholders supported the development of a model policy or clause,⁸² the ALRC considers that the development of comprehensive guidance material, rather than a model policy, would be more effective. As noted by the OAIC, the ‘availability of a model privacy policy may encourage organisations to adopt such a policy without consideration for the particular circumstances of that specific workplace’.⁸³

15.84 The ALRC considers that any guidance material should contain information in relation to existing privacy obligations; roles and responsibilities; processes and procedures; and the potential effects of any applicable mandatory reporting or other requirements.⁸⁴

15.85 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.⁸⁵ The OAIC supported the development and publication of guidance if the Australian Government removed the employee records exemption from the *Privacy Act*.⁸⁶

79 Ai Group, *Submission CFV 141*; Business SA, *Submission CFV 98*. See also ADFVC, *Submission CFV 124*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 113*.

80 Fair Work Ombudsman, *Best Practice Guide: Workplace Privacy*.

81 ACCI, *Submission CFV 128*.

82 ADFVC, *Submission CFV 124*; ACTU, *Submission CFV 100*.

83 Office of the Australian Information Commissioner, *Submission CFV 142*.

84 ACTU, *Submission CFV 100*.

85 Specifically, the ALRC 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).

86 Office of the Australian Information Commissioner, *Submission CFV 142*.

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

Verifying family violence

15.86 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 gain additional entitlements. The need to avoid ‘incentivising’ a claim of family violence is a theme of this Inquiry discussed in Chapter 2. To ensure the integrity of the employment system, it is necessary, in certain circumstances, to require verification of claims of family violence.⁸⁷

15.87 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.

15.88 A key issue arises as to the type of verification of family violence that should be required. For example, in the context of access to family violence leave, stakeholders suggested that a wide range of documentary verification to support a claim of family violence may be appropriate, including a document issued by:

- a police officer;
- a court;
- a health professional, including doctor, nurse or psychiatrist/psychologist;
- a lawyer;
- a family violence service or refuge worker; and/or
- the employee, in the form of a signed statutory declaration.⁸⁸

87 See, eg, Office of the Australian Information Commissioner, *Submission CFV 18*.

88 Kingsford Legal Centre, *Submission CFV 161*; Australian Human Rights Commission, *Submission CFV 48*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; Queensland Law Society, *Submission CFV 21*; Office of the Australian Information Commissioner, *Submission CFV 18*; Redfern Legal Centre, *Submission CFV 15*; WEAVE, *Submission CFV 14*; Women’s Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

15.89 The 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.⁸⁹

15.90 Where relevant in Chapters 16 and 17, the ALRC has noted the need for verification of family violence. The ALRC considers that providing employees and employers with information about what might constitute appropriate verification could form part of the national education and awareness campaign or a workplace policy and be included in material about developing family violence clauses in enterprise agreements.

Research and data collection

15.91 In *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021*, the National Council to Reduce Violence against Women and their Children (the National Council) highlighted that 'data relating to violence against women and their children in Australia is poor'.⁹⁰ The National Council noted that the way in which information is reported is 'generally inconsistent and does not allow for a comprehensive understanding of family violence'.⁹¹

15.92 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.

15.93 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 helps to underpin evidence-based policy and legal responses to family violence, and inform quality education and training programs.

15.94 In Part E, the ALRC makes a range of recommendations, 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:

- workplace family violence policies;

89 Office of the Australian Information Commissioner, *Submission CFV 18*.

90 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.

91 *Ibid.*, 47.

- family violence-related inclusions in individual flexibility arrangements;
- family violence-related inclusions and clauses in enterprise agreements—including the taking of leave;
- family violence clauses or provisions in modern awards; and
- ‘business implications and costs’ associated with each of the above.⁹²

15.95 There are a range of existing data collection mechanisms and processes that may be utilised to collect such data, some of which are outlined below. However, the ALRC is of the view that several of the existing mechanisms could be used for other purposes and there are a number of additional data collection sites and mechanisms that may assist in building an evidence base in this area.

Fair Work Australia

15.96 Two key sections of the *Fair Work Act* are relevant to the scope of FWA research—ss 590 and 653.

15.97 Section 590 provides that FWA may inform itself in relation to any matter before it in such a manner as it considers appropriate, including by conducting inquiries or undertaking or commissioning research.⁹³ Where family violence is relevant to a particular matter before FWA, the ALRC considers this provision is sufficiently broad to allow FWA to inform itself appropriately.

15.98 A question arises in relation to the other provision—s 653 of the *Fair Work Act*—as to whether an amendment is required to the Act in order to facilitate the conduct of reviews and research into family violence as an emerging development in the making of enterprise agreements, and its effect more broadly in the employment law system.

15.99 Under s 653, 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. 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.⁹⁴

15.100 Some stakeholders expressed the view that, as there are no associated reporting requirements, FWA may have limited information available to it in order to inform such research.⁹⁵

92 Business SA, *Submission CFV 98*.

93 *Fair Work Act 2009* (Cth) ss 590, 653.

94 The Minister must table a copy of the report in Parliament within 15 sitting days: *Ibid* s 653(3), (4).

95 See, eg. ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 113*; ACTU, *Submission CFV 100*.

15.101 In its submission, DEEWR indicated that whether family violence could be considered in the review and research of the effect these arrangements have on the employment of women is a ‘matter for FWA’.⁹⁶ In consultations, FWA noted the resource implications of expanding current research under s 653.⁹⁷

15.102 The ALRC considers that s 653 is a broad provision and that, in order to ensure the General Manager has continued discretion to conduct research and review of a wide range of employment developments, rather than being limited by being overly prescriptive, ‘it would not be appropriate to create or add specific consideration of this issue’.⁹⁸ As a result, amendment to the *Fair Work Act* is unnecessary. Instead, the ALRC recommends that the General Manager of FWA should, in conducting the review and research required under s 653 in relation to enterprise agreements and individual flexibility arrangements, consider family violence-related developments and the effect on the employment of those experiencing family violence.

DEEWR

15.103 As discussed in Chapter 16, 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 such clauses.

15.104 DEEWR maintains the Workplace Agreements Database (WAD) which contains information on federal enterprise agreements that have been lodged with, or approved by, FWA.⁹⁹ 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.

15.105 In response to the ALRC’s suggestion that DEEWR collect data about the inclusion of family violence clauses in enterprise agreements as part of the WAD, DEEWR has advised that ‘it is possible, and it is willing to collect data on the incidence of references to domestic violence in enterprise agreements’, including specific family violence clauses as well as broader reference to family violence in the agreement. DEEWR suggests that ‘it would be possible to commence collection of the data for the June quarter 2011 onwards’ and this data would be available on request.¹⁰⁰ As a result, the ALRC recommends that DEEWR should collect data on the incidence of family violence-related clauses and references in enterprise agreements and include it as part of the WAD.

96 DEEWR, *Submission CFV 130*.

97 Fair Work Australia, *Consultation*, By telephone, 30 September 2011.

98 ACCL, *Submission CFV 128*.

99 The ALRC understands that the WAD is reviewed annually with the aim of improving the ‘efficiency and relevance of data collection’: Department of Education, Employment and Workplace Relations, *Correspondence*, 27 June 2011.

100 DEEWR, *Submission CFV 130*.

The ADFVC and other bodies

15.106 In addition to data collection by DEEWR and FWA, the ADFVC submitted that there is a need for ‘independent research, monitoring and evaluation of the incidence of domestic/family violence in the workplace on a national basis’.¹⁰¹

15.107 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 in enterprise agreements. 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 Australian Bureau of Statistics 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.¹⁰²

15.108 This framework outlines 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 considers the ADFVC would be well placed to facilitate the collection of such data using this method and to consider additional data collection methods with respect to the inclusion of other workplace rights and entitlements as well as their broader impact, particularly in the context of the national education and awareness campaign.

15.109 In addition, the ALRC understands that part of the White Ribbon Workplace Program is to develop an evaluation program to assess progress by individual businesses and industry organisations, specific sub-programs and the national partnerships program. This program may provide another useful model for data collection.¹⁰³

15.110 There is also a need for research and economic modelling to inform reviews such as the one of the NES as part of Phase 5, to assist in the determination of an appropriate quantum of any family violence leave under the NES. Stakeholders like the National Network of Working Women’s Centres have suggested that ‘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’.¹⁰⁴ Data collected in

101 ADFVC, *Submission CFV 124*.

102 Social Policy Research Centre, *Framework to Monitor and Evaluate the Outcomes of the Introduction of Domestic Violence Clauses* (2011).

103 White Ribbon, *Consultation*, Sydney, 28 September 2011.

104 National Network of Working Women’s Centres, *Submission CFV 20*.

relation to the utilisation of leave under family violence clauses in enterprise agreements may also assist in this regard.

15.111 The ALRC suggests that the Productivity Commission may play a constructive role in examining the impact of possible reforms on businesses and undertaking economic modelling, for example by analysing data collected by FWA, DEEWR, the ADFVC and other bodies, in order to inform the recommended review of the NES.

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

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

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

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

16. *Fair Work Act 2009* (Cth)

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Summary

16.1 The *Fair Work Act 2009* (Cth) 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. The *Fair Work Act* establishes a safety net comprising: the National Employment Standards (NES), modern awards and national minimum wage orders; and a compliance and enforcement regime. It also establishes an institutional framework for the administration of the system comprising Fair Work Australia (FWA) and the Fair Work Ombudsman (FWO).¹

16.2 Chapters 16 and 17 provide an overview of the *Fair Work Act* and examine possible options for reform within the context of the ALRC's recommended five-phase approach to reforms in this area. The focus of this chapter is on potential reform of the

¹ The Fair Work Divisions of the Federal Court and Federal Magistrates Court and, in some cases, state and territory courts, perform judicial functions under the *Fair Work Act: Fair Work Act 2009* (Cth) pt 4–2.

Act, its institutions, and agreements and instruments made under the Act, to address the needs—and ultimately the safety—of employees experiencing family violence. The chapter examines the background, coverage and objects of the *Fair Work Act*, as well as the role and processes of FWA and the FWO. The ALRC suggests ways in which those institutions or their processes may function to protect the safety of those experiencing family violence. In addition, this chapter examines:

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

Fair Work Act 2009 (Cth)

16.3 The *Fair Work Act* replaced the *Workplace Relations Act 1996* (Cth) and most provisions of the Act took effect on 1 July 2009. The history surrounding the enactment of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), the Federal election campaign in 2007—including the policy announcement *Forward with Fairness*,² which preceded the *Fair Work Act*—and the introduction of the *Fair Work Act*, have been the subject of much debate and commentary.

16.4 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 establishment of a number of advisory

2 See, eg, K Rudd and J Gillard, *Forward with Fairness: Policy Implementation Plan* (2007).

groups.³ The Government also conducted a number of other specific consultations in relation to the NES.⁴ The present Inquiry comes not long after the conclusion of those consultative processes and shortly before a planned Post-Implementation Review of the *Fair Work Act*.

Coverage

16.5 The *Fair Work Act* regulates ‘national system’ employers and employees.⁵ 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.⁶ As a result, the national system covers the Commonwealth, Commonwealth authorities and constitutional corporations,⁷ and

- all other employment in Victoria, ACT and the Northern Territory;
- all private sector employment in New South Wales, Queensland and South Australia; and
- all private sector and local government employment in Tasmania.

16.6 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.

16.7 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.⁸

16.8 The *Fair Work Regulations 2009* (Cth) address matters of detail within the framework established by the *Fair Work Act*. For example, the *Fair Work Regulations* provide additional definitions, explain the application of the Act and elaborate on certain terms and conditions of employment.

3 National Workplace Relations Consultative Council and sub-committees, Business Advisory Group, Workers Advisory Group and Small Business Working Group: *National Workplace Relations Consultative Council Act 2002* (Cth); Explanatory Memorandum, Fair Work Bill 2008 (Cth), [r19].

4 Explanatory Memorandum, Fair Work Bill 2008 (Cth), [r20].

5 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.

6 In 1996 Victoria was the first state to refer key industrial relations powers to the Commonwealth.

7 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).

8 For example, non-national system employees are entitled to unpaid parental leave, notice of termination, payment in lieu or notice and protection from unlawful termination of employment: *Fair Work Act 2009* (Cth) pts 6–3, 6–4.

Objects

16.9 Section 3 of the *Fair Work Act* contains the objects of the Act and sets out the manner in which the Act is intended 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
- (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.

16.10 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.

16.11 Of particular importance in the context of this Inquiry is the incorporation of references to, and actual entitlements based on, the concept of social inclusion. For example, the inclusion 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'.⁹

⁹ 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.

16.12 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, while ensuring proposals are also consistent with the objects of the Act.

Post-Implementation Review

16.13 By 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 regulatory impacts of the legislation and whether the Act is meeting its objectives.¹⁰

16.14 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, at some point, amendments to a range of provisions under the Act, examined in this chapter, may be necessary. The PIR is likely to provide an appropriate forum in which the ALRC's discussion of the issues relating to family violence in the context of the Act may be considered.

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

Institutions

Fair Work Australia

16.15 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 divisions. It commenced operation on 1 July 2009, assuming the functions of the Australian Industrial Relations Commission, the Australian Industrial Registry, the Australian Fair Pay Commission and some functions of the Workplace Authority.¹¹

16.16 FWA has functions conferred by s 576 of the *Fair Work Act*, including in relation to: the NES; modern awards; enterprise agreements; and general protections. Decisions of FWA (other than decisions of the Full Bench or the Minimum Wage Panel) can be appealed upon application to FWA, with leave from the Full Bench.¹²

16.17 Under s 577 of the *Fair Work Act*, FWA is required to perform its functions and powers in a manner which

- (a) is fair and just; and

10 The PIR 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)*, [r360]; and DEEWR, *Agency Budget Statement 2011–2012 (2011)*, Outcome 5, 130.

11 There are several types of FWA members: Primary FWA members including the President; Deputy Presidents and Commissioners; and Minimum Wage Panel members: *Fair Work Act 2009 (Cth)* s 575.

12 *Ibid* pt 5–1, div 3.

- (b) is quick, informal and avoids unnecessary technicalities; and
- (c) is open and transparent; and
- (d) promotes harmonious and cooperative workplace relations.

Options for reform

16.18 The ALRC considers that there are a number of specific reforms which would ensure FWA members and processes are better able to respond to the needs of those experiencing family violence. These relate to waiver of application fees, time limits for making applications and the general conduct of matters. Broader consideration of systemic reform to the role or powers of FWA is beyond the scope of the Terms of Reference for this Inquiry.

Waiver of application fees

16.19 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.¹³ Where applicants are experiencing financial hardship, the fee may act as a disincentive to lodge an application.¹⁴ Family violence may be the cause of financial hardship—for example, where the family violence affects an applicant’s access or control over his or her income or partner’s income.

16.20 The *Fair Work 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.¹⁵ Stakeholders have emphasised that while FWA has discretion to waive the fee, there are instances in which ‘community legal centres have been unable to obtain a fee waiver for welfare-dependent clients with no realisable assets’.¹⁶

16.21 In order to apply for a waiver, an applicant must complete a ‘Waiver of Application Fee’ form. The ALRC suggests that this form could be amended 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.¹⁷ In addition, the ALRC recommends that FWA members and other relevant personnel undertake training, including in relation to the potential effect of family violence on an applicant’s financial circumstances.

Time limits for making an application

16.22 An application for unfair dismissal must be lodged with FWA within 14 days of the dismissal.¹⁸ The Explanatory Memorandum to the Fair Work Bill indicates that the

13 The fee is currently \$60.60. See: *Fair Work Regulations 2009* (Cth) regs 3.02, 3.03, 3.07, 6.05.

14 National Network of Working Women’s Centres, *Submission CFV 20*.

15 *Fair Work Regulations 2009* (Cth), regs 3.02(7), 3.03(7), 3.07(7), 6.05(7).

16 ADFVC, *Submission CFV 26*.

17 As suggested by Kingsford Legal Centre, *Submission CFV 161*.

18 Under Work Choices the time limit was 21 days. In the Fair Work Bill 2008 (Cth) the time limit was initially 7 days.

aim of the reduced application time is to ‘promote quick resolution of claims and increase the feasibility of reinstatement as an option’.¹⁹

16.23 The 14-day time limit within which an application for unfair dismissal must be lodged, except in ‘exceptional circumstances’, may be particularly onerous for people experiencing family violence:

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.²⁰

16.24 However FWA may grant a further period within which to make an application if satisfied that there are ‘exceptional circumstances’,²¹ taking 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.²²

16.25 FWA’s power to allow a further period for application in ‘exceptional circumstances’ may provide a mechanism through which victims of family violence may be granted additional time to make an application. However, to the extent that FWA takes a strict approach, as suggested by some stakeholders,²³ 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.

Conduct of matters

16.26 FWA has a range of powers under the *Fair Work Act* with respect to determining the conduct of conferences and hearings as well as in relation to restricting the publication of confidential evidence.²⁴ Stakeholders have emphasised that FWA’s use of such powers to ‘issue orders regarding privacy and restricted presence at hearings and conferences as well as suppression of publication of personal details,

19 Explanatory Memorandum, Fair Work Bill 2008 (Cth) [r 222].

20 ADFVC, *Submission CFV 26*. See also Kingsford Legal Centre, *Submission CFV 161*.

21 *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.

22 *Fair Work Act 2009* (Cth) s 394(3).

23 ADFVC, *Submission CFV 26*. See also Kingsford Legal Centre, *Submission CFV 161*.

24 *Fair Work Act 2009* (Cth) ss 394(3), 593, 594.

evidence and documents may assist in encouraging and supporting victims of family violence to pursue matters' in FWA.²⁵

16.27 The ALRC understands that FWA members are involved in ongoing professional development, both internally and externally.²⁶ The ALRC recommends that Fair Work Australia should review its processes, and members and other relevant personnel should be provided with training, to ensure that the existence of family violence is appropriately and adequately considered at relevant times in the conduct of matters. This would include in deciding whether:

- the applicant would suffer 'serious hardship' if they were required to pay an application fee;
- there are 'exceptional circumstances' under s 394(3) of the *Fair Work Act* that would warrant the granting of a further period within which to make an application for unfair dismissal;
- to make orders in relation to a hearing under s 593 of the *Fair Work Act*; and
- to make orders restricting the publication of confidential evidence under s 594 of the *Fair Work Act*.

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

Fair Work Ombudsman

16.28 The FWO is an independent statutory office created by the *Fair Work Act*.²⁷ The primary aim of the FWO is to promote harmonious, productive and cooperative workplace relations and compliance with the Act, through education, assistance and advice. The FWO also plays a role in monitoring compliance, carrying out investigations, and in some cases, commencing proceedings or representing employees or outworkers in order to promote overall compliance.²⁸ The FWO has an obligation to consult with FWA in producing guidance material that relates to FWA's functions.²⁹

16.29 Key recommendations in Part E of this Report that relate to the role of the FWO are: Recommendation 15–2—privacy guidance material; Recommendation 16–3—IFA's; and Recommendation 16–5—family violence clauses in enterprise agreements.

25 ACTU, *Submission CFV 100*.

26 Fair Work Australia, *Consultation*, by telephone, 30 September 2011.

27 *Fair Work Act 2009* (Cth) s 681.

28 *Ibid* s 682(1).

29 *Ibid* s 682(2).

Enterprise agreements

16.30 The law of employment, as it related 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. 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, which can prevail over contracts of employment.³⁰

16.31 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 [FWA] to facilitate good faith bargaining and the making of enterprise agreements.³¹

16.32 There are three types of enterprise agreements: single-enterprise agreements; multi-enterprise agreements; and ‘greenfields’ agreements.³² 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.³³

16.33 The *Fair Work Act* lists several categories of matters in relation to enterprise agreements: permitted matters that may be included;³⁴ mandatory terms that must be included;³⁵ and unlawful terms that cannot be included or that are of no effect.³⁶ In order to be approved by FWA, there are a number of requirements, one of which is that it must pass the ‘better off overall’ test. 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.³⁷

30 ‘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’.

31 *Fair Work Act 2009* (Cth) s 171.

32 Single-enterprise agreements involve a single employer or one or more employers cooperating in what is essentially a single enterprise; multi-enterprise agreements involve two or more employers that are not all single-interest employers; ‘greenfield’ agreements involve a genuinely new enterprise that has not yet employed employees: *Ibid* s 172.

33 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); DEEWR, *Trends in Federal Enterprise Bargaining, December Quarter 2010* (2010).

34 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: *Fair Work Act 2009* (Cth) s 172(1).

35 For example, terms in relation to individual flexibility and consultation: *Ibid* ss 202, 205.

36 For example, terms that are discriminatory. *Ibid* ss 194, 195, 253.

37 *Ibid* s 193.

16.34 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.³⁸

16.35 IFAs and family violence clauses in enterprise agreements provide two mechanisms that may assist to account for the needs, and protect the safety, of those experiencing family violence.

Individual flexibility arrangements

16.36 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.

16.37 Section 202 of the *Fair Work Act* requires that an enterprise agreement must include a ‘flexibility term’.³⁹ A flexibility term allows an employer and an employee to make a specific 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.⁴⁰ Where a flexibility term is included in an enterprise agreement, the scope of an IFA is limited by the flexibility term in the enterprise agreement itself.⁴¹ If an enterprise agreement does not include a flexibility term, the model flexibility term is taken to be a term of the agreement.⁴²

16.38 The ALRC considers that while IFAs may act as one mechanism through which to account for the needs of employees experiencing family violence, they may not necessarily be the most appropriate in the family violence context. However, the ALRC acknowledges the potential role IFAs may play in some circumstances where an employee is experiencing family violence and recommends that the FWO include information in existing guidance material on negotiating IFAs where an employee is experiencing family violence.

Is there a role for IFAs where an employee is experiencing family violence?

16.39 Stakeholders have expressed differing views on the usefulness of IFAs generally and more specifically in relation to the use of IFAs in circumstances where an employee is experiencing family violence.⁴³

38 See, eg, *Ibid* ch 2, pt 2–4, div 3.

39 *Ibid* s 202.

40 *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.

41 Some stakeholders have expressed concern about the inclusion of restrictive flexibility terms in enterprise agreements and the flow-on effect that has on the usefulness of IFAs: AFEI, *Submission CFV 158*; Ai Group, *Submission CFV 141*.

42 *Fair Work Act 2009* (Cth) ss 202(4), 202(5). See *Fair Work Regulations 2009* (Cth) sch 2.2, reg 2.08.

43 For example, a number of stakeholders have expressed concern about a range of aspects of the operation of IFAs generally: AFEI, *Submission CFV 158*; Ai Group, *Submission CFV 141*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 113*; ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*; National Network of Working Women’s Centres, *Submission CFV 20*; ACCI, *Submission CFV 19*.

16.40 In some circumstances, where no other entitlements exist, IFAs may prove useful in responding to the needs of employees experiencing family violence.⁴⁴ IFAs may ‘deliver a level of individual flexibility [which] could accommodate employees with tailored conditions’.⁴⁵ For example, where an employee is in a position to negotiate, 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’.⁴⁶

16.41 However, the circumstances in which IFAs could help protect employees experiencing family violence are limited and the introduction of other measures, such as those recommended in relation to family violence clauses, modern awards and ultimately the NES, may be preferable.⁴⁷ Stakeholders have expressed a range of concerns with respect to the usefulness and appropriateness of IFAs in circumstances where an employee is experiencing family violence. Concerns primarily arise in relation to: unequal bargaining power;⁴⁸ the level of confidence, knowledge and skill required to negotiate an IFA;⁴⁹ and the limited likelihood of victims of family violence negotiating IFAs.⁵⁰ In addition, employees experiencing family violence often require immediate flexibility or altered arrangements in order to deal with unforeseen circumstances arising from family violence—‘IFAs do not really take these emergencies that require flexibility into account’, even where employers may be willing to negotiate an IFA.⁵¹

Development of a guide to negotiating IFAs

16.42 The ALRC acknowledges the concerns of some stakeholders with respect to the appropriateness of IFAs in circumstances involving family violence and, by extension, inclusion of material in guidance about negotiating an IFA in such circumstances.⁵² However, despite the limitations of IFAs, both generally and in a family violence context, there is nonetheless a need for additional guidance for employees and employers to highlight the fact that IFAs may be negotiated to accommodate the needs

44 See, eg, Kingsford Legal Centre, *Submission CFV 161*; CCIWA, *Submission CFV 123*; Australian Human Rights Commission, *Submission CFV 48*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*. For example, where a family violence clause is included in an enterprise agreement, in line with Recommendation 16–4, that would supplant the need to negotiate an IFA to deal with circumstances arising from an employee’s experience of family violence.

45 ACCI, *Submission CFV 19*.

46 ADFVC, *Submission CFV 26*.

47 ACTU, *Submission CFV 39*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; ADFVC, *Submission CFV 26*; National Network of Working Women’s Centres, *Submission CFV 20*; Redfern Legal Centre, *Submission CFV 15*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

48 ADFVC, *Submission CFV 26*; National Network of Working Women’s Centres, *Submission CFV 20*.

49 Australian Human Rights Commission, *Submission CFV 48*; ACTU, *Submission CFV 39*; National Network of Working Women’s Centres, *Submission CFV 20*.

50 For example, the AHRC submitted that ‘women are less likely than male employees to engage in individual negotiations with an employer’: Australian Human Rights Commission, *Submission CFV 48*. See also ADFVC, *Submission CFV 26*.

51 National Network of Working Women’s Centres, *Submission CFV 20*; ADFVC, *Submission CFV 26*.

52 ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 113*.

of employees experiencing family violence where an employee chooses to negotiate one.⁵³

16.43 The FWO has developed Best Practice Guide 03, *Use of Individual Flexibility Arrangements*.⁵⁴ While some stakeholders advocated the development of family violence-specific material,⁵⁵ the ALRC recommends that the FWO, in consultation with unions and employer organisations, should include information in the existing guide with respect to negotiating an IFA in circumstances where an employee is experiencing family violence. 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.⁵⁶

16.44 The amendment of the FWO guide should involve consultation with unions and employer organisations, all of whom have a role in ‘promoting and informing employees about their rights to negotiate individual flexibility arrangements in order to ensure equitable access’.⁵⁷

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

Family violence clauses

16.45 A number of stakeholders considered that the inclusion of family violence clauses in enterprise agreements is a ‘positive move to protect the safety and industrial rights of [people] who have experienced family violence, which has resulted in a negative impact on their work entitlements’.⁵⁸

16.46 However, the ALRC does not consider that the *Fair Work Act* should be amended to mandate the inclusion of family violence clauses. Rather, the ALRC recommends that the Australian Government support the inclusion of family violence clauses which, at a minimum, should contain several basic requirements. Beyond that however, given enterprise agreements are negotiated at an individual workplace level, the inclusion of a family violence clause will necessarily be the product of agreement

53 Australian Human Rights Commission, *Submission CFV 48*; ACCI, *Submission CFV 19*; Women’s Health Victoria, *Submission CFV 11*; ADFVC, *Submission CFV 26*.

54 Fair Work Ombudsman, *Best Practice Guide: Use of Individual Flexibility Arrangements*.

55 ADFVC, *Submission CFV 26*.

56 The inclusion of sample IFAs was supported by Women’s Health Victoria, *Submission CFV 11*.

57 Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*.

58 National Network of Working Women’s Centres, *Submission CFV 20*. See also: Australian Human Rights Commission, *Submission CFV 48*; ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; National Network of Working Women’s Centres, *Submission CFV 20*; Redfern Legal Centre, *Submission CFV 15*; WEAVE, *Submission CFV 14*; Women’s Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

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.⁵⁹

Should family violence clauses be encouraged?

16.47 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. Family violence clauses recognise and address the impact of family violence on employees and workplaces, and may provide a flexible way to negotiate workplace responses to family violence, and provide enforceable entitlements.

16.48 There are currently a range of family violence clauses that are either included, or are being negotiated for inclusion, in enterprise agreements around Australia.⁶⁰ In 2010, the first family violence clauses were included in the enterprise agreements for Surf Coast Shire and University of New South Wales (UNSW) professional staff. Both agreements were subsequently approved by FWA.⁶¹ The Australian Services Union (ASU) clause was included in the Surf Coast Shire agreement and is reproduced below.⁶²

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.

59 A range of stakeholders supported the inclusion of family violence clauses on this basis: ACTU, *Submission CFV 39*; ACCI, *Submission CFV 19*.

60 Family violence clauses have been included in: *Thoroughbred Racing SA Ltd Barrier Staff/AWU, Enterprise Agreement 2011*; 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; Health and Community Services Victoria; and the NSW State Government including the Transport Accident Commission. The Maritime Union of Australia is trialling clauses with DP World Stevedores: ADFVC, *Domestic Violence and Workplace Rights and Entitlements Project* <www.austdvclearinghouse.unsw.edu.au/workplace_whats_new.htm> at 28 July 2011.

61 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.

62 Surf Coast Shire, *Enterprise Agreement 2010–2013*.

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 experienc[ing] family violence will be given a resource pack of information regarding support services.

16.49 The UNSW clause is more limited, providing a right to request access to existing 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.⁶³ 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.⁶⁴

16.50 While enterprise agreements covering Commonwealth agencies do not currently include family violence clauses, the Government has expressed support for 'enterprise bargaining on domestic violence clauses in Commonwealth Government agency agreements'.⁶⁵

16.51 Despite their introduction in a number of agreements, there are also a range of concerns about the inclusion of such clauses. On the one hand, stakeholders have expressed concerns about the limited application of enterprise agreements as they 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. Stakeholders also emphasised that, at times, bargaining items that benefit vulnerable employees, such as family violence clauses, may be excluded from mainstream bargaining processes.⁶⁶ Such a conclusion is borne out by academic research on bargaining outcomes: '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'.⁶⁷

16.52 On the other hand, employer concerns have mirrored those raised in relation to other statutory or workplace entitlements, in particular with respect to the potential costs to business associated with the inclusion of such clauses.⁶⁸

Should there be basic requirements for a family violence clause?

16.53 While some stakeholders advocated the adoption of the ASU clause, or a model family violence clause, the ALRC acknowledges that 'one-size does not fit all'.⁶⁹ As emphasised by the Australian Chamber of Commerce and Industry (ACCI), 'these types of clauses are negotiated with employees on a voluntary basis' and, 'where an

⁶³ University of New South Wales (Professional Staff), *Enterprise Agreement 2010*.

⁶⁴ Ibid.

⁶⁵ G Marcus, 'Interview with Hon Kate Ellis, Federal Minister for Status of Women' (2011) 44 *Australian Domestic and Family Violence Clearinghouse Newsletter* 12.

⁶⁶ Australian Human Rights Commission, *Submission CFV 48*; ACTU, *Submission CFV 39*.

⁶⁷ Australian Human Rights Commission, *Submission CFV 48*.

⁶⁸ See, eg, AFEL, *Submission CFV 158*; Ai Group, *Submission CFV 141*; ACCI, *Submission CFV 128*; ACCI, *Submission CFV 19*.

⁶⁹ ACCI, *Submission CFV 19*.

employer agrees to such clauses, it is because it meets the specific needs of its staff, which may not be true for other workplaces'.⁷⁰ While such entitlements need to be clear and enforceable, clauses must also be sufficiently flexible to allow businesses to meet their particular needs. As a result, the ALRC does not recommend a 'model' family violence clause.

16.54 However, the ALRC considers that family violence clauses should include certain minimum content. Other matters may be more appropriately decided by unions, employer organisations and employees/employers. The ALRC recommends that, at a minimum, family violence clauses should include provisions in relation to:

- when verification of family violence is required and the type of verification;
- confidentiality;
- reporting, roles and responsibilities;
- flexible work arrangements; and
- access to paid leave.⁷¹

16.55 The form these basic requirements take in family violence clauses in specific enterprise agreements is a matter for negotiation.

Verification of family violence

16.56 To ensure the integrity of a workplace human resources system, where there is access to entitlements under a family violence clause, verification of family violence may be required. As discussed in Chapter 15, employees should be entitled to provide a range of 'proof'.

Access to paid leave

16.57 In many cases an employee experiencing family violence will quickly exhaust his or her leave entitlements but will require leave, for example, to attend court proceedings or medical appointments. Employers' provision of additional paid family violence leave is an important component of workplace responses to family violence. However, as stakeholders have emphasised throughout this Inquiry, not all employers are in a position to be able to provide such leave.⁷² Consequently, a family violence clause should specify the leave entitlements of an employee experiencing family violence in a particular workplace, whether in the preferred form of additional family violence leave, access to miscellaneous paid leave, or some other form of existing paid leave.

70 Ibid.

71 A range of stakeholders supported these requirements: ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; National Network of Working Women's Centres, *Submission CFV 20*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

72 See, eg, Ai Group, *Submission CFV 141*; ACCI, *Submission CFV 19*.

Development of guidance material

16.58 The ALRC suggests that the Australian Government should provide ongoing funding to bodies such as the Australian Domestic and Family Violence Clearinghouse (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 and the development of family violence clauses appropriate in a range of businesses and industries. The ALRC emphasises the need for guidance material to account for the differing size and resources of businesses, recognising that many businesses are ‘small to medium sized without dedicated human resource professionals’.⁷³

16.59 In addition, the ALRC recommends that the FWO should develop a guide to negotiating family violence clauses in enterprise agreements, in consultation with the ADFVC, unions, and employer organisations.⁷⁴ 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.

16.60 To support the effective operation of such clauses, there is a need for a range of complementary education, training and awareness-raising measures and the development of workplace policies and procedures.⁷⁵ Importantly, education and training with respect to family violence clauses in enterprise agreements should form part of the national education campaign recommended in Chapter 15.

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

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

⁷³ ACCI, *Submission CFV 128*.

⁷⁴ Suggested by Australian Human Rights Commission, *Submission CFV 48* and supported by Women’s Health Victoria, *Submission CFV 133*; ADFVC, *Submission CFV 124*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 113*; Business SA, *Submission CFV 98*; ACCI, *Submission CFV 19*.

⁷⁵ Australian Human Rights Commission, *Submission CFV 48*; ACTU, *Submission CFV 39*; ACCI, *Submission CFV 19*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

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

Modern awards

16.61 A modern award is an industrial instrument that regulates the minimum terms and conditions for a particular industry or occupation in addition to the statutory minimum outlined by the NES.⁷⁶ A modern award cannot exclude any provisions of the NES but can provide additional detail in relation to the operation of an NES entitlement.

16.62 Under the *Fair Work Act*, a national system employee who is not covered by an enterprise agreement⁷⁷ and is not a ‘high income employee’⁷⁸ may be covered by a modern award.⁷⁹ Evidence suggests that women are likely to be more award-reliant than men.⁸⁰ 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.

16.63 A number of stakeholders argued that, at the Commonwealth level, existing terms in modern awards are insufficient to respond to the needs of employees experiencing family violence,⁸¹ despite the provisions of the *Fair Work Act* being sufficiently broad to allow scope for the inclusion of family violence-related terms. In 2012 and 2014, FWA will conduct reviews of modern awards. The ALRC recommends that in the course of those reviews, the way in which family violence may be incorporated into modern awards should be considered. The provisions in the *Crown*

76 Beginning in 2008, the Australian Industrial Relations Commission, and then its successor FWA, conducted an award modernisation process which reviewed and rationalised existing awards to create streamlined ‘modern awards’. The award modernisation process was completed by the end of 2009, with 122 modern awards commencing operation on 1 January 2010. FWA continues the modernisation process in relation to enterprise instruments and certain former state awards preserved by the national system. See Fair Work Australia, *About Award Modernisation* <www.fwa.gov.au/index.cfm> at 8 November 2011; A Stewart and P Alderman, ‘Awards’ in CCH Australia, *Australian Master Fair Work Guide* (2010) 147.

77 *Fair Work Act 2009* (Cth) s 57.

78 *Ibid* s 47(2).

79 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): *Ibid* ss 46–48. There is an obligation to comply with a modern award: *Fair Work Act 2009* (Cth) s 45.

80 Australian Government, *Submission to the Fair Work Australia Annual Wage Review 2010*, 19 March 2010, [1.38]. See also ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; National Network of Working Women’s Centres, *Submission CFV 20*.

81 ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*; National Network of Working Women’s Centres, *Submission CFV 20*; Redfern Legal Centre, *Submission CFV 15*; WEAVE, *Submission CFV 14*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

Employees (Public Service Conditions of Employment) Award 2009 (NSW) provides a useful example.

Scope for the inclusion of family violence-related terms

16.64 The *Fair Work Act* prescribes terms which must, must not, or may, be included under a modern award.⁸² While some stakeholders expressed the view that it is necessary or preferable to amend s 139(1) to include a new allowable term or to make specific reference to family violence in the allowable terms,⁸³ 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 terms in modern awards.⁸⁴ For example, it provides for the inclusion of terms about:

- type of employment—for example, full-time, part-time or casual,⁸⁵ and ‘terms about the facilitation of flexible working arrangements, particularly for employees with family responsibilities’;⁸⁶
- arrangements for when work is performed—for example, variations to hours of work, rostering, notice periods and working hours;⁸⁷
- leave;⁸⁸ 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.⁸⁹

16.65 While the ALRC agrees that specific reference to family violence in s 139(1) might ‘further clarify’ the rights of employees experiencing family violence,⁹⁰ it is not necessary in order to allow the inclusion of family violence-related terms.

16.66 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. There are also a range of other NSW awards

82 See *Fair Work Act 2009* (Cth) ch 2, pt 2–3, div 3.

83 Australian Human Rights Commission, *Submission CFV 48*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; Queensland Law Society, *Submission CFV 21*; National Network of Working Women’s Centres, *Submission CFV 20*; WEAVE, *Submission CFV 14*; Confidential, *Submission CFV 13*; Women’s Health Victoria, *Submission CFV 11*.

84 This view was supported by a number of stakeholders in consultations and submissions. See, eg, ACTU, *Submission CFV 39*; ACCI, *Submission CFV 19*.

85 *Fair Work Act 2009* (Cth) s 139(1)(b).

86 The Explanatory Memorandum to the Fair Work Bill states that the provision which allows terms about type of employment to be included in modern awards would allow modern awards to include terms about the facilitation of flexible working arrangements: Explanatory Memorandum, Fair Work Bill 2008 (Cth) [531].

87 *Fair Work Act 2009* (Cth) s 139(1)(c).

88 *Ibid* s 139(1)(h).

89 *Ibid* s 144. Note, there are certain requirements under s 144(4).

90 ACTU, *Submission CFV 39*.

which have now been varied to include family violence provisions.⁹¹ While the NSW *Crown Employees 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.⁹²

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.

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.

16.67 The NSW *Crown Employees 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

91 *NSW Public Health System Nurses’ & Midwives’ (State) Award 2011* (NSW); *Crown Employees (Police Officers) Interim Award 2011*; *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 (NSW Police Force Administrative Officers and Temporary Employees) 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); *Crown Employees (NSW Police Special Constables) (Police Band) Award* (NSW); *Crown Employees (NSW Police Special Constables (Security)) Award* (NSW).

92 *Crown Employees (Public Service Conditions of Employment) Award 2009* (NSW).

days per calendar year to be used for absences from the workplace to attend to matters arising from domestic violence situations'.⁹³

Should family violence-related terms be included?

16.68 The ALRC considers the inclusion of such terms 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 their retaining employment.

16.69 The majority of stakeholders who addressed this issue expressed the view that existing terms in modern awards are inadequate to respond to the needs of employees experiencing family violence.⁹⁴ A range of stakeholders supported the inclusion of family violence-related terms in modern awards, in particular to provide a safeguard for victims of family violence covered solely by an award.⁹⁵ For example, the ADFVC submitted that while 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.⁹⁶

Upcoming reviews of modern awards

16.70 The tension between the need to ensure that modern awards are relevant and take account of changes in community standards and expectations, and the need to ensure a simple and stable modern award system, 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. The manner in which the reviews will be conducted is yet to be decided, but is likely to involve public submissions and hearings.⁹⁷

16.71 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 2012.⁹⁸ The scope of the review is limited to FWA considering whether modern awards achieve the modern awards objectives and are

93 Ibid.

94 ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*; National Network of Working Women's Centres, *Submission CFV 20*; Redfern Legal Centre, *Submission CFV 15*; WEAVE, *Submission CFV 14*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

95 See, eg, ADFVC, *Submission CFV 26*.

96 Ibid.

97 Fair Work Australia, *Consultation*, by telephone, 30 September 2011.

98 *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) sch 5, s 6.

operating effectively, without anomalies or technical problems arising from the award modernisation process.⁹⁹

16.72 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 stated 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’.¹⁰⁰

16.73 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.¹⁰¹ Accordingly, the ALRC considers that, rather than proposing the inclusion of a new allowable term (which is probably unnecessary in any event), or outlining the form in which family violence-related terms 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 recommends that in the course of the 2012 and 2014 reviews of modern awards by FWA, the ways in which family violence may be incorporated into modern awards should be considered.

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

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

General protections

16.74 Some victims of family violence are subject to discrimination and adverse treatment in the workplace as a result of their experiences of family violence.¹⁰² Current general protections provisions under the *Fair Work Act* offer limited protection in such circumstances.

16.75 Whether family violence should be included as a separate ground of discrimination under the *Fair Work Act* should be considered in the context of anti-discrimination law more generally. However, the question of whether family violence should be included as a separate ground of discrimination under anti-discrimination

99 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.

100 Explanatory Memorandum, Fair Work Bill 2008 (Cth), [600].

101 *Fair Work Act 2009* (Cth) s 157.

102 See, eg. Australian Human Rights Commission, *Submission CFV 48*.

laws falls outside the Terms of Reference for this Inquiry. The ALRC nevertheless recommends that the AHRC examine the possible basis upon which status as an actual or perceived victim of family violence should be included as a protected attribute under Commonwealth anti-discrimination law in the future. The ALRC also suggests that possible inclusion in the *Fair Work Act* be considered once any new ground is included in anti-discrimination legislation.

Overview of the provisions

16.76 Under the *Fair Work Act*, national system employees are entitled to a range of general workplace protections.¹⁰³ Specifically, the Act protects workplace rights and the exercise of those rights, freedom of association and involvement in lawful industrial activities, and provides other protections, including protection from discrimination.¹⁰⁴ Part 3–1 of the *Fair Work Act* contains these general protections which, among other things, prohibit an employer from taking ‘adverse action’,¹⁰⁵ against an employee or prospective employee on the basis of the employee having, exercising or not exercising, or proposing to exercise or not exercise, a ‘workplace right’, or to prevent the exercise of a ‘workplace right’.¹⁰⁶

16.77 It is important to note that where, for example, family violence clauses are included in enterprise agreements, or other family violence-related entitlements are included under workplace laws or instruments, this necessarily expands the workplace rights upon which an adverse action claim under Part 3–1 could be based.

Discrimination

Are the current provisions sufficient?

16.78 Employees experiencing family violence may be ‘subject to direct and indirect adverse treatment in the workplace, as a result of their experience’ of family violence.¹⁰⁷ Stakeholders such as the AHRC submitted that ‘most commonly the adverse treatment manifests as being denied access to leave, flexible work arrangements or their employment being terminated’.¹⁰⁸

103 The Act protects workplace rights and the exercise of those rights; freedom of association and involvement in lawful industrial activities; and provides other protections, including from discrimination.

104 *Fair Work Act 2009* (Cth) ch 3, pt 3–1.

105 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, and threatening any of the above: Ibid s 342(1).

106 A ‘workplace right’ exists where an employee is: entitled to the benefit of, or has a role or responsibility under, a workplace law, instrument, or an order made by an industrial body; able to initiate, or participate in, a process or proceedings under a workplace law or 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 law or instrument, or in the case of an employee, in relation to their employment: Ibid s 341. Section 341(2) outlines examples of processes and proceedings under a workplace law or instrument.

107 Australian Human Rights Commission, *Submission CFV 48*.

108 Ibid.

16.79 However, employees experiencing family violence may face difficulties in relying on the protected attributes articulated in s 351(1) of the *Fair Work Act*, which prohibits specific forms of ‘adverse action’ being taken for discriminatory reasons:¹⁰⁹

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.¹¹⁰

16.80 In many cases, it is difficult for a person experiencing 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.¹¹¹ By way of example, the AHRC noted that

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.¹¹²

16.81 The National Network of Working Women’s Centres illustrated the limited protection afforded by the current provisions through a case study.¹¹³

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.

16.82 In addition, where a person experiencing family violence is able to establish a claim under the existing attributes, where the focus is moved from family violence itself to disability, Victoria Legal Aid has suggested that this may ‘compound feelings of powerlessness’.¹¹⁴

109 Ibid; ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*; National Network of Working Women’s Centres, *Submission CFV 20*; WEAVE, *Submission CFV 14*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

110 *Fair Work Act 2009* (Cth) s 351(1). Note, 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: *Fair Work Act 2009* (Cth) s 772(1)(f).

111 Australian Human Rights Commission, *Submission CFV 48*. See also: ADFVC, *Submission CFV 26*; A Heffernan and L Matahaere, ‘Domestic Violence Discrimination in the Workplace: Is Statutory Protection Necessary?’ (Paper presented at Our Work, Our Lives National Conference on Women and Industrial Relations, Darwin, August 12–13 2010).

112 Australian Human Rights Commission, *Submission CFV 48*.

113 National Network of Working Women’s Centres, *Submission CFV 20*.

114 Victoria Legal Aid, *Submission CFV 25*. See also Women with Disabilities ACT, *Submission CFV 153*.

16.83 Conversely, stakeholders such as ACCI expressed the view that the existing general protections provisions ‘do provide appropriate protections for employees’.¹¹⁵

A new ground of discrimination?

Anti-discrimination legislation

16.84 Some stakeholders considered that family violence should be included as a protected attribute under Commonwealth, state and territory anti-discrimination legislation as a precondition to including family violence as a ground under the general protections provisions of the *Fair Work Act*.¹¹⁶

16.85 The Australian Government is currently consolidating and harmonising Commonwealth anti-discrimination laws, as well as considering the inclusion of new grounds of discrimination.¹¹⁷ In September 2011, the Attorney-General released a Discussion Paper which, among other things, noted that initial submissions in relation to the consolidation supported the inclusion of ‘domestic violence victim status’ or ‘victim or survivor of domestic violence’ as a protected attribute particularly in the areas of employment and accommodation.¹¹⁸ Submissions in response to the Discussion Paper close on 1 February 2012.¹¹⁹

16.86 The question of whether family violence should be included as a protected attribute under anti-discrimination laws is considered beyond the Terms of Reference for this Inquiry. However, the ALRC is aware of the role played by the AHRC in informing the consolidation process, and in providing an evidence base upon which the Government can consider the inclusion of new grounds. As a result, the ALRC recommends that the AHRC, in consultation with relevant stakeholders, should examine the possible basis upon which status as an actual or perceived victim of family violence should be included as a protected attribute under Commonwealth anti-discrimination law.

16.87 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

115 See, eg, ACCI, *Submission CFV 19*.

116 ACTU, *Submission CFV 39*; Victoria Legal Aid, *Submission CFV 25*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*.

117 One of the initiatives proposed in Australia’s Human Rights Framework, 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 Council on Law and Justice (formerly the Standing Committee of Attorneys-General).

118 Commonwealth Attorney-General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws, Discussion Paper* (2011), 23-24.

119 Australian Government Attorney-General’s Department, *Anti-Discrimination Consolidation* <www.ag.gov.au/antidiscrimination> at 2 November 2011.

criminal proceeding, seek a protection order or seek medical attention related to experiences of family violence.¹²⁰ Stakeholders such as Victoria Legal Aid and the ADFVC suggested that ‘Australia should follow international best practice in this area’.¹²¹

Fair Work Act

16.88 Essentially, it should not be necessary for people experiencing family violence to ‘engage in complex legal analysis to demonstrate discrimination’ under the existing grounds.¹²² However, the general protections provisions under the *Fair Work Act* do not operate in isolation and are designed to complement, and are necessarily linked to, Commonwealth, state and territory anti-discrimination legislation. As a result, the ALRC considers that including family violence as a ground under the *Fair Work Act* should be considered, following its inclusion under Commonwealth, state and territory anti-discrimination law.

16.89 Without amendments to anti-discrimination legislation, there are a range of difficulties associated with including family violence as a ground of discrimination under ss 351(1) and 772(1)(f) of the *Fair Work Act*—primarily in relation to how any such ground would be formulated, and the interpretation and operation of s 351(2).

16.90 There are differing views on the meaning and effect of s 351(2) in the context of proposed amendments to s 351(1). Some stakeholders expressed 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 that case, in order for family violence to be included as a separate ground under s 351(1) of the *Fair Work Act*, 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.¹²³ The other view expressed, with some support from 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’.¹²⁴

120 See, eg, *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; *Colorado Revised Statutes* (US) §24-34-402.7; *Anti-Violence Against Women and Their Children Act 2004* (Philippines) s 43.

121 ADFVC, *Submission CFV 26*. See also Victoria Legal Aid, *Submission CFV 25*.

122 Redfern Legal Centre, *Submission CFV 15*.

123 ACTU, *Submission CFV 39*; Victoria Legal Aid, *Submission CFV 25*.

124 Australian Human Rights Commission, *Submission CFV 48*. See also Explanatory Memorandum, Fair Work Bill 2008 (Cth), ch 3, pt 3–1.

16.91 Despite these difficulties, the insertion of family violence into ss 351(1) and 772(1)(f) of the *Fair Work Act* as a separate ground of discrimination received widespread support from stakeholders.¹²⁵ Some submitted that 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’.¹²⁶ In addition, submissions 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;¹²⁷ the applicability of civil penalty provisions;¹²⁸ and the availability of injunctions to prevent adverse action or unlawful termination.¹²⁹

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

Temporary absence due to illness or injury

16.92 Under ss 352 and 772(1) of the *Fair Work Act*, employees experiencing 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.¹³⁰

16.93 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

125 ACTU, *Submission CFV 39*; Women’s Legal Services NSW, *Submission CFV 28*; ADFVC, *Submission CFV 26*; Victoria Legal Aid, *Submission CFV 25*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; National Network of Working Women’s Centres, *Submission CFV 20*; Redfern Legal Centre, *Submission CFV 15*; WEAVE, *Submission CFV 14*; Confidential, *Submission CFV 13*; Women’s Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*; Northern Rivers Community Legal Centre, *Submission CFV 08*. Queensland Law Society, *Submission CFV 21* also expressed the view that the insertion would have ‘some merit’.

126 Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*. See also ADFVC, *Submission CFV 26*.

127 The FWO can investigate discrimination against employees and investigate on its own initiative.

128 Sections 351(1) and 772(1)(f) of the *Fair Work Act 2009* (Cth) attract civil penalty provisions under pt 4–1, allowing employees, unions and FWO to commence penalty order proceedings against employers who contravene the general protections provisions.

129 ADFVC, *Submission CFV 26*.

130 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*. 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: Fair Work Act 2009* (Cth) ss 352, 772(1)(a).

- 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.¹³¹

16.94 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.¹³²

16.95 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.

16.96 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. As a result, where an employee is 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 satisfactory evidence of their family violence-related illness or injury.

16.97 If the circumstances under which an employee can access personal/carer's leave under the NES are extended, or additional family violence leave is included, the *Fair Work Regulations* may need to be amended, either to expand the meaning of prescribed illness or injury, or to add an additional provision. Such amendment would be necessary to provide protection to employees experiencing family violence who have their employment terminated while they are temporarily absent from work as a result of a family violence. The ALRC considers that the Australian Government may need to consider this issue in due course.

131 *Fair Work Regulations 2009* (Cth) reg 3.01.

132 *Ibid* reg 3.01.

17. The National Employment Standards

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Summary

17.1 This chapter considers the National Employment Standards (NES) under the *Fair Work Act 2009* (Cth) which came into effect from 1 January 2010 and enshrine ten minimum statutory entitlements for all national system employees.¹ There are a number of changes to the *Fair Work Act* and employment law in Australia more broadly that will assist in increasing the safety, and responding to the needs, of employees experiencing family violence. 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.

17.2 As a result, as part of Phase Five of the ALRC's suggested strategy for phased implementation of reforms contained in Part E of this Report, the ALRC recommends that the Australian Government should consider amending the NES. In particular, the ALRC recommends that there should be consideration of: whether family violence should be included as a circumstance in which an employee should have a right to request flexible working arrangements; and whether additional paid family violence-related leave should be included as a minimum statutory entitlement under the NES.

1 *Fair Work Act 2009* (Cth) ch 2, pt 2–2. Some NES have broader coverage: *Fair Work Act 2009* (Cth) pt 6–3.

The NES

Statutory safety net

17.3 The NES were introduced following significant consultation² to provide a ‘safety net which is fair for employers and employees and supports productive workplaces’.³ The NES replaced the Australian Fair Pay and Conditions Standard (AFPCS)⁴ and many of the entitlements under the AFPCS and then NES arise from a long history of test cases.⁵

17.4 As a result, amendment to the NES, for example to provide for additional leave, would involve a significant change to the *Fair Work Act* framework. With this in mind, the ALRC does not recommend that the NES be amended at this time.

Interaction with modern awards and enterprise agreements

17.5 The intent of the NES to provide 10 minimum and enforceable entitlements is in part reflected in the interaction between the NES, modern awards and enterprise agreements, the rules of which are outlined in s 55 of the *Fair Work Act*.⁶

17.6 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.⁷

17.7 The NES are an absolute legislative safety net that cannot be excluded or overridden by a less beneficial individual contract, enterprise agreement or modern award, other than as expressly allowed.⁸ While there is no specific legislative rule about the interaction between the NES and contracts, it is governed by ‘well established principles’ including, for example, that a term in a contract of employment that is less favourable than a statutory entitlement is not effective.⁹

2 Prior to the introduction of the NES, the Australian 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 *Fair Work Act 2009* (Cth) retains the substance of the Exposure Draft, with some amendments.

3 Explanatory Memorandum, Fair Work Bill 2008 (Cth), 25.

4 Introduced by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) which amended the *Workplace Relations Act 1996* (Cth).

5 See, eg, ACCI, *Submission CFV 19*. See also 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) 40–42.

6 *Fair Work Act 2009* (Cth) s 55.

7 Explanatory Memorandum, Fair Work Bill 2008 (Cth), [233].

8 *Fair Work Act 2009* (Cth) s 55. Note, some provisions of the NES expressly authorise a modern award or enterprise agreement to deal with certain issues in a way that would, or might, otherwise be contrary to the NES. See, eg, *Fair Work Act 2009* (Cth) ss 93, 101, 107(5).

9 Explanatory Memorandum, Fair Work Bill 2008 (Cth), 207.

Family violence—a role for the NES?

17.8 As noted by the Australian Chamber of Commerce and Industry (ACCI), tribunals and parliaments in Australia have a ‘long history of creating a limited number of minimum employment standards of general application’.¹⁰ As a result, in the course of this Inquiry, two key questions arise when considering amendment to the NES—first, why include provisions relating to family violence, as opposed to other grounds? Secondly, why in the NES, as opposed to other workplace instruments and policies?

17.9 Given the prevalence of family violence and its on employees, workplaces and productivity, the ALRC considers that the NES, in particular with respect to the right to request flexible work arrangements and family violence-related leave, could play an important role in responding to family violence when it becomes a workplace issue.

17.10 While important, the Australian Domestic and Family Violence Clearinghouse (ADFVC) argues that mechanisms other than statutory entitlements alone are inadequate, as statutory entitlements are ‘fundamental to achieving widespread change to address the impact of family violence in the workplace’.¹¹ This is in part because provision of such entitlements acknowledges that ‘dealing with family violence is a community rather than just an individual responsibility’.¹²

17.11 However, amendment to the NES would involve a significant change to the *Fair Work Act* framework after already extensive consultations surrounding the introduction of the Act. In addition, there is a need to build a foundation for any such changes, in order to balance the needs of employees with the economic and practical realities faced by businesses and employers. As a result, in line with the phased approach to implementation outlined in Chapter 15, the ALRC is of the view that consideration of amendments to the NES should occur in accordance with Recommendations 17–1 and 17–2.

Extending the right to request flexible working arrangements

17.12 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.¹³

17.13 The ALRC recommends that as part of Phase 5 of the whole-of-government strategy for phased implementation of reforms contained in this Report, the Australian Government should consider amending s 65 of the *Fair Work Act* to provide that an

10 ACCI, *Submission CFV 19*.

11 ADFVC, *Submission CFV 26*. Further, for example, the AHRC submitted that amendments to the 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’: Australian Human Rights Commission, *Submission CFV 48*.

12 Redfern Legal Centre, *Submission CFV 15*.

13 *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, patterns, and location of work.

employee who is experiencing family violence, or who is providing care or support to another person 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.

17.14 The ALRC notes that while the Terms of Reference for this Inquiry require the ALRC to focus on family violence, there are potentially a number of circumstances and categories of people to whom the right to request flexible work arrangements could, and should, be extended.

Family violence and the right to request

17.15 In many workplaces, ‘employers and employees work through and deal with many challenging issues affecting workers in their professional and personal lives’,¹⁴ including the impact of family violence. 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 and, as a result, there may be a need for a ‘more secure entitlement to access flexible working arrangements’.¹⁵

17.16 Some stakeholders strongly supported the inclusion of family violence as a ground upon which an employee should be entitled to request flexible working arrangements.¹⁶ Provision of flexible working arrangements is likely to ‘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.¹⁷ 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.

17.17 While it was acknowledged that ‘many employers already provide important support’ in a range of forms,¹⁸ amendment to the NES would avoid 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

14 ACCL, *Submission CFV 19*.

15 Australian Human Rights Commission, *Submission CFV 48*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

16 Australian Human Rights Commission, *Submission CFV 48*; ACTU, *Submission CFV 39*; Women’s Legal Services NSW, *Submission CFV 28*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; Queensland Law Society, *Submission CFV 21*; National Network of Working Women’s Centres, *Submission CFV 20*; AASW (Qld), *Submission CFV 17*; Redfern Legal Centre, *Submission CFV 15*; WEAVE, *Submission CFV 14*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*; Northern Rivers Community Legal Centre, *Submission CFV 08*.

17 ACTU, *Submission CFV 39*; National Network of Working Women’s Centres, *Submission CFV 20*.

18 ACCL, *Submission CFV 19*.

arrangements.¹⁹ This is particularly important for people experiencing family violence who are often casual employees with little power to negotiate such changes.²⁰

17.18 By way of comparison, 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.²¹

17.19 If the right to request provisions were amended, the ALRC suggests that s 65 of the *Fair Work Act* should provide that an employee who is experiencing family violence, or who is providing care or support to another person who is experiencing family violence, may request the employer for a change in working arrangements to assist the employee to deal with circumstances arising from the family violence.

17.20 The provision should be broadly formulated to cover care or support provided to a member of the employee's immediate family or household, including children or dependants who may have been affected by family violence,²² as well as in a range of 'other important relationships such as Indigenous kinship ... neighbours or close friends who may well be more likely to be called upon to care or support a victim of family or domestic violence than a member of the family or household'.²³

17.21 The ALRC considers that the evaluation of the effectiveness of the current provision is necessary and each of the concerns identified by stakeholders outlined above should be considered in the course of any proposed amendment.²⁴ While ACCI indicated that it would not support any changes to the *Fair Work Act* at this stage, it 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'.²⁵

Potential limitations with the current provision

17.22 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. However, there were also a number of other concerns expressed by many stakeholders in relation to the current structure and operation of s 65 of the *Fair Work Act*, including the procedural nature of the provision, the limited availability of enforcement mechanisms and the grounds for refusal.

19 Australian Human Rights Commission, *Submission CFV 48*. See also R Braaf and I Meyering, *Seeking Security: Promoting Women's Economic Wellbeing Following Domestic Violence* (2011), 90.

20 National Network of Working Women's Centres, *Submission CFV 20*.

21 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.

22 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: ACTU, *Submission CFV 39*; National Network of Working Women's Centres, *Submission CFV 20*.

23 ACTU, *Submission CFV 100*.

24 Women's Health Victoria, *Submission CFV 11*.

25 ACCI, *Submission CFV 19*.

Eligibility requirements

17.23 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.²⁶ The victims of family violence are predominantly women, and generally have a more disrupted work history,²⁷ which may make it more difficult to satisfy eligibility requirements.²⁸

Response period

17.24 An employer must respond to any request for flexible working arrangements by an employee in writing within 21 days and, if refusing the request, must give reasons for doing so.²⁹ The difficulty is that, due to the unpredictable nature of family violence, employees experiencing family violence may need a response sooner, and that such a response period may mean no change to working arrangements, or even reasons for refusal to allow a change, is available when it is most necessary.³⁰ However, stakeholders emphasised that this must be balanced with the need to ensure employers have sufficient time to examine and determine appropriate alternative working arrangements.³¹

Procedural nature of the provision

17.25 Concern has also been expressed that the provision is procedural rather than substantive. That is, 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.³² The rationale for the inclusion of a procedural provision was 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’.³³ However, stakeholders have emphasised that there are ‘limitations with only having a right to request and not an entrenched clear entitlement’.³⁴

26 *Fair Work Act 2009* (Cth) s 65.

27 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.

28 ADFVC, *Submission CFV 26*. See also: Women’s Legal Services NSW, *Submission CFV 28*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*.

29 *Fair Work Act 2009* (Cth) s 65(4), (5).

30 National Network of Working Women’s Centres, *Submission CFV 20*.

31 See, eg, ACCI, *Submission CFV 128*.

32 *Fair Work Act 2009* (Cth) s 65.

33 Department of Education, Employment and Workplace Relations, *National Employment Standards Exposure Draft: Discussion Paper* (2008), 61.

34 National Network of Working Women’s Centres, *Submission CFV 20*.

Limited enforcement or appeal mechanisms

17.26 There are also limited enforcement or appeal mechanisms available where an employee considers a request has been unreasonably refused.³⁵ 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.³⁶

17.27 Stakeholders submitted that the ‘same rights of redress’ that apply to the other NES should be extended to this provision.³⁷ The ACTU argued that denial of appeal rights to FWA, except where specifically provided for in an enterprise agreement, raised issues of justice, and stated that ‘it is wholly inappropriate that such a basic right to procedural fairness be left to the vagaries of the bargaining framework’.³⁸

Refusal on ‘reasonable business grounds’

17.28 Section 65(5) of the *Fair Work Act* provides that such a request may only be refused on ‘reasonable business grounds’.³⁹ In light of the lack of legislative clarification of what constitutes reasonable business grounds, some stakeholders suggested that the provision should outline an ‘an employer’s obligations to have properly considered the request and reasonably endeavoured to accommodate the request’.⁴⁰

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

- (a) who is experiencing family violence, or

35 Concern about this was expressed by a number of stakeholders. See, eg, Australian Human Rights Commission, *Submission CFV 48*; ACTU, *Submission CFV 39*.

36 *Fair Work Act 2009* (Cth) s 739.

37 Australian Human Rights Commission, *Submission CFV 48*.

38 ACTU, *Submission CFV 39*.

39 *Fair Work Act 2009* (Cth) s 65(5). The *Fair Work Act 2009* (Cth) does not elaborate on what may, or may not, comprise ‘reasonable business grounds’ and there has been no case law regarding the meaning of the phrase. However, there has been significant commentary: 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. In the *Family Provisions Test Case* (2005) 143 IR 245, decided prior to the introduction of the provision, the AIRC formulated a similar entitlement and suggested that such grounds may include cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service: *Family Provisions Test Case* (2005) 143 IR 245, 333.

40 The ACTU proposed adopting wording from the *Equal Opportunity Act 1995* (Vic): ACTU, *Submission CFV 100*.

- (b) who is providing care or support to another person who is experiencing family violence,
- may request the employer for a change in working arrangements to assist the employee to deal with circumstances arising from the family violence.

Family violence-related leave

17.29 The ALRC recommends that as part of Phase Five of the whole-of-government strategy for phased implementation of reforms contained in this Report, the Australian Government should consider amending the NES with a view to including provision for additional paid family violence leave. The ALRC is of the view that there should be a core of basic requirements with respect to family violence leave, including that it should be paid, flexible and easily accessible where necessary, while containing sufficient safeguards to maintain the confidentiality of personal information and the integrity of the leave system.

Current leave entitlements under the NES

17.30 Under the NES, employees are entitled to access a number of categories of paid and unpaid leave, including: parental leave; annual leave; personal/carer's leave; compassionate leave; community service leave; and long service leave.⁴¹ Section 107 of the *Fair Work Act* includes notice and evidence requirements relating to leave under the NES.⁴² An employee who is experiencing family violence may use a combination of leave entitlements to take time off work for purposes related to family violence.⁴³ However, there are restrictions on the use of particular types of leave;⁴⁴ and where family violence occurs over a prolonged period, people experiencing family violence may quickly exhaust their leave entitlements.

A need for family violence leave under the NES?

17.31 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, stakeholders suggest that frequently those experiencing violence exhaust their existing

41 *Fair Work Act 2009* (Cth) ch 2, pt 2-2, div 5-9. 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: *Fair Work Act 2009* (Cth) pt 4-1, div 2.

42 *Fair Work Act 2009* (Cth) s 107.

43 AFEI, *Submission CFV 158*; Ai Group, *Submission CFV 141*; DEEWR, *Submission CFV 130*; ACCI, *Submission CFV 128*.

44 For example, personal/carer's leave can only be used in circumstances of personal illness or injury or caring responsibilities. Strictly interpreted such leave could not be used in circumstances such as attending court: *Fair Work Act 2009* (Cth) ch 2, pt 2-2, div 7.

leave entitlements, particularly where the violence occurs over a prolonged period.⁴⁵ In addition, there is currently a discretionary element associated with the granting of leave in cases of family violence. In light of this, the ALRC considers existing leave provisions provided for in the NES may not adequately provide for the needs of employees experiencing family violence.

17.32 Employer organisations expressed significant concerns about the costs associated with the introduction of additional leave entitlements.⁴⁶ In order to address such concerns it is necessary to ensure there is widespread recognition of the need for additional leave, and to ensure that employers—who are likely to shoulder the burden of the additional cost of leave—are satisfied that a ‘strong case is made out for doing so’.⁴⁷ As a result, the ALRC suggests that research, data collection and economic modelling are important precursors to the recommended review of the NES and determination of any quantum of leave.⁴⁸ Further, in examining leave-related costs, the ALRC emphasises the need to factor in current monetary and non-monetary costs to the Australian economy and businesses associated with family violence.⁴⁹

17.33 In light of such opposition to the inclusion of family violence leave under the NES, the ALRC considers that the phased approach and consideration of this issue as suggested in Chapter 15 is vital. In the course of the phased approach, the ALRC considers 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 that will contribute to a universal approach to, and understanding of, family violence and its impact in the workplace.⁵⁰

17.34 While recognising the important role played by other forms of regulation in this area, such as enterprise agreements, the ALRC considers that a minimum statutory entitlement is ultimately necessary and is likely to serve a number of purposes. 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 and would ensure all national system employees would have access to the leave. The ALRC considers that access to family violence leave through bargaining

45 See, eg, ADFVC, *Submission CFV 26*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

46 AFEI, *Submission CFV 158*; Ai Group, *Submission CFV 141*; ACCI, *Submission CFV 128*; CCIWA, *Submission CFV 123*; Business SA, *Submission CFV 98*; ACCI, *Submission CFV 19*.

47 ACCI, *Submission CFV 19*.

48 See Ch 15.

49 See Ch 1 and 15.

50 Submissions received in relation to this issue were overwhelmingly supportive of the introduction of a minimum statutory entitlement to family violence leave: Kingsford Legal Centre, *Submission CFV 161*; AEU, *Submission CFV 125*; NSW Women’s Refuge Movement Working Party, *Submission CFV 120*; Aboriginal & Torres Strait Islander Women’s Legal & Advocacy Service, *Submission CFV 103*; Australian Human Rights Commission, *Submission CFV 48*; ACTU, *Submission CFV 39*; Women’s Legal Services NSW, *Submission CFV 28*; Confidential, *Submission CFV 27*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; Queensland Law Society, *Submission CFV 21*; National Network of Working Women’s Centres, *Submission CFV 20*; AASW (Qld), *Submission CFV 17*; Redfern Legal Centre, *Submission CFV 15*; WEAVE, *Submission CFV 14*; Women’s Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*; Northern Rivers Community Legal Centre, *Submission CFV 08*.

and enterprise agreements may not be sufficient to protect the safety of employees experiencing family violence.⁵¹ Using paid parental leave as an example, the ADFVC submitted that ‘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’.⁵²

17.35 Secondly, the introduction of family violence leave as part of the minimum safety net under the NES is likely to play an educative role.⁵³ It gives express recognition to family violence as a national issue that has a significant impact on the Australian economy. It also recognises that both the government and workplaces have a role in, and responsibility for, responding to family violence.⁵⁴ This would build on the work already undertaken by the government in the *National Plan to Reduce Violence against Women and their Children* and similar initiatives noted in Chapter 1.⁵⁵

17.36 Another benefit of including family violence leave under the NES would be the availability of enforcement mechanisms through the application of civil remedy provisions.

Options for reform

17.37 There are a number of options for reform of the NES to provide access to family violence leave.

17.38 As a preliminary step, the ALRC considers that it may be appropriate to provide that, to the extent they are not already able to do so, employees experiencing family violence should be able to access other forms of existing leave for circumstances arising from family violence. In particular, the ALRC suggests that amending the circumstances in s 97 of the *Fair Work Act*, under which personal/carer’s leave can be taken, to include circumstances arising from family violence, may provide employees experiencing family violence with access to leave where necessary in a wider range of situations than is currently the case. For example, this would provide employees with access to personal leave to attend court proceedings, a purpose which is not currently provided for under personal/carer’s leave as it does not relate to illness or injury.⁵⁶

51 ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*.

52 ADFVC, *Submission CFV 26*.

53 National Network of Working Women’s Centres, *Submission CFV 20*.

54 Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*.

55 National Council to Reduce Violence Against Women, *National Plan to Reduce Violence Against Women and Their Children (2010-2022)* (2011), Commonwealth of Australia.

56 ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; Queensland Law Society, *Submission CFV 21*; National Network of Working Women’s Centres, *Submission CFV 20*; Redfern Legal Centre, *Submission CFV 15*. 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: ACTU, *Submission CFV 39*.

17.39 In addition, the ALRC considers more substantive change is required to provide access to additional leave. While broadly supporting the introduction of some form of family violence leave, stakeholders expressed differing views with respect to the two key options for reform. These options are to provide either:

- a new statutory minimum entitlement to ‘family violence leave’ under the NES; or
- additional leave for family violence purposes as a subset of personal/carer’s leave under the NES.

17.40 A range of stakeholders also suggested a new minimum statutory entitlement to family violence leave, paid for by the government in a similar way to the paid parental leave scheme.⁵⁷

17.41 By way of comparison, a number of overseas jurisdictions have enacted legislation that entitles victims of family violence to take leave from work, including specifically identified family violence leave, or requirements to grant ‘reasonable and necessary leave’ for purposes related to experiencing family violence.⁵⁸

Specific family violence leave

17.42 Stakeholders supporting this option expressed the view that it was necessary to articulate the entitlement as an additional, but separate, category of leave in order to:

- reflect the conceptual differences between leave for family violence and other purposes, and to validate the experiences of people experiencing family violence;
- provide a requirement in relation to which employers must develop specific policies and procedures;
- more clearly identify family violence as a possible work health and safety issue;
- allow for different evidentiary requirements from other forms of leave; and
- provide consistency and clarity in light of the introduction of family violence leave under clauses in enterprise agreements.⁵⁹

Additional leave as a subset of personal/carer’s leave

17.43 Incorporating additional family violence leave into existing entitlements may create a ‘less threatening step’ for employees,⁶⁰ and utilise the existing leave system

⁵⁷ Union Roundtable, *Consultation*, Sydney, 30 September 2011.

⁵⁸ 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).

⁵⁹ ADFVC, *Submission CFV 124*. See also Kingsford Legal Centre, *Submission CFV 161*; Women’s Health Victoria, *Submission CFV 133*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 113*; Australian Human Rights Commission, *Submission CFV 48*.

⁶⁰ AEU, *Submission CFV 125*; ACTU, *Submission CFV 100*.

and administrative processes. However, disclosure of family violence would still be required to access any additional leave included as a subset of personal/carer's leave.

17.44 In order for family violence leave to be included as such a subset, the provision would need to be amended to account for circumstances other than those involving personal illness or injury or caring responsibilities. As the provisions operate, an employee can access carer's leave to provide care or support because of illness or injury or an 'unexpected emergency' affecting the person for whom they are caring. However, an employee can only access personal leave due to illness or injury, not where they are affected by an unexpected emergency, such as in circumstances of family violence.⁶¹

Basic requirements

17.45 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. Any family violence leave introduced under the NES should:

- be introduced in the context of a range of initiatives aimed at addressing family violence in the workplace;⁶²
- be accessible in a range of circumstances arising from family violence, including 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;⁶³
- be accessible as consecutive or single days, or as a fraction of a day;⁶⁴
- be available to employees who are victims of family violence as well employees who need to access such leave to provide care or support to another person, for example a member of the employee's immediate family or household who is experiencing family violence;⁶⁵
- not be subject to a minimum employment or qualifying period, or to be accrued in advance;⁶⁶

61 *Fair Work Act 2009* (Cth) s 97.

62 Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; AASW (Qld), *Submission CFV 17*; Women's Health Victoria, *Submission CFV 11*.

63 Women's Legal Services NSW, *Submission CFV 28*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; Queensland Law Society, *Submission CFV 21*; Women's Health Victoria, *Submission CFV 11*.

64 ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

65 See eg, ACTU, *Submission CFV 100*; Australian Human Rights Commission, *Submission CFV 48*.

66 ACTU, *Submission CFV 39*; Women's Legal Services NSW, *Submission CFV 28*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*.

- be paid;⁶⁷ and
- be subject to verification of entitlement.⁶⁸

Complementary initiatives

17.46 The ALRC considers that there is a need to introduce a range of initiatives to address family violence as an issue affecting the workplace. 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 recommendations such as with respect to the need for a national education and awareness campaign, and other initiatives.⁶⁹

Paid leave

17.47 There are strong arguments in favour of the need for paid family violence leave, or a combination of paid and unpaid leave, to avoid provision of a ‘hollow’ entitlement, risk further disadvantaging victims of family violence, or to fail to achieve the objects underlying its introduction.⁷⁰ Stakeholders emphasised that ensuring leave is paid recognises that people experiencing family violence are often in a position of financial hardship and allows them to ‘maintain their income’⁷¹ at a time where maintain economic independence and financial security is vital to ‘maintaining suitable housing, ensur[ing] future safety and on the ability to secure on-going family stability for them and their children’.⁷²

17.48 In light of the focus of this part of the Report on ensuring the economic security and independence of employees experiencing family violence, and 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 paid leave and, possibly, also additional unpaid leave.

67 ACTU, *Submission CFV 39*; Women’s Legal Services NSW, *Submission CFV 28*; Confidential, *Submission CFV 27*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; National Network of Working Women’s Centres, *Submission CFV 20*; Redfern Legal Centre, *Submission CFV 15*; WEAVE, *Submission CFV 14*; Women’s Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

68 Australian Human Rights Commission, *Submission CFV 48*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; Queensland Law Society, *Submission CFV 21*; Office of the Australian Information Commissioner, *Submission CFV 18*; Redfern Legal Centre, *Submission CFV 15*; WEAVE, *Submission CFV 14*; Women’s Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

69 See, eg, Rec 15–1.

70 Kingsford Legal Centre, *Submission CFV 161*; ACTU, *Submission CFV 39*; Women’s Legal Services NSW, *Submission CFV 28*; Confidential, *Submission CFV 27*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; National Network of Working Women’s Centres, *Submission CFV 20*; Redfern Legal Centre, *Submission CFV 15*; WEAVE, *Submission CFV 14*; Women’s Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

71 Kingsford Legal Centre, *Submission CFV 161*.

72 ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*. See also ACTU, *Submission CFV 39*.

Accessibility

17.49 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.

17.50 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

17.51 Several stakeholders highlighted the impact that family violence often has, not only on the victims, but also on friends, relatives and other household members, including children.⁷³ The Australian Human Rights Commission suggested that the ALRC consider the extension of family violence leave to those ‘assisting and supporting’ employees affected by family violence.⁷⁴

17.52 The ALRC agrees that an employee who is experiencing family violence, or who is required to provide care or support to another person who is experiencing family violence, should be entitled to family violence leave. The ALRC suggests that any definition of another person should include members of immediate family or household but also recognise the kinship and family relationships of Indigenous people as well as people from CALD communities, the living arrangements and relationships of people with disability,⁷⁵ and those in same-sex relationships.⁷⁶

17.53 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.⁷⁷ However, 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. Such limitations may ‘undermine the beneficial nature of this type of leave’ and prevent access by those who most require it.⁷⁸

73 ACTU, *Submission CFV 100*; Australian Human Rights Commission, *Submission CFV 48*; National Network of Working Women’s Centres, *Submission CFV 20*.

74 Australian Human Rights Commission, *Submission CFV 48*.

75 People with Disability, *Consultation*, By telephone, 10 October 2011.

76 ACTU, *Submission CFV 100*; LGBTI Community Roundtable, *Consultation*, Sydney, 28 September 2011.

77 *Fair Work Act 2009* (Cth) s 96.

78 ADFVC, *Submission CFV 26*. See also ACTU, *Submission CFV 39*; Women’s Legal Services NSW, *Submission CFV 28*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*.

17.54 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.⁷⁹ While, 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. 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.

17.55 Another entitlement issue raised in submissions, which will need to be considered in the course of any review, is whether perpetrators of family violence should be entitled to access any family violence leave under the NES. The Queensland Law Society stated that 'an employer should not be required to determine who is a victim and who is a perpetrator of domestic violence' and so suggested that 'to ensure access to justice for all parties, these circumstances should apply to both the applicant and the respondent of any family violence action'.⁸⁰ Conversely, stakeholders such as the Kingsford Legal Centre emphasised that 'perpetrators of family violence should not benefit from their actions' and are not usually the ones who require access to leave.⁸¹ In the ALRC's view, access to leave by people using family violence would be contrary to the objects according to which any such leave should be introduced.

Period of leave

17.56 The ALRC is conscious of the need to balance the needs, rights and responsibilities of employees and employers. The ALRC is required, under the *Australian Law Reform Commission Act 1996* (Cth), to consider the cost implications of any recommendation.⁸² The ALRC suggests that the quantum of leave provided for under the NES should be determined in the course of any review into the NES, following consultation with key stakeholders and appropriate analysis of actual periods of leave taken and the projected cost to business.⁸³

17.57 There are differing views as to the most appropriate period of any family violence leave. Many stakeholders submitted that 20 days of paid leave would be appropriate, in line with existing family violence leave entitlements under enterprise agreements.⁸⁴ However, while this period may be appropriate in the context of an

79 *Fair Work Act 2009* (Cth) s 107.

80 Queensland Law Society, *Submission CFV 21*.

81 Kingsford Legal Centre, *Submission CFV 161*.

82 *Australian Law Reform Commission Act 1996* (Cth) s 24 as amended by the *Financial Framework Legislation Amendment Act 2010* (Cth).

83 AFEI, *Submission CFV 158*; ACCI, *Submission CFV 128*; Australian Human Rights Commission, *Submission CFV 48*; National Network of Working Women's Centres, *Submission CFV 20*; ACCI, *Submission CFV 19*.

84 ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; Women's Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

enterprise agreement negotiated to take into account the circumstances of an individual employer, it may not be appropriate as a statutory minimum.

17.58 Other stakeholders supported an entitlement of up to two days of leave per occasion.⁸⁵ This approach would be in line with the enterprise agreement negotiated at the University of New South Wales.⁸⁶ However, in circumstances of ongoing family violence, this entitlement might result in an employee being entitled to a potentially unlimited amount of leave. Further, processing these applications may impose a significant administrative burden on employers.

Verification of entitlement

17.59 While many stakeholders strongly supported the introduction of family violence leave, many recognised the need to ensure that employees accessing such 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. Employer organisations in particular expressed concern about the provision of an additional category of family violence leave being open to ‘unscrupulous behaviour and abuse’.⁸⁷ To preserve the integrity of the leave system, employees accessing family violence leave must be subject to the same requirements to demonstrate their entitlement to the leave as other forms of leave.

17.60 The ALRC considers that the existing, generally expressed, evidence requirements provided for under s 107 of the *Fair Work Act* should also apply to any family violence leave. However, the types of verification that a victim of family violence may be able to provide to an employer upon request are varied and 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;
- a court;
- a health professional, including doctor, nurse or psychiatrist/psychologist;
- a lawyer;
- a family violence service or refuge worker; and/or
- the employee, in the form of a signed statutory declaration.⁸⁸

85 Queensland Law Society, *Submission CFV 21*.

86 University of New South Wales (Professional Staff), *Enterprise Agreement 2010*.

87 Business SA, *Submission CFV 98*. See also ACCI, *Submission CFV 128*; Queensland Law Society, *Submission CFV 21*.

88 Australian Human Rights Commission, *Submission CFV 48*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; Queensland Law Society, *Submission CFV 21*; Office of the Australian Information Commissioner, *Submission CFV 18*; Redfern Legal Centre, *Submission CFV 15*; WEAVE, *Submission CFV 14*; Women’s Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

17.61 As noted by the OAIC:

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.⁸⁹

17.62 Finally, providing employers information about what might constitute appropriate verification could form part of the national education campaign recommended in this Report.⁹⁰

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

89 Office of the Australian Information Commissioner, *Submission CFV 18*.
90 Rec 15-1.

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, protects employees experiencing family violence and, where it does not do so, how that might be addressed. In particular, the chapter examines: legislative duties of care; the nature and role of regulatory guidance; the importance of further consideration of family violence as a possible work health and safety issue, including research and data collection; as well as the importance of increased awareness, education and training around family violence and its impact as a possible work health and safety issue.

18.2 This chapter contains two main approaches to the issue of family violence as a possible work health and safety issue. First, under the Commonwealth OHS system, legislative and regulatory duties appear to be sufficiently broad to capture some circumstances in which family violence may affect an employee in the workplace. In these instances, in terms of employer obligations, the risk posed by family violence is analogous to the risk posed by other forms of workplace violence. As a result, lack of knowledge, rather than legislative inadequacies, represent the greatest challenge in such instances and so improving awareness and understanding of family violence as a possible OHS issue is the focus of reforms. The ALRC makes a range of recommendations focused on: increasing awareness of family violence and its impact as a possible work health and safety issue; the incorporation of systems and policies into normal business practice to develop the capacity of employers and employees to

effectively manage family violence as an OHS risk; and data collection mechanisms to establish an evidence base upon which to plan future policy directions in this area.

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

18.4 The central premise underlying this chapter is that, where family violence is a possible OHS issue, employees should be given the highest level of protection reasonably practicable, and employers should introduce measures to respond to family violence and create and sustain safe work environments in such circumstances.

Broader concepts

18.5 The Model Work Health and Safety Act (Model Act) developed by Safe Work Australia, and the Work Health and Safety Bill 2011 (Cth), 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).¹ 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, unless referring to the duties under the Model Act, the terms 'employer', and occasionally 'duty holder' when referring specifically to a duty of care, are used in this chapter.

18.6 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 the Model Act, recognising that it adopts a broad definition of 'worker' instead of 'employee', due in part to the changing nature of work relationships.²

18.7 This chapter uses the term 'workplace' when referring to the place where work is carried out. Under the Model Act 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.³

1 The principal duty holder under the Model Act is a person conducting a business or undertaking, defined in s 5: Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011.

2 Safe Work Australia, *Explanatory Memorandum—Model Work Health and Safety Act* (2010), [38]. 'Worker' is defined as a person who carries out work in any capacity for an employer, including in any of the capacities listed, such as employee, contractor or subcontractor, outworker, apprentice, student or volunteer: Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 s 7.

3 Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 s 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].

Overview of the OHS system

Legislative and strategic framework

18.8 Any duties employers may have 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.

18.9 The key elements of the existing Commonwealth framework governing OHS are:

- *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*) and *Occupational Health and Safety (Safety Standards) Regulations 1994* (Cth) (*OHS Regulations 1994*); and
- *Occupational Health and Safety Code of Practice 2008* (Cth) (*OHS Code*).

18.10 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* may be used in court as evidence of the standards of health and safety that employers should achieve.⁴

18.11 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).⁵ The *OHS Act* charges these bodies with ensuring compliance with OHS standards, advising employers and employees on health and safety matters, and formulating policies related to OHS.⁶ Comcare and the SRCC also publish supplementary guidance material.

18.12 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).⁷ The National Strategy was reviewed by the Workplace Relations Ministers Council (WRMC) in 2004–2005. One of the functions of Safe Work Australia is to revise and further

4 *Occupational Health and Safety Code of Practice 2008* (Cth), 18. DHS, *Additional Submission to the Senate Community Affairs Committee Inquiry of the Human Services Legislation Amendment Bill 2010* (2011).

5 *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 may be eligible for compensation: *Safety, Rehabilitation and Compensation Act 1988* (Cth) ss 5A, 6, 14.

6 *Occupational Health and Safety Act 1991* (Cth) ss 12, 12A, 38A, 41, 75A, 77.

7 Safe Work Australia, *National OHS Strategy 2002–2012*.

develop the National Strategy.⁸ One area of attention in 2011–2012 is developing a National Work Health and Safety Strategy to replace the current National Strategy.⁹

Review and harmonisation of OHS law

Towards national uniformity

18.13 Since 2008, OHS law in Australia has been the focus of significant legislative and policy developments. The Work Health and Safety Bill 2011 (Cth) was introduced in July 2011 as part of a harmonisation process to introduce model OHS legislation across Australia.¹⁰ Mirror legislation has also been introduced in a number of other Australian jurisdictions.¹¹ These reforms ‘represent the most significant reform’ to OHS laws in Australia in the last 30 years.¹²

18.14 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’.¹³ 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 Safe Work Australia) and the adoption and implementation of model legislation in each jurisdiction.¹⁴

18.15 The National Review into Model Occupational Health and Safety Laws (National OHS Review) was completed in January 2009.¹⁵ 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.¹⁶

8 *Safe Work Australia Act 2008* (Cth) s 6.

9 Safe Work Australia, *Agency Budget Statement 2011–2012* (2011), 372.

10 The Bill was introduced on 6 July 2011 and subsequently passed both the House of Representatives and the Senate. The harmonisation process has Council of Australian Governments 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.

11 *Work Health and Safety Act 2011* (NSW); *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2011* (ACT); *Work Health and Safety Bill 2011* (Cth); *Work Health and Safety Bill 2011* (SA); *Work Health and Safety Bill 2011* (Tas); *Work Health and Safety Bill 2011* (NT). See also G Rich-Phillips (Assistant Treasurer Victoria), ‘Victoria Calls for Delay to National Occupational Health and Safety Harmonisation’ (Press Release, 28 September 2011); Government of Western Australia Department of Commerce, *WorkSafe Western Australia Commissioner Statement* <www.commerce.wa.gov.au/worksafe/content/About_Us/Legislation/National_model_act_FAQs.html> at 21 November 2011.

12 B Sherriff and M Tooma, *Understanding the Model Work and Health Safety Act* (2010), ix.

13 Explanatory Memorandum, *Work Health and Safety Bill 2011* (Cth), 1.

14 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.

15 The Panel produced two reports, one in October 2008 and another in January 2009.

16 Safe Work Australia, *Explanatory Memorandum—Model Work Health and Safety Act* (2010), 1.

18.16 The model legislation, regulations and codes of practice were released by Safe Work Australia following a detailed process and extensive stakeholder consultation and include:

- the Model Act;¹⁷
- Model Work Health and Safety Regulations (Model Regulations);¹⁸ and
- Model Codes of Practice, relevantly including ‘How to Manage Work Health and Safety Risks’, ‘How to Consult on Work Health and Safety’; ‘Managing the Work Environment and Facilities’;¹⁹ and ‘Preventing and Responding to Workplace Bullying’.²⁰

18.17 However, the Model Act does not contain all detailed provisions required to give effect to legislation of this kind, leaving some matters to the relevant jurisdiction in order to recognise the differing needs of jurisdictions according to their ‘commercial or industrial environment’.²¹

18.18 The Terms of Reference require the ALRC to review current Commonwealth law.²² However, as the Model Act, Model Regulations and Model Codes of Practice form the basis for the legislation that has been or will be enacted in each jurisdiction, have Commonwealth, state and territory support,²³ and are due to form part of the harmonised OHS regime from 1 January 2012, the discussion below focuses on the content of the model provisions.

Safe Work Australia

18.19 Safe Work Australia was established in 2009 as a statutory agency to ‘improve occupational health and safety outcomes and workers’ compensation arrangements in Australia’.²⁴ It is an ‘inclusive, tripartite body comprising 15 members’ including a Chair; the CEO; representatives from the Commonwealth, States and Territories; as well as employee and employer representatives.²⁵

18.20 Safe Work Australia’s functions 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

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 Ibid.

20 Released by SWA for public comment between 26 September 2011–16 December 2011.

21 B Sherriff and M Tooma, *Understanding the Model Work and Health Safety Act* (2010), 3.

22 The Terms of Reference are set out at the front of this Report and are available on the ALRC website: <www.alrc.gov.au>.

23 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.

24 *Safe Work Australia Act 2008* (Cth) s 3.

25 Safe Work Australia <<http://safeworkaustralia.gov.au/AboutSafeWorkAustralia/Corporateinformation/OurMembers/Pages/OurMembers.aspx>> at 18 November 2011.

data. It also plays a role in the development and promotion of strategies to raise awareness of OHS and workers' compensation.²⁶

Purposes of the OHS system

18.21 The main object of the Model Act is to 'provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces' by, among other things:

- 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.²⁷

18.22 Commentators have noted that 'these changes put safety at the forefront of corporate decision making'.²⁸ Implicit in the objects of the Model Act is the preventative focus of the OHS system.

18.23 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

26 *Safe Work Australia Act 2008* (Cth) s 6.

27 Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 s 3. Section 3 of the *Occupational Health and Safety Act 1991* (Cth) contains the objects of that Act.

28 B Sherriff and M Tooma, *Understanding the Model Work and Health Safety Act* (2010), ix.

with the objective of the Model Act to provide a framework for continuous improvement and progressively higher standards of work health and safety.

Family violence—a work health and safety issue?

18.24 Throughout this Inquiry it has become apparent that more needs to be done to ensure that employees and employers understand the magnitude of the possible risk family violence and its impact pose as a work health and safety issue.

18.25 A key question underlying this area relates to the point at which family violence may become an OHS issue in the workplace, as opposed to a ‘private’ issue, or one which is more appropriately dealt with by other laws, for example where the conduct may be an offence under criminal laws. 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.²⁹

18.26 By way of illustration, Ontario’s Health and Safety Guidelines 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.³⁰

18.27 Ultimately, the ALRC has formed the view that family violence may, in some cases, 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.

The legislative duty of care

18.28 There are a range of duties owed by both employers and employees under the Model Act.³¹ Of particular relevance is the duty of care owed by employers, employees and third parties.³² Importantly, the Model Act ‘establishes a regime of responsibilities

29 National Network of Working Women’s Centres, *Submission CFV 20*.

30 Occupational Health and Safety Branch, Ontario Ministry of Labour, *Workplace Violence and Harassment: Understanding the Law* (2010), [1.3].

31 The ALRC does not discuss the duty of care owed by officers of companies and other organisations despite that being one of the significant reforms under the Model Act. Under the Model Act officers must exercise due diligence to ensure corporate compliance and fulfil corporate governance responsibilities: see, eg, B Sherriff and M Tooma, *Understanding the Model Work and Health Safety Act* (2010), ch 3. In addition, employers owe employees a duty of care both at common law and under legislation. The primary focus of this chapter is the legislative duty of care.

32 Aside from the duty of care, the other key duty 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. This issue is discussed in detail in the Discussion Paper, in which the ALRC indicated it did not intend to make any proposals for reform: Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011) ch 18.

and obligations owed by duty holders which is commensurate with their ability to influence safety outcomes’.³³

What is an employer’s duty of care with respect to family violence?

18.29 The Model Act provides a primary duty of care under which 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 and 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; monitoring of the health of workers for the purposes of preventing illness or injury arising from the conduct of the business or undertaking³⁴ and a duty to consult.³⁵

18.30 As outlined above, the Model Act provides that the primary duty holder is a PCBU and expands the class of persons to whom a duty is owed to ‘workers’, including among others, employees, subcontractors, outworkers, apprentices, students and volunteers.³⁶ Under this general duty, primary duty holders must take ‘reasonable precautions to prevent workplace related harm to workers and the public, including the possibility of harm to employees from nonemployees’,³⁷ which the ALRC suggests includes partners, ex partners and other family members who may use family violence against an employee.

18.31 Moreover, the primary duty of care is not limited to the workplace. Rather, the laws apply to work activities wherever they occur and so apply ‘as much to the home as they do to the workplace’.³⁸

18.32 With respect to the qualifier of ‘reasonably practicable’, the Explanatory Memorandum to the Model Act explains that ‘the standard of reasonably practicable

33 B Sherriff and M Tooma, *Understanding the Model Work and Health Safety Act* (2010), 49.

34 Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 s 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 Act*, Revised Draft, 23 June 2011 s 28.

35 Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011, s 47. 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’: *Occupational Health and Safety Act 1991* (Cth) s 16.

36 Both definitions expand existing definitions of ‘employer’ and ‘employee’: Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 s 7.

37 ACCL, *Submission CFV 19*.

38 They may also apply in the following locations: house, road, airport lounge, hotel room, or shopping centre: B Sherriff and M Tooma, *Understanding the Model Work and Health Safety Act* (2010), ix.

has been generally accepted for many decades as an appropriate qualifier of the duties of care in most Australian jurisdictions'.³⁹ 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;
- the availability and suitability of ways to eliminate or minimise the hazard or risk; and
- the associated costs.⁴⁰

Circumstances in which a duty arises

18.33 Throughout this Inquiry, stakeholders have expressed a divergence of views about the circumstances in which family violence may give rise to a duty of care under the Model Act, if at all.

18.34 At the outset it is important to note that, in instances of criminal acts, such acts are the responsibility of law enforcement authorities and reporting and responses should be tailored accordingly.

18.35 Safe Work Australia emphasised that, while recognising family violence may 'impact on the workplace, it is not a risk that arises from the conduct of a business or undertaking or work itself' and is therefore 'beyond the scope' of the model work health and safety laws.⁴¹ It also expressed the view that duties in relation to workplace violence generally are limited to reasonably foreseeable risks which arise 'due to the nature of the work, like as in the services sector, banking and cash handling, policing'.⁴²

18.36 However, numerous stakeholders have expressed the view that, in some circumstances, family violence may be an OHS issue.⁴³ The ALRC considers that in some circumstances, where family violence-related incidents occur in the workplace and affect the health and safety of workers in that workplace, that PCBU's may well owe a primary duty of care.

18.37 The analogy with other forms of workplace violence is a useful one. A PCBU owes a duty to ensure, so far as is reasonably practicable, the health and safety of workers and provision of a safe working environment, which encompasses the

39 Safe Work Australia, *Explanatory Memorandum—Model Work Health and Safety Act* (2010), [70].

40 Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011, s 18. Safe Work Australia has developed Interpretative Guidelines providing guidance on interpretation and application of the term 'reasonably practicable': Safe Work Australia, *Interpretative Guideline: Model Work Health and Safety Act- The Meaning of 'Reasonably Practicable'* (2011).

41 Safe Work Australia, *Submission CFV 115*.

42 Ibid.

43 See, eg, ADFVC, *Submission CFV 124*; ACCL, *Submission CFV 19*.

potential risk posed by internal, external or client-initiated violence. The existence of a worker's intimate relationship does not alter that duty. In addition, in light of evidence which suggests that two thirds of Australian women who report violence by a current partner are in paid employment,⁴⁴ it may be considered reasonably foreseeable that family violence will have an impact on the workplace, and that some such impact may involve concerns for safety, particularly if that violence comes into the workplace.

18.38 As a result, the ALRC considers that circumstances in which family violence may pose a clear OHS issue or risk include:

- physical or verbal abuse between partners employed at the same workplace;
- threats to a partner or the partner's co-workers at the workplace;
- harassment or attacks on a partner or a partner's co-workers at their workplace, either in person or through phone calls and emails;
- 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;⁴⁵ and
- in the most extreme cases, family violence-related homicide at the workplace.⁴⁶

18.39 While the ALRC considers that the above circumstances are ones in which a PCBU owes a primary duty of care, throughout this Inquiry the ALRC has heard 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, or if they do they are unsure what steps they are reasonably required to take to fulfill their primary duty of care. This is likely to be compounded from 1 January 2012 as a result of the expanded definitions and concepts of PCBU, worker and workplace under the Model Act. Accordingly, the ALRC makes a range of recommendations in relation to the need for guidance, education, training and appropriate employer responses in relation to these circumstances later in this chapter.

Circumstances where it is unclear whether a duty exists

18.40 However, there are some instances involving family violence where no duty is owed, or where it is unclear whether a PCBU owes a duty of care. For example, the definition of 'workplace' under the Model Act 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.⁴⁷ In the context of family violence, it does so in a way possibly not envisaged, raising difficult and previously unconsidered questions with respect to the extent of duties where family violence exists. For example, if a worker who is experiencing family violence is working from home and in the course of undertaking that work is

44 Australian Bureau of Statistics, *Personal Safety Survey*, Catalogue No 4906.0 (2005), 11, 34.

45 Australian Bureau of Statistics, *Women's Safety Survey*, Catalogue No 4128.0. (1996).

46 See, eg, Women's Health Victoria, *Submission CFV 11*.

47 Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 s 8.

threatened or physically or verbally abused, does this come within the duty of care owed by a PCBU?

18.41 Some stakeholders submitted that family violence may also pose an OHS risk, analogous to the risk posed by other psychosocial hazards.⁴⁸ As one commentator has noted, ‘the broad formulation of the general duty provisions clearly covers hazards hitherto unregulated, such as ergonomic and psychosocial hazards’.⁴⁹ It is unclear whether, by extension, where family violence causes employees to be distracted or inattentive, leading to reduced ability to operate equipment safely or concentrate on tasks and increasing the risk of accidents, it is likely to engage an employer’s duty of care. There are a range of issues yet to be included under the OHS ‘umbrella’ and this particular iteration of family violence may be one such issue which is not yet the subject of legislation, Codes of Practice or guidelines,⁵⁰ and therefore warrants further consideration.

18.42 Accordingly, in relation to these types of circumstances, the ALRC recommends that Safe Work Australia, among others, should examine the effect of the harmonised OHS regime on duties and obligations owed in relation to family violence as a possible work health and safety issue.

18.43 Finally, while the ALRC does not recommend the inclusion of a specific duty of care with respect to family violence in this Report, some stakeholders supported such a move, suggesting that it would ensure that duty holders were required to take appropriate action in all cases where they ‘become aware (or ought to be reasonably aware) of family violence that could be a risk to a worker in the workplace’.⁵¹ It may be instructive for Safe Work Australia in the course of its examination of the duties of care to consider, by way of comparison, a family violence provision introduced in Ontario.⁵² 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 ...

48 Psychosocial hazards can include bullying, harassment and stress. See, eg, 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.

49 Ibid, 7.

50 This sentiment was expressed particularly in relation to occupation stress and other similar psychosocial hazards.

51 Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*.

52 The provision was introduced in Ontario after a series of family violence-related deaths in workplaces and arose in part from recommendations made by a Coroner’s Jury following an inquest into the death of Lori Dupont and subsequent lobbying for changes to OHS legislation: see, eg, Centre for Research and Education on Violence against Women and Children and University of Western Ontario, *Report of Workplace Violence Think Tank* (2008).

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 ...⁵³

What is an employee's duty of care?

18.44 Workers also have a primary 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.⁵⁴ The inclusion of this duty under the Model Act acknowledges the changing way work is performed, as many employees have greater independence and control over the condition of their work, and recognises the role employees play in risk identification and creating a safe work environment. These duties to take reasonable care also apply to a person at a workplace.⁵⁵

18.45 In consultations, Safe Work Australia 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.⁵⁶ 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 to ensure that family violence does not adversely impact on others. Accordingly, the ALRC makes a range of recommendations in relation to the need for guidance, education and training that are likely to assist employees experiencing family violence to fulfil their duties under the Model Act. The ALRC suggests that Safe Work Australia should give further consideration to the circumstances in which an employee experiencing family violence has a duty to disclose that violence to their employer for the purposes of fulfilling their own duty of care, and if they do not, firstly, whether that constitutes a breach of their duty and secondly, how it affects the employer's duty.

Research and data collection

18.46 The National OHS Strategy refers to the need to improve data collection and analysis of OHS issues.⁵⁷ Despite this, there is a lack of publicly available data about the incidence of family violence-related OHS hazards or incidents.

18.47 As outlined above, there are some instances in which family violence may pose a clear OHS issue or risk—in such instances, the ALRC considers the most appropriate approach is to conduct research into duties arising in such instances and to ensure reliable data is collected in order to provide a basis for any future policy development. There are also instances in which it is unclear whether a primary duty exists—in such instances the need for research and data collection differs and as a result, the ALRC

53 *Occupational Health and Safety Act 1990* RSO c O1 (Ontario) ss 32.0.4, 32.0.5.

54 Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 s 28. Note, officers also have a range of duties: Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 ss 27, 28, 29.

55 Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 s 29.

56 Safe Work Australia, *Consultation*, by telephone, 17 January 2011.

57 Safe Work Australia, *National OHS Strategy 2002–2012*.

considers it is appropriate to identify family violence as an OHS risk as a research priority.

18.48 Stakeholders like the Australian Domestic and Family Violence Clearinghouse (ADFVC) have emphasised the importance of research and data collection in this area to ‘assist in enhancing recognition of family violence as a workplace issue’.⁵⁸ Throughout the course of this Inquiry, stakeholders have suggested that data may usefully be collected through the notifiable incident system or through changes with respect to data surrounding work-related fatalities and the use of workers’ compensation data.⁵⁹ The ALRC recommends that Safe Work Australia consider ways to extend and improve data coverage, collection and analysis in relation to family violence as a work health and safety issue.

18.49 In its submission, Safe Work Australia stated that its ‘limited resources need to be focused on collecting data and carrying out research to prevent work-related injury and illness as a priority’.⁶⁰ The ALRC and numerous stakeholders are of the view that research and data collection around family violence-related illness and injury in the workplace is a priority, as such research and data ‘assists decision makers when developing or evaluating policies in relation to work health and safety and workers’ compensation by building on knowledge of existing issues, identifying trends and emerging issues’.⁶¹

18.50 The ALRC therefore considers that Safe Work Australia is the most appropriate body to conduct research and collect information about family violence as a possible OHS issue. The functions of Safe Work Australia include to ‘collect, analyse and publish data or other information’ and to ‘conduct and publish research’ relating to OHS ‘in order to inform the development or evaluation of policies’.⁶² As a result, it already has sections undertaking research and evaluation, and data analysis.⁶³ However, the ALRC suggests that State and Territory OHS regulators, Comcare and similar bodies could also play a role in any such research or data collection. The ADFVC suggested that such research could be ‘conducted in consultation or partnership with existing researchers who have experience in creating research methodology for data collection’ in this area.⁶⁴

58 ADFVC, *Submission CFV 26*.

59 For example, some stakeholders expressed support for amending the reporting mechanisms and recording of workplace fatality statistics to outline more clearly the cause of the injury or death, in particular where it involves family violence: *Ibid*. 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.

60 Safe Work Australia, *Submission CFV 115*.

61 *Ibid*

<<http://safeworkaustralia.gov.au/AboutSafeWorkAustralia/WhatWeDo/Research/Pages/Research.aspx>> at 18 November 2011.

62 *Safe Work Australia Act 2008* (Cth) s 6.

63 The main role and function Safe Work Australia’s Research and Evaluation Section is to conduct and make publicly available research in relation to work health and safety and workers’ compensation.

64 ADFVC, *Submission CFV 124*.

18.51 The ALRC recommends that in the course of conducting research and collecting data in this area, Safe Work Australia should focus on examining the effect of the harmonised legislative and regulatory OHS scheme on duties and obligations owed in relation to family violence as a work health and safety issue—in particular the duty of:

- PCBUs in circumstances where family violence enters the workplace; and
- workers to disclose family violence; whether non-disclosure constitutes a breach of their primary duty and the effect it may have on the duty owed by a PCBU.

18.52 One of the focuses for Safe Work Australia in 2011–12 will be the development of a comprehensive Research and Data strategy,⁶⁵ another is finalising development of the National Work Health and Safety Strategy 2012–2022 to replace the current National Strategy.⁶⁶ In addition, the ALRC understands that Safe Work Australia’s work is ‘guided by its strategic and operational plans’.⁶⁷ The ALRC considers the development of these strategies, or any review of other strategies or plans, provide the most appropriate opportunity to consider this issue.

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

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

A focus on education and awareness

18.53 One of the key recommendations in this Report is Recommendation 15–1, in which the ALRC recommends that the Australian Government should initiate a national education and awareness campaign around family violence and its impact as a work issue. The ALRC suggests that one important component of the national campaign should focus on family violence as a possible OHS issue and the national education campaign will provide an important basis for education, training and awareness raising in relation to family violence as a possible OHS issue.

18.54 One of the objects of the Model Act involves the promotion of the provision of advice, information, education and training in relation to OHS.⁶⁸ In light of the

⁶⁵ Safe Work Australia, *Agency Budget Statement 2011–2012* (2011), Overview and Resources, 372.

⁶⁶ Safe Work Australia, *Submission CFV 115*.

⁶⁷ *Ibid.*

⁶⁸ Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 s 3(1)(d).

ALRC's recommendations, 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. It is important that such education and training goes 'hand in hand'⁶⁹ with the other recommendations made in this chapter.

18.55 Such 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'.⁷⁰ The ALRC reinforces the views expressed 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.⁷¹ The ALRC considers that if a definition of family violence is included in Codes of Practice and other Safe Work Australia 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.⁷²

18.56 Stakeholders supported a national approach in this area, as well as recognising the particular role to be played by bodies such as Safe Work Australia, the Fair Work Ombudsman (FWO) and State and Territory OHS regulatory bodies as well as unions and employer organisations.⁷³

18.57 While Safe Work Australia submitted that 'it is not appropriate that Safe Work Australia be the lead agency to develop this type of material',⁷⁴ the ALRC is of the view that Safe Work Australia and State and Territory OHS regulators should play a lead role in this area.⁷⁵ While not necessarily possessing expertise in family violence, they are clearly the bodies with responsibility for 'developing and promoting national strategies to raise awareness' and improve OHS.⁷⁶ As a result, as submitted by ACCI, educative 'materials should be provided by the OHS regulator(s) at first instance'.⁷⁷ However, bodies such as FWO could also be involved in the provision of educational material, including 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'.⁷⁸

69 AASW (Qld), *Submission CFV 17*.

70 ADFVC, *Submission CFV 26*.

71 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.

72 See Rec 3–1.

73 ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*; Queensland Law Society, *Submission CFV 21*; National Network of Working Women's Centres, *Submission CFV 20*; ACCI, *Submission CFV 19*; AASW (Qld), *Submission CFV 17*; Women's Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

74 Safe Work Australia, *Submission CFV 115*.

75 See, eg. ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

76 *Safe Work Australia Act 2008* (Cth) s 6.

77 ACCI, *Submission CFV 19*.

78 *Ibid*.

18.58 Further, stakeholders recognised the need to involve bodies and organisations with expertise in family violence,⁷⁹ such as the ADFVC, as well as ‘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’.⁸⁰

18.59 As a result, the ALRC recommends that Safe Work Australia should work with the ADFVC, unions, employer organisations, State and Territory OHS regulators and other relevant bodies to raise awareness about family violence and its impact as a work health and safety issue, and develop and provide associated education and training. The ALRC considers that such information should be provided through a range of forms, and be tailored to suit specific industries and workplace types and sizes, and provided in an accessible and culturally-appropriate manner.

18.60 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, for example, through incorporation into training modules which focus on workplace violence.⁸¹

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

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

Codes of Practice and other guidance

18.61 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. However, there is a need to make out a duty before guidance is relevant, therefore in this Report the ALRC suggests that such guidance is only relevant in relation to those instances of family violence where there is a clear duty of care.⁸²

18.62 Discussion of family violence in a Code of Practice or guidance would not necessarily change employers’ legal obligations. However, explicit recognition that family violence can affect the workplace could raise both employers’ and employees’

79 Safe Work Australia, *Submission CFV 115*; ADFVC, *Submission CFV 26*.

80 ADFVC, *Submission CFV 26*.

81 ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*; National Network of Working Women’s Centres, *Submission CFV 20*. Similar strategies were supported by WEAVE who also submitted that there is a need for employer safety audits: WEAVE, *Submission CFV 14*.

82 Instances where the ALRC considers a clear duty of care exists are outlined at paragraph 18.38.

awareness of family violence as a potential work health and safety issue and provide useful guidance to employers on how to respond appropriately.

18.63 There are a range of mechanisms through which greater recognition and understanding could be achieved. The development of guidance, whether in the form of a Code of Practice, or other forms, builds upon general education, training and measures aimed at increasing the visibility and understanding of family violence as an OHS issue discussed later in the chapter. In this section of the chapter the ALRC considers:

- the appropriate type of guidance about family violence as an OHS issue, with a particular focus on Codes of Practice; and
- the substance of such guidance, including defining family violence as an OHS issue and identifying and responding to family violence in this context.

What form should guidance take?

18.64 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 Safe Work Australia, Comcare and similar bodies. 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 guidance should be provided in: OHS legislation, Codes of Practice, or in other forms.⁸³ The ALRC has formed the view that the inclusion of information on family violence as a possible work health and safety issue should, at a minimum, be included in Codes of Practice and that other guidance may also play a role.

Codes of Practice

18.65 Codes of Practice provide practical guidance on safe work practices and risk management. 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. 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 to or better than the Code of Practice).⁸⁴

83 ACTU, *Submission CFV 39*; Women's Legal Services NSW, *Submission CFV 28*; ADFVC, *Submission CFV 26*; Queensland Law Society, *Submission CFV 21*; National Network of Working Women's Centres, *Submission CFV 20*; ACCI, *Submission CFV 19*; WEAVE, *Submission CFV 14*; Women's Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*; R Johnstone and L Bluff, *Consultation*, by telephone, 5 May 2011.

84 *Occupational Health and Safety Code of Practice 2008* (Cth), 18.

18.66 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. Most stakeholders who considered this issue suggested that Codes of Practice were the most appropriate place to include consideration of family violence as an OHS issue,⁸⁵ as they provide an ‘important touchstone for duty holders’.⁸⁶

18.67 However, neither the OHS Code nor any of the Model Codes of Practice developed by Safe Work Australia identify or consider responses to family violence as a potential OHS risk. In its submission to this Inquiry, Safe Work Australia stated that ‘as family violence is not a risk that arises from work, it ... cannot be included as a specific work health and safety issue in the model codes’.⁸⁷ The Safe Work Australia Agency Budget Statement indicates that one of the focuses of Safe Work Australia in 2011–2012 will be on the continued development of model Codes of Practice and national guidance material.⁸⁸ The ALRC understands that several of the Codes of Practice are considered complete, however notes that Safe Work Australia’s responsibility with respect to such Codes includes to ‘if necessary, revise them’.⁸⁹

18.68 Consequently, the ALRC considers that the inclusion of information on family violence as a possible work health and safety issue should, at a minimum, be included in Codes of Practice. While some stakeholders suggested that bodies such as Safe Work Australia and the ADFVC could collaborate to create a specific Code of Practice for family violence-related workplace safety risks, others emphasised that information should be included in general Codes, such as those in relation to risk assessment, workplace violence or psychosocial hazards, ‘rather than creating a further Code of Practice specifically on domestic/family violence related risks’.⁹⁰ In particular, the ALRC is of the view that the most appropriate Codes in which to include such information are: ‘How to Manage Work Health and Safety Risks’; ‘How to Consult on Work Health and Safety’; ‘Managing the Work Environment and Facilities’; and ‘Preventing and Responding to Workplace Bullying’.⁹¹

Regulations

18.69 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

85 See, eg Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*; Women’s Legal Services NSW, *Submission CFV 28*; ADFVC, *Submission CFV 26*; National Network of Working Women’s Centres, *Submission CFV 20*.

86 ADFVC, *Submission CFV 26*.

87 Safe Work Australia, *Submission CFV 115*.

88 Safe Work Australia, *Agency Budget Statement 2011–2012* (2011), Overview and Resources, 372.

89 *Safe Work Australia Act 2008* (Cth) s 6.

90 ADFVC, *Submission CFV 124*. In its submission, the ADFVC suggested specific parts of current Codes of Practice which could be amended.

91 Safe Work Australia, *Draft Code of Practice: Preventing and Responding to Workplace Bullying* (2011); 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).

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.

18.70 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.⁹² However in light of contrasting 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.

Other guidance

18.71 Throughout this Inquiry stakeholders have outlined a range of other possible responses to family violence in an OHS context, many of which involve inclusion of information in guidance or the development of parallel policies and procedures.⁹³

18.72 Several stakeholders supported the development of an overarching workplace family violence policy which encompassed OHS.⁹⁴ In addition to this, however, stakeholders including the Australian Services Union supported the development of stand-alone guidance material that ‘specifically deals with the implications of family violence in the workplace and an employer’s obligations in relation to protecting their employees from manifestations of family violence at the workplace’.⁹⁵

18.73 However, the ALRC considers that incorporating consideration of family violence into existing policies, risk assessment frameworks and documents as well as safety plans⁹⁶ is the preferable approach. As a result, the ALRC suggests that ‘auditing existing policies, examining values and mission statements, and considering the effects of organisational culture,’⁹⁷ as well as developing new policies and procedures, as required, may also go some way to increasing the safety of employees experiencing family violence as well as their co-workers and the workplace more generally.

18.74 In addition, Safe Work Australia has developed Interpretative Guidelines to assist in the interpretation and application of the Model Act.⁹⁸ As a result, the ALRC suggests that, in the course of examining duties and obligations, and what constitutes ‘reasonably practicable’ in the context of family violence as a possible work health and safety issue arising under the harmonised legislative and regulatory OHS scheme, Safe

92 ACTU, *Submission CFV 39*. The Joint submission from Domestic Violence Victoria and others, *Submission CFV 22* and Women’s Health Victoria, *Submission CFV 11* expressed a similar view, stating that family violence should be included in OHS legislation or regulations.

93 ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 113*; Redfern Legal Centre, *Submission CFV 15*; Women’s Health Victoria, *Submission CFV 11*.

94 This issue is discussed in the context of national initiatives in Ch 15.

95 ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

96 *Ibid.*

97 Women’s Health Victoria, *Submission CFV 11*.

98 See, eg, Safe Work Australia, *Interpretative Guideline: Model Work Health and Safety Act- The Meaning of ‘Reasonably Practicable’* (2011).

Work Australia should consider inclusion of guidance on the matter in Interpretive Guidelines.

18.75 Finally, the ALRC recognises the important role played by other forms of guidance material and suggests that bodies such as Safe Work Australia, Comcare, and others involved in the national education and awareness campaign in Recommendation 15–1 could be involved in the provision of additional guidance.

Substance of guidance

18.76 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 and its impact as a work health and safety issue. In addition to general information about the nature, features and dynamics of family violence, such guidance should ultimately assist employers and employees to identify, and respond to, family violence where it presents in the work context. The ALRC considers that Codes of Practice should include:

- a definition of family violence—in line with that suggested in Chapter 3;
- 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

18.77 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 legislation, but more explicit discussion in the context of workplace risks posed by family violence may be helpful.

18.78 As outlined above, in fulfilling their duty of care, employers must consider what is 'reasonably practicable'.⁹⁹ 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.¹⁰⁰ The ALRC considers that guidance could be included in material such as the Interpretative Guidelines, in order to assist employer to put in place measures to ensure they are able to identify family violence in the workplace.¹⁰¹ Models from state codes of practice and other

99 Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 s 47.

100 Safe Work Australia, *Explanatory Memorandum—Model Work Health and Safety Act* (2010), [71].

101 Safe Work Australia, *Interpretative Guideline: Model Work Health and Safety Act- The Meaning of 'Reasonably Practicable'* (2011).

jurisdictions—in particular, recent legislation and accompanying guidelines from Ontario, Canada—provide examples of what subjects such guidance could discuss. The inclusion of such guidance is likely to be particularly important under the Model Act, given the expanded range of potential ‘workplaces’. However, guidance should make clear the distinction between work-related and personal responsibilities.

18.79 The approach in the Ontario *Occupational Health and Safety Act* 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’.¹⁰² The ALRC suggests that this formulation may strike a useful balance in an area where it is difficult to distinguish clearly between workplace and personal responsibilities.

18.80 In identifying family violence in the workplace, the ALRC also considers that suggestions from existing Codes of Practice discussing bullying, psychosocial hazards, and general violence may be of assistance, outlining approaches including:

- reviewing absenteeism records;
- checking injury records;
- conducting confidential surveys to identify possible sources of violence; and
- encouraging workers to communicate about workplace violence.¹⁰³

18.81 In light of the expanded concept of workplace under the Model Act, 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

18.82 In order to ensure effective reporting and responses to family violence in an OHS context, both employers and employees have an important role to play. However, at the outset, it is important to note that ‘whilst businesses can play a role in ensuring its workforce isn’t exposed to internal or external sources of harm’,¹⁰⁴ in instances of criminal acts such acts are the responsibility of law enforcement authorities and reporting and responses should be tailored accordingly.

18.83 The ALRC acknowledges the need for workplace responses that are tailored to meet the individual needs of businesses, and of employees within those businesses. In order for employers to be prepared to address the risks associated with family violence in the work context, they must be aware that an employee is experiencing family

102 *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].

103 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].

104 ACCL, *Submission CFV 19*.

violence that is likely to result in an OHS hazard or incident.¹⁰⁵ As a result, a precondition for responding appropriately is to ensure adequate structures are in place for disclosure and reporting of family violence.¹⁰⁶ Such structures also assist in establishing and encouraging a reporting and safety culture.¹⁰⁷ Women’s Health Victoria highlighted the importance of leadership in this respect, 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’.¹⁰⁸

18.84 However, in instances where family violence clearly engages a primary duty of care and is an OHS issue, workplace responses can build on existing measures associated with risk management and safety plans 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’.¹⁰⁹

18.85 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 and the overarching need to ‘recognise, respond and refer’.¹¹⁰

18.86 Guidance may usefully provide information about how employers should respond to and minimise risks associated with family violence and its affect on the workplace. 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.

18.87 In some cases, employers will already have mechanisms and processes in place that 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 a possible OHS issue. This section of the chapter considers general responses as well as providing some discussion of the ways in which safety plans can be used by employers, and outlines what such plans could include.

18.88 The ALRC considers that the risk assessment components currently contained in the Model Codes of Practice could be amended to account for the risk posed by family violence. This may assist workplaces to integrate good risk management practices in relation to family violence into day-to-day business operations. In doing so, the Model

105 In consultations SWA expressed the view that workplace responses can realistically only be focused on the risks arising from the business or undertaking and what is reasonably practicable for the employer to do in the circumstances: Safe Work Australia, *Consultation*, by telephone, 17 January 2011.

106 See, eg. ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

107 Note, the Model Act prohibits discriminatory conduct, including against employees who raise safety concerns: Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 pt 6.

108 Women’s Health Victoria, *Submission CFV 11*.

109 ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

110 Women’s Health Victoria, *Submission CFV 11*.

Act requires employers to consult workers in relation to the identification of hazards and assessment of risks as well as decisions made to eliminate such risks.¹¹¹

Safety plans

18.89 A key element of effective risk management emphasised by stakeholders is the development and implementation of general and individual safety plans tailored to the individual business and needs of employees experiencing family violence.¹¹² The ALRC considers that Safe Work Australia should work with the ADFVC, unions and employer organisations to develop safety plans to be incorporated into guidance material which includes measures to minimise the risk of family violence in the workplace.¹¹³ It is necessary to recognise the need for flexible safety plans to suit businesses of varying sizes across a range of industries.¹¹⁴

18.90 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 Act 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.

18.91 As part of the Domestic Violence Workplace Rights and Entitlements Project, the ADFVC has developed resources designed to assist employers in assessing and responding to risks in the workplace, associated with family violence. These resources include 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. Such plans could be developed to work with, or be incorporated into, existing safety plans. The guide 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:

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?

111 Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 ss 47–49.

112 ADFVC, *Submission CFV 26*. Similar strategies were supported by WEAVE who also submitted that there is a need for employer safety audits: WEAVE, *Submission CFV 14*.

113 ADFVC, *Submission CFV 124*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 113*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*.

114 ADFVC, *Submission CFV 124*.

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 [his or] her and with [his or] 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.¹¹⁵

18.92 In addition, Women’s Health Victoria suggested other issues to consider when drafting a safety plan include considering changes to work schedule, location or telephone number; developing a return to work place if absence is agreed to; provision of emergency contact details; obtaining an apprehended violence order that includes the workplace; and reviewing workplace safety arrangements.¹¹⁶

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

- (a) ‘How to Manage Work Health and Safety Risks’;
- (b) ‘Managing the Work Environment and Facilities’;
- (c) ‘How to Consult on Work Health and Safety’;

115 ADFVC, *Workplace Guide: Domestic Violence Safety Plan*.

116 Women’s Health Victoria, *Submission CFV 11*.

- (d) 'Preventing and Responding to Workplace Bullying'; and
- (e) any other code that Safe Work Australia may develop in relation to other relevant topics, such as workplace violence and psychosocial hazards.

**Part F—
Superannuation**

Chapter

19. Superannuation Law

19. Superannuation Law

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Summary

19.1 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.¹ 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.²

19.2 In this chapter the ALRC examines ways in which the Australian superannuation system does, or could, respond to protect those people experiencing family violence. The ALRC makes a number of recommendations, but in doing so acknowledges the specific role that superannuation plays as a long-term form of savings and recognises the policy tension between the need to preserve superannuation benefits until retirement and the need, in limited circumstances, to allow early access to superannuation funds.

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

2 By 2050, almost one in four Australians will have reached retirement age, compared to one in seven in 2010: *Ibid.*

19.3 This chapter consists 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 spousal contributions and self-managed superannuation funds (SMSFs). The ALRC concludes that the treatment of superannuation should be considered in the context of a wider inquiry into how family violence should be dealt with in respect of property proceedings under the *Family Law Act 1975* (Cth). The ALRC also makes a number of suggestions with respect to compliance action taken in relation to SMSFs and recommends changes to guidance material with respect to establishing, managing and winding up a SMSF.

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

Overview of the superannuation system

Superannuation legislation

19.5 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 the:

- *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 the Australian Prudential Regulatory Authority (APRA), the Australian Securities and Investments Commission (ASIC) and the Commissioner of Taxation;³ and
- *Superannuation Industry (Supervision) Regulations 1994* (Cth) (*SIS Regulations*)—which articulate the grounds for early access to superannuation.

19.6 Two other pieces of legislation are also relevant for the purposes of specific issues within this chapter. First, as outlined in Chapter 1, detailed consideration of, or proposals with respect to amending, the *Family Law Act 1975* (Cth) is beyond the

3 *Superannuation Industry (Supervision) Act 1993* (Cth) s 3(1).

Terms of Reference for this Inquiry.⁴ 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 (2010). However, in the present Inquiry, 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.

19.7 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.

Regulatory bodies

19.8 The superannuation system is regulated by several 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*;
- APRA—the prudential regulator that regulates superannuation funds other than SMSFs and reviews compliance with the *SIS Act*; and provides guidance to trustees in relation to the early release of superannuation entitlements on the basis of severe financial hardship;⁵ and
- the Department of Human Services (DHS), in particular Medicare—which is responsible for the administration of applications for early release on compassionate grounds.⁶

19.9 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.⁷

Superannuation Complaints Tribunal

19.10 The Superannuation Complaints Tribunal was established under the *SRC Act* to deal with complaints about superannuation—specifically in the areas of Regulated Superannuation Funds, annuities and deferred annuities, and Retirement Savings

4 The full Terms of Reference are set out at the front of this Report and are available on the ALRC website at <www.alrc.gov.au>.

5 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).

6 The general administration of the early release of superannuation and RSA benefits on compassionate grounds was transferred from APRA and the Commissioner of Taxation to the Chief Executive Medicare on 1 November 2011: *Superannuation Legislation Amendment (Early Release of Superannuation) Act 2011* (Cth).

7 For example, the Association of Superannuation Funds of Australia and the Australian Institute of Superannuation Trustees.

Accounts. The Tribunal’s jurisdiction does not, however, extend to complaints concerning SMSFs.

Superannuation policy

19.11 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.⁸

Superannuation principles

19.12 In the course of the Super System Review, the Review Panel formulated ten superannuation principles as the ‘guiding principles by which policy is developed in relation to superannuation generally’.⁹ A number of principles are of particular relevance to this Inquiry, including the need for: a well regulated superannuation system in which members can have confidence; a system which allows and respects individual choice, but also recognises associated increased responsibility which comes with that choice; and for superannuation-related decision making to be taken with a long term perspective.¹⁰ These principles provide a useful touchstone for this chapter, in addition to the key themes articulated in Chapter 2.

Purposes of superannuation

19.13 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.¹¹

19.14 In the course of this Inquiry, two of these pillars are considered—this chapter focuses on superannuation and Chapters 5–9 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.

8 Australian Government, *‘Stronger Super’: Government Response to the Super System Review* (2010). 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 detail in this Chapter.

9 J Cooper and others, *Super System Review Final Report: Part One—Overview and Recommendations* (2010), Overview, 4.

10 Ibid, Overview, 4.

11 Ibid, Overview, 15.

19.15 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.¹²

19.16 A number of key policy tensions have emerged in the course of this Inquiry with respect to family violence and superannuation.

19.17 First, superannuation is generally provided through a trust structure where trustees hold the superannuation funds 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 of members, 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 proper role of trustees in the context of superannuation fund management.

19.18 Secondly, a tension exists between the need for a well-regulated superannuation system on the one hand, and the need for individual choice with respect to, for example, contributions splitting or the type or management of superannuation funds. This tension is particularly evident in considering SMSFs in light of suggestions about the power imbalances often present in SMSFs.

19.19 The third 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.

Superannuation and family violence

19.20 The Terms of Reference for this Inquiry require the ALRC to consider reforms to improve the safety of people experiencing family violence. In the superannuation context, the ALRC considers that safety encompasses both physical safety and safety derived from financial independence and economic security.

19.21 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, and that for women who were unable to stabilise their financial situation, the consequence was a downward spiral of debt and poverty.¹³ The ADFVC also stressed that financial hardship in turn impacts on the safety of victims of family violence. For example, it affects their

12 ASFA, *Submission CFV 24*.

13 ADFVC, *Submission CFV 26*.

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.¹⁴

19.22 In addition, the Australian Institute of Superannuation Trustees (AIST) estimated that the ‘median superannuation balance for women aged between 55 and 64 years is \$53,000, compared to \$90,000 for men in the same age group’.¹⁵

19.23 Against this backdrop, in the course of this Inquiry stakeholders have emphasised that superannuation is another area through which victims of family violence experience coercion and control in the form of economic abuse, or that may provide necessary funds to leave a violent relationship.¹⁶ As a result, this chapter examines three key areas of superannuation in which the impact of family violence is likely to be most obvious: superannuation contributions splitting; SMSFs; and early access to superannuation.

Superannuation and coercion

19.24 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 contributions under reg 6.44 of the *SIS Regulations*, or a SMSF.

Spousal contributions

19.25 Since 1 January 2006, eligible superannuation members have been able to request that their superannuation contributions be split with their ‘spouse’.¹⁷ The payment of the split contributions to a member’s spouse is known as a ‘contributions-splitting superannuation benefit’.¹⁸ Maximum limits apply to the amount of superannuation that may be split in each financial year.¹⁹

19.26 The *SIS Regulations* provide that superannuation trustees are not required to offer their members the option to split their superannuation contributions.²⁰ If a

14 Ibid.

15 AIST, *Super-Poor, But Surviving: Experiences of Australian Women in Retirement* (2011), 10.

16 National Welfare Rights Network, *Submission CFV 150*; AIST, *Submission CFV 146*; Office of the Australian Information Commissioner, *Submission CFV 142*; Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*; Confidential, *Submission CFV 91*; ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*; Northern Rivers Community Legal Centre, *Submission CFV 08*.

17 The term spouse is defined to include: a person to whom the member is legally married; a person that a 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: *Superannuation Industry (Supervision) Act 1993* (Cth) s 10.

18 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.40.

19 The ‘maximum splittable amount’ is defined in the *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.40.

20 Ibid reg 6.45.

superannuation fund does provide members with 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.²¹

19.27 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 contributions 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.

Trustee obligations to consider coercion

19.28 Superannuation trustees possess a number of duties and obligations and are subject to a range of regulatory requirements.²² 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. In carrying out their fiduciary duty to act in the best interests of the member, it may be difficult for trustees 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.

19.29 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 expose decisions to legal challenge. It may also be beyond what a prudent trustee is expected to consider as part of their fiduciary duty.

19.30 In considering how a trustee or another body could consider coercion and what if any steps they could take to limit or ameliorate the effect of that on a victim of family violence, stakeholders expressed the view 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 the decision about the splitting application.²³ However, beyond that, while some stakeholders supported the introduction of an obligation on trustees,²⁴ most stakeholders reiterated their concerns in relation to the

21 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.

22 Including under common law and legislation such as the *Superannuation Industry (Supervision) Act 1993* (Cth) and *Corporations Act 2001* (Cth).

23 ASFA, *Submission CFV 24*.

24 ACTU, *Submission CFV 39*; Northern Rivers Community Legal Centre, *Submission CFV 08*.

difficulty and inappropriateness of imposing obligations of this kind on trustees.²⁵ Accordingly, the ALRC does not make any recommendations with respect to the contributions splitting regime.

How could a victim of family violence recover their superannuation?

19.31 Where benefits have been transferred under a superannuation contributions 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. While the ALRC considers that victims of family violence should be able to recover superannuation transferred in such circumstances, it is clear that any such mechanism would need to be included in the *Family Law Act*.

19.32 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.²⁶ In making such orders, superannuation benefits transferred under the superannuation contributions splitting regime as a result of coercion cannot be ‘clawed back’, but may be taken into account in considering the contributions of the parties—to the property, including financial and non-financial contributions and contributions to the welfare of the family—and ultimately in the distribution of assets between the parties.²⁷

19.33 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. In the case of *In the Marriage of Kennon* the Family Court of Australia 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.²⁸ 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.

19.34 As outlined above, detailed consideration of, and proposals to amend, the *Family Law Act* goes beyond the Terms of Reference for this Inquiry. The ALRC therefore considers the most appropriate approach to this issue is to refer to the

25 See, eg, AIST, *Submission CFV 146*; ASFA, *Submission CFV 24*; Law Council of Australia, *Submission CFV 23*.

26 *Family Law Act 1975* (Cth) ss 79 (marriage), 90SM (de facto relationships).

27 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—*Hickey and Hickey* (2003) 30 FamLR 355); or whether superannuation interests should be valued separately from other items of property (a ‘two pools’ approach—*In the Marriage of Coghlan* (2005) 33 Fam LR 414); identify and assess the contributions that the parties have made to the property; identify and assess the earning capacity, needs and child support obligations of each party; and make an order that is just and equitable in all the circumstances: *Family Law Act 1975* (Cth) ss 75(2); 79(2); 79(4)(a)–(g); 90SF(3); 90SM(3); 90SM(4)(a)–(g).

28 *In the Marriage of Kennon* (1997) 139 FLR 118, 140.

recommendation in *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.²⁹

19.35 Such an inquiry could consider, for example:

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*.³⁰

19.36 In particular, the ALRC recommends that any such inquiry should include consideration of the treatment of superannuation in property proceedings involving family violence. This was supported by stakeholders in this Inquiry.³¹

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

Self-managed superannuation funds

19.37 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.³² SMSFs are restricted to a maximum of four members.

19.38 The majority of SMSFs—more than 90%—are funds with two members³³ and ‘most of these would be spouses’.³⁴ SMSFs constitute the largest sector within Australia’s superannuation sector by both number of assets and asset size.³⁵ At 30 March 2010, there were approximately 423,000 SMSFs, representing 99% of all superannuation funds, and comprising over 30% of total superannuation assets.³⁶ The

29 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.

30 *Ibid.*, ch 17.

31 See, eg, ASFA, *Submission CFV 154*; AIST, *Submission CFV 146*.

32 J Cooper and others, *Super System Review Final Report: Part One—Overview and Recommendations* (2010), 223.

33 *Ibid.*, 222.

34 AIST, *Submission CFV 146*.

35 J Cooper and others, *Super System Review Final Report: Part One—Overview and Recommendations* (2010), 218.

36 *Ibid.*

SMSF sector has grown rapidly: in the five years to 30 June 2009, it has experienced an annualised growth rate of 20%.³⁷

19.39 The Super System Review concluded that ‘the SMSF sector is largely a successful and well-functioning part of the system’.³⁸ However, 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, SMSFs are subject to a less onerous regulatory regime than some other forms of superannuation funds.³⁹

SMSFs and family violence

19.40 In circumstances of family violence involving the trustees 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. In light of this, and 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.⁴⁰

19.41 However, many of the possible amendments to the regulation of the SMSF sector would involve sector-wide amendment and have a more systemic impact than only in relation to those experiencing 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 wider than 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.

19.42 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. This was reinforced by stakeholders who emphasised that many SMSFs ‘have a combination of active and passive trustees’ and that ‘a feature of SMSF trusteeship today, be it proper or not, is that not all trustees are equal’.⁴¹

19.43 As a result, the ALRC makes a number of suggestions and recommendations for reform to the regulation of SMSFs and associated guidance material to protect the safety of trustees experiencing family violence.

37 Ibid.

38 Ibid, Overview, 16.

39 APRA, ‘A Recent History of Superannuation in Australia’ (2007) 2 *APRA Insight* 3, 8.

40 See Rec 3–4 in relation to the need for a consistent definition of family violence.

41 ASFA, *Submission CFV 154*.

ATO guidance material

19.44 SMSFs are regulated by the ATO, which publishes a range of material which is designed to assist SMSF trustees. This includes a SMSF Newsletter; guidance material on winding-up a SMSF; as well as a SMSF specific advice process through which a trustee can write to the ATO and request advice about how superannuation law applies to a particular transaction or arrangement for a SMSF. The ATO legal database and electronic super-audit tool also contain material relevant to SMSFs.⁴²

19.45 Ensuring such material provides individuals establishing SMSFs with sufficient information about the following matters may go some way to protecting SMSF trustees experiencing family violence:

- setting up a SMSF—including creating appropriate safeguards, for example ‘joint signatories on bank accounts’,⁴³
- 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.

19.46 As a result, the ALRC recommends that the ATO amend existing guidance material designed to assist SMSF trustees to equip trustees generally and, in particular, those experiencing family violence, with ‘greater knowledge of how to protect their interests’.⁴⁴ Guidance material could, for example, include case studies illustrating the potential impact family violence may have in the context of establishing, managing and winding up a SMSF as well as ‘suggestions and examples of best practice’.⁴⁵ In addition, the ALRC considers that the inclusion of general information about the potential effect of family violence on superannuation savings and SMSFs would be useful.⁴⁶

Determining appropriate compliance action

19.47 In circumstances where a person using family violence is a SMSF trustee, and they fail to comply with superannuation or taxation law and are therefore the subject of compliance action, it is important to avoid that action exacerbating the harm or disadvantage suffered by the trustee experiencing family violence who is not the subject of compliance action. In order to ensure that the ATO is able to consider family

42 ATO, *Self-managed Superannuation Funds* <www.ato.gov.au/superfunds/> at 1 July 2011; ATO, *How to Apply for SMSF Specific Advice* <www.ato.gov.au/businesses/content.aspx?doc=/content/00206984.htm> at 17 November 2011; ATO, *Winding-Up a SMSF: What You Need to Know* (2010); ATO, *Legal Database Online* <<http://law.ato.gov.au/atolaw/index.htm>> at 17 November 2011 contains SMSF rulings and determinations.

43 AIST, *Submission CFV 146*.

44 Ibid.

45 Ibid.

46 Ibid.

violence in determining the most appropriate compliance action in such circumstances, the ALRC suggests that the ATO consider the impact of compliance action and provide trustees with the additional guidance material recommended in Recommendation 19–2.

19.48 The following ATO example outlines a circumstance in which a dispute may arise between trustees—potentially involving family violence—and the negative consequences that may follow from such a dispute.⁴⁷

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.

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.

19.49 In dealing with circumstances in which a fund may be non-compliant, such as in the case study 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;

47 ATO, *How Your Self-Managed Super Fund is Regulated* (2011).

- disqualification of trustees; and
- in serious cases, civil prosecution of trustees.⁴⁸

19.50 In determining the appropriate action, the ATO sends fund trustees a letter, outlining the basis for their non-compliance and providing them with an opportunity to provide any additional information. The letter outlines that the ATO will consider the tax consequences of treating the fund as a non-complying fund, the seriousness of the contravention and all other relevant circumstances.⁴⁹

19.51 ‘Differentiated compliance treatments’ are a feature of the Stronger Super SMSF reforms,⁵⁰ and there is an increasing move away from making a fund non-compliant.⁵¹ However, in its submission, AIST expressed the view that the ATO should not be required to consider family violence when determining appropriate compliance action, except where the ATO is alerted to the fact that family violence ‘is a key component’ of the conduct.⁵²

19.52 In light of ATO moves towards a more nuanced approach to compliance, and stakeholder views, the ALRC does not consider it is necessary to make a recommendation in this respect. However, the ALRC emphasises that in exercising its discretion in compliance matters the ATO should ensure, as far as possible, compliance action does not have a negative impact on the victim, for example by way of non-complying fund status or forced sale of assets that may have adverse capital and tax consequences.⁵³ The ALRC suggests, in line with the views of stakeholders, that the ATO, in determining the appropriate compliance action, should consider all available material and ‘grade each breach and determine whether the contravention occurred intentionally or accidentally based on [a] reasonably arguable position’.⁵⁴ In doing so, there appears to be a need for the ATO to take into account that ‘not all trustees are equal’⁵⁵ and the potential impact of family violence.

19.53 In addition, the ALRC also suggests that amended ATO material, as set out in Recommendation 19–2, should be provided to trustees with the compliance letter referred to above, to ensure they are aware that circumstances such as family violence, where relevant, can be considered by the ATO should the trustee provide the ATO with relevant material. Where material is provided which indicates family violence is a key component of the conduct, the ATO then has discretion to consider such material in determining the appropriate compliance action.

48 See, eg, *Superannuation Industry (Supervision) Act 1993* (Cth) ss 262A (undertakings), 298 (causing civil proceedings to begin). See also: ATO, *How Your Self-Managed Super Fund is Regulated* (2011).

49 Correspondence from ATO, 6 October 2011; *Superannuation Industry (Supervision) Act 1993* (Cth) s 42A(5).

50 ASFA, *Submission CFV 154*.

51 ATO, *Consultation*, by telephone, 28 September 2011.

52 AIST, *Submission CFV 146*.

53 *Ibid.*

54 ASFA, *Submission CFV 154*.

55 *Ibid.*

SMSF professionals

19.54 There is no formal requirement to be a licensed SMSF adviser.⁵⁶ Stakeholders have expressed the view that advice regarding the establishment and operation of SMSFs, received from accountants, tax agents, fund administrators, lawyers and financial advisers, can be 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. As a result, in consultations, some stakeholders suggested that requiring these professionals to provide additional information to individuals establishing a SMSF may go some way to protecting trustees experiencing family violence.

19.55 Developments such as the Future of Financial Advice reforms, among others, will be important in reviewing existing professional standards and training requirements as well as licensing exemptions.⁵⁷ As a result, the ALRC suggests that, in this context, 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.

19.56 Stakeholders have also suggested that guidance material, developed in accordance with Recommendation 19–2, should be made available to SMSF professionals ‘so that they can begin to advise and implement such best practice’.⁵⁸

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

Gaining early access to superannuation

19.57 There are three key forms of superannuation benefits:

56 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.

57 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 Licence 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.

58 AIST, *Submission CFV 146*.

- preserved benefits—which must be retained in superannuation until ‘preservation age’;⁵⁹
- 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.

19.58 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*.⁶⁰

19.59 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.

19.60 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. However, stakeholders such as Women’s Legal Services NSW argued that victims of family violence should be entitled to early access to superannuation only as a ‘last resort’ and that

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.⁶¹

19.61 In its submission, the Association of Superannuation Funds of Australia (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.⁶²

19.62 Consequently, ideally, 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.⁶³

59 Preservation age ranges from 55 to 60 depending on date of birth.

60 *Superannuation Act 1976* (Cth) s 79B; *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.01.

61 Women’s Legal Services NSW, *Submission CFV 28*.

62 ASFA, *Submission CFV 24*.

63 See Chs 5–8.

19.63 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 person using family 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;⁶⁴ 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.⁶⁵ 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.⁶⁶

Severe financial hardship

19.64 The *Superannuation Act* and *SIS Regulations* provide for early release of superannuation benefits on the grounds of ‘severe financial hardship’.⁶⁷ Fund trustees are responsible for determining the release of benefits on this basis. Different conditions for early release apply, depending on the age of the member, in particular whether the member is under or over ‘preservation age’.⁶⁸

19.65 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 that they:

- have been receiving ‘Commonwealth income support payments’ continuously for the past 26 weeks;⁶⁹
- 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);⁷⁰ and
- are unable to meet reasonable and immediate family living expenses.⁷¹

64 AIST, *Submission CFV 146*; Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*.

65 AIST, *Super-Poor, But Surviving: Experiences of Australian Women in Retirement* (2011), 10. See also ACTU, *Submission CFV 39*.

66 See, eg, Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994).

67 The rules of the superannuation fund must also allow early access on this basis.

68 *Superannuation Act 1976* (Cth) s 79B; *Superannuation Industry (Supervision) Regulations 1994* (Cth) sch 1, reg 6.01(5).

69 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.01(2).

70 Centrelink’s role is to ‘supply, on request from an income support recipient, confirmation that the income support recipient has received income support payments for the required period’: FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011.

71 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.01(5), (5A).

19.66 If these requirements are satisfied, the trustee may release a lump sum of between \$1,000 and \$10,000.⁷²

19.67 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 that they:

- have been receiving ‘Commonwealth income support payments’ for a cumulative period of 39 weeks after they reached their preservation age; and
- 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’.⁷³

19.68 Where a person satisfies these requirements, there is no limit on the amount that can be released.⁷⁴

Qualifying period

19.69 The ALRC considers that the current requirement that applicants under the preservation age must have been receiving a Commonwealth income support payment for 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.

19.70 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 increasing the flexibility of the current requirement for 26 weeks continuous receipt of income support payments to 26 out of a possible 40 weeks.⁷⁵

19.71 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 5–8, the ALRC is concerned that the current formulation may operate to exclude victims of family violence from accessing early release on this ground. In particular, as stakeholders have emphasised, 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.⁷⁶ The Commonwealth 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.⁷⁷

72 Ibid sch 1, pt 1.

73 Ibid reg 6.01(5)(b).

74 Ibid sch 1, pt 1.

75 Senate Select Committee on Superannuation and Financial Services—Parliament of Australia, *Early Access to Superannuation Benefits* (2002), [4.36]–[4.40].

76 National Welfare Rights Network, *Submission CFV 150*; WRC (NSW), *Submission CFV 70*; Commonwealth Ombudsman, *Submission CFV 16*; WEAVE, *Submission CFV 14*; Northern Rivers Community Legal Centre, *Submission CFV 08*.

77 Commonwealth Ombudsman, *Submission CFV 16*.

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.

19.72 Such difficulties may also arise where victims are not previously eligible for social security payments due to income or assets tests, as 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 eligible for early access to superannuation during the period when they are suffering the most severe financial hardship.⁷⁸

19.73 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'.⁷⁹

19.74 However, the ALRC is 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.⁸⁰

19.75 Accordingly, and in line with the recommendation made by the Senate Select Committee on Superannuation and Financial Services, the ALRC recommends 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. This amendment would still provide an objective financial hardship test but is likely to

78 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 Chs 5–8.

79 ASFA, *Submission CFV 24*.

80 Commonwealth Ombudsman, *Submission CFV 16*.

result in a more ‘consistent and sensitive approach’ in relation to those seeking early access to their superannuation, including people experiencing family violence.⁸¹

19.76 The ALRC did not receive any feedback from stakeholders indicating that there are particular difficulties for a person over the preservation age 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

19.77 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 and Youth Allowance paid to a person who is undertaking full-time study.⁸²

19.78 The ALRC considers that recommending amendment to the definition of ‘Commonwealth income support payments’ is beyond the scope of the Terms of Reference for this Inquiry, given its systemic impact on people across the social security and superannuation systems.⁸³

19.79 The policy underlying exclusion of some of these payments was, in part, 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. As a result, a number of stakeholders opposed any amendment to the definition.⁸⁴ Stakeholders also opposed amendment on the basis that recipients of excluded payments are generally likely to have ‘low levels of superannuation and therefore any early lump sum releases will have a significant impact on the total level of superannuation’.⁸⁵

19.80 However, the ALRC notes that, 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

81 Ibid. See also National Welfare Rights Network, *Submission CFV 150*; AIST, *Submission CFV 146*; Northern Rivers Community Legal Centre, *Submission CFV 08*.

82 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.01(2). The ALRC understands that the definition also excludes NEIS, Abstudy, workers’ compensation, as well as transport accident and personal income protection payments: National Welfare Rights Network, *Submission CFV 150*. The Ombudsman advised that complaints received in relation to NEIS payments ‘may indicate an anomaly. NEIS payments assist an eligible job seeker to commence their own business. NEIS payments provide the same level of assistance as Newstart Allowance and are described as ‘ongoing income support, but are not included in the payments that meet the requirements of a “Commonwealth income support payment” for the purpose of applying for an early release of superannuation’: Commonwealth Ombudsman, *Correspondence*, 28 October 2011.

83 See, eg, ASFA, *Submission CFV 154*.

84 Ibid; Treasury, *Consultation*, by telephone, 21 September 2011.

85 AIST, *Submission CFV 146*.

financial hardship,⁸⁶ and a number of stakeholders reiterated the same view throughout this Inquiry, submitting that the exclusion is ‘unfair and unreasonable’.⁸⁷

Guidance material

19.81 The trustees of a superannuation fund are responsible for determining the release of benefits on the basis of severe financial hardship. However, APRA provides guidance to trustees across a range of areas, including in relation to applying the ground of severe financial hardship. APRA is progressively issuing Superannuation Prudential Practice Guides (SPG) to replace existing Circulars, Guidance Notes and other materials. Guidance in this area is currently provided by Superannuation Circular No I.C.2 *Payment Standards for Regulated Superannuation Funds*.⁸⁸ However, in December 2011, APRA proposes to issue a final version of a draft Superannuation Prudential Practice Guide, SPG 280—*Payment Standards for Regulated Superannuation Funds and Approved Deposit Funds* released for consultation in August 2011.⁸⁹ Neither the current Circular nor the draft SPG provide any direction for trustees in determining whether, for example, an applicant is unable to meet reasonable and immediate family living expenses.⁹⁰

19.82 The ALRC understands that the SPGs are designed to provide high level advice to trustees, in this instance to assist in determining whether an applicant satisfies the ground of severe financial hardship.⁹¹ However, the ALRC considers there is a need for guidance material that provides trustees with more specific guidance 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.

19.83 The ALRC therefore recommends that APRA 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.⁹² The ALRC considers such guidance could:

- contain a definition of family violence;⁹³

86 Senate Select Committee on Superannuation and Financial Services—Parliament of Australia, *Early Access to Superannuation Benefits* (2002).

87 National Welfare Rights Network, *Submission CFV 150*.

88 APRA, *Superannuation Circular No I.C.2: Payment Standards for Regulated Superannuation Funds* (2006).

89 APRA, *Guidance for Superannuation Licensees: Contribution and Benefit Accrual Standards, Payment Standards* (2011), 10.

90 APRA, *Superannuation Circular No I.C.2: Payment Standards for Regulated Superannuation Funds* (2006); APRA, *Prudential Practice Guide Draft, Payment Standards for Regulated Superannuation Funds and Approved Deposit Funds*, SPG 280 (2011).

91 APRA, *Consultation*, by telephone, 23 September.

92 Supported by: AIST, *Submission CFV 146*. ASFA indicated that while this issue is not ‘unimportant’, given the present reform agenda, APRA ‘may not view providing such guidance as a high priority’: ASFA, *Submission CFV 154*.

93 As recommended in Rec 3–4.

- 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;⁹⁴ 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.

19.84 In addition to developing the guide, the ALRC suggests that AIST, ASFA and other relevant bodies should encourage superannuation funds to provide staff involved in assessing applications for early release of superannuation on the basis of severe financial hardship, training in relation to the effect family violence may have on determining whether an applicant is unable to meet reasonable and immediate family living expenses.

Time limit

19.85 The Terms of Reference for this Inquiry require the ALRC to focus on those experiencing family violence. However, throughout this Report the ALRC has been 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 a benefit—in this case, faster early access to superannuation funds.

19.86 There is currently no time limit within which fund trustees must process applications for early release on the basis of severe financial hardship. While an application for early release of superannuation made by a victim of family violence is likely only to be made in extreme cases, this is also the case for other people making applications for early release of superannuation. As a result, the period of time before any applicant can access the funds (if early release is approved) should be as short as possible. Stakeholders have submitted that applications should be processed as quickly as possible and that, while some delays may arise from the need to obtain proof of eligibility and of identity, such claims are 'given priority'.⁹⁵ In light of this, and the ALRC's desire to avoid creating a two-tier system, the ALRC considers that no legislative or regulatory changes could usefully be made in relation to facilitating the prompt processing of applications for early release in circumstances involving family violence.⁹⁶

94 This is linked to the issue of separation under one roof in the context of social security considered in Ch 6.

95 AIST, *Submission CFV 146*.

96 Ibid; ATO Superannuation Consultative Committee, *Consultation*, Sydney, 13 September 2011.

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

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

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

Compassionate grounds

19.87 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.⁹⁷

19.88 A person may apply to DHS for early access on compassionate grounds where the benefits are required for a category of narrowly defined expenses:

- 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

⁹⁷ *Superannuation Act 1976* (Cth) s 79B; *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.19A(1).

- expenses in other cases where APRA has determined that the release is consistent with one of the foregoing grounds.⁹⁸

19.89 DHS determines applications for early release on compassionate grounds. DHS (or more specifically, the assessor) must be satisfied that the applicant's circumstances fit into one of the specified grounds and that the applicant lacks the financial capacity to meet the expenses without a release of benefits.⁹⁹ 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.¹⁰⁰

19.90 If a person satisfies the requirements, DHS may release a single lump sum of an amount reasonably required, taking account of the ground upon which the application was made and the applicant's financial capacity.¹⁰¹

19.91 The DHS *Guidelines for Early Release of Superannuation Benefits on Compassionate Grounds* (Guidelines) provide guidance to DHS assessors.¹⁰² 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 capacity 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'.¹⁰³

19.92 Throughout this Inquiry, stakeholders have commented on two key areas in relation to early release on compassionate grounds. The first is the current administration of the compassionate grounds—the ALRC recommends additional training and guidance in this regard. The second relates to options for reform of the compassionate grounds—the ALRC does not recommend amendment to existing compassionate grounds or creation of a new ground to account for early release for purposes stemming from family violence.

98 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.19A(1). In *Flanagan v APRA* [2004] FCA 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: APRA, *Guidelines for Early Release of Superannuation Benefits on Compassionate Grounds* (2010) 52–65.

99 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.19A(2).

100 See *Ibid* reg 6.19A(2)–(5).

101 The sum must not exceed an amount determined by DHS 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.

102 The ALRC understands these Guidelines were transferred to DHS but mirror the former APRA, *Guidelines for Early Release of Superannuation Benefits on Compassionate Grounds* (2010).

103 *Ibid*, 8.

Administration of compassionate grounds

19.93 Administration of early release of superannuation on compassionate grounds was transferred from APRA to DHS following legislative changes in September 2011.¹⁰⁴

19.94 Throughout the Inquiry a number of stakeholders expressed general concerns about the administration of compassionate grounds. For example, the Ombudsman expressed the view that assessment of applications for early release of superannuation on compassionate grounds ‘should involve processes capable of identifying and responding to vulnerable applicants’ and that ‘the process should have the flexibility to identify vulnerable applicants at any stage and ensure that a single assessor is responsible for their application’.¹⁰⁵

19.95 DHS has advised that upon transfer of responsibility for administration, the assessment team was transferred from APRA into DHS and that while there is a ‘sense of continuity in the management of the program’, a number of ‘service delivery improvements’ are planned.¹⁰⁶ The improvements will in part draw upon the experience and resources of the broader DHS portfolio to provide financially vulnerable customers, including those seeking early access to superannuation, with increased and coordinated support and access to services as well as case management.¹⁰⁷

19.96 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 DHS. The ALRC considers that many of the service delivery improvements planned by DHS in this area appear positive. However, where a compassionate ground may otherwise be made out, the ALRC considers that the Guidelines and associated training may be two areas in which the administration of compassionate grounds may be amended to account for applicants experiencing family violence.

Time period

19.97 The Service Delivery Agreement between APRA and DHS requires applications for early release on compassionate grounds to be assessed by DHS within 10 business days; however ‘this turnaround time can increase in busy periods’.¹⁰⁸ DHS also administers ‘prioritisation criteria which allow for applicants in certain circumstances to have their applications assessed within 48 hours of prioritisation being approved’.¹⁰⁹

104 *Superannuation Legislation Amendment (Early Release of Superannuation) Act 2011* (Cth). Between February and September 2011, APRA delegated responsibility for early release on compassionate grounds to DHS following Machinery of Government Changes: DHS, *Submission CFV 155*.

105 Commonwealth Ombudsman, *Correspondence*, 28 October 2011.

106 DHS, *Consultation*, by telephone, 30 September 2011.

107 *Ibid* *Consultation*.

108 DHS, *Submission CFV 155*.

109 *Ibid*.

19.98 Of the complaints the Ombudsman's office investigated in 2010 about 'processing of applications for approval of early release of superannuation on compassionate grounds', the Ombudsman 'found that ... delay was attributed to two main factors'—'complainants reported difficulty in understanding or obtaining the documents' required, and 'APRA's administrative arrangements concerning the order in which applications are assessed and reassessed can cause delays in processing'.¹¹⁰

19.99 The ALRC suggests that, in the course of developing and revising material made available to customers wishing to make an application for early release, or with respect to the application forms themselves, DHS should consider any changes that could usefully be made to more clearly outline the process and documents required in support of an application for early release. The ALRC considers that the DHS case management approach and prioritisation criteria may assist in addressing some stakeholder concerns with respect to administrative arrangements and associated delays.

Guidelines

19.100 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 that DHS should amend the Guidelines to ensure that they:

- contain a definition of family violence;¹¹¹
- 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.¹¹²

Training

19.101 DHS has advised that in late 2011 and early 2012, it will review and implement training of assessors in order to ensure sensitive and appropriate customer engagement:

Recently we have rolled out training around disability awareness, mental health issues ... by extension, we could look at rolling out training for family violence issues.¹¹³

19.102 The ALRC considers that the amendment of the Guidelines to include family-violence related considerations, case management and new administration

110 Commonwealth Ombudsman, *Correspondence*, 28 October 2011.

111 As recommended in Rec 3–4.

112 This is linked to the issue of separation under one roof in the context of social security considered in Ch 6. Supported by AIST, *Submission CFV 146*.

113 DHS, *Consultation*, by telephone, 30 September 2011.

arrangements provide a useful opportunity to introduce consistent, regular and targeted training in this respect.¹¹⁴ The ALRC recommends that DHS staff involved in assessing applications for early release of superannuation on compassionate grounds should be provided with training in relation to family violence, including: the potential impact on applicant's circumstances; and responding appropriately to applicants who disclose, or who are experiencing, family violence.

Options for reform

19.103 The ALRC does not consider it is appropriate to include family violence as a purpose for which an applicant may apply for early access on compassionate grounds; or to create of a new ground of early release on the basis of family violence.

19.104 Broadly speaking, several 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.¹¹⁵ 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.

19.105 Many stakeholders however reiterated the overarching policy concerns as the basis for opposing the inclusion of an additional ground, emphasising the importance of preservation of superannuation benefits until retirement, and argued that this policy objective should prevail over expanding grounds for early release.¹¹⁶

19.106 The ALRC notes that if reg 6.19A of the *SIS Regulations* were to be amended, the ALRC considers the preferable approach would be to add family violence to the existing list of purposes for which an applicant may apply for early release on compassionate grounds. In doing so, the ALRC considers that any such ground should be subject to the same eligibility criteria as the existing purposes.¹¹⁷ However, careful consideration of the types of information applicants might reasonably be required to provide to DHS in support of their application would be necessary,¹¹⁸ and 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.¹¹⁹

114 Confidential, *Submission CFV 165*; National Welfare Rights Network, *Submission CFV 150*; AIST, *Submission CFV 146*.

115 ASFA, *Submission CFV 154*; AIST, *Submission CFV 146*; ACTU, *Submission CFV 39*; Women's Legal Services NSW, *Submission CFV 28*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; WEAVE, *Submission CFV 14*.

116 ASFA, *Submission CFV 24*. See also ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*.

117 ACTU, *Submission CFV 39*.

118 Ibid; Commonwealth Ombudsman, *Submission CFV 16*.

119 Commonwealth Ombudsman, *Submission CFV 16*.

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

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

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

Other issues

Contacting applicants

19.107 In situations involving family violence, an applicant 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 applicant experiencing family violence may be jeopardised in circumstances if the superannuation fund or DHS contacts them in relation to their application.

19.108 In the course of this Inquiry stakeholders advised that applicants are contacted using the 'contact details nominated', which includes a preferred telephone number and a postal address that can be separate from the residential address.¹²⁰ AIST emphasised that fund staff 'do not acknowledge that an application has been submitted unless it has confirmation that it is speaking to the member concerned'.¹²¹ AIST also advised that most superannuation fund 'administration systems facilitate the inclusion of a "flag" on the member's account to indicate special treatment when the account is accessed in the future'.¹²²

19.109 However, ASFA indicated that it is difficult to suggest a mechanism that would guarantee the safety of members experiencing family violence as there is 'no guarantee as to who is controlling the application', the person using or experiencing family violence.¹²³

120 DHS, *Submission CFV 155*.

121 AIST, *Submission CFV 146*.

122 Ibid.

123 ASFA, *Submission CFV 154*.

19.110 The ALRC makes no recommendations in this regard, but suggests that any family violence-related training provided to DHS and superannuation fund staff could assist in raising awareness about the potential use of existing processes such as identity verification and administrative flags where family violence is identified.

Data collection

19.111 The guiding principles developed in the course of the Super System Review include principles with respect to the need for high quality research and data.¹²⁴ The ALRC understands that as part of the Stronger Super reforms APRA will be ‘collecting greater levels of data’.¹²⁵

19.112 Accordingly, given the importance of comprehensive data in providing a sound evidence base upon which the Government can make future policy in this area, the ALRC suggests that superannuation funds, AIST, ASFA, APRA and DHS should consider ways in which early release data could be captured in order to provide a ‘better understanding ... of whom and why members are trying to access early release of their benefits’.¹²⁶ This would be particularly useful in the course of any future consideration of whether family violence should be added to the existing list of purposes for which an applicant may apply for early release of superannuation on compassionate grounds.

124 J Cooper and others, *Super System Review Final Report: Part One—Overview and Recommendations* (2010), Overview 4.

125 AIST, *Submission CFV 146*.

126 *Ibid.*

Part G— Migration

Chapters

- 20. Migration Law—The Family Violence Exception
- 21. The Family Violence Exception—Evidentiary Requirements
- 22. Refugee Law

20. Migration Law—The Family Violence Exception

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Summary

20.1 This chapter considers 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.¹

20.2 The suite of recommendations in this chapter aims to improve the accessibility of the family violence exception to victims of family violence.

¹ Provisions relating to family violence are found in the *Migration Regulations 1994* (Cth) pt 1 div 1.5. In this Report the ALRC uses the expression ‘family violence’, as defined in Ch 3. A number of overseas jurisdictions use the term ‘domestic violence’ in their legislation—where that is the case, the ALRC replicates that terminology.

20.3 The ALRC’s principal recommendation is that the family violence exception should be expanded to cover secondary applicants for onshore permanent visas, and holders of a Prospective Marriage (Subclass 300) visa who have experienced family violence but who have not married their Australian sponsor. The ALRC makes a further recommendation that secondary applicants for a temporary visa should be able to access a new onshore temporary visa, to allow them to remain in Australia to seek services and make arrangements to return to their country of origin, or to apply for a new visa.

20.4 The ALRC also recommends targeted education and training for visa decision makers, ‘competent persons’² and ‘independent experts’³, and better information dissemination for visa applicants in relation to legal rights and family violence support services, prior to and on arrival in Australia.

Australia’s partner visa scheme

20.5 Partner visas form part of Australia’s family migration stream allowing non-citizens to enter and remain in Australia on the basis of their spouse or de facto relationship (both opposite and same-sex) with an Australian citizen or permanent resident.⁴ All applicants for a partner visa must be sponsored by an Australian citizen or permanent resident.⁵

Partner visas

20.6 To obtain permanent residence on a partner visa, applicants must go through a two-stage process.⁶ 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.⁷ 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.⁸ After this probationary period, the relationship is reassessed and a permanent visa can

2 ‘Competent persons’ refer to a range of professionals who may give statutory declaration evidence in support of a non-judicially determined claim of family violence. See Ch 21.

3 An ‘independent expert’ refers to a Centrelink social worker, to whom a visa decision maker can refer a non-judicially determined claim of family violence where he or she is not satisfied on the evidence presented that the applicant has suffered family violence. See Ch 21.

4 See, generally, Department of Immigration and Citizenship, *Fact Sheet 30: Family Stream Migration—Partners* (2010) <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.

5 *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.

6 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.

7 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) <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.

8 *Migration Regulations 1994* (Cth) reg 1.15A outlines the factors that must be considered in determining whether a spouse or de facto relationship is genuine.

only be granted if, among other things, the spouse or de facto relationship remains ‘genuine and continuing’.⁹

Prospective marriage visas

20.7 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),¹⁰ that allows for entry into Australia for a nine-month period, within which the marriage must take place.¹¹ 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.

The family violence exception

How the exception works

20.8 The family violence exception is set out in the criteria for the relevant visa under sch 2 of 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, needed for obtaining permanent residence. The Department of Immigration and Citizenship (DIAC) guidelines for decision makers—the *Procedures Advice Manual 3* (PAM)—state that 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
 - 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.¹²

20.9 In addition to the partner visa class, the family violence exception can currently be invoked in certain skilled stream (business) visa classes.¹³ In those cases, the secondary visa applicant can rely on the family violence exception if the relationship

9 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 dependant child of the relationship. See, eg *Migration Regulations 1994* (Cth) sch 2, cl 100.221(5) in relation to Subclass 100 visas.

10 *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.

11 *Ibid* sch 2 cl 300.511.

12 Department of Immigration and Citizenship, *Procedures Advice Manual 3* (2010)—*The FV Provisions in Migration Law*, [2.1].

13 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).

has ceased, and the secondary visa applicant, or a member of his or her family unit, has suffered family violence committed by the primary visa applicant.¹⁴

20.10 In order to meet the family violence exception, applicants must satisfy the requirements for a judicially or non-judicially determined claim of family violence prescribed in regs 1.23(2)–(14).¹⁵

20.11 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, on average, they account for approximately 1.5% of all partner visa cases.¹⁶

Policy tensions

20.12 In Chapter 1, the ALRC outlines some of the key themes and policy tensions that are common in each of the Inquiry areas. The policy challenge in this area is to ensure accessibility to the family violence provisions for genuine victims of family violence while preserving the integrity of the visa system.

20.13 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 Australian 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.

20.14 Integrity concerns relate to ensuring that the visa system is not open to abuse or manipulation. As DIAC articulated in its submission, the finite number of permanent visas granted may mean that, ‘some applicants will seek to contrive or exaggerate claims to meet visa requirements’.¹⁷ As a result

14 See, eg, *Migration Regulations 1994* (Cth) sch 2 cl 846.321(3). 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 ‘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 visa applicant.

15 The evidentiary requirements are discussed in Ch 21.

16 Based on statistics from DIAC’s Annual Report for the period from 2005–09, and comparing the number of family violence claims with the total number of partner visa applications made.

17 DIAC, *Submission CFV 121*.

non-genuine applications have the potential to disadvantage genuine applicants who are waiting for their decisions on their visa applications and to reduce the benefit to Australia which the government hopes to deliver through the Migration Program.¹⁸

20.15 DIAC stressed that an ideal system is one that ‘would be sufficiently simple that it could be accessed by all applicants without generating an “industry” while providing robust assessment of claims and correct identification of non-genuine applications’.¹⁹

Expanding the family violence exception

20.16 During the Inquiry, a major issue identified was whether the family violence exception should be expanded to cover a wider range of visa subclasses. The ALRC recommends that the family violence exception should also be available to Prospective Marriage (Subclass 300) visa holders who are victims of family violence, but who have not married their Australian sponsor. It should also be available to secondary applicants where there is an open application for an onshore permanent visa.

20.17 For victims of family violence on temporary visas, the ALRC recommends that such persons should be able to apply for a temporary family violence visa that would allow them time to access services and make arrangements to leave Australia, or to apply for another visa.

Prospective marriage visas

20.18 A Prospective Marriage visa holder must marry his or her Australian sponsor within the visa period (nine months), before applying for an onshore partner visa. 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 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.²⁰ 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 to obtain permanent residence.

20.19 In the report, *Equality Before the Law: Justice for Women* (ALRC Report 69), the ALRC expressed concerns in relation to the position of women entering Australia on a Prospective Marriage visa.²¹ The ALRC highlighted concerns that the provisions treat women as a commodity in that ‘if the relationship does not work out, the woman

18 Ibid. Attachment A includes a table showing the number of claims against the family violence exception since 2008–09 years, including the number of cases referred to the Department of Human Services (Centrelink).

19 DIAC, *Submission CFV 121*.

20 See *Migration Regulations 1994* (Cth) sch 2 cl 820.211(8)–(9).

21 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), 224.

can be sent back to her country of origin'.²² Similar concerns have been expressed by academic commentators.²³

Vulnerable position of prospective marriage visa holders

20.20 Throughout the Inquiry, the ALRC often heard about the vulnerable position of Prospective Marriage visa holders who are the victims of family violence.²⁴ Case studies presented by stakeholders suggest that Prospective Marriage visa holders are even more vulnerable than those on Partner visas, due to: heightened isolation, lack of social and financial support, language barriers, poor knowledge of the legal system, and limited time spent in Australia.²⁵

20.21 In addition to having to relocate to Australia to be married, many victims of family violence find it difficult to return home due to cultural stigma, financial constraints and other reasons, if the marriage does not eventuate. In the worst case scenario, a person may risk persecution upon returning to their country of origin having failed to marry.²⁶

20.22 There was uniform support for the ALRC's proposal to expand the family violence exception to cover those on Prospective Marriage visas who have not married their Australian sponsor.²⁷ DIAC agreed that, as Prospective Marriage visa holders may remain in Australia for up to nine months prior to the marriage,

there is a risk that some visa applicants may be manipulated and forced to remain in an abusive relationship. Such amendments [as proposed by the ALRC] would ensure that Prospective Marriage visa holders have a legal basis for having their claims heard by the Department.²⁸

A legitimate expectation of a permanent migration outcome

20.23 The ALRC considers that expanding the family violence exception to cover Prospective Marriage visas is consistent with the policy intention of the family violence exception—to ensure that visa applicants do not have to remain in a violent relationship to ensure a migration outcome. It is also consistent with the ALRC's view that the family violence exception should be available where there is a legitimate expectation of a permanent migration outcome. It can be argued that Prospective

22 Ibid.

23 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; M Crock, 'Women and Migration Law' in P Easteal (ed) *Women and the Law* (2010) 328; P Easteal, 'Broken Promises: Violence Against Immigrant Women in the Home' (1996) 21(2) *Alternative Law Journal* 53.

24 See, eg, IARC, *Submission CFV 149*; WEAVE, *Submission CFV 106*.

25 IARC, *Submission CFV 149*; WEAVE, *Submission CFV 106*; Bringa Refuge, *Submission CFV 96*; Erskine Rodan and Associates, *Submission CFV 80*.

26 RILC, *Submission CFV 129*.

27 Confidential, *Submission CFV 165*; N Dobbie, *Submission CFV 163*; RAILS, *Submission CFV 160*; ANU Migration Law Program, *Submission CFV 159*; Law Institute of Victoria, *Submission CFV 157*; Townsville Community Legal Service, *Submission CFV 151*; IARC, *Submission CFV 149*; Migration Institute of Australia, *Submission CFV 148*; RILC, *Submission CFV 129*; DIAC, *Submission CFV 121*; WEAVE, *Submission CFV 106*; Bringa Refuge, *Submission CFV 96*.

28 DIAC, *Submission CFV 121*.

Marriage visa holders have such an expectation in coming to Australia in order to marry their Australian sponsor with the ultimate aim of applying for a permanent Partner visa.

Preserving the integrity of the system

20.24 DIAC suggested that there was some risk in expanding the family violence exception—‘applicants may perceive the requirements of a Prospective Marriage visa as easier to pass and seek to use this and a family violence claim to obtain permanent residence’.²⁹ However, it agreed that such risks could be mitigated if the procedures for verifying the occurrence of family violence were sufficiently robust.³⁰ National Legal Aid suggested that the change be the subject of research to ‘identify whether the integrity of the system has been adversely affected’.³¹

20.25 In the ALRC’s view, the safety of Prospective Marriage visa holders is best ensured by allowing victims to access the family violence exception. If the ALRC’s recommendation is implemented, the Australian Government may wish to consider further amendments to enhance the integrity measures around the criterion for a Prospective Marriage visa.

A new class of visa?

20.26 In *Family Violence and Commonwealth Laws* (ALRC Discussion Paper 76) (Discussion Paper) the ALRC raised other possible options for reform to ensure that victims of family violence on Prospective Marriage visas were protected including: the introduction of a new temporary visa,³² and abolishing the Prospective Marriage visa in favour of a subclass of tourist visa, similar to the approach taken in New Zealand.³³ There was no support among stakeholders for abolishing the Prospective Marriage visa in favour of a visitor visa model similar to that in place in New Zealand.³⁴

20.27 However, some stakeholders supported the notion of a new temporary visa. Such a visa could allow victims to pursue Ministerial Intervention under s 351 of the *Migration Act* without first having to appeal the decision to cancel the Prospective Marriage visa to the Migration Review Tribunal (MRT), or allow a period of time for recovery from trauma associated with family violence and to make appropriate arrangements to leave Australia.³⁵

29 Ibid.

30 Ibid. See also IARC, *Submission CFV 149*. The ALRC addresses the evidentiary requirements in Ch 21.

31 National Legal Aid, *Submission CFV 164*.

32 Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), Proposal 20–3.

33 Ibid, Question 20–5. The New Zealand visitor visa model is also discussed: 684.

34 Law Institute of Victoria, *Submission CFV 157*; DIAC, *Submission CFV 121*.

35 Law Institute of Victoria, *Submission CFV 157*; RILC, *Submission CFV 129*. For example, the LIV envisaged that a temporary visa could allow for a 6 week period (extendable in exceptional circumstances) to allow a person to recover from injury or trauma, and to make arrangements to leave Australia. Such a visa should also allow access to Special Benefit payments.

20.28 DIAC considered that retaining the Prospective Marriage visa would keep intact some system integrity measures beneficial to both it and visa applicants. The creation of a new class of visitor visa was considered inappropriate as the current visitor visas requires that applicants ‘intend only a visit to Australia—rather than have a pre-formed intent to seek to migrate’.³⁶ The new visitor visa would not be more beneficial to victims of family violence because those on the new visitor visa

may have a reasonable expectation of being sponsored for a permanent visa at the conclusion of their initial stay. This would be the case particularly for fiancés or couples who wish to use such a visa to develop their relationship to a point required for a Partner visa. As a result, holders of this visa may have similar incentives to remain in a violent relationship as some Prospective Marriage visa applicants currently do.³⁷

20.29 DIAC also argued that creation of a new visitor visa would also be contrary to ‘deregulation efforts underway by the Department to reduce the number of visas and simplify them’.³⁸

20.30 DIAC argued that an advantage of keeping the Prospective Marriage visa—in addition to allowing a nine-month stay, as opposed to three months for visitor visas—is that both applicants and sponsors must meet a range of other migration checks, including in depth health and character assessment.³⁹ It also allows for some scrutiny of relationship intentions as applicants are required to have met their sponsor in person and to have formed a genuine intention to marry. No such requirements are in place for visitor visas.

20.31 The ALRC is of the view that the safety of victims of family violence would be best achieved by retaining the Prospective Marriage visa and providing for access to the family violence exception, rather than the creation of a new visitor visa subclass for this purpose.

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

Secondary applicants for permanent visas

20.32 The ALRC recommends that the *Migration Regulations* should be amended to provide that the family violence exception is accessible by secondary applicants for all onshore permanent visas.

20.33 A number of temporary or provisional visas provide a pathway to permanent residency—that is, to be eligible for a permanent visa; a person must have previously

36 DIAC, *Submission CFV 121*.

37 *Ibid.*

38 *Ibid.*

39 *Ibid.*

held a temporary or provisional visa.⁴⁰ Stakeholders have expressed concern that, where such pathways exist, secondary visa holders—usually a spouse and/or children—are especially vulnerable to family violence, as they are dependent on the relationship with the primary visa holder for a permanent migration outcome. 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 to be 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 the expiration of the temporary visa.⁴¹

20.34 A problem arises that, by the time an application for a permanent visa is made, a secondary visa applicant—who may have been in a violent relationship for some time on the temporary visa—has no access to the family violence exception. A victim of family violence may therefore feel compelled to stay in that violent relationship until such time as the person and his or her partner are granted permanent visas, before taking steps to ensure safety.

20.35 Many stakeholders supported expanding the family violence exception to secondary applicants when an application for a permanent visa is made.⁴² The Immigration Advice and Rights Centre (IARC) agreed that all secondary applicants for permanent visas should be able to access a ‘consistent and fair regime to gain Australia’s protection if they become a victim of family violence at the hands of a primary visa applicant’.⁴³ DIAC suggested that expanding the family violence exception in this way is consistent with the ‘policy rationale behind the family violence exception to prevent people remaining in violent relationships in order to preserve his or her eligibility for a permanent visa’ and that:

to do this effectively, it is necessary to identify people who have a reasonable expectation of obtaining permanent residence on the basis of their partner relationships. The Commission’s proposal to open the provisions to people in

40 For example, the Contributory Aged Parent (Subclass 884) visa is a temporary visa that allows aged parents who are in Australia on temporary basis and who have children living in Australia, to live in Australia for two years. Holders of this visa can then apply for the Contributory Aged Parent (Residence) (Subclass 864) visa.

41 National Legal Aid, *Submission CFV 75*.

42 National Legal Aid, *Submission CFV 164*; RAILS, *Submission CFV 160*; ANU Migration Law Program, *Submission CFV 159*; Law Institute of Victoria, *Submission CFV 157*; Confidential, *Submission CFV 152*; Townsville Community Legal Service, *Submission CFV 151*; IARC, *Submission CFV 149*; Migration Institute of Australia, *Submission CFV 148*; WEAVE, *Submission CFV 106*.

43 IARC, *Submission CFV 149*.

Australia with open permanent visa applications would be a feasible way of identifying this cohort.⁴⁴

The need for consistency

20.36 The ALRC considers that the inconsistent and differential application of the family violence exception across different visa subclasses may threaten the safety of victims of family violence. Consistency in the application of the family violence exception across visa subclasses addresses a key theme in this Inquiry—that of accessibility.

20.37 There appears to be no sound policy reason why the exception should apply to protect secondary visa applicants on certain business (skilled stream) visas—as it currently does—but not to other onshore permanent visas. Family violence situations may arise between a primary and secondary visa applicant for any kind of visa. Victims should not have to remain in a violent relationship in order to ensure that their eligibility for a permanent visa is preserved.

20.38 Family violence may have occurred before and/or after an application for a permanent visa is made. Therefore the family violence exception should be made available to secondary applicants as a time of application or time of decision criterion in respect of a permanent visa application.

Consequential considerations

20.39 DIAC also suggested that if the family violence exception were to be expanded to cover all secondary applicants for permanent visas, consideration would have to be given to some consequential policy and implementation issues, including:

- measures to ensure that the expanded provisions worked with an appropriate measure of system integrity, for example a requirement that the primary applicant is granted a visa before a victim is granted theirs and/or a sponsorship bar that prevented the victim from sponsoring their ex-partner for 5 years;
- interaction with ‘Skill Select’, a new model for selecting skill migrants which will take effect from 1 July 2012 and which will change both the visa application process and the distribution between onshore and offshore visas for skilled migrants;
- how such provisions would apply to long-term Subclass 457 visa holders who move to Employer Nominated Scheme (ENS) or Regional Skilled Migration Scheme (RSMS) visas; and
- how would the Department best ensure consistency in the processing of family violence cases across multiple visa streams.⁴⁵

20.40 The ALRC agrees that such considerations will need to be considered when implementing the ALRC’s recommendation.

44 DIAC, *Submission CFV 121*.

45 DIAC, *Submission CFV 121*.

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

Temporary visas

20.41 For secondary visa holders of temporary visas, the ALRC recommends that a new temporary visa be created to allow victims of family violence to remain in Australia for a period of time to access services and make arrangements to return to their country of origin or to apply for another visa.

20.42 Some stakeholders expressed concerns for the safety of primary holders of student and visitor visas who form a relationship with an Australian resident and are subjected to family violence.⁴⁶ Similar concerns were expressed in relation to secondary holders of temporary visas, who may be subjected to family violence by a primary visa applicant.⁴⁷

20.43 Divergent views were expressed by stakeholders about the legitimate role of the migration system in ensuring the safety of victims of family violence who are in Australia temporarily. A number of stakeholders argued that the family violence exception should apply to temporary visa holders, to give effect to Australia's 'overriding obligation' as a party to international human rights instruments.⁴⁸ Others argued that there is no need for reform of migration law 'in relation to family violence matters for those victims who come to Australia on a *truly temporary basis* (such as tourism or business visitors, international students and their spouses) knowing that they have to return to their prospective countries'.⁴⁹

Expectation of a permanent migration outcome

20.44 Section 30 of the *Migration Act* defines a 'temporary visa' as a visa that allows the holder to remain in Australia for a specified period while the holder has a specified status. One problem with extending the family violence exception to cover temporary or provisional visas lies in being able to define when and whether there is a reasonable expectation of a permanent migration outcome. DIAC submitted that—unlike the situation where a permanent visa application has been made, and a reasonable expectation of a migration outcome is formed—it would be legally and practically

46 See Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*; WEAVE, *Submission CFV 31*.

47 ANU Migration Law Program, *Submission CFV 79*; National Legal Aid, *Submission CFV 75*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*; WEAVE, *Submission CFV 31*.

48 Townsville Community Legal Service, *Submission CFV 151*; WEAVE, *Submission CFV 106*; AASW (Qld), *Submission CFV 38*; Good Shepherd Australia New Zealand, *Submission CFV 41*.

49 Refugee Advice & Casework Service Inc, *Submission CFV 111*.

more difficult to define groups of temporary residents who had similar reasonable expectations'.⁵⁰

20.45 Other stakeholders pointed out that, in practice, there are some temporary visa subclasses where applicants may have a reasonable expectation of a permanent migration outcome once certain conditions are satisfied. For example, the Migration Institute of Australia submitted that 'this is particularly true of many holders of Subclass 457 visas, a considerable number of whom go on to obtain permanent residence through employer sponsorship'.⁵¹

Ministerial intervention

20.46 In the Discussion Paper, the ALRC asked whether s 351 of the *Migration Act* should be amended to allow victims of family violence on temporary visas to apply for Ministerial Intervention in circumstances where there has not been a decision made by the MRT and, if a permanent visa is granted, what factors should influence this decision.⁵²

20.47 Stakeholders did not support such an amendment.⁵³ DIAC submitted that Ministerial Intervention provisions 'are designed as a safety net option of last resort for people who do not meet the legal requirement for the grant of a visa', such that allowing victims of family violence to make direct requests to the Minister would

fundamentally change the concept and operation of the Ministerial Intervention ... [and] may also raise questions such as why family violence victims get direct access to the Minister, while such direct access is not available to other vulnerable groups, such as the parents of young Australian citizen children.⁵⁴

A new temporary visa for victims of family violence?

20.48 The Law Institute of Victoria (LIV) submitted that, even if the family violence exception were to be expanded to cover secondary visa applicants where an application for a permanent visa has been made—as the ALRC recommends—this does not provide a pathway 'for a person on a temporary visa who suffers family violence and then leaves the primary visa holder, where no further visa application is made by the primary visa holder'.⁵⁵ The LIV therefore recommended that a new subclass be created for 'victims of family violence who hold temporary Spouse Dependent visas'.⁵⁶ The LIV envisaged that such a visa would allow the victim to stay in Australia for a temporary period of time—irrespective of when the violence occurred and the

50 DIAC, *Submission CFV 121*.

51 Migration Institute of Australia, *Submission CFV 148*.

52 Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), Question 20–3.

53 Law Institute of Victoria, *Submission CFV 157*; DIAC, *Submission CFV 121*; Refugee Advice & Casework Service Inc, *Submission CFV 111*.

54 DIAC, *Submission CFV 121*.

55 Law Institute of Victoria, *Submission CFV 157*.

56 *Ibid.*

temporary visa type—allowing the victim time to access support services and decide how to proceed.⁵⁷

20.49 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.⁵⁸ 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.⁵⁹

20.50 There was considerable support for the creation of a new visa in Australia, taking into consideration the Canadian approach.⁶⁰ For example, the ANU Migration Law Program submitted that such a visa

would break the nexus of dependence on the primary visa applicant and allow them to apply for a visa separately. The visa application would need to carry with it the right to a bridging visa with work rights to allow applicants to maintain households and care for any dependants.⁶¹

20.51 The Refugee Advice and Casework Service (RACS) agreed that, if there is a need to allow a temporary visa holder to remain in Australia temporarily after leaving the violent relationship,

a practical measure would be to allow victims to apply for a Bridging Visa E, based on the victim’s intention to make suitable arrangements to leave Australia, rather than through avenues of Ministerial Intervention.⁶²

20.52 The Migration Institute of Australia submitted that the factors listed in the Canadian model should be taken into consideration in determining whether a permanent visa should be granted.⁶³

Separating protection from the migration outcome

20.53 The visa system contemplates that temporary visas, by their nature, do not envisage an applicant being in Australia beyond the specified period contemplated by the relevant visa. Any move to extend the family violence exception to apply to temporary visas or to create a new visa subclass that provides for a permanent migration outcome, risks creating an incentive to claim family violence as a means of securing a migration outcome. On the other hand, the ALRC acknowledges that

57 Ibid.

58 See generally, Immigration and Citizenship Canada, *IP 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* (2011).

59 See Ch 21.

60 ANU Migration Law Program, *Submission CFV 159*; Law Institute of Victoria, *Submission CFV 157*; Migration Institute of Australia, *Submission CFV 148*; Refugee Advice & Casework Service Inc, *Submission CFV 111*.

61 ANU Migration Law Program, *Submission CFV 159*.

62 Refugee Advice & Casework Service Inc, *Submission CFV 111*.

63 Migration Institute of Australia, *Submission CFV 148*.

Australia owes legal and moral obligations to ensure the safety of those who are in Australia on temporary visas.

20.54 The ALRC considers that there is merit in creating a new temporary visa subclass for secondary visa applicants who are victims of family violence. Such a visa should entitle the holder to access social security benefits and entitlements. A temporary visa that gives victims time and resources to access support services and make arrangements to leave Australia better ensures the safety of victims of family violence. It allows victims to leave a violent relationship with knowledge that they can take measures to protect their safety without being removed from Australia immediately. However, it is important that such a visa is temporary, so as not to ‘incentivise’ family violence claims.

20.55 If the temporary visa holder applies for another visa with a permanent migration outcome, the integrity of the system is not compromised as the applicant will have met the requirements for a permanent visa in his or her own right.

20.56 If a new temporary visa subclass is created, this may alleviate the burden on Ministerial Intervention under s 351 of the *Migration Act*—a measure of last resort. Ministerial Intervention could accommodate cases where victims of family violence have resided in Australia for a long period of time and have formed strong ties, or have children resulting from the relationship. In these cases, the expectation of, and necessity for, a permanent migration outcome could be matters to be considered by the Minister for Immigration and Citizenship.

Access to family violence services and social security

20.57 During the Inquiry, stakeholders expressed considerable concern about the limited ability for temporary visa holders to access crisis services, accommodation, and income support.⁶⁴ For example, Domestic Violence Victoria and others in a joint submission submitted that, in relation to temporary visa holders:

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.⁶⁵

20.58 In the Discussion Paper, the ALRC expressed a view that there is a role for the migration system in ensuring access to family violence services and social security entitlements for temporary visas. Stakeholders have argued that, in practice, certain visa subclasses restrict the ability of victims to access to family violence services and social security payments and entitlements.⁶⁶ As noted in Chapter 7, a general principle of social security law is that a person must be an Australian resident—defined as an

64 NSW Women’s Refuge Movement Working Party, *Submission CFV 120*; Confidential, *Submission CFV 36*; Confidential, *Submission CFV 35*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*; WEAVE, *Submission CFV 31*; ADFVC, *Submission CFV 26*.

65 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*.

66 Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), 677.

Australian citizen, a permanent visa holder, or a Protected Special Category visa holder—to qualify for social security payments and entitlements.⁶⁷ 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.⁶⁸

20.59 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.⁶⁹ Currently, such determinations are in force for nine types of temporary visa, including Partner (Subclass 820 and 209) visas.⁷⁰

20.60 There appears to be no reason why such a determination could not also be made in relation to any new visa subclass introduced in line with Recommendation 20–3. The policy intention behind exemption from Special Benefit is to recognise that a person may suffer a ‘substantial change in circumstances beyond their control’, where there is ‘domestic violence perpetrated by the sponsor’.⁷¹

20.61 Access to appropriate social security payments and entitlements may empower victims to leave violent relationships, and to take measures to ensure their safety. Access to Special Benefit will go some way to ensure that those on the new temporary family violence visa have some financial control over their lives, and are able to access family violence services, and other services to ensure their safety. The ALRC makes recommendations about this in Chapter 7.⁷²

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

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

67 *Social Security Act 1991* (Cth) s7(2); FaHCSIA, *Guide to Social Security Law* <www.fahcsia.gov.au/guides_acts/> at 1 November 2011, [2.2.4.10] (Verifying Residence/Citizenship).

68 FaHCSIA, *Social Security Payments Residence Criteria* (2011) <www.fahcsia.gov.au/sa/international/policy/Residence_Criteria> at 12 July 2011.

69 Ibid.

70 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.

71 FaHCSIA, *Social Security Payments Residence Criteria* (2011) <www.fahcsia.gov.au/sa/international/policy/Residence_Criteria> at 12 July 2011.

72 Rec 7–2.

Fee waivers in review applications

20.62 The ALRC recommends that the Australian Government should consider reviewing the MRT’s application fee arrangements—contained in reg 4.14 of the *Migration Regulations*—including their impact on the ability of victims of family violence to access merits review. Such a review should be conducted in consultation with community and migration legal centres, and the MRT. It could consider the restructuring the hierarchy of fees to ensure that victims of family violence are not unduly denied access to merits review.

20.63 Applications for all visas are considered, in the first instance, by a DIAC officer as a delegate of the Minister. In the event of an unfavourable decision, applicants can apply for merits review of the visa decision to the MRT.⁷³

20.64 When making an appeal to the MRT, an application fee must be paid.⁷⁴ Prior to 1 July 2011, the application fee for review in an MRT case was \$1400.⁷⁵ This amount is refundable to an applicant if a favourable decision on the case is made.⁷⁶ Prior to 1 July 2011, the entire fee could be waived where the relevant decision maker was satisfied that ‘the fee has caused, or is likely to cause, severe financial hardship to the review applicant’.⁷⁷ However, the *Migration Amendment Regulation 2011 (No 4)* (Cth) removed the MRT’s ability to waive the fee.⁷⁸ A separate piece of amending legislation also increased the review application fee to \$1540.⁷⁹ 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’ for a review applicant, it can reduce the fee by 50%—to \$770.⁸⁰

The impact of fee waiver removal on victims of family violence

20.65 Many stakeholders expressed serious concern about the impact of the removal of the MRT’s fee waiver power on those experiencing family violence, and called for the fee waiver power to be reinstated.⁸¹ Some argued that the requirement to pay the fee had the potential to reduce access to merits review—and the family violence

73 *Migration Act 1958* (Cth) s 347. Although the MRT 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).

74 *Migration Act 1958* (Cth) s 347(1)(c).

75 *Migration Regulations 1994* (Cth) reg 4.13(1).

76 *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 *Migration Act* in relation to the decision.

77 *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.

78 *Migration Amendment Regulation (No 4) 2011* (Cth) sch 1 reg 2.

79 *Migration Legislation Amendment Regulations (No 1) 2011* (Cth).

80 *Migration Amendment Regulation (No 4) 2011* (Cth) reg 3.

81 National Legal Aid, *Submission CFV 164*; RAILS, *Submission CFV 160*; ANU Migration Law Program, *Submission CFV 159*; Townsville Community Legal Service, *Submission CFV 151*; IARC, *Submission CFV 149*; Migration Institute of Australia, *Submission CFV 148*; RILC, *Submission CFV 129*; Community Legal Centres NSW, *Submission CFV 127*; Federation of Ethnic Communities’ Councils of Australia, *Submission CFV 126*; Refugee Advice & Casework Service Inc, *Submission CFV 111*.

exception—as well as perpetuating violence and the vulnerability of victims whose finances are controlled by their sponsor.⁸²

20.66 The Refugee and Immigration Legal Centre noted that ‘all but a handful of the people ... have been able to seek review only because they have been able to have the Tribunal fee waived completely’, and the requirement to pay a fee ‘has begun to cause hardship to clients’.⁸³ In addition, stakeholders also argued that the inability to access merits review had a number of potential consequences for victims of family violence. For example, Community Legal Centres NSW (CLC NSW) argued that as a result of the fee:

Some of these women will return to their partners (in hope that they will pay the MRT fee, and the case can be re-assessed as an ongoing relationship); some will stay unlawfully in Australia after their visa ends; some will lodge Protection Visa applications (even if they clearly cannot meet the protection visa requirements, as this is a more affordable way to remain legally in Australia and eventually access the Minister’s discretion to ‘intervene’ under s 417 of the *Migration Act*.⁸⁴

20.67 Stakeholders also argued that the financial benefit derived from the fees collected—in cases whether it would otherwise have been waived—were marginal compared to the potential detrimental impact on victims of family violence. For the financial year 2009/2010, fee waiver requests to the MRT accounted for 10% of lodgements, less than 5% of which were granted.⁸⁵ This would have amounted to \$393,500 if the new fee were paid and does not represent a significant proportion of the MRT’s revenue.

20.68 CLC NSW suggested a number of potential solutions, including:

- A hierarchy of fees, depending on the nature of the application to the MRT: e.g. business/employment related matters paying a higher fee; family visas paying a more moderate fee; family violence claims and applications from people in detention paying no fee; or
- Amend the Migration Regulations 1994 to specify that no fee is payable by an applicant who claims (at DIAC or MRT-level) to meet the family violence provisions for the visa they applied for.⁸⁶

The need to review fee structures

20.69 In the ALRC’s view, the re-introduction of the fee waiver provisions is desirable to ensure that victims of family violence have access to merits review and ultimately, the family violence exception. In particular, the ALRC is concerned about the potential

82 See case studies in submissions from IARC, *Submission CFV 149* and Community Legal Centres NSW, *Submission CFV 127*.

83 RILC, *Submission CFV 129*.

84 Community Legal Centres NSW, *Submission CFV 127* noted that, by being denied access to the MRT, a victim of family violence will not be able to access Ministerial Intervention under s 351 of the *Migration Act*.

85 Refugee Advice & Casework Service Inc, *Submission CFV 111*; Community Legal Centres NSW, *Submission CFV 127*.

86 Community Legal Centres NSW, *Submission CFV 127*.

impact the fee requirement may have on the ability of victims of family violence to access appropriate services and migration assistance to ensure their safety.

20.70 However, reverting back to the old fee waiver structure would require a broad structural reform of the MRT's fee structure, with implications extending beyond victims of family violence. In all areas of this Inquiry, the ALRC has been cognisant of avoiding the creation of a two-tiered system in which family violence is emphasised above other forms of disadvantage. For example, if the *Migration Regulations* were amended to provide that a full fee waiver is available to victims of family violence, a question arises to why victims of family violence get such treatment and not others who may also be suffering financial hardship.

20.71 Given that a new fee structure was implemented on 1 July 2011, the ALRC recommends that the Australian Government should review the impact of the provisions on victims of family violence, in consultation with community and migration legal centres and the MRT. Such a review could consider re-structuring the hierarchy of fees to ensure that victims of family violence are not unduly denied access to merits review, as suggested by the NSW CLC. The Attorney-General's Department (AGD) is currently conducting a review of the current fee arrangements.⁸⁷ The ALRC notes that AGD may wish to consider the concerns expressed by stakeholders to this Inquiry about the impact of the removal of the MRT's fee waiver on victims of family violence.

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

Partner visa sponsorships

20.72 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—provides a measure of protection for victims of family violence.⁸⁸ The ALRC makes no recommendations to amend the sponsorship requirements in light of the difficulties in implementing a separate sponsorship criterion without breaching Australia's international obligations, and adequate framing of procedural fairness and privacy obligations to the sponsor.

20.73 As noted above, 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

⁸⁷ This was brought to the ALRC's attention by National Legal Aid, *Submission CFV 164*.

⁸⁸ See *Migration Regulations 1994* (Cth) reg 1.20J.

form, which is then submitted to DIAC along with the partner visa application.⁸⁹ 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’.⁹⁰

20.74 In the Discussion Paper, the ALRC asked whether there was a need to amend the *Migration Act* and *Migration Regulations* to provide for a separate and reviewable criterion for the grant of a visa.⁹¹ It was envisaged that such a reform may provide a framework in which to assess the character of the sponsor. Parallels were drawn with the requirements for sponsorship of a child, whereby a sponsor must undergo a character assessment, and the sponsorship must be refused for people who have a conviction or have committed a registrable offence.⁹²

The problematic nature of regulating sponsorship

20.75 Stakeholders considered the introduction of a separate criterion for sponsorship in partner visas to be problematic.⁹³ DIAC submitted that:

Such measures could lead to claims that the Australian Government is arbitrarily interfering with families, in breach of its international obligations. It could also lead to claims that the Australian government is interfering with relationships between Australians and their overseas partners in a way it would not interfere in a relationship between two Australians.⁹⁴

20.76 The LIV argued that ‘issues of procedural fairness to the alleged perpetrator, privacy and discrimination outweigh any potential gains from disclosure to the applicant’.⁹⁵

20.77 On the other hand, some stakeholders supported having a separate criterion for sponsorship, ‘as it would prevent many potential victims from being sponsored initially’.⁹⁶ There were concerns that despite the current limitations on sponsorships, ‘there are a number of ways to subvert the existing protections such as marrying within

89 Department of Immigration and Citizenship, *Form SP 40—Sponsorship for a Partner to Migrate to Australia* 2011.

90 Visa Lawyers Australia, *Submission CFV 76*.

91 Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), Question 20–6.

92 See *Migration Amendment Regulations (No. 2) 2010* (Cth); *Migration Regulations 1994* (Cth) 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).

93 Law Institute of Victoria, *Submission CFV 157*; Townsville Community Legal Service, *Submission CFV 151*; DIAC, *Submission CFV 121*.

94 DIAC, *Submission CFV 121*.

95 Law Institute of Victoria, *Submission CFV 157*.

96 Migration Institute of Australia, *Submission CFV 148*. See also, National Legal Aid, *Submission CFV 164*; RAILS, *Submission CFV 160*.

the newly arrived migrant sector/community as opposed to re-sponsoring from outside Australia'.⁹⁷ The Refugee and Immigration Legal Service (RAILS) stated that

sponsors should submit to a police check in relation to past family violence convictions or protection orders when making an application to sponsor a spouse/de facto partner and that there be a discretionary power for the decision maker to refuse approval of the sponsorship on that basis.⁹⁸

20.78 DIAC noted that there may be a 'risk that Australian sponsors could be disadvantaged by previous conduct that occurred a long time ago'.⁹⁹

20.79 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'.¹⁰⁰ Rather than instituting a separate criterion for sponsorship, the ALRC considers that the safety of victims of family violence can be promoted through targeted education and information dissemination.

Education, training and information dissemination

20.80 The ALRC recommends that the Australian Government should collaborate with relevant migration service providers, community legal centres, and industry bodies to ensure targeted education and training on family violence issues for decision makers, competent persons, visa applicants and visa holders. Recognition should be given to the fact that different groups within the migration system may have differing education and information needs.

Meeting different needs across the sector

20.81 Stakeholders supported the need for education and training for all those in the migration system, but noted that education needs to be targeted to meet the needs of different groups. For example, DIAC observed that 'competent persons' are 'expected to be professionals who work with victims of family violence and so have expertise which can inform Departmental decision making'.¹⁰¹ However, such persons may not be so familiar with, or have complete understanding of, migration processes:

To this effect, it may be possible to review or improve current information in order to assist competent persons and applicants understand particular migration requirements; including the process for making and assessing family violence claims as well as guidelines on how to complete forms and comply with statutory declaration requirements.¹⁰²

97 Townsville Community Legal Service, *Submission CFV 151*.

98 RAILS, *Submission CFV 160*.

99 DIAC, *Submission CFV 121*.

100 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), 231.

101 DIAC, *Submission CFV 121*.

102 *Ibid.*

20.82 DIAC suggested that due to a large number of competent persons, it would not be possible for it undertake a ‘comprehensive training program’.¹⁰³ However, this is a role that could be performed by community and migration legal centres. The IARC argued for continued funding so that it could ‘deliver community information sessions to various organisations, including those that are able to provide statements as competent persons’.¹⁰⁴ If the ALRC’s recommendation in Chapter 21 to repeal the provisions regulating the content of a competent person’s statutory declaration is implemented, this will reduce the need for competent persons to have a complete understanding of migration processes. However, training and education can still be provided to competent persons about the migration requirements and how to complete forms in a way that ensures that evidence is well presented for the visa decision maker.

20.83 In its submission, DIAC noted that it had seen ‘benefits from centralising processing of all family violence claims made during processing of permanent Partner visa applications in a single team’.¹⁰⁵ The ALRC supports the moves within DIAC towards specialised units dealing with family violence claims as this presents opportunities for targeted training of visa decision makers, allowing them to build expertise in dealing with family violence-related claims.¹⁰⁶

20.84 In relation to independent experts, stakeholders expressed concern about inconsistent decision making by Centrelink ‘independent experts’ (social workers) in the migration context, due to lack of understanding of migration requirements, or different understandings in relation to the nature, features and dynamics of family violence.¹⁰⁷ The adoption of a common definition of family violence across the different areas of Commonwealth laws may help to address this issue.¹⁰⁸ A common definition also provides a platform for training around how the definition is applied.¹⁰⁹

20.85 In respect to migration agents, the Migration Institute of Australia indicated that—apart from training about the legal requirements—migration agents could be given training to enable them to better address family violence issues with clients in culturally sensitive ways. The Institute indicated that it runs professional development programs in which family violence is sometimes mentioned in relation to certain visa types, while no regular specific family violence module exists in the curricula, the Institute intends to develop such a module.¹¹⁰ In addition, the Institute stated that it

103 Ibid.

104 IARC, *Submission CFV 149*.

105 DIAC, *Submission CFV 121*.

106 Leveraging specialisation is crucial to the ALRC’s recommendations for reform of the evidentiary requirements in Ch 21.

107 This is discussed in more detail in Ch 21.

108 The ALRC’s recommendation for a common definition of family violence across Commonwealth legislation, including the *Migration Regulations* can be found in Ch 3.

109 In Ch 4, the ALRC makes recommendations about training and education for DHS staff (including social workers) in relation to the nature, features and dynamics of family violence: Rec 4–5.

110 Migration Institute of Australia, *Consultation*, Sydney, 13 October 2011.

will collaborate with relevant agencies and experts to provide information sessions and materials to the membership to raise awareness and understanding of these issues to the level expected of customer service officers in the above mentioned agencies.¹¹¹

Opportunities for collaboration

20.86 The ALRC considers that there are opportunities for the Australian Government to collaborate with relevant migration service providers, community legal centres, and industry bodies to ensure targeted education and training on family violence issues for decision makers, competent persons and independent experts. The safety of victims of family violence is better protected if decision makers have a strong awareness and understanding of family violence issues in the migration context.

Information dissemination to visa applicants

20.87 The ALRC recommends that the Australian Government should collaborate with migration service providers, community legal centres, and industry bodies to ensure that information about legal rights and the family violence exception are provided to visa applicants and visa holders in a culturally appropriate and sensitive manner.

Pre-embarkation information

20.88 Throughout the Inquiry, the ALRC has heard about the need to ensure that 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.¹¹² For example, the ANU Migration Law Program 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.¹¹³

20.89 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’.¹¹⁴ The RILC suggested that ‘this could go some way in addressing this underlying issue’.¹¹⁵

20.90 In the Discussion Paper, the ALRC highlighted that the provision of information could be targeted to countries where concerns about serial sponsorship exists.¹¹⁶ DIAC cautioned that ‘any efforts to provide additional information on family violence should

111 Migration Institute of Australia, *Submission CFV 148*.

112 ANU Migration Law Program, *Submission CFV 79*; National Legal Aid, *Submission CFV 75*; Good Shepherd Australia New Zealand, *Submission CFV 41*. See also R Braaf and I Meyering, *Seeking Security: Promoting Women’s Economic Wellbeing Following Domestic Violence* (2011).

113 ANU Migration Law Program, *Submission CFV 79*.

114 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), 233.

115 RILC, *Submission CFV 129*.

116 Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), 691.

be developed in a way that does not stigmatise foreign partners or their sponsors and does not unnecessarily duplicate the information available through existing program and products'.¹¹⁷

20.91 The ALRC considers that the Australian Government should consider ways to ensure that visa applicants are provided with information prior to departure to Australia. For example, DIAC submitted that it was open to amending 'the content of Partner visa grant letters in order to more clearly set out where applicants can obtain information about life in Australia, including the availability of legal services'.¹¹⁸

Settlement information

20.92 DIAC submitted that migrants in Australia 'receive or have easy access to information about legal rights and family violence services through a number of programs managed by the Department'.¹¹⁹ These include the:

- *Beginning Life in Australia* booklet;
- Adult Migrant English Program (AMEP);
- Humanitarian Settlement Services Orientation Program; and
- Settlement Grants Program.¹²⁰

20.93 In relation to the AMEP, DIAC advised that 'course content is developed by AMEP providers and may vary but usually includes general information and contacts on legal rights, family law and domestic violence'.¹²¹

20.94 Despite the existence of these programs and materials, the experience of some community and migrant legal service providers suggested many individuals remained unaware of their rights and options. The RILC submitted, in the context of prospective marriage visa holders that:

the fundamental problem persists that vulnerable persons in these situations are unaware of their options. They are often in precarious positions because of their subjection to abuse, their lack of English ability, and their fear of social disapprobation.¹²²

20.95 The Federation of Ethnic Communities' Councils of Australia (FECCA) indicated that, in its experience, information should be delivered in an accessible way—through a variety of formats—taking into account cultural appropriateness and linguistic sensitivity. Such information should be delivered by 'bilingual, bicultural community-based and/or culturally competent workers and advocates who understand the legal frameworks and the cultural dynamics of family violence, its prevention and

117 DIAC, *Submission CFV 121*.

118 *Ibid.*

119 *Ibid.*

120 *Ibid.*, Attachment B.

121 *Ibid.*

122 RILC, *Submission CFV 129*.

methods of support'.¹²³ Recent studies have also reinforced that education initiatives are most successful when: a range of different media formats are utilised; designed or piloted with community consultation and involvement; and implemented on an ongoing basis.¹²⁴

20.96 The ALRC appreciates that DIAC has in place a number of programs that deliver settlement information to migrants, including in relation to the legal system and the family violence exception. However, there appears to be scope for better collaboration between DIAC, migration services and community legal centres to better ensure that relevant information reaches the migrant community. DIAC's booklet, *Beginning Life in Australia*, for example, may not be distributed in hard copy in print format to community legal centres or migration service providers, and therefore, is not available to a segment of the community who are internet illiterate, or who have no access to the internet.

20.97 The ALRC notes that DIAC has a YouTube channel with informative videos on a number of different aspects of the migration process.¹²⁵ A video could be produced in consultation with the migration services and the community—with voiceovers in different languages—to promote healthy relationships and information about legal services in Australia.

20.98 As another example, stakeholders suggested that newly arrived on partner visas should be required to take training on respectful and healthy relationships.¹²⁶ Such training could be provided in a culturally sensitive manner by community groups, as part of the 510 hours of English classes offered as part of the DIACs settlement programs.¹²⁷

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

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

123 Federation of Ethnic Communities' Councils of Australia, *Submission CFV 126*.

124 C Poljski and A Murdolo, *On Her Way: Primary Prevention of Violence Against Immigrant Women in Australia* (2011).

125 DIAC, *ImmiTV* <www.youtube.com/user/ImmiTV> at 9 November 2011.

126 Confidential, *Submission CFV 152*; IARC, *Submission CFV 32*.

127 ADFVC, *Submission CFV 26*.

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). This was an area identified by stakeholders as being in need of substantial reform.

21.2 As noted in Chapter 20, a key policy tension in this area is the need to ensure the accessibility of the family violence exception while maintaining the integrity of the visa system. If evidentiary requirements are too strict and rigid, it may prevent access to the family violence exception for genuine victims. On the other hand, if evidentiary requirements are not sufficiently robust, there is scope for fraudulent claims or other abuse of the family violence exception for migration outcomes.¹

21.3 The ALRC recommends a new model for dealing with non-judicially determined claims of family violence. The key recommendation is for the *Migration Regulations* to be amended to provide that any evidence—in addition or as an alternative to a statutory declaration from ‘competent persons’—can validly support a non-judicially determined claim of family violence. In addition, the ALRC

¹ See Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), 700–703 for a more detailed discussion of the tension, and history of the family violence exception.

recommends that the prescriptive requirements governing statutory declarations from competent persons in reg 1.26 be repealed. This will allow applicants to bring a wide range of evidence in support of their family violence claim. Where the visa decision maker is not satisfied that an applicant has suffered family violence, referral can be made to an independent expert within the Department of Human Services (Centrelink).

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

21.5 The area of judicially determined claims of family violence was less problematic. The ALRC recommends, however, that subsections in reg 1.23 of the *Migration Regulations* that require that the violence, or part of the violence, must have occurred while the relationship was in existence, be repealed.

Evidentiary requirements

Legislative history

21.6 In their initial form, the *Migration Regulations* restricted the forms of acceptable evidence to support a family violence claim to judicially-determined evidence.² However, in response to concerns that 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)³ (*Equality Before the Law*)—legislative changes were introduced in 1995 to broaden the range of evidence that could be provided 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’.⁴ 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 and be granted permanent residence. The ultimate decision as to whether a person met the family violence exception remained with the visa decision maker.

21.8 While the 1995 amendments made the exception more accessible to victims of family violence, it caused some unintended consequences. In particular, there was uncertainty as to the level of evidence required in a competent person’s statutory declaration 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.

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.

21.9 As a result of these concerns, the Australian Government sought to amend the legislation to make the evidentiary requirements more rigorous.⁵ However, the resolution to pass these amendments was disallowed by the Senate on 1 November 2000.⁶

The current evidentiary regime

21.10 In 2005, the *Migration Regulations* were amended to provide a new system of non-judicially determined evidence.⁷ As a result, the current system provides 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 that basis;⁸ 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;⁹ and
- the visa decision maker must take as correct the opinion of the ‘independent expert’.¹⁰

21.11 These amendments reflected the policy position that where evidence of family violence has not been tested by a court, such evidence is ‘to be assessed by the Minister, and in certain circumstances, an independent expert’.¹¹ An ‘independent expert’ is defined in reg 1.21 of the *Migration Regulations* 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’.¹² The only organisation gazetted is Centrelink.¹³

Judicially-determined claims of family violence

Forms of evidence

21.12 Evidence in support of a judicially-determined claim of family violence may take the form of:

5 See *Migration Amendment Regulations (No 5) 2000* (Cth). It was proposed that where an applicant makes a non-judicially determined claim of family violence, the then Department of Immigration and Indigenous Affairs (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 Migration Review Tribunal (MRT), the Tribunal would have the discretion to ask Centrelink for a report.

6 See Commonwealth, *Parliamentary Debates*, Senate, 1 November 2000, 18870 (P McKiernan—Senator).

7 *Migration Amendment Regulations (No 4) 2005* (Cth).

8 *Migration Regulations 1994* (Cth) reg 1.23(10)(a).

9 *Ibid* reg 1.23(10)(b).

10 *Ibid* reg 1.23(10)(c).

11 Explanatory Memorandum, *Migration Amendment Regulations (No 4) 2005* (Cth).

12 *Migration Regulations 1994* (Cth) reg 1.21.

13 See Commonwealth of Australia, *Special Gazette S119* (2005). As discussed in Ch 4, Centrelink is now part of the Department Human Services (DHS).

- 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;¹⁴ or
- a conviction, or finding of guilt against the alleged perpetrator, in respect of an offence against the victim;¹⁵ 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.¹⁶

21.13 Stakeholders indicated that applicants encountered few problems once a valid judicially-determined claim of family violence had been made. However, stakeholders highlighted numerous challenges faced by victims of family violence from migrant communities and culturally and linguistically diverse (CALD) backgrounds in accessing the legal system, including: language barriers; isolation; precarious economic and employment situations.¹⁷ While these are systemic issues wider than those addressed in this Inquiry, the ALRC notes the ongoing efforts of the Family Law Council's inquiry into *Indigenous and Culturally and Linguistically Diverse clients in the family law system*.¹⁸ The ALRC suggests that the recommendations of that Inquiry will have implications for victims of family violence from CALD communities.

Post-separation violence

21.14 In November 2009, the *Migration Regulations* were amended to require—for 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’.¹⁹

21.15 The ALRC recommends that this requirement be repealed. In the ALRC's view, the safety of victims of family violence is best protected by a policy that recognises that relationship breakdown may occur over a period of time, and that the family violence exception should work to prevent a person from remaining in, or returning to, a violent relationship.

14 *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.

15 *Ibid* reg 1.23(6).

16 *Ibid* reg 1.23(4).

17 Good Shepherd Australia New Zealand, *Submission CFV 41*; AASW (Qld), *Submission CFV 38*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*; IARC, *Submission CFV 32*; WEAVE, *Submission CFV 31*; ADFVC, *Submission CFV 26*.

18 The Terms of Reference of the Council's Inquiry can be found at <www.ag.gov.au>.

19 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). While the requirement applies to both judicially-determined and non-judicially determined claims, stakeholder concerns were addressed primarily at judicially-determined claims.

Recognising the link between violence and separation

21.16 A number of stakeholders supported the proposal to repeal the requirement that the violence must have occurred while the relationship was still in existence.²⁰ There was general consensus that the requirement does not reflect the reality of relationships, where violence may escalate or begin at the point of separation. DIAC acknowledged that ‘the point at which a relationship ceases can be difficult to determine’ and that ‘persons can be particularly vulnerable to family violence at this time’.²¹

21.17 The Immigration Advice and Rights Centre (IARC) argued that ‘some couples separate from one another one in hope that a period of separation may result in reconciliation’ and that, ‘it is during this period of “separation” that family violence can occur’.²² The Law Institute of Victoria (LIV) submitted that amendment was required to acknowledge ‘victims of family violence leaving and returning multiple times and that family violence may take many different forms’.²³

21.18 Nigel Dobbie, a specialist migration agent, went further, and argued that the requirement ‘empowers the perpetrator’ because the perpetrator:

can simply end the relationship and immediately thereafter inflict violence on the victim, for example, by bashing her. As the relationship was over when the bashing occurred, the victim does not get the benefit of the family violence provision, despite a conviction of assault against the perpetrator.²⁴

21.19 It was further submitted that the perpetrator is encouraged to ‘dump and then bash’, because a sponsor who commits violence after ending the relationship does not ‘lose one of his two permitted sponsorships’,²⁵ as no visa was granted on the basis of the family violence exception.

What is the legitimate role of the family violence exception?

21.20 If the relationship has ended and family violence occurs afterwards, a question arises as to whether the migration system—via the family violence exception—should be responsible for ensuring the safety of the person, or whether that responsibility is better addressed in other contexts.

21.21 DIAC noted that, if family violence occurs after the relationship has already ceased, the visa applicant’s position in the context of the *Migration Regulations* has

20 Confidential, *Submission CFV 165*; National Legal Aid, *Submission CFV 164*; N Dobbie, *Submission CFV 163*; RAILS, *Submission CFV 160*; ANU Migration Law Program, *Submission CFV 159*; Law Institute of Victoria, *Submission CFV 157*; Confidential, *Submission CFV 152*; Townsville Community Legal Service, *Submission CFV 151*; IARC, *Submission CFV 149*; Migration Institute of Australia, *Submission CFV 148*; WEAVE, *Submission CFV 106*.

21 DIAC, *Submission CFV 121*.

22 IARC, *Submission CFV 149*.

23 Law Institute of Victoria, *Submission CFV 157*.

24 N Dobbie, *Submission CFV 163*. The submission also recognised that family violence can also be inflicted on men.

25 Ibid. As noted in Ch 20, sponsorship limitations mean that a person is allocated a quota of two sponsorships in a lifetime. A sponsorship is counted towards the quota if a person has been granted a partner or prospective marriage visa on the basis of sponsorship, or, if a visa was granted because of the family violence provisions as a result of family violence committed by the sponsor.

already changed and the family violence exception can no longer perform its intended function²⁶—that is, to allow persons to leave the relationship without prejudicing their migration status.

21.22 DIAC suggested that policy guidelines on this issue can provide greater flexibility for cases where family violence occurs during the course of a relationship breakdown. For example, the *Procedures Advice Manual 3 Guidelines* (PAM) could

indicate that decision makers, in contemplating if the family violence took place before the relationship ended, should have regard to claims that the applicant left the relationship because the behaviour of the sponsor made them feel fearful. The fact that the violent behaviour occurred after the applicant left could then justify that the applicant's feelings of fear were 'reasonable'.²⁷

21.23 DIAC further indicated that PAM could also be amended 'to clarify that Regulation 1.23 should only be invoked to refuse an application where a clear break in the relationship has occurred and the alleged family violence occurs well after that event'.²⁸

21.24 The ALRC considers that, while amendments to PAM would be useful, requirement in reg 1.23 should be repealed. The *Migration Regulations* do not require a causal nexus between the breakdown of the relationship and the fact that the alleged victim has suffered 'relevant family violence'. This point was emphasised by DIAC in its submission; all that is required is that the relationship has ceased, and the victim has suffered family violence committed by the sponsor.

21.25 The ALRC considers that—given that there is no requirement that the violence must have caused the breakdown of the relationship—the difficulty in determining when a relationship has broken down and the propensity for violence to occur around the time of separation, the policy approach expressed by the Full Federal Court in *Muliyana v Minister for Immigration and Citizenship* is preferred. That is, the family violence exception

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.²⁹

21.26 The Court also suggested that there 'will be cases where the violence occurs between former partners in circumstances, for example, many years after the relationship has ended, such that it would not qualify as 'domestic violence' within a concept of a "non-judicially determined claim for domestic violence"'.³⁰ The ALRC considers that, a common sense reading of the provision would probably rule out instances where the violence occurred a substantial time after the relationship had ceased as being 'family violence'.

26 DIAC, *Submission CFV 121*.

27 *Ibid.*

28 *Ibid.*

29 *Muliyana v Minister for Immigration and Citizenship* [2010] FCFCA 24, [34].

30 *Ibid.*, [35].

21.27 In the ALRC's view, such a policy position better reflects the nature, features and dynamics of family violence.³¹ There is substantial evidence to suggest 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.³²

21.28 The ALRC considers that the safety of victims of family violence would be best protected by repealing the requirement that the violence, or part of the violence, must have occurred while the relationship was still in existence. However, in the event that the provision is not repealed, or until it is, the ALRC recommends that amendments to PAM be made, along the lines suggested by DIAC.

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

Family violence protection orders

21.29 Until the requirement in reg 1.23 is repealed the ALRC recommends that PAM should be amended to clarify, or provide additional clarification, that a family violence protection order granted after separation should be regarded as sufficient evidence that family violence has occurred.

21.30 Since the introduction of the requirement in reg 1.23 that the violence must have occurred while the relationship was in existence, DIAC officers are less readily accepting a final family violence protection order obtained after separation.³³

21.31 Stakeholders argued that the *Migration Regulations* do not make reference 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'.³⁴

31 The nature, features and dynamics of family violence are discussed in Ch 3.

32 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.

33 This was raised by the Immigrant Women's Support Service, *Submission FV 61 Part 1*, 1 June 2010, 8, as part of the ALRC's Family Violence Inquiry in 2010. It was suggested that, 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.

34 IARC, *Submission CFV 32*. See also Visa Lawyers Australia, *Submission CFV 76*; Law Institute of Victoria, *Submission CFV 74*.

21.32 There was strong support for the proposal that PAM be updated to reflect that family violence orders obtained post-separation could be used to prove the existence of family violence.³⁵ DIAC submitted that ‘this approach is already consistent with current policy and [we would be] happy to provide additional clarification in PAM’.³⁶

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

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

Non-judicially determined claims of family violence

International comparisons

21.33 A number of overseas jurisdictions—including the US, Canada, UK and New Zealand—have family violence provisions. Although these models reflect differing policy considerations in their respective countries, their approaches to evidentiary requirements provide a useful point of comparison with the Australian system.

United States

21.34 The US has a comprehensive legislative scheme for the protection of immigrant women who are victims of ‘domestic violence’.³⁷ This is enshrined in the *Violence Against Women Act (VAWA)* of 1994.³⁸

21.35 Under US immigration law, spouses of US citizens or lawful permanent residents may 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

35 Confidential, *Submission CFV 165*; National Legal Aid, *Submission CFV 164*; RAILS, *Submission CFV 160*; ANU Migration Law Program, *Submission CFV 159*; Townsville Community Legal Service, *Submission CFV 151*; DIAC, *Submission CFV 121*; IARC, *Submission CFV 149*; Migration Institute of Australia, *Submission CFV 148*; WEAVE, *Submission CFV 106*.

36 DIAC, *Submission CFV 121*.

37 The differences in terminology are discussed in Ch 20.

38 The Act was passed as part of *Violent Crime Control and Law Enforcement Act of 1994* Pub L No 103-332, 108 Stat 1796, 1902 (US) and codified in various sections of United States Code. The Act was ‘reauthorised’ in 2000 and 2005 and, although the title of the Act refers to women, protection applies to all spouses, including men.

year conditional residence grant.³⁹ That is, the immigrant must be supported in the petition for permanent residence by his or her US spouse.

21.36 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.⁴⁰ 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.⁴¹ 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.⁴²

21.37 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. In these cases, victims of domestic violence may seek to cancel their removal from the US on this basis.⁴³ Applications are made to a judge and, if successful, cancellation of removal entitles a victim to permanent residence.

21.38 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 the claim. Generally, applicants are encouraged to seek assistance from an attorney when making an 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’.⁴⁴

Canada

21.39 In Canada, a person whose sponsorship has broken down due to family violence can apply for permanent residence on ‘Humanitarian and Compassionate’ grounds,⁴⁵ whether or not the person has temporary residence status.⁴⁶ 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

39 *Violence Against Women Act (1994)* 2005 USC 8 (US) § 1186(a)(1).

40 *Ibid* § 1154(a)(1)(A)(iii)(I).

41 *Ibid* § 1154(a)(1)(A).

42 *Ibid* § 1154(a)(1)(A)(iii)(II)(aa)(CC)(aaa), (bbb).

43 *Ibid* § 1229b (2)(A)(i)(I)–(III). A victim must show, among other things, that she has been battered or subject to extreme cruelty by a spouse or lawful US permanent resident.

44 *Ibid* § 1229b(2)(D).

45 See *Immigration and Refugee Protection Act 2001* c 27 (Canada) s 25(1); *Immigration and Refugee Protection Regulations 2002* (Canada) reg 66.

46 *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’.

or she had to leave Canada’.⁴⁷ 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:

- 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.⁴⁸

21.40 Family violence is one of a number of factors to be considered in a ‘Humanitarian and Compassionate’ application, and the existence of family violence does not give an applicant the 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.⁴⁹

21.41 Similar to the US, there are no specific evidentiary requirements spelled out in the guidelines or legislation. Rather, the Immigration Guidelines state that the onus is on the applicant to put forth any ‘Humanitarian and Compassionate’ factors that he or she believes are relevant to the case, and ‘to be clear in the submission as to exactly what hardship they would face’.⁵⁰

21.42 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’.⁵¹ As such, the guidelines specifically note that legislation,

47 Immigration and Citizenship Canada, *IP 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* (2011), 12.7.

48 Ibid.

49 Ibid, 5.11.

50 Ibid, 5.7.

51 Ibid, 5.5.

policy statements, guidelines, and manuals and handbooks may legitimately influence decision makers in their work.⁵²

United Kingdom

21.43 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 to a two-year temporary visa period.⁵³ 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’.⁵⁴ There are no prescriptions on the type of evidence that may be presented.

21.44 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.⁵⁵

21.45 A criminal conviction is considered indisputable evidence that family violence has occurred.⁵⁶ 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.⁵⁷ 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.⁵⁸

21.46 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 General Medical Council registered family practitioner who has examined the applicant and is satisfied that the applicant has injuries consistent with being a victim of domestic violence;

52 Ibid, 5.6.

53 *Immigration Rules 1994* (UK) reg 287(a).

54 Ibid reg 289A(iv). Definition of ‘indefinite leave’ is taken to mean permanent residence. See UK Border Agency, *Partners* (2011) <www.ukba.homeoffice.gov.uk/partnersandfamilies/partners/> at 13 July 2011.

55 UK Border Agency, *Immigration Directorate Instructions* (2011), ch 8 section 4, [2.1].

56 Ibid, [3.1].

57 Ibid, [3.1.1].

58 Ibid, [3.2].

- 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;
- 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.⁵⁹

21.47 While the Instructions are comprehensive, they are not determinative, since ‘any evidence of domestic violence should be considered by caseworkers when making a decision’.⁶⁰ 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.⁶¹

New Zealand

21.48 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.⁶² Domestic violence applications are given priority processing, and are determined by immigration officers who have received specialist training in applying the policy.⁶³

21.49 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
- 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

59 Ibid, [2.3].

60 Ibid, [2].

61 Ibid.

62 Immigration New Zealand, *Operations Manual* (2011), S 4.5.20.

63 Ibid, S 4.5.25.

- 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.⁶⁴

21.50 The Instructions list persons who are ‘competent’ to make a statutory declaration that domestic violence has occurred. Similar to the Australian system, such persons include social workers, doctors, nurses, psychologists, counsellors, and experienced staff members of approved women’s refuges.⁶⁵

21.51 The Instructions provide that immigration officers can verify that the competent persons have made statutory declarations by contacting the relevant professional bodies.⁶⁶

The Australian system

21.52 In *Equality Before the Law*, the ALRC recommended 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.⁶⁷

21.53 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;⁶⁸
- a police record of assault along with two statutory declarations—one from the alleged victim, plus a statutory declaration made by a competent person;⁶⁹ or
- three statutory declarations—a statutory declaration from the alleged victim, plus two statutory declarations by two differently qualified ‘competent persons’.⁷⁰

21.54 ‘Competent persons’ who may give a statutory declaration for the purpose of a non-judicially determined claim include: medical practitioners; registered psychologists; registered nurses; social workers; family consultants 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 a person in a

64 Ibid, S 4.5.5.

65 Ibid, S 4.5.6. The instructions also provide that statutory declarations cannot be from competent persons who are from the same profession.

66 Ibid, S 4.5.6 (c).

67 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), Rec 10.2.

68 *Migration Regulations 1994* (Cth) reg 1.23(8).

69 Ibid regs 1.23(9), 1.24(1)(a).

70 Ibid regs 1.24(1)(b), 1.24(2).

position that involves decision-making responsibility for a women’s refuge or a crisis and counselling service that specialises in family violence.⁷¹

21.55 Where the alleged victim is a child, a ‘competent person’ can also be an officer of the child welfare or child protection authorities of a state or territory.⁷²

21.56 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.⁷³ 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.⁷⁴

21.57 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 DHS (Centrelink) independent expert for assessment. The visa decision maker must take as correct the opinion of the independent expert.

A new model

21.58 The ALRC recommends a new model for non-judicially determined claims of family violence, in which applicants can—in addition to statutory declarations from competent persons—submit any other evidence in making a valid non-judicially determined claim of family violence. The ALRC also recommends the repeal of reg 1.26 of the *Migration Regulations* governing the form of statutory declarations. Further, PAM should be amended to reflect that evidence other than from competent persons is relevant and should be given weight as is appropriate in the circumstances of the individual applicant. The current processes for referral to an independent expert would remain available where a visa decision maker is not satisfied on the evidence that an applicant has suffered family violence.

21.59 The net effect of the ALRC’s recommendation is a model that is simple to administer, accessible to victims of family violence, and provides for robust scrutiny of evidence by building upon moves towards specialisation within DIAC.

No prescriptions on types of evidence that can be presented

21.60 Many overseas jurisdictions do not limit the types of evidence that can be submitted in support of a family violence claim. There are a number of reasons why this approach should be adopted in Australia.

71 Ibid reg 1.21(1)(a).

72 Ibid reg 1.21(1)(b).

73 Ibid regs 1.26(a)–(g).

74 Department of Immigration and Citizenship, *Form 1040: Statutory Declaration Relating to Family Violence* (2009) <www.immi.gov.au/allforms/pdf/1040.pdf> at 20 July 2011.

21.61 First, accessibility would be improved because an applicant's claim would no longer hinge on whether or not he or she can access 'competent persons'. This addresses stakeholder concerns that the limited range of professionals deemed 'competent' under the *Migration Regulations* represents a barrier to access for those who cannot speak English and are socially isolated; who lack financial resources; or who live in remote and regional areas.⁷⁵

21.62 Secondly, allowing other evidence to be adduced not only creates a wider pool of evidence but, in some instances, better quality evidence. For example, stakeholders suggested that victims from CALD communities are more likely to disclose to bilingual workers—who are often the first point of contact for victims in their communities—than to competent persons with whom they may not have an ongoing relationship.⁷⁶ The ALRC's model reflects the position that there are other people, beyond 'competent persons' who are also capable of providing corroborative evidence in support of a person's family violence claim.

21.63 DIAC acknowledged this, and suggested that one option to reduce dependence on competent persons would be to broaden the non-judicial evidentiary requirements to include 'medical evidence, police reports, findings from other government agencies or witness statements'.⁷⁷ It was envisaged that 'such documents could be weighted according to their credibility and relevance'.⁷⁸

21.64 Stakeholders supported the option to expand the range of competent persons to include: bilingual workers;⁷⁹ counsellors and case managers in family violence services;⁸⁰ English as a second language (ESL) teacher;⁸¹ and lawyers.⁸² DIAC suggested that the list of competent persons could be expanded 'to include marriage counsellors where both parties have attended counselling'.⁸³

21.65 The ALRC considers that expanding the range of competent persons does not go far enough in ensuring flexibility and accessibility for victims of family violence. There are good policy reasons to retain the current list of 'competent persons' in its current form. As DIAC noted in its submission, 'competent persons' reflect a range of professionals who 'are expected to have expertise in family violence and who can provide credible and corroborative evidence to the Department'.⁸⁴ Expanding the range of 'competent persons' to other groups of people may blur this distinction and reduce the integrity of the competent person regime. It is worth noting that the words

75 RILC, *Submission CFV 129*; IARC, *Submission CFV 149*; ANU Migration Law Program, *Submission CFV 79*; Visa Lawyers Australia, *Submission CFV 76*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33* WEAVE, *Submission CFV 31*.

76 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*. This point was also made by stakeholders in a number of consultations conducted by the ALRC.

77 DIAC, *Submission CFV 121*.

78 Ibid.

79 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*.

80 Ibid.

81 Good Shepherd Australia New Zealand, *Submission CFV 41*.

82 Ibid.

83 DIAC, *Submission CFV 121*.

84 Ibid.

‘competent’ and ‘opinion’ in the *Migration Regulations* reflect that such persons have some degree of expertise in understanding family violence due to their profession or due to their position in a family-violence related field.

21.66 Increased flexibility could also be achieved by the ALRC’s proposal to amend the *Migration Regulations* to provide that visa decision makers can contact competent persons to amend minor errors or omissions.⁸⁵ However, the ALRC agrees with DIAC that such an amendment ‘would call into question how far this duty should extend and risks case law developing in a way that would be hard for the Department to administer’.⁸⁶ The ALRC’s recommendations are aimed at improving simplicity of the system, rather than making it more burdensome and complex.

Removing prescriptive requirements

21.67 While there is utility in keeping the list of ‘competent persons’, removing the prescriptive requirements surrounding the statutory declaration of such persons in reg 1.26 is a necessary reform. The repeal of the provision will remove the risk that claims are held invalid based on ‘technicalities’. The rigidity of the statutory declaration requirement was cited by stakeholders to be a substantial barrier to access of the family violence exception.⁸⁷ 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.⁸⁸

21.68 Removing the prescriptive requirements will also address a number of unintended consequences. For example, stakeholders suggested that it is 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 declaration requirements. Repeated visits to competent persons, who are professionals with limited time, have financial implications for victims, many of whom may be suffering from economic abuse.⁸⁹ DIAC noted with concern that

Some clients applying to be granted a visa under the family violence provisions in Division 1.5 of the *Regulations* appear to be paying significant amounts of money to either migration agents or competent persons to assist with their claims.⁹⁰

85 Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), Proposal 21–5.

86 DIAC, *Submission CFV 121*.

87 Visa Lawyers Australia, *Submission CFV 76*; Law Institute of Victoria, *Submission CFV 74*; AASW (Qld), *Submission CFV 38*; Good Shepherd Australia New Zealand, *Submission CFV 41* RAILS, *Submission CFV 34*; IARC, *Submission CFV 32*; WEAVE, *Submission CFV 31*.

88 Visa Lawyers Australia, *Submission CFV 76*.

89 DIAC, *Submission CFV 121*; IARC, *Submission CFV 32*; ADFVC, *Submission CFV 26*.

90 DIAC, *Submission CFV 121*.

21.69 Reduced visits to ‘competent persons’ may also reduce the number of times a person has to re-disclose traumatic experiences of family violence.

21.70 The ALRC acknowledges that the prescriptive requirements play an important role in ensuring that statutory declaration evidence is robust. The removal of these requirements from the *Regulations* can be offset by—as discussed below—moves towards specialisation and targeted training and education for decision makers. The ALRC agrees with DIAC that documents could be weighted according to their credibility and relevance. The ALRC recommends that PAM should be amended to reflect that evidence other from competent persons may be relevant, and is entitled to weight as is considered appropriate in the circumstances of the individual concerned. Guidance should reflect the position that all evidence submitted may be relevant, rather than providing another ‘checklist’ or hierarchy of evidence that must be strictly followed.

21.71 For example, while it may be reasonable to assume that a statutory declaration from a ‘competent person’ should be given more weight than a statement from someone who is not a professional, this should not be a blanket rule. Rather, the totality of the evidence should be considered, taking into account the circumstances of the individual. The ALRC notes that visa decision makers, in other areas of migration law, are routinely required to weigh evidence and make a decision in relation to credibility. This mirrors the position taken in the United Kingdom where such guidance is given to decision makers.

Leveraging specialisation

21.72 Expanding the range of available evidence will place an extra burden on decision makers. However, this also provides opportunities to build upon existing moves towards specialisation within DIAC, with benefits to both the Department and victims of family violence. DIAC submitted that one option for reform could include:

creating a dedicated processing centre for family violence processing in which staff can be trained and develop expertise in assessing family violence claims. This may be practical if the family violence provisions are extended to a wider range of visa classes, however, the Department has already seen benefits from centralising processing of all family violence claims made during processing of permanent visa applications in a single team.⁹¹

21.73 The ALRC considers that such moves towards specialisation will better equip visa decision makers with the ability to consider family violence evidence, provide some level of consistency and uniformity in the approach to family violence within DIAC, as well as provide a basis for targeted education and training.⁹²

21.74 Specialisation may also bring benefits in terms of quicker resolution of claims, and reduce the need for merits and judicial review. This would help address the

91 Ibid.

92 The ALRC makes recommendations about training and education for visa decision makers in Ch 20.

concerns of some stakeholders that family violence claims require expedited review processes.⁹³

Retaining independent experts

21.75 Given the way in which the *Migration Regulations* are currently structured, applicants may have an expectation that where statutory evidence is presented in the required form, the claim should succeed. There was agreement among stakeholders that the referral procedures to an independent expert lacked transparency and do not comply with the basic rules of procedural fairness, particularly because visa decision makers in practice do not give reasons for referring the matter.⁹⁴

21.76 Stakeholders supported the proposal that visa decision makers should have to give reasons for referral to an independent expert.⁹⁵ Nigel Dobbie submitted that, despite the requirement in the *Migration Regulations* to reach a state of non-satisfaction,

the delegates do not give, in applications that I have been involved with, reasons for their state of non-satisfaction, despite the required evidence being given ... being the provision of the statutory declaration or declarations from competent persons.⁹⁶

21.77 Other stakeholders expressed similar concerns that applicants were being referred unnecessarily—or as a matter of routine—even in cases where the ‘the statutory declarations have been of sufficiently high quality’.⁹⁷ The ANU Migration Law Program expressed a view 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.⁹⁸

21.78 In contrast, DIAC and the MRT argued that there is no need to give reasons for referral, since referral is not the final decision, but rather a step in the process.⁹⁹ DIAC stressed that

a referral to an independent expert is a process of evidence collection that forms the basis of a decision ... To require decision makers to explain and seek comment on

93 IARC, *Submission CFV 149*.

94 N Dobbie, *Submission CFV 163*. See also ANU Migration Law Program, *Submission CFV 79*; National Legal Aid, *Submission CFV 75*; Visa Lawyers Australia, *Submission CFV 76*; AASW (Qld), *Submission CFV 38*; RAILS, *Submission CFV 34*.

95 National Legal Aid, *Submission CFV 164*; N Dobbie, *Submission CFV 163*; RAILS, *Submission CFV 160*; Migration Institute of Australia, *Submission CFV 148*; ANU Migration Law Program, *Submission CFV 79*; Visa Lawyers Australia, *Submission CFV 76*; Good Shepherd Australia New Zealand, *Submission CFV 41*.

96 N Dobbie, *Submission CFV 163*.

97 RAILS, *Submission CFV 160*. See also ANU Migration Law Program, *Submission CFV 159*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*.

98 ANU Migration Law Program, *Submission CFV 159*.

99 DIAC, *Submission CFV 121*; Principal Member of the Migration and Refugee Review Tribunals, *Submission CFV 29*.

both a decision to refer and the outcomes of that referral would be cumbersome and potentially result in duplicate processes.¹⁰⁰

21.79 The ALRC considers that the question of whether evidence is provided in the manner required should be separated from whether that evidence can satisfy the visa decision maker that family violence has occurred. Visa decision makers are not experts in family violence, and that requiring visa decision makers to give reasons for referral—where this is not the final step in the decision making process—may be cumbersome and result in ‘duplicate’ processes, rather than a simpler system.

Consistency of independent expert assessments

21.80 There was general concern expressed among stakeholders that independent expert assessments lacked consistency and transparency. Stakeholders pointed to examples where the independent expert:

- had not applied the correct definition of relevant family violence;¹⁰¹
- conducted investigations on specific matters rather than confining their assessment to whether or not the victim had suffered family violence;¹⁰² and
- held views and attitudes that are contrary to the well-being and protection of victims of family violence.¹⁰³

21.81 RAILS submitted that, in its experience ‘the quality of the process and assessment by the independent expert varies greatly from person to person’ with ‘very little consistency in their approach’.¹⁰⁴ The Australian Domestic and Family Violence Clearinghouse (ADFVC) was concerned that ‘there is no clear criteria that must be met by independent experts with respect to training, experience and supervision’.¹⁰⁵

21.82 The concerns about inconsistency in decision making may be alleviated as a result of a number of recommendations in this Report. The adoption of a uniform definition of family violence across the different legislative schemes and targeted training in relation to the nature, features and dynamics of family violence should result in more consistent decision-making by ‘independent experts’. As noted in Chapter 3, because the definition of ‘relevant family violence’ is different to the definition of ‘family violence’, this results in some confusion among independent experts when assessing family violence claims.¹⁰⁶ In Chapter 4, the ALRC makes recommendations that Centrelink social workers (who are independent experts) should receive training and education, including in relation to the nature, features and dynamics of family violence.¹⁰⁷

100 RILC, *Submission CFV 129*.

101 ANU Migration Law Program, *Submission CFV 159*.

102 RILC, *Submission CFV 129*.

103 WEAVE, *Submission CFV 31*.

104 RILC, *Submission CFV 129*.

105 ADFVC, *Submission CFV 26*.

106 See also *Al-Momani v Minister for Immigration and Citizenship* [2011] FMCA 453.

107 Rec 4–5.

21.83 Further, the expansion of the range of evidence that can be considered by the visa decision maker should also translate to better evidence before an ‘independent expert’ when a matter is referred. This should have positive impact on the ability to independent experts to make good decisions.

21.84 The ALRC also notes that the creation of a statutory mechanism for merits review of independent expert decisions, while preferable, has the potential to create a burdensome and complex system that is not easily administered. This would go against the ALRC’s intention to create a simpler system.

Independent experts: merits review and procedural fairness

21.85 In the Discussion Paper, the ALRC proposed that the *Migration Regulations* be amended to require independent experts to give applicants statements of reasons for their decisions, and to provide for review of independent expert decisions.¹⁰⁸

21.86 A number of stakeholders supported these proposals. RAILS submitted that the ability to have an independent expert review was essential because

the independent expert holds enormous power ... yet the process undertaken by the independent expert is not subject to any scrutiny, they are not required to provide reasons for their decisions, and there is no process for seeking a review of their assessment, other than the expensive and limited provision for judicial review.¹⁰⁹

21.87 DIAC did not consider statutory amendments to provide for merits review of independent expert decisions necessary, given that applicants have a right to appeal to the MRT. Current practice is that ‘a summary of the decision of the independent expert’s assessment is provided to the applicant for comment’ before a decision is made on the case.¹¹⁰ If new information is provided by an applicant, the decision maker can refer the matter back to the independent expert for review of the original decision. However, review is not a right, but is at the discretion of the visa decision maker.

21.88 DIAC submitted that the full record of the independent expert’s opinion is not given because, in some circumstances, there is information that cannot be passed to the applicant because it has been provided confidentially to the independent expert or to DIAC by a third party. In such circumstances, ‘it may be difficult to provide even the gist of the information without revealing the source’.¹¹¹ However, it was noted that, typically

The reasons provided to the applicant do provide an indication of the information which has shaped the independent expert’s opinion and the way in which the different pieces of information has been weighed.¹¹²

108 Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), Proposal 21–7, 21–8.

109 RAILS, *Submission CFV 160*; RAILS, *Submission CFV 34*.

110 DIAC, *Submission CFV 121*.

111 *Ibid.*

112 *Ibid.*

21.89 The scope of the duty of procedural fairness owed by independent experts and visa decision makers to an applicant has been subject to recent judicial consideration.

21.90 In *Maman v Minister for Immigration and Citizenship*, Raphael FM found that the independent expert owed procedural fairness obligations to an applicant to disclose the contents of a letter written to the independent expert from the sponsor that was adverse to the applicant's claims.¹¹³ The Federal Magistrate Court also found that the MRT, when assessing whether an independent expert decision was properly made, must consider whether procedural fairness obligations were afforded to the applicant by the independent expert, and where it is found not so, refer such matter back to the independent expert to avoid jurisdictional error.¹¹⁴ In its submission, DIAC expressed an intention to appeal this decision to 'clarify the scope of the duty', but would not challenge the conclusion that a 'duty of procedural fairness exists'.¹¹⁵

21.91 However, in *Al-Monami v Minister for Immigration and Citizenship*, the court considered that, due to the procedural fairness obligations owed to an applicant by the MRT, this 'relieves an independent expert from following a like procedure for the purposes of preparing the report'.¹¹⁶ Driver FM agreed with Raphael FM that there are circumstances in which the MRT is obliged to refer back to an independent expert matters raised by an applicant in response to any summary of the independent expert's findings given to the applicant pursuant to s 359A of the *Migration Act*. Driver FM indicated that such instances may include circumstances where:

- a) the report is based on information that the applicant was not shown by the independent expert or had an opportunity to comment upon to the independent expert and, if he had had that opportunity, the report might be different; or
- b) the matters raised by the applicant in responding to the invitation to comment about the report cast doubt upon the validity of the report such that the Tribunal could not be satisfied that it was bound by the report.¹¹⁷

21.92 DIAC submitted that it was 'open to suggestions for improving the decision summary to ensure that family violence applicants gain a better understanding of how their case was assessed and decided, while protecting confidential information, where necessary'.¹¹⁸ The ALRC welcomes this, and notes that DIAC may wish to work with DHS to consider how this could be achieved.

21.93 Given the ongoing judicial consideration around this issue, and DIAC's intention to challenge the decision in *Maman* to clarify the scope of any procedural fairness obligations,¹¹⁹ the ALRC makes no recommendations in relation to the procedural fairness obligations of the independent expert. However, the ALRC considers it vitally important that victims of family violence are afforded procedural fairness by independent experts to the maximum extent possible, including being

113 *Maman v Minister for Immigration and Citizenship* [2011] FMCA 426, [3].

114 *Ibid.*

115 DIAC, *Submission CFV 121*.

116 *Al-Monami v Minister for Immigration and Citizenship* [2011] FMCA 453, [47].

117 *Ibid.*, [50].

118 DIAC, *Submission CFV 121*.

119 *Ibid.*

given reasons for the decisions. The ALRC notes that any such clarification by the courts should be reflected in PAM to the extent that it affects visa decision makers.

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

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

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

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

Independent expert panel

21.94 An alternative for reform of the non-judicially determined claim of family violence is the establishment of an independent expert panel. While the ALRC flagged this as the preferred option in the Discussion Paper,¹²⁰ stakeholders were cautious in supporting such a reform without further consideration of a number of issues.

21.95 The ALRC makes no recommendations for the establishment of an independent expert panel; however, the ALRC considers that the idea has some merit. The section below canvasses the issues to be considered if an independent expert panel is to be pursued.

Parallels with the health assessment regime

21.96 In the Discussion Paper, the ALRC envisaged that an independent expert panel scheme could operate in a manner similar to the arrangements in place for health assessments required for all visas.¹²¹

120 Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011), 734.

121 *Ibid.*, 732.

21.97 All permanent visa applicants are required to meet health requirements.¹²² 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.¹²³ A MOC is a medical practitioner who has been appointed in writing by the Minister for the purposes of the *Migration Regulations*.¹²⁴ 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.¹²⁵ 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.

21.98 Depending on the type of visa 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).¹²⁶ 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.¹²⁷

21.99 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.

Improved consistency, simplicity and quality of decision making

21.100 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 opportunities for

122 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’.

123 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 *Migration Regulations*.

124 Ibid reg 1.03 defines a MOC as ‘a medical practitioner employed or engaged by the Australian government’.

125 Ibid reg 2.25A(3).

126 Department of Immigration and Citizenship, *Form 1071i: Health Requirement for Permanent Entry to Australia* (2011), 2.

127 Ibid, 2.

targeted training and education.¹²⁸ For example, the Law Institute of Victoria submitted:

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.¹²⁹

21.101 DIAC submitted that an independent expert scheme could, if well designed, provide for simplicity in evidentiary requirements, and consistency in decision making. DIAC agreed that

there is scope to undertake a review of the current arrangements in relation to the assessment of non-judicially determined claims. The model of health assessment noted in the Discussion Paper may be one way of simplifying the evidentiary requirements for non-judicial claims of family violence while maintaining the rigour in the decision making process.¹³⁰

Avoiding pitfalls of the medical assessment regime

21.102 The Townsville Community and Legal Centre (TCLC) provided cautious support the panel scheme so long as avoided ‘the pitfalls of the MOC regime’.¹³¹ In its view, ‘there is too much to be critical of the MOC regime’ from the view of applicants.¹³² The TCLC pointed to the *Inquiry into Migration Treatment of Disability*, conducted the Joint Committee on Migration.¹³³ The Committee catalogued a number of criticisms of the current MOC system, including that:

- MOC decisions tend to be inconsistent and do not apply guidelines sufficiently and stringently;¹³⁴
- MOCs are required to weigh considerations beyond their expertise such as a disease’s ‘significant cost to the Australian community’;¹³⁵ and
- MOC decisions are often difficult to review and lack transparency.¹³⁶

21.103 In order to improve the transparency and consistency of decision making, the Committee recommended that DIAC make available the ‘Notes for Guidance’ used by

128 National Legal Aid, *Submission CFV 164*; Law Institute of Victoria, *Submission CFV 157*; IARC, *Submission CFV 149*; Migration Institute of Australia, *Submission CFV 148*; DIAC, *Submission CFV 121*; Law Institute of Victoria, *Submission CFV 74*; Visa Lawyers Australia, *Submission CFV 76*;

129 Law Institute of Victoria, *Submission CFV 74*.

130 DIAC, *Submission CFV 121*.

131 Townsville Community Legal Service, *Submission CFV 151*.

132 *Ibid.*

133 Joint Standing Committee on Migration–Parliament of Australia, *Enabling Australia: Inquiry into the Migration Treatment of Disability* (2010).

134 *Ibid.*, [4.13].

135 *Ibid.*, [3.5.2].

136 *Ibid.*, [4.68].

MOCs on its website and provide each applicant with a breakdown of their assessed costs associated with diseases or conditions under the Health Requirement.¹³⁷

A well-designed system

21.104 Stakeholders stressed the importance of having a well-designed system, and noted that a number of important matters would need to be resolved, including: who should comprise the panel; responsibility for its administration; and what assurances could be provided that it would be comprised of people with extensive experience in family violence.¹³⁸ RAILS submitted that ‘the timeliness of the assessments by the Independent Panel is a critical issue’,¹³⁹ as time delays and having to recall traumatic experiences with detrimental impact to a person’s health and well-being. The Migration Institute of Australia submitted that ‘the composition of any such panel would be fundamental of its success’.¹⁴⁰ DIAC suggested that a national organisation ‘which employs appropriate professionals could conduct interviews nationally and provide reports to visa decision makers’.¹⁴¹

21.105 Another possibility is for the Australian Government to appoint professionals to the panel based on their experience and expertise in dealing with family violence claims.

21.106 In light of the above concerns, the IARC submitted that ‘more detail and analysis is required before the Commission makes its recommendation’.¹⁴² The ALRC that an independent expert panel would need to be appropriately designed to avoid the pitfalls of the MOC regime. In particular, there should be a number of desirable outcomes of an independent expert panel.

21.107 First, an independent expert panel scheme should simplify the procedural requirements and increase accessibility to visa applicants who experience family violence. An expert panel scheme would enable the removal of existing strict procedural requirements and allow victims to present a wide range of evidence to the decision makers, including evidence from those persons to whom a victim may more readily disclose family violence. This outcome was supported by stakeholders and mirrors the position taken in the UK and other overseas 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.

137 Ibid, Recommendation 5.

138 RAILS, *Submission CFV 160*; IARC, *Submission CFV 149*; Migration Institute of Australia, *Submission CFV 148*.

139 RAILS, *Submission CFV 160*.

140 Migration Institute of Australia, *Submission CFV 148*.

141 DIAC, *Submission CFV 121*.

142 IARC, *Submission CFV 149*.

21.108 Secondly, an independent expert panel scheme should be underpinned by targeted training and education in relation to the nature, features and dynamics of family violence for those experts appointed to the panel.¹⁴³ This would provide a measure of assurance to victims that their claims will be assessed by professionals with specialist understanding of family violence. This would arguably lead to more consistent decision making and, ultimately, help to protect the safety of victims of family violence.

21.109 Thirdly, the expert panel scheme should provide for transparency and appropriate review mechanisms. The *Migration Regulations* could provide that a decision maker must take as correct an opinion of the independent panel assessor, as is the case with health assessments. However, in review applications, where there is new evidence or where significant time has elapsed, a review opinion from a different panel member could be sought. Reasons for decisions should be provided to the applicant.

21.110 Lastly, 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. Such a 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.

143 See Ch 20, Rec 20–5 where the ALRC recommends that training and education in relation to the nature, features and dynamics of family violence be provided for decision makers in the migration system.

22. Refugee Law

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Summary

22.1 This chapter considers the position of asylum seekers who seek protection in Australia as refugees on the basis of having experienced family violence. While family violence claims can fall under the definition of a refugee as contained in the United Nations *Convention Relating to the Status of Refugees* (the Refugees Convention)—as incorporated into Australian law by the *Migration Act 1958* (Cth)—this remains a complex area of the law marked by inconsistent decision making.

22.2 The ALRC recommends that the Minister for Immigration and Citizenship should issue a direction under s 499 of the *Migration Act 1958* (Cth) in relation to family violence in refugee assessment determinations. Such a direction should refer to guidance material on family violence contained in the Department of Immigration and Citizenship’s (DIAC) *Gender Guidelines*.¹ The ALRC further recommends that the *Gender Guidelines* should be the subject of ongoing, comprehensive and periodic review.

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

¹ Department of Immigration and Citizenship, *Procedures Advice Manual 3, Gender Guidelines: Assessing Gender-Related Claims* (2010).

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

Refugee law in Australia

The Refugees Convention

22.5 Australia is a signatory to the Refugees Convention, the key international instrument that regulates the obligations of states to protect refugees fleeing from persecution.² 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.

22.6 The *Migration Act* incorporates art 1A(2) into Australian domestic law, and gives effect to Australia's obligation of *non-refoulement*—not to return a person in any manner whatsoever to the frontiers of territories where the person's life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.³ 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'.

22.7 The term 'persecuted' in art 1A(2) 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 reasons 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'.

22.8 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.

2 *Convention Relating to the Status of Refugees*, 189 UNTS 151 (entered into force on 22 April 1954).

3 The principle of non-refoulement is enshrined in the Refugees Convention art 33.

22.9 The onshore component of Australia's Refugee and Humanitarian Program allows asylum seekers to apply for a protection visa.⁴ Primary refugee status assessments are made by a DIAC officer, as 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.⁵ This personal intervention power is only exercisable by the Minister and only in cases where the applicant has exhausted all avenues of merits review.⁶

Family violence and the definition of a refugee

22.10 Applicants who make asylum claims based on family violence have faced difficulties meeting the definition of 'refugee' in art 1A(2) of the Refugees 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 Refugees 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

22.11 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.⁷ These types of harms—generally experienced by women—are not afforded protection, because neither gender nor sex is an enumerated 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.⁸

22.12 A more problematic distinction relates to the public/private dichotomy. As Anthea Roberts explained, the Refugees 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.⁹

4 The requirements for a Protection Visa (Class XA) (Subclass 866) are found in the *Migration Regulations 1994* (Cth) sch 2.

5 *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'.

6 *Ibid* s 417(3).

7 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.

8 H Crawley, *Refugees and Gender: Law and Process* (2001), 21–26, 79–90.

9 A Roberts, 'Gender and Refugee Law' (2002) 22 *Australian Yearbook of International Law* 160, 161.

22.13 This is most evident in the interpretation of the term ‘persecution’. The Refugees Convention contains no definition of ‘persecution’.¹⁰ 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.¹¹

22.14 In *Applicant A v Minister for Immigration and Ethnic Affairs*, the High Court explained that:

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.¹²

22.15 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 Refugees Convention, because the state cannot be implicated in the infliction of that harm.¹³

The role of state responsibility

22.16 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*.¹⁴

22.17 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’.

22.18 The case was eventually appealed to the High Court, where Gleeson CJ defined the issues in dispute 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.

10 Though as noted above, the term ‘persecution’ is qualified by s 91R of the *Migration Act 1958* (Cth) for the purposes of Australian law.

11 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.

12 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

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.

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.¹⁵

22.19 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.¹⁶

22.20 Kirby J adopted the formula, ‘Persecution = Serious Harm + The Failure of State Protection’,¹⁷ 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’.¹⁸ 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’.¹⁹

22.21 Although the judgments took different approaches, the cumulative effect was that, where serious harm is inflicted by non-state actors for a non-Convention reason, the nexus to the Refugees Convention is met by the conduct of the state in withholding protection—in a selective and discriminatory manner—for a Convention ground.

22.22 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’.²⁰ Gleeson CJ considered that it was open on the evidence to conclude that ‘women in Pakistan’ comprise a ‘particular social group’.²¹

Family violence claims post-*Khawar*

Legislative amendments

22.23 Section 91R(1) of the *Migration Act* requires the applicant to show that the Convention reason is ‘the essential and significant reason’ for the persecution.²²

22.24 Commentators have argued that s 91R has made it more difficult to sustain claims for protection on family violence grounds. Catherine Hunter argues that, in the context of gender-related claims, the ‘essential and significant’ requirement will mean

15 *Minister for Immigration & Multicultural Affairs v Khawar* (2002) 210 CLR 1, [5], [6].

16 *Ibid.*, [30].

17 *Ibid.*, [118] referring to *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629, 653; *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 515–516.

18 *Ibid.*, [115].

19 *Ibid.*, [87].

20 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, [85].

21 *Ibid.*, [32].

22 *Migration Act 1958* (Cth) s 91R(1)(a). See also Explanatory Memorandum, Migration Legislation Amendment Bill (No 6) 2001 (Cth), [19]. Section 91R was inserted due to government concerns that decisions such as *Khawar* had widened the application of the Refugees Convention ‘beyond the bounds intended’.

that decision makers are likely to focus on aspects other than gender—such as political opinion or religion—until gender-related decisions are no longer controversial.²³ 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’²⁴ and, therefore,

due to the restrictive terminology of s 91R ... there is now a risk that certain Refugees Convention reasons may not be identified or adequately addressed, resulting in legitimate claims going unrecognised.²⁵

22.25 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.²⁶ In particular, such victims can experience serious psychological trauma even where there are minimal physical injuries.²⁷ 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.²⁸

22.26 Throughout the Inquiry, stakeholders 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,²⁹ and called for amendments to s 91R specifically to recognise gender-based claims,³⁰ including that ‘serious harm’ may include family violence coupled with the lack of state protection.³¹

22.27 However, the ALRC considers that substantive amendments to the *Migration Act*, and s 91R are not necessary, since that section does not provide an exhaustive list of types of harm that may constitute ‘serious harm’. While s 91R does not expressly acknowledge psychological harm or the failure of state protection, the ALRC considers that this is a sufficiently well established in Australian law in light of the decision in

23 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.

24 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).

25 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.

26 Ibid, 454.

27 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.

28 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.

29 ANU Migration Law Program, *Submission CFV 79*; National Legal Aid, *Submission CFV 75*; Law Institute of Victoria, *Submission CFV 74*; Good Shepherd Australia New Zealand, *Submission CFV 41*; RAILS, *Submission CFV 34*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*; WEAVE, *Submission CFV 31*.

30 Law Institute of Victoria, *Submission CFV 74*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*; WEAVE, *Submission CFV 31*.

31 ANU Migration Law Program, *Submission CFV 79*; Good Shepherd Australia New Zealand, *Submission CFV 41*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*.

Khawar.³² The ALRC has concluded that problems arise not because of a lack of understanding that family violence claims may fall under the Convention, but in the application of the principles in *Khawar* as it relates to s 91R.

Complexity of gender-related cases

22.28 In addition to the barriers imposed by s 91R in relation to ‘serious harm’, subsequent cases post-*Khawar* suggests that the area remains 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, require an in-depth understanding of the applicants’ claims and how it relates to country information.³³ Complex family violence claims are often intertwined with other Convention grounds, such as political opinion and religion, making it difficult to identify the nexus between the Convention reason and the harm feared.³⁴

22.29 Applicants face particular challenges in making claims with respect to a particular social group. For example, proving that a state is withdrawing or withholding protection for a Convention reason in a selective and discriminatory manner may be difficult for those who face language barriers, lack legal representation, or lack access to current country information.³⁵ 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.³⁶

22.30 Decision makers also face challenges in making consistent decisions. 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

³² See also, Migration and Refugee Review Tribunals, *Submission CFV 31*; RILC, *Submission CFV*.

³³ 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.

³⁴ 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.

³⁵ 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.

³⁶ Case law has established that the common characteristic of a ‘particular social group’ cannot be the harm feared. See eg, *Ibid*, 600, citing *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

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.³⁷

Improving consistency in decision-making

The usefulness of *Gender Guidelines*

22.31 The ALRC considers that DIAC's *Gender Guidelines* can play an important role in ensuring that the principle in *Khawar* is properly and consistently applied.³⁸ The ALRC recommends that the Minister for Immigration and Citizenship should issue a direction under s 499 in relation to the assessment of family violence claims in refugee cases, and that such a direction should refer to guidance material in the *Gender Guidelines*. The ALRC further recommends that *Guidelines* should be the subject of ongoing, comprehensive and periodic review.

22.32 Stakeholders pointed out that inconsistency in decision making in this area may derive from lack of sensitivity or knowledge in relation to gender-related claims, or a failure to properly consider the *Gender Guidelines*.³⁹ Stakeholders supported the proposal for the Minister to issue a direction under s 499 to require decision makers to have regard to the *Gender Guidelines* as a means of improving consistency in decision-making.⁴⁰

22.33 For example, the Refugee and Immigration Legal Centre (RILC) considered that a s 499 direction 'is a necessary, but not sufficient step in the effective processing of gender-based claims', and that the requirement to 'have regard' does not go far enough to ensure that current in-depth understanding of gender issues is maintained by officials that would translate in consistent decision making.⁴¹ The RILC agreed with the ALRC that the *Gender Guidelines* are particularly useful, but considered that they could benefit from further improvement and clarification, in particular, to:

give recognition that a woman's failure to conform with society's expectation of her may be interpreted as a threat to the power structures in that (patriarchal) society and that an adverse political opinion may be imputed; and

provide greater clarity around when any of the approaches [to determining a gender based particular social groups] should be used in order to create a principled approach to the issue which would allow for consistent decision-making.⁴²

37 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, [26].

38 In the Discussion Paper, the ALRC highlighted that the *Gender Guidelines* gave specific and detailed guidance on assessing gender-related claims, and the intersection between family violence and refugee law.

39 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*. See, also The Asylum Seeker Resource Centre, *A Case For Justice: Position Paper on the Legal Process of Seeking Asylum in Australia* (2011).14.

40 National Legal Aid, *Submission CFV 164*; RAILS, *Submission CFV 160*; ANU Migration Law Program, *Submission CFV 159*; Law Institute of Victoria, *Submission CFV 157*; Confidential, *Submission CFV 152*; Townsville Community Legal Service, *Submission CFV 151*; Migration Institute of Australia, *Submission CFV 148*; RILC, *Submission CFV 129*; WEAVE, *Submission CFV 106*.

41 RILC, *Submission CFV 129*.

42 *Ibid.*

22.34 It was also suggested that, in order for a s 499 direction to have meaningful effect, it is important that the *Gender Guidelines* ‘are subject to periodic and comprehensive review and revision where necessary to keep abreast international and domestic developments in gender claims’.⁴³

22.35 The Refugee and Casework Advice Service (RACS) cautioned that while a direction issued under s 499 may seem ‘reasonable and attractive at first sight’, it is not clear how effective this would be in practice, since the directions

are secondary law (not merely policy), they are limited in practice because they require only that a decision maker consider the directions made. How the weight of mandatory considerations is to be taken is a matter entirely dependent on individual decision makers.⁴⁴

22.36 The Law Institute of Victoria supported the intention of an s 499 direction but argued that ‘a better approach, however, may be to incorporate the *Gender Guidelines* into the Ministerial Direction’.⁴⁵

22.37 DIAC stressed that ‘protection visa decision makers and Protection Obligations Evaluation (POE) officers are already directed to a variety of guidelines, including *Gender Guidelines*, to inform refugee status determinations’.⁴⁶ As an alternative to the issuing of a s 499 direction, the Department suggested that:

An internal reminder should be issued to decision makers ... this reminder can provide guidance on what is covered in the *Gender Guidelines* and direct officers as to when they must have regard to this instruction.⁴⁷

Is there a need for a Ministerial Direction?

22.38 The policy issue is whether consistency in decision making is best achieved by leaving the guidance in the PAM—and issuing reminders to decision makers—or elevating the material therein to a direction under s 499 and making it a mandatory consideration. The ramifications of this distinction were articulated by the Federal Court in *El Ess v Minister for Immigration and Citizenship*:

PAM3 is not a binding document ... PAM3 is intended by its own terms to be nothing more than procedural and policy guidance to officers applying the *Migration Act* and the *Migration Regulations* ... PAM3 does not have the effect of a direction pursuant to s 499 of the *Migration Act*, which would bind a person or body having functions or powers under the *Migration Act* as to the performance of those functions or the exercise of those powers. Because the PAM3 guidelines are not binding on a decision-maker, they cannot be relevant considerations, in the sense of considerations that the decision-maker is bound by legislation to take into account.⁴⁸

43 Ibid.

44 Refugee Advice & Casework Service Inc, *Submission CFV 111*.

45 Law Institute of Victoria, *Submission CFV 157*.

46 DIAC, *Submission CFV 121*.

47 Ibid.

48 *El Ess v Minister for Immigration and Multicultural Affairs* [2004] FCA 1038. See also *Xie v Minister for Immigration and Multicultural Affairs* [2000] FCA 230; *Soegianto v Minister for Immigration and Multicultural Affairs* [2001].

22.39 There are a number of reasons why a direction is preferred. First, the direction would serve an educative function for decision makers by acting as a constant reference point in the assessment of family violence claims. In a complex area of the law, the requirement for decision makers to constantly turn their mind to, and apply principles to different and nuanced cases of family violence and gender-based claims, should over time lead to greater consistency in decision making.

22.40 Second, such a direction would add a measure of transparency and integrity to the decision-making process, and engender public confidence in it. Decision makers must be able to demonstrate to applicants that the matters under the Direction have been properly considered, and a failure to do so leaves the decision open to challenge on the grounds that the decision maker failed to take into account a relevant consideration. The UNHCR has argued that, in relation to its *Gender Guidelines*, while states may issue separate guidelines or incorporate procedural safeguards into legislation, ‘in either case it is preferable that decision makers are required to use any guidelines that exist’.⁴⁹

22.41 Section 499 directions have created some pitfalls in other areas of migration law. For example, a direction under s 499 in relation to decisions about character assessments under s 501 of the *Migration Act* has been held unlawful because it ‘improperly fettered a Tribunal’s discretion’.⁵⁰ In another instance, a direction was lawful, but ‘unjust’ for because it omitted ‘considerations which supported the non-citizen remaining in Australia, such as arriving as a minor and length of resident’.⁵¹ The drafting of a direction in relation to family violence would need to be careful to avoid such pitfalls.

22.42 Consistency in decision making may also be improved as a result of the ALRC’s recommendations in Chapter 20 in relation to targeted education and training for visa decision makers.⁵² Such training and education should take into consideration the intersection between family violence and refugee law, and the application of any direction issued under s 499.

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

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

49 UNHCR, *Comparative Analysis of Gender Related Persecution in National Asylum Legislation and Practice in Europe* (2004), 22.

50 *Asku v Minister for Immigration and Citizenship* (2001) 65 ALD 667.

51 *Toro Martinez v Minister for Immigration & Citizenship* (2009) 177 FCR 337, 357-358.

52 Rec 20–5.

Secondary visa applicants for protection visas

22.43 The ALRC recommends that the instruction *Ministerial Powers— Ministers Guidelines—s 48A cases and requests for intervention under s 48B of the Act* be amended to take into account family violence claims. This recommendation, combined with the issuance of a Ministerial Direction under s 499 of the *Migration Act* in relation to family violence in refugee status determinations may negate the need for a second protection visa application to be made.

The interaction between s 48A and 48B

22.44 In the Discussion Paper, the ALRC highlighted that those secondary visa applicants who are subjected to family violence once in Australia, are not able to apply for another protection visa in their own right, due to a bar under s 48A of the *Migration Act*.⁵³ The Minister for Immigration and Citizenship has discretionary and non-compellable power under s 48B to waive the s 48A bar, taking into account the public interest.

22.45 An issue arises as to whether the bar under s 48A unduly impacts upon victims of family violence who may otherwise have a legitimate claim for refugee protection. The Refugee Advice and Casework Service (RACS) argued that while there were good policy reasons to give effect to s 48A—to prevent abuse by people in the same family unit who would otherwise take turns to seek a Protection Visa as a primary visa applicant⁵⁴—the legislature may not have considered the practical difficulties for victims of family violence under these circumstances.⁵⁵

22.46 DIAC submitted that s 48B is not intended to give individuals affected by circumstances not related to any of the five Refugees Convention grounds the opportunity to ‘lodge another Protection visa application’.⁵⁶ DIAC noted that because family violence is not one of the five Refugees Convention grounds it is not addressed by the instruction, *Ministerial Powers— Ministers Guidelines—s 48A cases and requests for intervention under s 48B of the Act*.⁵⁷

Is there a need to amend s 48A?

22.47 A number of stakeholders called for amendment to s 48A to allow secondary visa applicants who are the victims of family violence to be allowed to apply for a

53 *Migration Act 1958* (Cth) s 48A(1)(a), (b). Section 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). A decision 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.

54 See also Migration Legislation Amendment Bill (No 6) 2001 (Cth).

55 Refugee Advice & Casework Service Inc, *Submission CFV 111*.

56 DIAC, *Submission CFV 121*.

57 *Ibid*.

protection visa in their own right.⁵⁸ Some argued that a secondary visa applicant who separates from her husband for family violence reasons ‘may be at risk of harm upon return because of their husband’s activities but may not be able to speak to that risk without their husband as a primary applicant’, and thus may feel compelled to remain in the violent relationship.⁵⁹

22.48 Stakeholders expressed concern that Ministerial Intervention under s 48B can result in significant delays, and in some instances applicants face ‘great difficulty in convincing DIAC that it is an appropriate case for the Minister to invoke s 48B’.⁶⁰ It was argued that there is a ‘substantial backlog’ of applications contributing to delays that may adversely affect a victim’s ‘psychological well-being’.⁶¹ For example, the RACS submitted that the Minister’s power under s 48B is rarely exercised, such that

when family violence victims seek advice on refugee law in order to make an informed decision as to whether to leave the violent relationship ‘the uncertainty in her ability to re-apply for a Protection visa’ would seem to encourage her to remain in a violent relationship.⁶²

22.49 Further concerns were raised that a system that relies on the discretionary power of the Minister ‘can result in inconsistent decision making and lacks the safeguards that due legal processes can provide’.⁶³ The Refugee and Immigration Legal Centre (RILC) expressed concern that a substantial number of s 48B requests were finalised by Departmental staff, leaving ‘potentially large gaps in protection’, because ‘DIAC is refusing a large number of applications before they reach the Minister’.⁶⁴

22.50 RACS called for s 48A to be amended to allow victims of family violence to apply for a further protection visa under ‘prescribed circumstances’—being situations where a person would be caught by s 48A but who have since left the violent relationship due to family violence.⁶⁵ The RILC suggested that, if the ability to make a further visa application was legislated,

the decision about whether ‘jurisdiction’ triggering a further application could be made by a decision maker who is trained in refugee decision making, and who could even follow on to consider the refugee claim. This would allow for transparent decision-making, the amassment of precedent decisions on further visa applications, and more efficient processing.⁶⁶

58 RAILS, *Submission CFV 160*; Law Institute of Victoria, *Submission CFV 157*; Migration Institute of Australia, *Submission CFV 148*; RILC, *Submission CFV 129*; Refugee Advice & Casework Service Inc, *Submission CFV 111*; WEAVE, *Submission CFV 106*.

59 Joint submission from Domestic Violence Victoria and others, *Submission CFV 33*. See also RAILS, *Submission CFV 160*; Law Institute of Victoria, *Submission CFV 157*.

60 RAILS, *Submission CFV 160*.

61 RILC, *Submission CFV 129*.

62 Refugee Advice & Casework Service Inc, *Submission CFV 111*.

63 RILC, *Submission CFV 129*.

64 The RILC highlighted that for the year 2010—2011, there was a total of 714 requests under s 48B. DIAC finalised 842 applications and 54 were finalised by the Minister.

65 Refugee Advice & Casework Service Inc, *Submission CFV 111*.

66 RILC, *Submission CFV 129*.

22.51 The ALRC recognises the legitimate policy aim of the s 48A bar is to ‘prevent members of families pursuing claims for protection one after the other—dragging on resolution of their status for years’.⁶⁷ Legislative amendments that would exempt secondary applicants, who are victims of family violence, from the bar to making a further protection visa application would result in a two tiered system. That is, legitimate questions may be raised about why secondary applicants would be able to apply for a further protection visa based on family violence claims, while others must attempt to access Ministerial Intervention under s 48B. The ALRC makes no recommendations to amend s 48A.

Amending guidelines

22.52 However, the ALRC considers that there is scope for improvement of DIAC’s Guidelines. The ALRC is particularly concerned that family violence is not mentioned in the guidelines on s 48B ministerial intervention because ‘family violence is not one of the five Convention grounds’.

22.53 There may well be instances—as stakeholders have argued—where a secondary visa applicant’s experiences of family violence in Australia may give rise to an independent claim of family violence under the Refugees Convention. For example, a victim may face harm from the primary visa applicant’s family if returned to the country of origin for having brought shame to the family name by ‘their unwillingness to submit’ to the primary visa applicant.⁶⁸ As noted above, if there is a real chance that a state withdraws protection to the secondary applicant on a Convention ground, this could give rise to a well founded fear of persecution.

22.54 The ALRC also considers that the safety of victims of family violence can be improved by measures that would support a secondary applicant making an independent protection visa claim based on family violence. There is nothing to prevent a secondary applicant from lodging a further protection visa application during primary consideration of the current (undecided) protection visa application.⁶⁹ The RILC highlighted that it was fundamental to ensure that claims are brought out during the protection visa process, since ‘a woman who is part of a family unit is often automatically considered to be the dependent of a principal male applicant’, and may ‘not be aware that she has an independent claim for protection’.⁷⁰ It was argued that

There should at least be the possibility of separate interviews for female family members ... Better management and support throughout the process may even prevent the need for recourse to a second protection visa application.⁷¹

67 Explanatory Memorandum, Migration Legislation Amendment Bill (No 6) 2001 (Cth).

68 See eg, RAILS, *Submission CFV 160*; IARC, *Submission CFV 32*.

69 The PAM 3 Guidelines suggest that in such an instance, ‘if the requirements in Regulations Schedule 1 are met, the further application is valid and should be considered concurrently with the existing application. The decision record provides for making a decision in respect of multiple applications.

70 RILC, *Submission CFV 129*.

71 Ibid.

22.55 The barriers to disclosure of family violence—noted in Chapter 1—may also lead secondary visa applicants not to disclose family violence when an application for a protection visa is made. If a Ministerial Direction is issued under s 499 of the *Migration Act* in relation to family violence in refugee status assessments—as the ALRC recommends—it could incorporate material in the *Gender Guidelines* to direct decision makers to consider any claims a secondary visa applicant may have in relation to family violence. For example, the ALRC notes that DIAC’s *Gender Guidelines* provide, usefully that in relation to women

There may be the shame of disclosing certain experiences such as having being raped and fears of how they might be perceived by an interpreter or decision maker. There may also be social and cultural barriers to lodging their applications or pursuing their own claims. In some cultures, it might be culturally inappropriate for women to be outspoken or to come forward with information.

...

The interviewing officer should ensure by careful questioning that all members of the family unit have been declared, and that all vital information pertinent to the application has been elicited.

...

The possibility of claims should be explored in respect of each family member to ensure a full picture is obtained.⁷²

22.56 An amendment to the instruction on the Minister’s power under s 48B, along with education and training around family violence issues and a ministerial direction under s 499 of the *Migration Act*, will improve practices and support secondary visa applicants in making independent claims for protection before the s 48A bar is triggered.⁷³

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

72 DIAC, *PAM 3: Gender Guidelines, Barriers Facing Female Applicants*.
73 Rec 20–5.

Appendix 1. Submissions

<i>Name</i>	<i>Number</i>	<i>Date</i>
Aboriginal & Torres Strait Islander Women's Legal & Advocacy Service	CFV 103	29 September 2011
Aboriginal & Torres Strait Islander Women's Legal Service North Queensland	CFV 99	26 September 2011
Aboriginal Legal Service of Western Australia	CFV 101	29 September 2011
ANU Migration Law Program	CFV 159 CFV 79	14 October 2011 7 June 2011
Association of Superannuation Funds of Australia	CFV 154 CFV 24	11 October 2011 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 Association of Social Workers (Qld) and Welfare Rights Centre (Qld)	CFV 140 CFV 139 CFV 138 CFV 137 CFV 136	1 October 2011 1 October 2011 1 October 2011 1 October 2011 1 October 2011
Australian Chamber of Commerce and Industry	CFV 128 CFV 19	30 September 2011 8 April 2011

Australian Council of Trade Unions	CFV 100 CFV 39	30 September 2011 13 April 2011
Australian Domestic and Family Violence Clearinghouse	CFV 124 CFV 110 CFV 105 CFV 104 CFV 102 CFV 71 CFV 53 CFV 26	30 September 2011 30 September 2011 29 September 2011 29 September 2011 29 September 2011 29 September 2011 11 May 2011 27 April 2011 11 April 2011
Australian Education Union	CFV 125	30 September 2011
Australian Federation of Employers and Industries	CFV 158	14 October 2011
Australian Human Rights Commission	CFV 48	21 April 2011
Australian Industry Group	CFV 141	30 September 2011
Australian Institute of Superannuation Trustees	CFV 146	7 October 2011
Australian Services Union, Victorian Authorities and Services Branch	CFV 113 CFV 10	30 September 2011 4 April 2011
Bringa Manly-Warringah Women's Resource Centre	CFV 96	26 September 2011
Bundaberg Family Relationship Centre	CFV 04	16 March 2011

Business SA	CFV 98	30 September 2011
Central Australian Aboriginal Legal Aid Service	CFV 107 CFV 78	30 September 2011 2 June 2011
Chamber of Commerce and Industry of Western Australia	CFV 123	30 September 2011
Commonwealth Ombudsman	CFV 62 CFV 54 CFV 16	27 April 2011 21 April 2011 6 April 2011
Community and Public Sector Union	CFV 147	7 October 2011
Community Legal Centres NSW	CFV 127	30 September 2011
Confidential	CFV 165	28 October 2011
Confidential	CFV 152	7 October 2011
Confidential	CFV 122	30 September 2011
Confidential	CFV 91	17 September 2011
Confidential	CFV 90	17 September 2011
Confidential	CFV 89	17 September 2011
Confidential	CFV 88	17 September 2011
Confidential	CFV 87	17 September 2011
Confidential	CFV 83	18 August 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 Victoria	CFV 55	27 April 2011
	CFV 44	21 April 2011
Department of Education, Employment and Workplace Relations	CFV 130	5 October 2011
	CFV 118	30 September 2011
	CFV 117	30 September 2011
	CFV 116	30 September 2011
Department of Families, Housing, Community Services and Indigenous Affairs	CFV 162	24 October 2011
Department of Human Services	CFV 155	12 October 2011
Department of Immigration and Citizenship	CFV 121	30 September 2011

N Dobbie	CFV 163	21 October 2011
P Easteal and E Emerson-Elliott	CFV 145 CFV 05	5 October 2011 23 March 2011
Elder Abuse Prevention Unit, Older Person's Programs, Lifeline Community Care Queensland	CFV 77	31 May 2011
Equality Rights Alliance—Women's Voices for Gender Equality	CFV 143	29 September 2011
Erskine Rodan and Associates	CFV 80	17 June 2011
FamilyVoice Australia	CFV 86	15 September 2011
Federation of Ethnic Communities' Councils of Australia	CFV 126	30 September 2011
Gippsland Community Legal Service	CFV 114	30 September 2011
Good Shepherd Australia New Zealand	CFV 41	15 April 2011
Good Shepherd Youth & Family Service	CFV 132	30 September 2011
Good Shepherd Youth & Family Service, McAuley Community Services for Women and Kildonan Uniting Care	CFV 65	4 May 2011
A Hatcher	CFV 03	8 January 2011
Homeless Persons Legal Service	CFV 95	26 September 2011
Immigration Advice and Rights Centre Inc	CFV 149 CFV 32	7 October 2011 12 April 2011
Indigenous Law Centre	CFV 144	5 October 2011
Inner City Legal Centre	CFV 131	4 October 2011

Joint Submission from Domestic Violence Victoria and others	CFV 59	27 April 2011
	CFV 33	12 April 2011
	CFC 22	6 April 2011
Kingsford Legal Centre	CFV 161	14 October 2011
Law Council of Australia	CFV 23	5 April 2011
Law Council of Australia, Family Law Section	CFV 67	5 May 2011
Law Institute of Victoria	CFV 157	14 October 2011
	CFV 74	17 May 2011
Lone Fathers Association Australia	CFV 109	30 September 2011
Migration Institute of Australia	CFV 148	7 October 2011
Multicultural Disability Advocacy Association	CFV 60	28 April 2011
National Children's and Youth Law Centre	CFV 156	12 October 2011
	CFV 64	3 May 2011
National Council of Single Mothers and their Children	CFV 119	30 September 2011
	CFV 57	28 April 2011
	CFV 45	21 April 2011
National Legal Aid	CFV 164	27 October 2011
	CFV 81	24 June 2011
	CFV 75	20 May 2011
National Network of Working Women's Centres	CFV 20	6 April 2011
National Welfare Rights Network	CFV 150	10 October 2011
Non-Custodial Parents Party (Equal Parenting)	CFV 134	4 October 2011
	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
NSW Women's Refuge Movement	CFV 120	30 September 2011
C O'Donnell	CFV 135 CFV 82	1 October 2011 14 July 2011
Office of the Australian Information Commissioner	CFV 142 CFV 68 CFV 61 CFV 30 CFV 18	30 September 2011 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 Advice & Casework Service Inc	CFV 111	29 September 2011
Refugee and Immigration Legal Service	CFV 160 CFV 34	17 October 2011 12 April 2011
Refugee & Immigration Legal Centre	CFV 129	30 September 2011
Safe Work Australia	CFV 115	30 September 2011
SingleMum	CFV 07	27 March 2011

Sole Parents' Union	CFV 63	27 April 2011
	CFV 52	27 April 2011
Townsville Community Legal Service	CFV 151	10 October 2011
Victoria Legal Aid	CFV 25	7 April 2011
Visa Lawyers Australia	CFV 76	23 May 2011
M Vnuk	CFV 47	21 April 2011
Women Everywhere Advocating Violence Elimination	CFV 108	30 September 2011
	CFV 106	30 September 2011
	CFV 92	30 September 2011
	CFV 85	20 September 2011
	CFV 84	20 September 2011
	CFV 58	13 September 2011
	CFV 31	13 September 2011
	CFV 14	6 September 2011
Welfare Rights Centre Inc NSW	CFV 70	27 April 2011
Welfare Rights Centre Queensland	CFV 66	12 April 2011
	CFV 43	5 April 2011
White Ribbon	CFV 112	9 May 2011
M Winter	CFV 97	30 September 2011
	CFV 51	26 September 2011
	CFV 12	27 April 2011
Women With Disabilities ACT	CFV 153	5 April 2011
		11 October 2011

Women's Health Victoria	CFV 133 CFV 11	4 October 2011 5 April 2011
Women's Legal Services NSW	CFV 28	11 April 2011
Women's Information and Referral Exchange	CFV 94 CFV 93	23 September 2011 23 September 2011

Appendix 2. Agencies, Organisations and Individuals Consulted

Name	Location
Aboriginal Family Law Services	Perth
Aboriginal Family Violence Prevention and Legal Service Victoria	Sydney
Aboriginal Legal Service of Western Australia	Perth
Advocacy for Inclusion	Sydney
Australian Chamber of Commerce and Industry	Melbourne Sydney
Australian Domestic and Family Violence Clearinghouse	Sydney
Australian Human Rights Commission	Sydney
Australian Industry Group	Sydney
Australian Institute of Superannuation Trustees	Sydney
Australian National University Legal Workshop	Canberra
Australian Prudential Regulation Authority	Sydney
Australian Taxation Office	Sydney
E Bodsworth, The Brotherhood of St Laurence	Melbourne
Associate Professor J Burn, Faculty of Law, University of Technology Sydney; Sudrshiti Reich, College of Law, Australian National University	Sydney
J Bytheway, Jobwatch	Melbourne

Name	Location
Professor T Carney, Sydney Law School, University of Sydney	Sydney
Centrelink (Multiple Consultations)	Canberra Sydney
CEO Challenge	Brisbane
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
R Dale, URCOT	Melbourne
J Della Bona, Beanangng Kwuurt Institute	Perth
Department of Education, Employment and Workplace Relations (Multiple Consultations)	Canberra Sydney
Department of Families, Housing, Community Services and Indigenous Affairs (Multiple Consultations)	Canberra Sydney
Department of Human Services (Multiple Consultations)	Canberra Sydney
Department of Immigration and Citizenship (Multiple Consultations)	Canberra Sydney
M Dimopoulos, MyriaD Consultants	Sydney
N Dobbie and X Devine, Dobbie and Devine Immigration Lawyers	Sydney
Domestic Violence Victoria and Others: Asylum Seeker Resource Centre; Domestic Violence Resource Centre Victoria; Multicultural Centre for Women's Health; Victorian Women Lawyers Law Reform Committee.	Sydney

Name	Location
Federal Magistrate R Driver	Sydney
Professor P Easteal and Professor D Emerson-Elliot	Canberra
Equal Opportunity for Women in the Workplace Agency	Sydney
Equality Rights Alliance	Canberra
Fair Work Australia	Sydney
Fair Work Ombudsman	Sydney
Fathers' Groups Roundtable: Dads in Distress Support Services; Lone Fathers Association of Australia; Shared Parenting Council of Australia	Sydney
B Fehlberg and C Millward	Sydney
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 Advice and Casework Service	Sydney
Immigrant Women's Speak Out Association	Sydney
InTouch Multicultural Centre Against Family Violence	Melbourne Sydney
M Kenny, Law Reform Commission of Western Australia	Sydney
Legal Aid WA	Perth
LGBTI Community Round Table—ACON; Inner City Legal Centre; Gay and Lesbian Immigration Taskforce; The Gender Centre; Welfare Rights Centre NSW.	Sydney
D Manne, Refugee and Migration Legal Centre	Melbourne
H Martin, Visa Lawyers Australia	Sydney

Name	Location
V Masters, Australian Government Solicitor	Melbourne
Migration Institute of 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
National Aboriginal and Torres Strait Islander Women's Alliance	Brisbane
National Network of Working Women's Centres	Brisbane
National Research Centre for Occupational Health and Safety Regulation	Sydney
D Nelson, Social Security Rights Victoria	Melbourne
Office of Australian Information Commissioner	Sydney
Office of the Commonwealth Ombudsman	Sydney
People with Disability Australia	Sydney
R Pilkington and S Lowes, Legal Aid NSW	Sydney
Queensland Council of Social Services	Brisbane
Queensland Domestic Violence and Employment Action Group	Brisbane
Associate Professor H Rhoades, Melbourne Law School, University of Melbourne	Sydney
Professor J Riley, Sydney Law School, University of Sydney	Sydney
Justice J Ryan and K Murray, Family Court of Australia	Sydney
Safe Work Australia	Sydney
K Swinbourne, Sole Parents' Union	Sydney

Name	Location
M Tooma, Norton Rose	Sydney
Treasury	Sydney
Unions Round Table: 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
E Webster, Central Australian Aboriginal Legal Aid Service Inc	NT
Western Australian Council of Social Services	Perth
White Ribbon	Sydney
Women with Disabilities Australia	Sydney
Women's Groups Roundtable: National Council for Single Mothers and Their Children; Women Everywhere Advocating Violence Elimination Inc	Sydney
Women's Legal Services	Sydney
C Wright, Fragoman Lawyers	Sydney

Appendix 3. Abbreviations

AASW (Qld)	Australian Association of Social Workers Queensland
AAT	Administrative Appeals Tribunal
ABS	Australian Bureau of Statistics
ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
ADFVC	Australian Domestic and Family Violence Clearinghouse
AFPCS	Australian Fair Pay and Conditions Standards
AGD	Attorney-General's Department
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
AMEP	Adult Migrant English Program
ANU	Australian National University
APONT	Aboriginal Peak Organisations Northern Territory
APRA	Australian Prudential Regulation 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
ATSIWLAS	Aboriginal and Torres Strait Islander Women’s Legal and Advocacy Service
ATSIWLSNQ	Aboriginal and Torres Strait Islander Women’s Legal Services North Queensland Inc
AVO	Apprehended Violence Order
CAALAS	Central Australian Aboriginal Legal Service
CALD	Culturally and Linguistically Diverse
Cape York Model	Cape York Welfare Reform Model
CCA	Comprehensive Compliance Assessment
CCB	Child Care Benefit
CDEP Scheme	Community Development Employment Projects Scheme
CDPP	Commonwealth Director of Public Prosecutions
CEDAW	<i>Convention on the Elimination of All Forms of Discrimination Against Women</i>
Child Support and Family Assistance Issues Paper	<i>Family Violence and Commonwealth Laws Issues Paper—Child Support and Family Assistance Law</i>
Child Support Guide	The Guide: CSA’s Online Guide to the Administration of the New Child Support Scheme
Child Support Issues Paper	<i>Family Violence and Commonwealth Laws Issues Paper—Child Support and Family Assistance Law</i>

CLC NSW	Community Legal Centres NSW
COAG	Council of Australian Governments
COCR	Change of Circumstances Reassessment
Compulsory IM	Compulsory Income Management
CPSIM	Child Protection Scheme of Income Management
CPSU	Community and Public Sector Union
CROC	<i>Convention on the Rights of the Child</i>
CSA	Child Support Agency
CSMC	Council of Single Mothers and their Children Inc
CTP	Capacity to Pay
CYWR	Cape York Welfare Reform
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
Discussion Paper	<i>Family Violence and Commonwealth Laws</i> (ALRC Discussion Paper 76)
DPO	Departure Prohibition Order
DVO	Domestic Violence Order
DVRC Victoria	Domestic Violence Resource Centre Victoria
DV Victoria	Domestic Violence Victoria
EAP	Employee Assistance Program

ENS	Employer Nominated Scheme
EOWA	Equal Opportunity for Women in the Workplace Agency
EPF	Employment Pathway Fund
EPP	Employment Pathway Plan
ERA	Equity Rights Alliance
ESAt	Employment Services Assessment
ESL	English as a Second Language
Exposure Draft Bill	Family Law Amendment (Family Violence) Bill 2010—Exposure Draft
FaHCSIA	Department of Families, Housing, Community Services and Indigenous Affairs
FAO	Family Assistance Office
<i>Family Assistance Act</i>	<i>A New Tax System (Family Assistance) Act 1999 (Cth)</i>
<i>Family Assistance (Administration) Act</i>	<i>A New Tax System (Family Assistance) (Administration) Act 1999 (Cth)</i>
Family Assistance Issues Paper	<i>Family Violence and Commonwealth Laws Issues Paper—Child Support and Family Assistance Law</i>
Family Violence Bill	Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth)
FECCA	Federation of Ethnic Communities' Councils of Australia
FMSS	Financial Management Support Services
<i>For Your Information</i>	<i>For Your Information: Australian Privacy Law and Practice, ALRC Report 108 (2008)</i>

FRC	Family Responsibilities Commission
FRCA	<i>Family Responsibilities Commission Act 2008 (Qld)</i>
FTB	Family Tax Benefit
FWA	Fair Work Australia
FWO	Fair Work Ombudsman
<i>Gender Guidelines</i>	Guidelines on Gender Issues for Decision Makers
GMC	General Medical Council
IARC	Immigration Advice and Rights Centre Inc
ICC	Indigenous Call Centre
ICCPR	<i>International Covenant on Civil and Political Rights</i>
ICT	Information and Communication Technology
IEP	Indigenous Employment Program
IFAs	Individual Flexibility Arrangements
IGA	Intergovernmental Agreement for Regulatory and Operational Reform in OHS
ISO	Indigenous Specialist Officer (Ch 4) Indigenous Service Officer (Ch 13)
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

LIV	Law Institute of Victoria
MAT	Maintenance Action Test
MDAA	Multicultural Disability Advocacy Association
Ministerial Taskforce	Ministerial Taskforce on Child Support
MOC	Medical Officer of the Commonwealth
Model Act	Model Work Health and Safety Act
Model Regulations	Model Work Health and Safety Regulations
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
National OHS Review	National Review into Model OHS Laws
<i>National Plan</i>	<i>National Plan to Reduce Violence against Women and their Children</i>
National Strategy	National OHS Strategy 2002–2012
NCSMC	National Council of Single Mothers and their Children
NES	National Employment Standards
New IM	New Income Management
NLA	National Legal Aid
NNWWC	National Network of Working Women’s Centres

NSWLRC	NSW Law Reform Commission
NTER	Northern Territory Emergency Response
NWRN	National Welfare Rights Network
OAIC	Office of the Australian Information Commissioner
OHS	Occupational Health and Safety
<i>OHS Act</i>	<i>Occupational Health and Safety Act 1991 (Cth)</i>
OHS Code	<i>Occupational Health and Safety Code of Practice 2008 (Cth)</i>
<i>OHS Regulations 1991</i>	<i>Occupational Health and Safety (Safety Arrangements) Regulations 1991 (Cth)</i>
<i>OHS Regulations 1994</i>	<i>Occupational Health and Safety (Safety Standards) Regulations 1994 (Cth)</i>
PAM	<i>Procedures Advice Manual 3</i>
PCBU	Person Conducting a Business or Undertaking
PIR	Post-Implementation Review
POE	Protection Obligations Evaluation
RACS	Refugee Advice and Casework Service (Chapters 20–22) Restricted Access Computer System (Chapter 5)
RAILS	Refugee and Immigration Legal Centre Inc
RDA	<i>Racial Discrimination Act 1975 (Cth)</i>
Refugees Convention	<i>Convention Relating to the Status of Refugees</i>
RILC	Refugee and Immigration Legal Centre Inc
RMOC	Review Medical Officer of the Commonwealth

The Royal Commission	Royal Commission into Aboriginal Deaths in Custody
RRT	Refugee Review Tribunal
RSMS	Regional Sponsored Migration Scheme
SCAG	Standing Committee of Attorneys-General
SCCB	Special Child Care Benefit
SEAM	School Enrolment and Attendance Measure
<i>Seeking Security</i>	<i>Seeking Security: Promoting Women’s Economic Wellbeing Following Domestic Violence</i>
Senate Committee	Senate Legal and Constitutional Affairs Legislation Committee
<i>SIS Act</i>	<i>Superannuation Industry (Supervision) Act 1993 (Cth)</i>
<i>SIS Regulations</i>	<i>Superannuation Industry (Supervision) Regulations 1994 (Cth)</i>
SMSF	Self-Managed Superannuation Fund
SPG	Superannuation Prudential Practice Guide
<i>SRC Act</i>	<i>Superannuation (Resolution of Complaints) Act 1993 (Cth)</i>
SRCC	Safety, Rehabilitation and Compensation Commission
SSAT	Social Security Appeals Tribunal
SSAA	<i>Social Security (Administration) Act 1999 (Cth)</i>
<i>SWA Act</i>	<i>Safe Work Australia Act 2008 (Cth)</i>
<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>
TCLC	Townsville Community and Legal Centre
TFN	Tax File Number

UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDRIP	Universal Declaration on the Rights of Indigenous Peoples
UNSW	University of New South Wales
VAWA	<i>Violence Against Women Act</i>
Voluntary IM	Voluntary Income Management
WAD	Workplace Agreements Database
Waiting period	Newly Arrived Resident's Waiting Period
WEAVE	Women Everywhere Advocating Violence Elimination Inc
WIRE	Women's Information Referral Exchange
WRC (NSW)	Welfare Rights Centre NSW
WRC Inc (Qld)	Welfare Rights Centre Inc (Qld)
WRMC	Workplace Relations Ministers Council