



**Submission by the  
Commonwealth Ombudsman**

**FAMILY VIOLENCE AND  
COMMONWEALTH LAWS:  
SOCIAL SECURITY**

**ISSUES PAPER 39  
PREPARED BY THE  
AUSTRALIAN LAW REFORM COMMISSION**

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## BACKGROUND

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability, and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

The Commonwealth Ombudsman holds a unique position in the Australian administrative law landscape and is provided with an understanding of many individual experiences of members of the public, who are dissatisfied with the way that government has dealt with their issue. Over time, through investigating individual complaints about the actions of a particular Commonwealth department or agency, the Ombudsman's office is able to build up a detailed picture of an agency's operations and to observe what happens when legislation can have unintended consequences.

The Australian Law Reform Commission (ALRC) has invited submissions in response to its Issues Paper, *Family Violence – Social Security* (IP 39), which deals with the treatment of family violence in Commonwealth social security laws<sup>1</sup>.

The Ombudsman's office receives and investigates complaints from individuals about the actions of Commonwealth departments or agencies. In 2009-10, Centrelink was the most frequently complained about Commonwealth agency (with 5,199 approaches made to the Ombudsman's office). This volume of complaints means the Ombudsman's office is uniquely placed to obtain an understanding of the individual experiences of members of the public with the operation of Commonwealth laws about social security benefits and the agencies that administer them.

The Ombudsman has received a small number of approaches concerning the actions of Centrelink where family violence has been raised as a feature of the experience of a person relevant to the approach, as perpetrator or victim. Indeed, personal experience of family violence may be the underlying reason for why a person has approached Centrelink in the first place.

However, we note that complainants may not always tell us about their experience of family violence. The very act of making an approach to our office may be too confronting for a person who is experiencing family violence. A victim may also decide to omit their experience of family violence from their complaint to us because of the shame they feel about their situation. Alternatively, many complainants may not volunteer to us their experience of family violence because they do not see it as

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<sup>1</sup> *Social Security Act 1991 and Social Security (Administration) Act 1999*

relevant to their complaint. We also think it is likely that some victims of family violence may not even realise that our office might be able to help them if they are experiencing a problem with Centrelink.

We are currently considering ways to make our office more accessible to vulnerable members of our community, including victims of family violence. However, for the purposes of this submission, we have drawn upon our general experience of investigating Centrelink complaints, and the information that we have gained through our engagement with community groups and government agencies that assist people in their dealings with Centrelink. In this way, we have been able to show some aspects of the social security system which are likely to cause problems for those who are experiencing or fleeing family violence. We make it clear in the submission whenever we express a view that is not drawn directly from a complaint that directly alleged or acknowledged family violence.

We welcome this opportunity to respond to the ALRC's Issues Paper and hope that our submission may usefully inform the ALRC's Inquiry.

# **RESPONSE TO THE ISSUES PAPER**

## **Defining family violence (Question 1)**

The ALRC queries whether the social security law should be amended to insert a definition of 'family violence' consistent with that previously recommended by the ALRC and NSW Law Reform Commission.

The Ombudsman's office considers that there is significant value in having a common definition of family violence across Commonwealth legislation. We are also in favour of the definition being consistently applied across the policies and procedures of Commonwealth agencies, wherever possible. Having a single consistently applied definition would potentially minimise the need for a person to retell their story and obtain different types of evidence for agencies they will commonly need to approach when experiencing or fleeing family violence, such as Centrelink and the CSA.

The definition recommended by the ALRC and NSW Law Reform Commission would seem to encompass the full range of behaviours that amount to 'violence' within the term 'family violence'. We do note, however, that any definition of family violence in the child support, family assistance and social security legislation would need to be broad enough to include violence involving persons connected by a variety of current and former 'family' relationships. To this end, we consider that the definition should acknowledge that 'family violence' may involve violence affecting parents and children, and other members of their former and current family units that are living separately and, indeed, may have never lived together. It may be necessary to separately define the term 'family', within the policy setting and context of the specific legislation.

## **Identifying, informing and collecting information about family violence (Questions 2-11)**

The ALRC's paper seeks comments on the way that family violence is identified and acted upon in the social security system, and asks whether additional steps should be taken to improve these processes.

### ***Seeking information about family violence***

Our office receives only a small number of complaints which mention family violence, and in most instances the violence is not the central focus of the complaint. This makes it difficult for us to draw conclusions about the effectiveness of Centrelink staff's advice to customers about the options available to them if they experience family violence.

However, as a general principle it is the view of this office that service delivery agencies such as Centrelink have an obligation to, wherever possible, actively seek information from customers about any circumstances which might affect their capacity to actively engage with government, or which might affect the type, rate or conditions of payments or services they are, or may be eligible for.

Anecdotally we are aware that many customers do not realise that family violence is something that may impact on the types of payments or services delivered to them by Centrelink. An active 'screening' process by staff, combined with general information to customers in claim forms, payment information booklets and letters may assist to better educate customers in this regard.

The challenges of identifying, and encouraging disclosure of sensitive personal information are discussed in more detail in the Ombudsman's own motion report, *Falling through the cracks: Engaging with customers with a mental illness in the social security system*.<sup>2</sup> Although that report, and its recommendations, focused on interactions with customers with a mental illness, it is our view that the same general principles apply when delivering services to all vulnerable customers, including those affected by family violence. The following recommendations from that report are particularly relevant if the references to customers with a mental illness are read more broadly to include all customers whose vulnerabilities may impact on their willingness or capacity to engage effectively with government, or may entitle them to different types, rates or conditions of payment or service.

#### ***Recommendation 3***

*Centrelink and DEEWR should expand existing service delivery procedures to require that, where staff identify a customer's mental illness may prevent them from adequately pursuing a beneficial course of action, the customer is provided with additional services by way of advice, support or referrals.*

#### ***Recommendation 7***

*Centrelink and DEEWR should consider how to improve their information products and staff scripts to ensure customers are aware of the benefits of disclosing a mental illness, and feel comfortable doing so.*

#### ***Recommendation 8***

*Centrelink and DEEWR enhance the existing training and procedural instructions to provide greater guidance to staff about what is expected of them when they identify that a customer has a mental illness. The procedural*

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<sup>2</sup> Ombudsman Report 13/2010, September 2010

*instructions should provide direct links to complementary procedures, such as referrals to social workers and JCAs.*

**Recommendation 9**

*Centrelink implement processes to collect information from customers who identify as having a disability (mental or physical) about the impact that disability has on their capacity to engage effectively with the social security system.*

**Recommendation 10**

*Centrelink should consider implementing a standard process for recording any special needs or limitations associated with mental illness on a customer's electronic file, as well as any instructions/strategies for accommodating those needs.*

*It may be appropriate to consider adopting standard words for reflecting a customer's condition and needs in order to avoid the risk of causing offence to the customer in the event of an FOI application.*

**Information sharing**

The ALRC asks about the circumstances, if any, in which information about family violence should be shared between government agencies. Our view is that careful consideration should be given to whether mandatory information-sharing between Centrelink and other agencies should take place. If information-sharing continues on a voluntary basis, then we consider that it would be appropriate for a customer to be informed that their disclosure of family violence is relevant to another agency and then their permission obtained for such information to be shared with other agencies. We also note that a consistent definition of family violence would certainly aid any information-sharing between Commonwealth government agencies.

Information sharing between Centrelink and other government agencies, such as the Child Support Agency and the Australian Tax Office, occurs in certain legislated circumstances. Our experience is that this information sharing is heavily weighted towards compliance and fraud control, to ensure that people do not obtain a financial advantage from the Commonwealth by failing to declare to an agency relevant information about their circumstances.

However, we have also noticed a trend in the complaints that we receive and investigate that many people assume that Commonwealth agencies share more information about their circumstances than is actually the case. In particular, people who are customers of Centrelink and the Child Support Agency often assume that those agencies automatically share information about their circumstances. In some cases, people have relied to their detriment on that assumption, and have failed to disclose the same information to other agencies, believing that their contact with one agency will suffice.

We also note some recent changes to the way that Centrelink and the Child Support Agency have encouraged people to view these agencies as a 'one stop shop' for social security, family assistance and child support information. We believe the government's plan to integrate the various agencies within the Commonwealth Human Services portfolio will further encourage people to assume that relevant information will be shared between Centrelink and the Child Support Agency. However, we understand that information sharing may occur only on a limited 'opt in

basis', i.e. where a customer expressly advises that they want their information shared and may be limited by computer platform issues.

We believe that the complaints we have seen indicate a pattern of vulnerable people who assume that Centrelink and the Child Support Agency will share relevant information about their situation and give them detailed and timely advice at appropriate times about their options. We consider that it would be preferable for Centrelink and the Child Support Agency to work together in a more co-ordinated way to ensure that people experiencing or fleeing domestic violence understand that those circumstances are relevant to the decisions and actions of many government agencies in providing them services. Both agencies should also be careful to explain to these customers that information about their family violence situation is not automatically shared, and they should consider contacting the other agency directly to discuss how this might affect the payments or services they receive.

### ***Collecting information about family violence***

With respect to Centrelink's record keeping for family violence matters, we are aware that it may record a 'vulnerability indicator' on a customer's record, including if a customer has recently experienced a relationship breakdown where family violence was involved. Job Services Australia (JSA) providers may also recommend that a vulnerability indicator is added to a customer's record, if one is not already present.

While vulnerability indicators are visible to all staff, it is our understanding that they are generally only considered when making decisions about compliance matters, and are not treated as a general indicator of vulnerability for staff when making decisions about other aspects of a customer's arrangements such as payments or concessions. In our view there would be merit in expanding the use of vulnerability indicators (or some other visible 'flag' on the customer's record) to highlight the customer's vulnerability to all staff handling their file. Recommendations 9 and 10 of the Ombudsman's *Falling through the cracks*<sup>3</sup> report were made to reflect this view.

The ALRC has queried whether Centrelink staff and social workers should be able to access information from the proposed national register of protection orders for the purposes of gathering information about a customer's family violence situation. While we appreciate efforts to inform the staff of Commonwealth agencies about the vulnerabilities of its customers, we do hold some concerns about enabling access to the recommended national register. Not all Centrelink customers who experience family violence would obtain a protection order or similar court order against the perpetrator. By having staff check the national register when a person alleges family violence, an assumption may be created that if nothing is listed on the national register, that the violence does not exist. Additionally, we are unsure as to how current the national register would be, which may create further complexities if a person refers to a recent order that is not on the register.

We reiterate our view that a person experiencing family violence should be able to choose how they want to declare themselves to others. A number of assumptions may be made by a staff member when a check of the national register reveals that a protection order has been obtained. We therefore consider that the register should only be used in the context of a customer's disclosure and how they want their experience to affect future dealings with agencies. We also note that there are a number of privacy considerations that would bear on the use by Centrelink social workers, Indigenous Service Officers and CSA staff of the national register. To this

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<sup>3</sup> Ombudsman Report 13/2010, September 2010

end, we consider that the use of the national register would need to be carefully controlled.

Where a customer discloses family violence in relation to a particular claim process, we are aware that Centrelink's procedures provide that staff should not (and in some instances must not) contact the perpetrator of the violence. We are supportive of arrangements that protect vulnerable customers and enable them to access entitlements without fear of recrimination. Of course, this protection must be balanced with the need for procedural fairness in situations where disclosures of family violence may have a flow-on effect for the entitlements of the alleged perpetrator.

Where Centrelink seeks to confirm the existence of family violence by obtaining evidence from third parties, we suggest that emphasis should be placed on obtaining information from independent and/or professional people or organisations who may have observed the violence or its effects. We acknowledge that these sorts of evidence will not be available in every case, but it may be appropriate 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.



## Relationships and social security law (Questions 12-23)

### ***'Member of a couple'***

Anecdotally this office is aware of instances where Centrelink has determined that a customer is a member of a couple, even where it appears the 'relationship' may have only continued as a result of duress or financial abuse. It is unclear whether this has resulted from decision makers believing that the criteria in s 4 of the *Social Security Act 1991* do not allow them to find the customer was not a member of a couple, or whether the facts of the individual cases were not sufficiently strong to overcome those criteria which did point to the existence of a relationship.

In any event and given the absence of any current advice to staff on this topic, we agree it may be appropriate for a clear position to be articulated regarding how information about family violence should be considered in assessing whether a customer is a member of a couple for social security purposes. This might be achieved by making direct reference to family violence in s 4, or by providing discretion to staff under policy guidance for s 4 and/or s 24 to determine that the existence of some types of family violence may demonstrate that a customer is not a member of a couple, or there are special reasons for treating them as not being a member of a couple.

### ***When a person is regarded as 'independent'***

The ALRC queries whether the current arrangements for determining independence afford sufficient support and protection to customers who experience family violence. As the ALRC mentions, the Ombudsman's office released a report into *Payment of independent rate of youth allowance to a young person*<sup>4</sup> in 2008 which clearly articulated the office's views on this topic. Of particular relevance to this report, we recommended that:

*Centrelink review its policies, practices and training to ensure that under-18 Youth Allowance applicants do not bear all responsibility for providing specific information about the financial circumstances of their parents or the level of support available, particularly in cases involving domestic violence, and/or where they do not live with their parents.*

Although we have not identified further complaints on this issue, recent discussions with non-government organisations have indicated that customers feel Centrelink's processes continue to place the bulk of the burden for establishing independence on the young person, even where staff are aware that family violence is the underlying reason for the customer's claim.

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<sup>4</sup> Ombudsman Report 01/2008, February 2008

## **Eligibility requirements (Questions 24-27)**

### ***Administrative requirements***

We are aware that Centrelink and DEEWR both have guidance available to staff for considering customer's individual circumstances when determining appropriate reporting and participation requirements. One of these considerations is whether the customer has experienced, or is experiencing family violence. As in many areas of service delivery, the potential for staff to exercise discretion on this basis is impacted by whether individual customers disclose the violence, either to the agency generally or in the particular context of negotiating their requirements.

With respect to the exemption timeframes for reporting and activity requirements, we note that many of them are relatively short (between two and 12 weeks) and it is not clear whether extensions to these timeframes are easily requested or granted. It may be helpful for Centrelink to clarify with customers, when granting it, the length and purpose of the exemption. This is particularly relevant if there is an expectation that the customer will somehow 'resolve' the barriers imposed by family violence in the given timeframe, or there is no discretion to extend or re-grant an exemption on the same grounds.

Our office is aware that family violence may be a 'reasonable excuse' for a failure to comply with a requirement, but it is not clear whether customers are aware of this or whether compliance staff specifically question customers about the existence of family violence (if not already recorded elsewhere) when deciding whether to apply a failure. It may be appropriate for either the social security law or policy to provide specific guidance to staff about whether family violence may be a relevant consideration in determining whether a customer has a 'reasonable excuse'.

## Duress (Questions 28-29)

### ***Nominee arrangements***

This office agrees that current nominee arrangements provide limited protections for customers who may appoint a nominee under duress. In particular, our office has identified in a number of complaints:

- the lack of regular review
- the lack of assessment of whether a requested nominee arrangement is in the customer's best interest, or entered into willingly by the customer
- the lack of automatic recognition of other legal forms of authority, including Powers of Attorney and Guardianship Orders.

#### **CASE STUDY – *Single form of authority***

Mr L held an enduring Power of Attorney and Guardianship Order that authorises him to act on behalf of Mr Z, and contacted Centrelink to provide information about Mr Z's living arrangements. When Mr Z requested written confirmation that Mr Z's details had been updated, Centrelink advised Mr L that he should arrange for Mr Z to complete a nominee authority if he wanted Mr L to represent him with Centrelink on an ongoing basis.

Mr L complained to the Ombudsman's office, saying that he disagreed that a nominee authority should be required, saying that Centrelink should give effect to the legal authorities already in place. He further complained that it was unreasonable to require a nominee authority from Mr Z as he was no longer capable of giving his consent.

Our office was satisfied that the requirement for Mr L to complete a nominee authority was consistent with Centrelink's existing policy arrangements.

Although there was no indication that Mr Z was subject to family violence, it is apparent that he was a vulnerable customer who required assistance in dealing with Centrelink. Complaints such as these highlight that the interests of many types of vulnerable customers may be better protected by the introduction of a revised nominee (or other 'authorised representative') system which:

- requires periodic review of existing arrangements
- requires scrutiny of requested arrangements for particular customers
- makes provision for the recognition of legal authority documents.

These sorts of changes would foster more consistent decision making, and ensure representative arrangements that protect customers rather than potentially exposing them to greater manipulation or abuse.

## Payments and payment arrangements (Questions 30-37)

### ***Crisis Payment***

The ALRC asks whether changes should be made to the eligibility criteria and policy guidance for Crisis Payment to make it more readily available to customers affected by family violence.

This office has received a number of complaints about Crisis Payments from customers experiencing family violence. Analysis of these complaints has highlighted a number of limitations on Crisis Payment, which prevent many customers in family violence situations from accessing payment.

Where a customer has experienced family violence and wishes to claim Crisis Payment, there are two grounds on which they can make a valid claim, being that:

- they have left the home they shared with the perpetrator of the violence, and wish to establish a new home
- the perpetrator of the violence has left, or been forcibly removed from the home, and the customer has stayed.

This means that there are groups of customers affected by family violence, who are not eligible for Crisis Payment, because:

- they have not yet left the home they share with the perpetrator of the violence and cannot afford to do so without financial assistance
- although they have been forced to leave their home a result of family violence, it was not a home they shared with the perpetrator of the violence (for example, customers who have already moved out of the family home to escape the perpetrator but the perpetrator locates them at the new home, or customers who have not ever shared a home with the perpetrator)
- they do not have stable accommodation as a result of family violence (for example, homeless customers or customers who have resided in emergency accommodation and wish to establish stable accommodation in order to escape family violence).

#### **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.

We are aware of situations where customers experiencing family violence who are not eligible for Crisis Payment have asked whether they are eligible for an advance payment as an alternative, only to be advised that they cannot obtain an advance because they have a debt or are already repaying an earlier advance. These customers are effectively left with no options for obtaining prompt financial support to assist with the costs of removing themselves from family violence. In our view, consideration should be given to expanding the eligibility criteria for Crisis Payment

to ensure that all customers who require financial assistance to escape family violence are able to access it. As the ALRC suggests, this may also include granting payment to non-customers who are experiencing financial hardship as a result of family violence.

**CASE STUDY – *No options for support***

Ms D applied to Centrelink for a Crisis Payment, saying that she needed to leave her home and establish a new home because of the threat of violence from her ex-partner. Her request was refused because Crisis Payment could not be paid where the home being left is not shared with the perpetrator of the violence.

Ms D then asked Centrelink if she could access an advance payment, but was advised this was not an option because she already had a Centrelink debt.

Our office declined to investigate and advised Ms D to seek a review of the decision to refuse her claim for Crisis Payment.

The ALRC asks whether customers in receipt of weekly payments should be eligible to receive Crisis Payment. As we understand it, Crisis Payment is designed to provide customers experiencing extreme circumstances with additional financial assistance. Given that many customers receiving weekly payments are already deemed vulnerable, there would seem to be a strong argument that this customer group may be more likely than others to require this additional support, and accordingly we can see no reason why it should not be available.

***Urgent payments***

We understand that the policy guidelines for urgent payments do not specifically refer to family violence in the definition of ‘exceptional and unforeseen circumstances’. We agree that family violence would seem to fall into the broader category of family breakdown, which is currently included in the *Guide to Social Security Law*. However, there would seem to be value in clearly articulating family violence as a relevant consideration for deciding whether to grant an urgent payment.

***Additional information***

We are aware of instances where 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’s office notes that limited offers of this kind are not supported by the law or policy, and indeed seem to indicate that staff are not considering each customer’s individual circumstances before making a decision about their assistance needs. We suggest that procedural guidance to staff regarding payments and services 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.

## **Income management (Questions 38-44)**

The Ombudsman's office has a dedicated Indigenous Unit that is focussed on investigating complaints and providing oversight over NTER measures including Income Management. While we have received complaints about the policy, general administration and decision-making under income management, these have not included any specific issues or information that relates to family violence or the questions posed in the ALRC's issues paper.

We are currently undertaking an own motion investigation into the quality of Centrelink's decisions concerning certain aspects of the new Income Management regime in the Northern Territory and may be able to provide comments to the ALRC at the conclusion of that investigation.