Commonwealth OMBUDSMAN

Submission by the Commonwealth Ombudsman

AUSTRALIAN LAW REFORM COMMISSION: INQUIRY INTO FAMILY VIOLENCE AND COMMONWEALTH LAWS

CHILD SUPPORT AND FAMILY ASSISTANCE
ISSUES PAPER 38
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Submission by Ms Alison Larkins, Acting Commonwealth Ombudsman,

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THE COMMONWEALTH OMBUDSMAN

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 has unintended consequences.

INTRODUCTION

The Australian Law Reform Commission (ALRC) has invited submissions in response to its Issues Paper, *Family Violence – Child Support and Family Assistance* (IP 38), which deals with the treatment of family violence in Commonwealth child support and family assistance law.

The Ombudsman's office receives and investigates complaints from individuals about the actions of Commonwealth departments or agencies, including the two agencies that administer child support and family assistance law (the Child Support Agency (CSA) and Centrelink). In 2009—10, Centrelink was the most frequently complained about Commonwealth agency (5,199 complaints to the Ombudsman's office) and the CSA was in third place (2,280 complaints). 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 child support and family payments and the agencies that administer them.

The Ombudsman has received a small number of complaints about the actions of the CSA and/or Centrelink where family violence is a factor in the complaint. Indeed, personal experience of family violence may be the underlying reason for a person approaching one of these agencies in the first place. Where relevant, we have included a snapshot of those complaints in this submission.

However, we note that complainants may not volunteer to us their experience of family violence because they do not see it as relevant to their complaint. 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. 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 the CSA or Centrelink. Furthermore, the very act of complaining to the Ombudsman may be too confronting for a person who is experiencing family violence.

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 CSA and 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 the CSA and Centrelink. In this way, we have been able to show some aspects of the child support and family payment programs 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.

This submission responds, in order, to each of the ALRC's questions posed in Issues Paper 38. In summary, we consider that there is scope to reform legislation, policy and practice in the area of child support and family assistance to better protect the safety of those experiencing family violence. We support the introduction of a consistent definition of family violence across child support and family assistance laws and policy. We can also see the benefit in routine screening for family violence of applicants for child support and family assistance so that applicants can be afforded greater assistance and information. Further publication by the CSA and Centrelink about special rules for cases where family violence is involved would ensure that customers of these agencies can better assess their options.

Our review of individual complaints about the CSA and Centrelink in relation to exemptions from taking reasonable maintenance action and ending collection of child support demonstrate that the current policy and practice may be having unintended consequences. There may be an opportunity to better support victims of family violence in seeking child support in certain circumstances. A provision that legal advice be obtained in relation to a decision to end collection of child support may help vulnerable people consider the full impact of their decision. Further information from the CSA about collection activities would enable payees to take actions to better protect themselves and consider their options. The Ombudsman also recommends a review of the 'all or nothing' application of the exemption to take reasonable maintenance action which can operate unfairly for some payees.

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

CHILD SUPPORT

Definition of family violence

IP 38: Question 1
Should the *Child Support (Assessment) Act 1989* (Cth) and the *Child Support (Registration and Collection) Act 1988* (Cth) be amended to insert a definition of family violence consistent with that recommended by the Australian Law Reform Commission and NSW Law Reform Commission in *Family Violence – A National Legal Response* (ALRC Report 114)?

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. Hopefully, it would lead to alignment of polices across relevant agencies, and reduce the likelihood of an anomalous situation where the same set of factual circumstances leads to recognition of violence by one agency, but not another.

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.

Definition of eligible carer

IP 38: Question 2
What changes, if any, are needed to improve accessibility to child support payments for non-parent and non-guardian carers of children at risk of family violence?

IP 38: Question 3
Does the requirement that the child be at 'serious risk' constitute a barrier to child support for non-parent and non-guardian carers, where parents or legal guardians do not consent to them providing care?

The definition of an eligible carer in s 7B of the *Child Support (Assessment) Act 1989* (CSAA) states that a person who is not a legal guardian or parent of a child is not taken to be an eligible carer of a child unless it would be unreasonable for a parent or legal guardian to care for the child.[1] Section 7B(3) provides that it is unreasonable for a parent or legal guardian of a child to care for the child if the CSA 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.

We note that these are two tests, to be applied as alternatives.

On 8 April 2011, the CSA updated the *Child Support Guide* (the Guide)[2] to make its policy about the application of s 7B (i.e. the 'non-parent carer limitation') somewhat clearer. However, we still have some reservations about the coverage of the policy statements about the non-parent carer limitation in the Guide, and about the CSA's procedures for applying it. Further, we have some concerns about the underlying policy intention of the non-parent carer limitation, and how it fits within the broader policy of the CSAA, particularly in the light of legislative amendments that took effect from July 2008 and July 2010. We have decided to canvass these problems in this submission, because they may be having unintended outcomes for children who do not live with either of their parents because of family violence.

The non-parent carer limitation was enacted as part of the *Child Support Legislation Amendment Bill (No. 2) 2000.* The explanatory memorandum for the measure states 'the child support scheme should not be seen to condone or assist the breakdown of families'. It is therefore, in our view, a measure enacted to give a parent a veto right over a child being cared for by a non-parent carer in some circumstances, rather than one intended to ensure that the safety of a child would be paramount, or to ensure that a parent would continue to contribute to a child's support irrespective of where the child resides. While it could be argued that this would reduce the incentive for a child to leave home against his or her parent's (reasonable) wishes, it nevertheless means that a parent will not be required to contribute to the child's support while the child lives elsewhere. This appears to be an exception to the principal object of the CSAA, which is to ensure that children receive a proper level of child support and the duty to provide this rests with their parents.[3]

We note the strong similarities between the non-parent carer limitation for child support and the policy for assessing when it is unreasonable for a young person to live with one or both of their parents, which is one of the criteria for payment of the Independent Rate of Youth Allowance (YA) to a person aged 15-25. However, those

1 Section 7B(2) of the CSAA.
2 The Guide 2.1.1 http://guide.csa.gov.au/part_2/2_1_1.php#eligiblenpc at 8 April 2011.
3 Sections 3 and 4 of the CSAA.

rules do not apply to preclude a non-parent carer from applying for FTB for a child under 16.

From July 2010, the policy and administrative arrangements for determining a person's care percentage for child support were aligned with those for Family Tax Benefit (FTB). This is known as the 'alignment of care' measure, and we discuss it further in response to Questions 15 and 16 of the ALRC's issues paper, starting on page 19 of this submission.

As we understand the CSA's policy, there are now two sets of rules for determining who is entitled to receive child support for a child.

1. The 'alignment of care' rules apply to:
   - parents, and
   - non-parent carers who care for a child with the consent of both the child's parents.

   These rules take account of the actual care arrangements for the children, irrespective of whether the carer is a legal guardian, emphasising the principle that parents are obliged to support their children. They are also the same rules Centrelink applies when any carer applies for FTB for that child.

2. The non-parent carer limitation rules apply to:
   - non-parent carers who care for a child without the consent of either of the child's parents, where it is unreasonable for the child to live with either parent, and, arguably, also to
   - non-parent carers who care for a child with the consent of one of the child's parents, where it is unreasonable for the child to live with the other parent and
   - non-parent carers who care for a child without the consent of either of the child's parents, where it is unreasonable for the child to live with one of their parents.

   These rules prevent a non-parent carer successfully applying for child support from the parent of the child unless it is unreasonable for the child to live with that parent.

We consider that this is confusing, and also believe there is a risk that a non-parent carer will be entitled to FTB for a child aged under 16, but not be entitled to child support from the child's parents for that same child because of the non-parent carer limitation. We query whether this could be an unintended policy outcome.

We also note that when the non-parent carer limitation was enacted, a non-parent carer had to make a separate child support application against each of the child's parents, or could choose to apply against only one parent. This meant that a non-parent carer could choose to apply only against the parent who consented to the care arrangement; or the parent who did not consent, but with whom it was nevertheless unreasonable for the child to live.

From July 2008, a non-parent carer must apply for child support against both parents, unless there are special circumstances. The Guide says that 'special circumstances' would include a fear of violence or other special circumstances.[4] However, the CSA has not been able to explain to us how it would deal with a non-

[4] The Guide 2.1.1 at http://guide.csa.gov.au/part_2/2_1_1.php#specialcircs at 8 April 2011.

parent carer application in a case where only one parent consents to the child living with them, or where it is unreasonable for the child to live with the parent who does not consent to the care arrangements. It is therefore unclear whether the CSA would make an assessment against both parents; refuse the application against both parents; or make an assessment against only the parent with whom it is unreasonable for the child to live. The CSA has undertaken to discuss this problem with the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) – the department responsible for child support policy.

We now turn to our concerns about the circumstances in which the Guide says the CSA will be satisfied that it is unreasonable for a child to live with a parent. These are narrower than those that Centrelink applies for YA and we query whether this was deliberate. We note that the differences in the rules for YA and child support are not simply a matter of internal CSA and Centrelink policy, but reflect differences in the terms of the relevant legislation.

According to the *Guide to Social Security Law*[5]*:*

> Young people are considered to be independent for YA … purposes if they cannot live at the home of either or both their parents … because:
>
> - of extreme family breakdown or other similar exceptional circumstances, OR
> - 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, OR
> - their parents … are unable to provide the young person with a home because they lack stable accommodation.

The Guide to Social Security also explains how Centrelink will assess 'Extreme Family Breakdown & other similar exceptional circumstances':[6]

> Situations that constitute 'other similar exceptional circumstances', or that are similar to extreme family breakdown cannot be defined. The following list provides some examples.
>
> *Example 1:*
>
> - *criminal activity or substance abuse by the parents, OR*
> - *severe neglect, where adequate food, clothing, shelter, hygiene, medical attention and supervision is not being provided, OR*
> - *extreme and abnormal demands placed on the young person.*
>
> *Example 2: Cultural or religious demands, although these would rarely constitute the main reason for extreme family breakdown. Extreme cultural practices are generally illegal practices such as arranged marriages and female circumcision.*
>
> *Example 3: Refusal to allow the young person to work or study.*

If the ALRC considers that the non-parent carer limitation is justified, we consider there would be considerable value in aligning the circumstances when it would be considered unreasonable for a child to live with a parent for both YA and child support. In particular, we note that neglect has been recognised as one of the most serious threats to a child's long term well-being, but for child support purposes, a parent's neglect of a child might not be recognised as a circumstance that would make it unreasonable for a child to live with that parent.

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5 *Guide to Social Security Law 3.2.5.30* at http://www.fahcsia.gov.au/Guides_Acts/ssg/ssguide-3/ssguide-3.2/ssguide-3.2.5/ssguide-3.2.5.30.html

6 *Guide to Social Security Law 3.2.5.40* at http://www.fahcsia.gov.au/Guides_Acts/ssg/ssguide-3/ssguide-3.2/ssguide-3.2.5/ssguide-3.2.5.40.html

We further recommend that decisions about whether it is unreasonable for a child to live with his or her parent be made by a senior CSA officer, preferably with the support or advice of a suitably qualified professional, such as a social worker. Indeed, it is surprising that the CSA does not already refer cases of this type to a Centrelink social worker for assessment and assistance, and to consider whether the child requires further assistance or support from a welfare agency, or perhaps even if the child has been a victim of crime. We consider that it would be appropriate for the CSA to make such a referral even if there is a court order saying that the child is to live with their parent and the non-parent carer is unable to provide documentary evidence that would satisfy the CSA that it would be unreasonable for the child to live with that parent.

Exemption from requirement to take reasonable maintenance action

IP 38: Question 4

In relation to the legislative requirement that a person take reasonable maintenance action, in order to receive more than the base rate of Family Tax Benefit Part A, what changes, if any, are needed to family assistance and child support legislation and policy to:

(a) ensure that exemptions are accessible to victims of family violence;
(b) ensure that exemption periods are of an appropriate duration; and
(c) address any financial disadvantage of victims of family violence who are exempted?

IP 38: Question 5

Should Child Support Agency staff be required to provide information about family violence exemptions when dealing with applications for child support assessment?

Research into domestic and family violence confirms the consistent under-reporting of violence and the reluctance of victims to disclose to agencies with which they come into contact for a variety of reasons.[7]

Our contact with staff at Family Relationships Centres reveals that even where issues of violence are pertinent to the making of parenting plans, women are likely to under-report or minimise violence in the home. Victims of violence need to be given a number of opportunities to raise the issue of violence and information to understand that it is relevant in child support decisions.

We consider that CSA staff should routinely provide information about family violence exemptions when dealing with applications for child support assessment. If the CSA only provides this information to customers who specifically ask for it, or happen to mention their experience, or fear, of violence there is a serious risk that the customer may take action that jeopardises their own or their children's safety, or simply choose to do without child support, at risk of being overpaid FTB. We consider it is likely that a victim of family violence may not have thought to tell the CSA about their situation when applying for a child support assessment.

The Ombudsman's office has received a number of complaints from child support and/or FTB recipients who say that they were unaware of exemptions for family violence. Often, these people are in 'private collect' arrangements and their complaint relates to the problems complying with the reasonable maintenance action test, although some are 'CSA collect' cases and are fearful of, or actually suffering from their former partner's reaction to the CSA's collection. Not all of them ultimately decide to apply for an exemption, and not all of those who do apply are successful. Nevertheless, this is an important option that people need to know about.

Advising a person of the existence of the family violence exemption when they first approach the CSA about child support would help ensure that those affected by family violence are able to make an informed decision about the exemption option. Even if people are not interested at the time, they should be aware that they may be able to use it in future.

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[7] See Laing, L 2010 *No way to live* and p.49 Chisholm report 2009 *Family Courts Violence Review*

The following case study is an example of where a CSA customer had been unaware of the possibility of obtaining an exemption.

Case study 1: Why didn't they tell me?
Mrs A complained to our office that between 2004 and 2009 she received a lower rate of FTB Part A from Centrelink because it believed she had failed to take reasonable maintenance action. Mrs A said she had not collected child support from her former partner because of his abusive behaviour. Mrs A said that she told Centrelink and the CSA about the violence issues from 1998 to 2009. She said that she was not advised about the possibility of an exemption until late 2009 when a Centrelink social worker invited her to apply. She said that she had not seen anything on Centrelink's website or in its letters before this that would have prompted her to ask for an exemption for family violence reasons.

Centrelink granted Mrs A an exemption from 25 June 2009, but refused to backdate it. Mrs A believed that the exemption should have been backdated to 2004, so that she could receive the higher rate of FTB for that period. Our investigation revealed that Centrelink had already decided not to backdate Mrs A's exemption. This was because Centrelink had no records of Mrs A having told it about domestic violence earlier than 2009 and it did not consider the letter that she provided in 2009 from a friend was sufficient evidence of her fears.

We informed Mrs A that she could request a review of Centrelink's decision by an Authorised Review Officer and could then request a review by the SSAT. We encouraged Mrs A to provide any evidence she had of discussions with Centrelink in her review request.

IP 38: Question 6
What reforms, if any, are needed to ensure that persons who use family violence are not relieved from financial responsibility when victims obtain exemptions from the requirement to take reasonable maintenance action?

We recognise that the family violence exemption can operate to relieve a payer of child support from financial responsibility to pay for the costs of raising their children. We consider this is a difficult policy area, but believe that the overriding priority must be the safety of the carer and children. In many circumstances, an exemption can reduce the violence or fear of violence experienced by a payee that stems from applying for child support against a payer.

We consider that any discussion of exemptions from the requirement to take reasonable maintenance action on the grounds of family violence needs to also have regard to the legislative intent that both parents bear the primary responsibility for financially supporting their children. It is not, in our view, appropriate for an exemption from taking action to obtain child support to be the Commonwealth's first and foremost response to a carer's fear of violence from their former partner.

Accordingly, it would be appropriate for Commonwealth laws, and the arrangements to administer them, to support and protect victims of family violence as far as possible, so that they can be safely encouraged to seek child support. We consider that this requires a more coordinated approach by CSA and Centrelink when a person discloses a fear of family violence.

In the following case study, a family violence victim received conflicting and confusing advice about her options from the CSA and Centrelink.

Case study 2: I don't understand what they want from me!

Ms B made an application for child support with the CSA. She complained that she had provided the CSA with a copy of an Apprehended Violence Order (AVO) preventing her former partner, Mr C, from seeing her or the children due to violence, but that she had been asked for more evidence by the CSA to demonstrate why the AVO was required.

Our inquiries revealed that when Ms B applied for child support and told the CSA about the AVO, the CSA transferred her call to Centrelink to obtain an exemption. However, Ms B did not end up seeing a social worker at Centrelink, presumably because she had already applied for child support.

When Ms B made her child support application, she also provided the CSA with a letter setting out an agreement between her and Mr C for care of the children. Since making the agreement, Ms B had obtained advice from the Police that the AVO meant she was under no obligation to let Mr C see the children. She advised the CSA that the children were solely in her care. The CSA then sought further information from Ms B about the reasons why she had obtained the AVO, so it could consider whether she had an 'acceptable reason' for not making the children available to Mr C (so it could consider whether to make an interim care determination).[8] *Ms B was confused as to what she needed to do.*

We advised Ms B to make an appointment with Centrelink to see a social worker and apply for an exemption on the basis of family violence, which Ms B subsequently did.

If Centrelink and the CSA had worked together to support Ms B, rather than requiring her to speak to each agency separately, this would have minimised her confusion. In hindsight, we are concerned that Ms B may have gained the impression from her contact with the CSA that she had to make her children available to Mr C in order to qualify for child support, even though there was an AVO that prevented him from seeing them. If that was the case, given her fear of his violence, she may have believed her only safe alternative was to seek Centrelink's exemption from collecting child support.

IP 38: Question 7

Should a person who has been granted an exemption from the requirement to take reasonable maintenance action due to family violence, also be exempt from paying child support to the person who has used family violence?

The following two case studies raised this very issue.

Case study 3: If only I'd known!

Ms D had sole care of her child for seven years. She applied to the CSA for a child support assessment and for CSA collection. The CSA accepted her application and attempted to collect child support from Ms D's former partner, Mr E.

Ms D had a domestic violence order in place against Mr E. Despite this, Ms D said that Mr E continued to intimidate her with violence and threats of violence. She decided to ask the CSA to stop collecting child support for her and made her case 'private collect'. But Mr E did not make any child support payments to her.

The child then went to live with Mr E. Mr E applied for child support from Ms D and asked the CSA to collect it from her. Ms D is now required to pay child support to Mr E. Ms D complained to our office that she felt it was unjust since Mr E had never paid her anything. The CSA had explained to her that it could not back-date collection in her case to the years when Mr E should have paid privately. We concluded

[8] See our comments in response to IP 38: Question 16

that the CSA's advice to Ms D was correct and suggested that she obtain legal advice about taking her own court action to collect the unpaid child support.

Ms D was particularly upset that when she complained to the CSA about her situation, it advised her that it could have assisted her a number of years ago in obtaining an exemption. Ms D said that when she advised the CSA that she wanted it to stop collecting for her, it did not provide her with any other options. It is not clear to us whether Ms D told the CSA why she had decided to collect her child support privately. Ms D's ignorance of the exemption option appears to have worked a double disadvantage to her. She did not receive any child support from Mr E while her child was in her care and Centrelink would have assumed that she was receiving 100% of her assessed child support and reduced her FTB accordingly.

Case study 4: But I'm the victim!
Ms F was the mother of one child. She left her ex-husband, Mr G, due to domestic violence. She had also obtained restraining orders against him. Centrelink granted her an exemption from having to apply for child support.

Ms F said that Mr G kidnapped their child and then applied for child support from her. Ms F said that she was on a low income and had fallen behind with her child support payments. The CSA then started garnisheeing her wages in order to recover the debt. Ms F felt that there were double standards and wanted to know why she had no rights and had to pay. We concluded that the CSA had acted reasonably and in accordance with the law in accepting Mr G's application for child support. We suggested that Ms F lodge a complaint with the CSA about the rate at which it was collecting her child support arrears and to return to our office if she was unhappy with the outcome.

This office considers that this question raises difficult policy considerations. As noted earlier, we consider that the overriding priority in administering the exemption provisions must be the safety of the carer and children. Family violence exemptions are given only where applying for, or collecting, child support poses an unacceptable risk to the safety of the carer and children. Extending the exemption to apply to both parents may seem fair, but would arguably not achieve the same result of protecting the safety of the carer and children. It could mean additional financial hardship for the children, depriving them of a level of financial support both now and possibly into the future. It could also lead to further violence to the (now) former carer, or even the child, if the current carer is unable to obtain child support on the basis of past events and behaviour.

If the ALRC does recommend that a family violence exemption given to one parent should (or could) result in a 'bar' to the current or future child support entitlement of the other parent, this would require a fundamental rethink of the way that exemptions are given.

The current process for obtaining an exemption does not result in a finding being made against another person (the perpetrator). If an exemption could potentially affect the rights of another person, we consider that procedural fairness calls for a more stringent test regarding the presence of violence or fear of violence. While we do not advocate a test setting levels as to when violence is 'bad' enough to meet the exemption, we consider that there needs to be an objective test that would also call for a response from the alleged perpetrator.

The following case study is based on a complaint that we received from a former child support payer, who was dissatisfied with the CSA's failure to consult with him before it ended his child support assessment on the basis of a family violence exemption granted to his former partner.

Case study 5: Don't they want my side of the story?
Mr H contacted our office, concerned that the CSA had ended his child support assessment. He said he had been making private payments to his former partner when he was advised that his case had ended. Mr H said that he had spoken to a CSA officer at the counter who had told him that this had been done at his former partner's request and Mr H had guessed, from the officer's responses, that it was due to an exemption for family violence. Mr H considered that he had been denied natural justice as he refutes the allegations. He said that proper investigation should be conducted before such claims are accepted.

Our office was able to confirm for Mr H that the CSA had not made a finding against him and that the exemption would be reviewed in the future. He was advised that he could write a letter disputing the allegations and ask the CSA to put it on his file. The CSA confirmed that its procedure is to not tell a party that the end of the case was due to a violence exemption.

IP 38: Question 8
Exemption policy in relation to the requirement to take reasonable maintenance action is currently provided for in the *Family Assistance Guide* and the *Child Support Guide*. Should legislation provide that a person who receives more than the base rate of Family Tax Benefit Part A may be exempted from the requirement to take reasonable maintenance action on grounds of family violence?

The Ombudsman's office agrees that the exemption from the requirement to take maintenance action on the grounds of family violence should be provided for in child support and family assistance legislation. This would add clarity and certainty regarding the status of exemptions on the grounds of family violence within the child support and social security space.

IP 38: Question 9
Do any other issues arise for victims of family violence in obtaining exemptions from the requirement to take reasonable maintenance action?

If a person already has a child support assessment when Centrelink grants an exemption, they need to take an additional step to end their child support assessment. The payee must contact the CSA to make an election to end their child support assessment from a specified day.[9] The CSA is required to end the assessment from the specified day.[10] This gives rise to the possibility that due to delay or misunderstanding, an exemption can be administered retrospectively and cause unintended hardship to the carer and children.

In our view, an exemption should not operate retrospectively so that a payer is entitled to a refund of child support already paid. Additionally, we do not consider that it is fair for the CSA to recover from a payee who ends their assessment because of family violence any amounts they have already received as child support from the payer. The following case study highlights this problem.

Case study 6: I want my money back!
Mr I complained to us in October 2010 about a range of matters including the CSA's delay in recovering money from his former partner, Ms J, after it ended his child support case. Our investigation confirmed that, in February 2008, Ms J had obtained a retrospective exemption from Centrelink after seeing a Centrelink social worker, and ended her child support assessment. Deductions by CSA from Mr I's pay continued to be made until July 2008, and were paid to Ms J before the CSA implemented her election.

[9] Section 151 of the CSAA.
[10] Section 12(4) of the CSAA.

The CSA has asked Ms J to repay the overpayment, but there is no cost effective means for the CSA to recover it at present. However, Ms J remains liable for this sum and it is likely that the CSA will collect it from her in the future.

We think it is clear that that the granting of an exemption on the basis of family violence is not a decision that is made for the benefit of the other party. Accordingly, we consider it inappropriate, given the circumstances in which the case was ended, that the ending of the assessment should result in a situation of overpayment and where money could be recovered from the person obtaining the exemption.

Seeking information about family violence

IP 38: Question 10
Should application forms for a child support assessment, or other Child Support Agency forms – including electronic forms – seek information about family violence? If so, how?

This office considers that CSA forms should seek information about family violence. We are aware that the CSA's Change of Assessment (COA) forms have, for many years, asked whether the person has a restraining, intervention or other order involving the other parent. However, we understand that the CSA asks for this information to assist it with deciding how best to arrange the parents' separate conferences with the decision maker, rather than for any broader purpose. We are not aware of any other CSA forms that collect this information.

We suggest that it would be appropriate for the CSA to prominently include information on its letters and forms to explain that family violence might be relevant to a person's obligation to apply for and collect child support. The information should be designed to encourage the person to contact the CSA to discuss what measures the CSA can take to reduce the risk that seeking child support would precipitate violence.

In any case where a person identifies to the CSA that they have a fear of violence, the CSA should conduct a more detailed screening by asking questions about the general indicators of violence (for example, controlling behaviour regarding finances). We also consider that it would be appropriate for CSA forms to screen for a number of vulnerability indicators including homelessness, disability, illiteracy and mental illness. We note that often these indicators, along with family violence, occur in combination.

However, we recommend that any information sought about family violence should be voluntary. The existence of a domestic violence order against a person may raise a number of assumptions about both a victim and alleged perpetrator. We consider that it is up to the person experiencing the family violence to decide how they want to declare themselves to Commonwealth agencies. We believe the CSA's forms, letters and other publications should all provide clear and consistent information to assist people to understand that declaring family violence might actually be relevant and in their interests. It is important that people understand when they have choices and what they are.

IP 38: Question 11
Should Child Support Agency staff be required to inquire about family violence when a person makes a telephone application for a child support assessment? In what other circumstances, if any, should Child Support Agency staff be required to inquire about family violence when dealing with customers?

This office agrees that telephone applications for a child support assessment should be accompanied by a CSA staff member inquiring about family violence and providing information about exemptions from the requirement to take reasonable maintenance action.

However, we note that telephone applications do not differ markedly from written applications. In this respect, applications made in writing and online should also inquire about family violence indicators and provide information about exemptions.

IP 38: Question 12
Should Centrelink staff be required to inquire about family violence when referring a person to the Child Support Agency?

We consider that, before Centrelink staff refer a person to the CSA in order to apply for a child support assessment, that they should inquire about family violence. This is sensible as a referral to a Centrelink social worker might be more appropriate and should be made if a person refers to family violence and wishes to apply for an exemption from the requirement to take reasonable maintenance action.

However, we believe it is vital that CSA and Centrelink staff do not assume that a person who is experiencing or has experienced family violence will necessarily choose not to receive child support. They may simply need additional information, protection or security to manage the risks associated with applying for child support. Again, we would stress that it is important that people understand when they have choices and what those choices are.

Consistent with our response to question 10 (above), we consider that information should be sought regarding a range of vulnerabilities and that such information should be voluntary.

IP 38: Question 13
Are Centrelink social workers, Indigenous Service Officers and Child Support Agency staff able to access information about persons who have identified themselves as victims of family violence as to whether they have obtained a protection order or similar? Should Centrelink social workers, Indigenous Service Officers and Child Support Agency staff be able to access the national register recommended in *Family Violence – A National Legal Response*, Report 114 (2010)?

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 customers of Centrelink or the CSA 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, or may not be 'serious'. 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 end, we consider that the use of the national register would need to be carefully controlled.

IP 38: Question 14
In what circumstances, if any, should information about family violence be shared between the Child Support Agency and other government agencies, such as Centrelink?

Our view is that careful consideration should be given to whether mandatory information-sharing between the CSA and other agencies should take place. If information-sharing continues on a voluntary basis, then it would be appropriate for a person 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 the CSA and other government agencies, such as Centrelink and the Australian Tax Office, occurs in certain legislated circumstances. The complaints that we receive suggest 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 noticed a trend in the complaints that we receive and investigate that many people assume that Commonwealth agencies share far more information about their circumstances than is actually the case. In particular, people who are customers of the CSA and Centrelink 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 make an application for child support or FTB, believing that their contact with one agency will suffice.

We also note that some recent changes to the way that the CSA and Centrelink do business have encouraged people to view the CSA and Centrelink as a 'one stop shop' for child support and FTB information. The 'alignment of care' initiative that commenced on 1 July 2010 means that parents can report a change in the care arrangements for their children to either CSA or Centrelink and the agency they notified will make a decision about the new care percentage and transfer that information to the other agency. We believe the government's plan to further 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 CSA. 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 that we have included in this submission reveal a pattern of vulnerable people who assume that the CSA and Centrelink will share relevant information about their situation and give them detailed and timely advice at appropriate times about their options. We consider that the present 'split' between Centrelink's responsibility for administering the 'reasonable maintenance action' test and the CSA's responsibility for assessing, or both assessing and collecting child support, places these vulnerable people at a disadvantage. We consider that it would be preferable for the CSA and Centrelink to work together in a more coordinated way to ensure that people experiencing or fleeing domestic violence, and who disclose this fact to either agency at any time, do not make poor choices about child support through ignorance or confusion about their options.

Assessment of child support

Determination of percentage of care

IP 38: Question 15
In what ways, if any, can the legislative basis for Child Support Agency determinations about the percentage of care, be improved for victims of family violence?

IP 38: Question 16
In what ways, if any, can the rules, as stated in the *Child Support Guide*, for the Child Support Agency to verify actual care when parents dispute the care that is occurring, be improved for victims of family violence?

In November 2009, the former Ombudsman, Prof. John McMillan made a submission to an independent review of the CSA's administration.[11] The submission included a series of case studies that illustrated some of the problems that we had observed in complaints about the CSA's administration of the rules about determining a parent's percentage of care for a child. Those rules changed from 1 July 2010, with the implementation of the 'alignment of care' initiative. The most significant aspect of the changed rules, in our view, is a reduced emphasis on the care arrangements that have previously been agreed or ordered for children, and a focus upon where the children are actually living (i.e. the factual care arrangements).

We have received some complaints about the change in CSA policy. Those complaints generally allege that the emphasis on 'factual care' encourages people to contravene court orders. Most complainants have been payers whose child support was previously assessed on the basis of their court-ordered care, despite them not actually having that contact with their children. They have expressed dissatisfaction when their child support has been reassessed on the basis of their actual care. We have declined to investigate those complaints as they relate to the application of a deliberate government policy. We also note that the new rules contain a measure to discourage non-compliance, with an 'interim care determination' available for up to 14 weeks (or 26 weeks in special circumstances), when the former ordered or agreed care percentage would apply while the parent with less care was taking reasonable action to ensure that the other parent complied with the order or agreement.

At a recent meeting with community groups who work with parents after separation, we heard a different complaint about the new rules. We have not investigated the complaint, as the person involved did not make their complaint to us directly and the information was offered to us anonymously. We include it here, simply by way of illustrating the difficulty in developing a policy that appropriately responds to every situation.

The complaint concerned a woman who said that her former partner had refused to return their child after a court-ordered contact visit. He had then advised the CSA that the child was now permanently in his care. The CSA contacted the mother and asked her to confirm the change in care. She said that the care had indeed changed, but said that she did not consent to it. She also said that she was too frightened of her former husband to take action to enforce the order. We were told that the CSA asked

[11] *Submission by the Commonwealth Ombudsman, Delivering Quality Outcomes Review: Child Support Program conducted by Mr David Richmond AO for the Secretary of the Australian Government Department Of Human Services,* available at http://www.ombudsman.gov.au/docs/submissions/submission_on_the_csp_delivering_quality_outcomes_review.pdf see pages 9-11.

the woman to get written evidence from a third party confirming her story. She decided not to do this, because the CSA said that it would have to allow her former partner to comment upon the evidence she provided. She did not want to place her friends or family in the position of giving evidence against her husband, who she believed would be likely to retaliate.

What we can observe about the CSA's procedures for making a care decision is that they seem to rely heavily upon a parent either confirming or consenting to the care change that the other parent has advised, or providing documentary evidence to support their claim. As the anecdotal evidence above shows, this might disadvantage a parent who is afraid to challenge the word of their former partner, or who does not wish to involve outsiders in their affairs, or who is ashamed to tell family and friends about their situation.

We also have some concern about statements in the CSA's Guide to the effect that the CSA will, if unable to make a care determination on the balance of probabilities, assume that the previous care percentage is the same and will continue.[12] The ALRC's issues paper observed that the Guide does not make clear how the CSA would make a determination when there has been no prior assessment of the level of care. We agree, but also note our view that it is not appropriate for the CSA to simply assume that the former care percentage continues to be accurate if the evidence indicates that it has changed, although it is not clear what the exact care percentage should be. In order to bring clarity to the child support case, we consider that the CSA should avoid relying on the status quo and, instead, always make a decision regarding the percentage of care.

Departure from administrative assessment

IP 38: Question 17
Is family violence adequately taken into account in the grounds for a departure determination?

As we have noted above in our response to question 10, the CSA Change of Assessment (COA) form asks COA applicant or respondent if they have a restraining or intervention order involving the other parent, so that it can make appropriate conference arrangements. We do not, however, believe that family violence is specifically taken into account under the actual grounds for a departure determination. We do not consider it is appropriate for this office to express a view on whether there should be a specific departure ground that deals with family violence.

IP 38: Question 18
What reforms, if any, are needed to ensure that victims of family violence obtain a departure determination where appropriate?

We regularly receive complaints from child support customers, both payers and payees, male and female, about the compulsory exchange of documents between parents in the COA process. We generally decline to investigate those complaints as they relate to the application of a deliberate government policy, enshrined in legislation, aimed at ensuring procedural fairness. However, a person with a fear of family violence may have special reasons for wishing not to disclose their information to their former partner. The CSA should be able to give these people clear and practical advice about how they can protect their privacy, while still giving sufficient evidence to support their case.

[12] The Guide 2.1.1 http://guide.csa.gov.au/part_2/2_2_1.php at 4 April 2011.

Case study 7: Security and disclosure of personal information

Ms K obtained a lifetime protection order against her former partner, Mr L. She had changed her name and address since separating from Mr L. Ms K was a recipient of child support from Mr L and wanted to lodge a change of assessment in respect of school fees for their two children. Ms K had been advised by the CSA to redact the documents she sent in so the school details and address would not be visible when the documents were provided to Mr L as part of the change of assessment process.

Ms K was concerned that the documents would be useless without this information and that her application would be rejected. She was also worried that Mr L may become angry when he viewed the documents without any identifying information and that this may place her in danger. She was also concerned that another person could easily impersonate her on the telephone and obtain her name and address details from the CSA, thereby compromising her safety. Our investigation enabled us to advise Ms K that the CSA has a detachable personal details page for change of assessment applications in which a parent can add any identifying information that will be removed by the CSA prior to sending a copy of the relevant change of assessment documents to the other party. The CSA also informed us that it had added a password to her child support case at her request.

We consider that this case highlights the importance of the CSA speaking to the customer about what their concerns are regarding the disclosure of information and then what will and will not be disclosed as part of the open exchange of information.

IP 38: Question 19

Should the Child Support Agency be required to ask payees if they have concerns about family violence before it initiates departure determinations?

This office considers that the CSA should certainly be required to ask payees about family violence concerns before it initiates departure determinations. We recommend that the CSA check its computer records to find out whether a person has previously disclosed the existence of family violence before it contacts their former partner to discuss the latter's current financial situation. We note that the CSA's procedures require that the CSA make contact with both parents before sending a summary of information to either of them that initiates the COA process.[13] This preliminary contact with both parents would be an opportunity for the CSA to specifically check whether a parent has a fear that initiating a COA could place that person at further risk of family violence.

IP 38: Question 20

Should the Child Support Agency be required to ask customers about family violence prior to initiating other proceedings or actions? If so, which proceedings or actions should this requirement apply to?

A number of CSA decisions and actions have the potential to place a victim of family violence at greater risk of further violence. One such situation is where the CSA is taking particular enforcement action, such as undertaking legal action to seize assets and sell a payer's assets to recover a child support debt. Where a payee has experienced violence at the hands of the payer, a CSA decision to pursue legal action may only inflame the situation and place the payee in danger. We consider that in such circumstances, the CSA should keep the payee informed about collection activities (as it can under s 113(2) of the *Child Support (Registration and Collection) Act 1988* (the CSRCA)) and enable the payee to comment on the appropriateness of such action given any experience of family violence.

[13] A notice under s 98M of the CSAA.

Further, we consider that any sudden or significant change to the child support assessment has the potential to disturb what may previously have been a reasonably smooth and trouble-free child support case. For example, if the CSA makes a retrospective reduction to a child support assessment this can place the payee in a situation where he or she has been overpaid child support. This overpayment is a credit for the payer, who is not obliged to make further payments to the CSA, who will in turn stop paying child support to the payee. In the following case study, we show how an overpayment placed a payee in a vulnerable situation where she felt she had no alternative but to accede to her former partner's request for additional time with their child. We do stress, however, that this was not a case where the complainant alleged that her former partner was violent.

Case study 8: Between a rock and a hard place

Mrs M was entitled to child support for her oldest child, payable by her former partner Mr N. She has remarried and has younger children with her husband. Mr N had failed to lodge his tax returns for many years and the CSA had assessed and collected his child support using income information that Mr N had provided by telephone. Mr N eventually lodged his tax returns for the previous seven years, declaring income which was lower than the figure he had previously told the CSA.

The CSA amended all of Mr N's child support assessments and advised Mrs M that she had been overpaid $13,000 in child support. The CSA told her that it would talk to Mr N to see if he would 'gift' the overpayment to her, but that if he refused, she would receive no child support for five years and the CSA would also recover the debt by taking her tax refunds. Mrs M believed after this conversation with the CSA that it would also take the money in her children's bank accounts.

When the CSA asked Mr N if he wanted to gift the overpayment to Mrs M, he said he would discuss it with Mrs M. Mrs M said that Mr N told her he would gift the overpayment only if she agreed to a change in residence arrangements for their child. She said that she felt like she had no alternative but to agree to his proposal. She missed four days of work because she was beside herself with anxiety over the debt and the discussions with Mr N. Mrs M is no longer liable to repay the overpayment, but feels like she was blackmailed. She has now opted out of CSA collection as she felt she could not trust the CSA.

Collection and enforcement of child support

IP 38: Question 21

What reforms, if any, are needed to protect victims of family violence who, due to fear of persons who have used violence:

a) elect to collect child support privately, or elect to end collection by the Child Support Agency; and
b) privately collect less than the assessed amount of child support, or no child support?

Case study 6 on page 14 demonstrates how administrative delay in ending a child support assessment can have a deleterious effect on the payee, especially in situations of family violence. The following case study is another example of an administrative error having potentially serious consequences for a payee.

Case study 9: Just keep the money – he probably won't find out!

Ms O was a child support payee with a fear of domestic violence from her former partner, Mr P. The CSA discovered that Mr P had underestimated his income for his child support assessment and asked him to pay arrears. Ms O was afraid that Mr P would force her to give back anything that the CSA collected for her. She spoke to a Centrelink social worker about her situation and then instructed the CSA to end her child support assessment and Mr P's arrears.

The CSA paid Ms O $600 that it had intended to refund to Mr P. Ms O contacted the CSA to find out whether she should return it. The CSA told Ms O that she could keep it: Mr P might not know she had received the money and he would probably think the CSA had kept it. Ms O complained to the Ombudsman about this advice, as she was not sure what to do. She suspected that Mr P knew the CSA had paid the money to her and was afraid of what might happen if she attempted to conceal this from him.

Our investigation of Ms O's complaint achieved the following:

- *we were able to confirm for Ms O that Mr P was aware that she received the money, making it easier for her to handle any consequences*
- *the CSA advised Mr P that it had been 'remiss' in paying $600 to Ms O and invited him to apply for compensation*
- *the CSA acknowledged the sensitive nature of Ms O's case and apologised to her*
- *the CSA re-examined the breakdown in its procedures and identified a system improvement to reduce the risk to other vulnerable payees.*

We have also received complaints to our office which, while not involving family violence, demonstrate the impact that collection of child support can have on all parties to a case. Applying for CSA collection means that a payee hands over to the CSA control over the action taken to collect child support. Child support is transformed from a debt between the parents into a debt that the payer owes the Commonwealth, with the payee being the recipient of any payments the CSA is able to collect. The CSA decides what collection action will be taken and when, without consulting the payee. Having the decision taken out of their hands may be quite appropriate for some payees, including those who fear a violent reaction from their former partner. However, as the case study below shows, 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. While there was no indication of family violence in the following case, we do note that the complainant was actually the payer. In any case, we believe it neatly illustrates the difficult choice a payee can be forced to make.

Case study 10: But where will the kids live?
The payer, Mr Q, complained to us about CSA collection activity to recover a child support debt. The CSA obtained court orders requiring Mr Q to pay the debt and authorising the sale of his home if he failed to comply. His failure to comply meant that the CSA was ready to appoint the Official Receiver to sell the property.

Mr Q and his former wife, Ms R, shared the care of their two youngest children. Mr Q had a serious medical condition which affected his capacity to work and Ms R had frequent periods of homelessness. From time to time Ms R moved back in with Mr Q, although they remained separated.

Our investigation revealed that the payee, Ms R, told the CSA that she did not want the debt enforced through the sale of the property as the children live with him. The CSA advised her that she could not influence the enforcement action taken by the CSA as it was a debt owed to the Commonwealth. The CSA told her that she could end the case and opt out of CSA collection. Ms R was unsure about the impact any decision to end the case and discharge the arrears would have on her Family Tax Benefit entitlement for the children.

Although we had not received a complaint from Ms R, we advised the CSA that we were concerned that she was being required to quickly make a choice about something that would have a major impact on the lives of herself and her children. We were concerned that she should not feel pressured to do without child support in order to keep some stability in her children's lives. The CSA gave her some additional time to seek advice about her options before it proceeded to appoint the Official Receiver, so she did not have to rush making a decision about whether to end her child support assessment. Eventually, Ms R decided not to end her child support case.

In Ms R's case, the CSA advised her to talk to Centrelink about the impact that ending the child support assessment would have upon her FTB payments. However, we consider that payees would benefit from legal advice before making a decision to end collection of child support. We also consider that it would be appropriate for the CSA and Centrelink to work together more flexibly to support payees to remain within the child support scheme. The present policy seems only to allow a payee who fears family violence to choose to receive all their child support, or none of it, at the risk of losing their FTB.

In the following case study, the payee chose to enforce her child support privately because of family violence. However, she complained to us that the payer was still able to use the CSA to disrupt her payments, while appearing to comply with his obligations. The CSA did not seem to appreciate how its processes, and in particular its concern to protect its customers' privacy, could potentially be used against the payee.

Case study 11: Of course I'm paying my child support!
Ms S contacted us to complain that the CSA had received money from her former partner, Mr T, for child support but would not disburse it to her. Ms S said that she had been opting in and out of CSA collection due to pressure from Mr T. She had switched to private collection and told us that she had given Mr T her bank details, but that she had not received any money from him for the past two months.

During family court proceedings, Ms S became aware that Mr T had made child support payments to the CSA. When she contacted the CSA, it advised her that it could not confirm that it had received an amount from Mr T but that even if it had, it could not release any monies to her.

When we contacted the CSA, it advised us that Ms S and Mr T had taken out intervention orders against each other. Mr T told the CSA that he had paid child support amounts to the CSA because he did not have Ms S's bank account details and, due to the intervention order, could not contact her to

obtain them. When the CSA received the money from Mr T, its records showed that he did not owe any child support (because the case was now private collect) so it said it could not disburse the money to Ms S. Even when Ms S contacted the CSA to ask whether it was holding any money for her, the CSA took the view that this was actually Mr T's money and that privacy requirements prevented it from letting Ms S know that a payment had been made.

Ms S said that she felt 'forced' back into CSA collection. She considered it unfair that the CSA could receive payments from a payer when the case was 'private collect' but could not transfer those payments to the payee. She felt that this was a 'loophole' in the law that allowed payers to control payees.

We consider it is vital that the CSA not become part of the battle to control someone. We suggest that the CSA treat cases like this with particular care. In special or unusual cases, dogged adherence to procedure can lead to unfair outcomes. The CSA needs to be able to identify special cases and consider practical and legal ways to ensure it can deliver a fair result.

IP 38: Question 22
In practice, how does the requirement to take reasonable maintenance action affect victims of family violence who collect less than the full amount of child support? What reforms, if any, are needed to ensure that victims of family violence in these circumstances are not financially disadvantaged by receiving less Family Tax Benefit Part A?

We note that paragraphs 110-112 on page 24 of the ALRC Issues Paper appear to blur the separate roles of CSA and Centrelink in the administration of the 'reasonable maintenance action' test for FTB. If a payee chooses to collect their child support privately, this ends the CSA's direct interest in how much child support is actually transferred between the parents.[14]

The CSA's ongoing involvement in a private collect case is to make (and amend, where appropriate) the child support assessment, which dictates the amount of child support that the payer is obliged to pay to the payee. This in turn is the amount that the payee is entitled to collect from the payer. But the payee is not required to report to the CSA what he or she actually collects from the payer.

The CSA reports each 'private collect' payee's 'entitlement' to Centrelink, which then assesses the payee's FTB Part A on the basis of an assumption he or she has collected 100% of their assessed entitlement, on time and in full. The automated transfer of data between the CSA and Centrelink is an efficient way to assess fortnightly FTB entitlements. It is subject to a 'reconciliation' at the end of the financial year, where the payee/FTB recipient is asked to confirm that he or she collected their child support. If the payee advises Centrelink that he or she received less child support than he or she was entitled to it places them at risk of being found to have failed the 'reasonable maintenance action' test.

Ms U's case below shows how Centrelink applies the 'reasonable maintenance action' test to private collect payee.

[14] However, the CSA's statistics about the amount of child support transferred under the child support scheme include private collect cases, and presume that in 100% of every private collect payee's entitlement is paid on time and in full.

Case study 12: All or nothing

Ms U first complained to us in July 2006. She was the carer of eight children, six of whom were aged between 5 and 12. She said she had a number of family violence orders against her former partner, Mr V, who she described as a drug addict. The CSA had made an assessment of child support, requiring Mr V to pay child support of $26 per month for their children. Ms U had told the CSA that she did not want it to collect child support for her. But Mr V was not making payments to Ms U. He had recently moved interstate.

Ms U's complaint was about Centrelink's decision that she had been overpaid more than $50,000. The overpayment had been raised because Centrelink decided that she had failed to take reasonable maintenance action against Mr V over a four year period, which was a condition for her to receive FTB Part A for her children. We advised Ms U to seek a review of Centrelink's decision.

Ms U contacted us again about three weeks later. She said that she had talked to Centrelink about her situation, and that it had waived her $50,000 overpayment, but it had now decided that she would have to repay a different overpayment of $10,000 for the same reasons. Ms U believed this was unfair. She had already asked Centrelink to review this second decision. We invited her to contact us again if she was not satisfied with the result of her review. Ms U called again, later that day, to advise that Centrelink told her that the overpayment would stand, but that she had asked for a further review by Centrelink's Authorised Review Officer. She also had an appointment to see a Centrelink social worker with a view to obtaining an exemption from taking maintenance action on the basis of family violence. We advised Ms U that the steps she was taking seemed to be appropriate to address her complaint. A week later we had another call from Ms U, and confirmed our earlier advice.

In late August 2006, Ms U called us again to complain that her ARO review was still not finished. Centrelink had advised her that it would start deducting $60 per fortnight from her FTB to recover the overpayment, despite her request for a review. When we contacted Centrelink about her complaint, we were advised that there was a backlog of ARO reviews, but that it hoped to be able to finalise Ms U's review before the deductions from her FTB were due to start. We relayed this advice to Ms U. She was not pleased that we were unable to get her a quicker result.

We did not hear from Ms U again, but Centrelink advised us that in September 2006, the ARO decided that it was unreasonable for Ms U to be required to collect maintenance from Mr V. Centrelink cancelled Ms U's FTB debt and repaid to her the $120 that it had recovered while the ARO review was underway.

Fortunately, Ms U had the tenacity to challenge Centrelink's decisions. It would seem that the amount that Ms U stood to lose in FTB far exceeded the child support that the CSA had assessed Mr V to pay, and which Centrelink expected her to collect from him. We understand that the purpose of the 'reasonable maintenance action' policy is to encourage separated parents to support their children, rather than rely upon the social security system. We wonder whether this 'all or nothing' approach to private collection for FTB Part A is a proportionate measure for cases, like Ms U's, where the child support assessment is very low.

We also note that if Ms U were to be granted an exemption from taking maintenance action, she would have to end her child support assessment to take advantage of it. She could not, for example, ask the CSA to collect less than the full amount of child support for her, or receive less than the full amount from Mr V privately. We are concerned that this lack of flexibility might prevent the carers of children from relationships where family violence is a feature from receiving any child support at all.

We recommend that the ALRC consider whether there might be some way to allow a carer to choose to collect less than the full amount of their assessed child support if that would be safer for them and their children. We have set out below the legislative

provision that gives rise to the 'reasonable maintenance action' test (item 10, Division 2, Part 2 of Schedule 1 to *A New Tax System (Family Assistance) Act 1999*). In our view, it does not require a rigid 'all or nothing' approach to maintenance action. Indeed, it seems to suggest that the question of what is 'reasonable' could vary according to the circumstances of the particular case.

> The FTB child rate for an FTB child of an individual is the base FTB child rate (see clause 8) if:
> (a) the individual or the individual's partner is entitled to claim or apply for maintenance for the child; and
> (b) the Secretary considers that it is reasonable for the individual or partner to take action to obtain maintenance; and
> (c) the individual or partner does not take action that the Secretary considers reasonable to obtain maintenance.

IP 38: Question 23
What reforms, if any, are needed to ensure that victims of family violence are not required by Child Support Agency to privately collect child support?

We have been unable to identify any complaints concerning CSA-initiated private collect arrangements. We understand that this option has been used sparingly by the CSA after its introduction in 1999. 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.

However, we wonder whether there are significant policy reasons to justify disrupting child support arrangements that are already working well against the will of the payee. We note that it is always possible for the payee to choose private collection, if that is a suitable option in their case.

IP 38: Question 24
What reforms, if any, are needed to protect victims of family violence who, due to fear of persons who have used violence, elect to:
a) end Child Support Agency collection of child support debt?
b) request that Child Support Agency revoke a Departure Prohibition Order?

Ending CSA collection of child support debt

The following case study is a complaint made by a child support payer, which revealed a serious problem in the CSA's processing of his former partner's election to end her child support assessment because of her concern about family violence. This case study, like that of Ms O (Case Study 9), shows how administrative errors and delays could place a payee at greater risk of violence.

Case study 13: Unfinished business
Mr W, a payer, contacted this office to complain that the CSA was continuing to deduct child support from his Centrelink benefits despite his belief that 'everything is supposed to be fixed' and he had no ongoing child support liability. Our investigation of Mr W's complaint revealed that his former partner, Ms X, the payee, had sought an exemption from the requirement to collect support from Mr W on the basis of her fear of family violence (from him). When Ms X saw the Centrelink social worker, she completed a CSA form electing to ending her child support assessment, and said that she did not want the CSA to collect any payments still owed by Mr W.

The Centrelink social worker granted Ms X an exemption in January 2009 and advised the CSA. Later that month, the CSA advised both parents that the child support assessment had ended but (incorrectly)

advised Mr W that child support arrears were still outstanding. In March and April 2009, the CSA withheld child support from Mr W's Centrelink benefit.

The CSA subsequently refunded these amounts to Mr W and apologised to Ms X for the delay in processing her election.

We note that there are situations in which a victim of family violence may elect for arrears to still be collected and that assumptions should not be made to the contrary. The following complaint to our office demonstrates this, as well as the need to ensure that a payee who elects to end the child support assessment understands the finality of his or her decision.

Case study 14: What about the arrears?
Ms Y, a payee of child support for her two children, contacted our office with her concern about arrears of child support being cancelled on her child support case. She said that there was $9,000 of child support due to her and that she needed the money in order to pay for school fees.

Ms Y said that she had been granted an exemption from taking maintenance action for three years after her former partner, Mr Z, made threats against her. Ms Y said that Centrelink told her the CSA would ask her whether she wanted the arrears discharged but that she was never asked. She became aware two years later that the CSA had used its discretion to cancel the arrears. Ms Y said she was advised to seek the arrears from Mr Z through the courts. Ms Y lodged an objection to the CSA's decision to cancel the arrears and this was being considered by the CSA.

Another complaint to our office revealed the importance of a person being able to take the time to make a decision about the collection of arrears, as shown below.

Case study 15: In two minds
Ms AA complained to our office about a child support debt that was outstanding from her former partner, Mr BB. Ms AA said that she was attempting to gain an exemption due to repeated threats of violence from Mr BB. She said that she and her child had moved about 60 or 70 times in the past 15 years to escape Mr BB. Ms AA wanted to clear the arrears that Mr BB had with the CSA so that she could receive payments from Centrelink instead. She said Centrelink told her that she could not apply for an exemption in respect of the arrears, and that if she cancels the arrears then Centrelink will raise an overpayment against her which she will have to repay.

When we contacted Ms AA again to find out whether she had spoken to a Centrelink social worker about an exemption, she seemed to have had second thoughts about her options. Ms AA said that she still wanted the arrears collected but that the CSA was not collecting them fast enough due to a lack of investigation into Mr BB's income. Ms AA said that she would explore collection options with the CSA's complaints service.

If the payee is not receiving a Centrelink benefit, he or she can cancel their child support assessment without getting an exemption from Centrelink. However we still consider that there is scope for the CSA to more clearly explain the consequences of someone electing to cancel child support arrears on a case and possibly recommend obtaining legal advice. Even though the payee's decision could not impact upon taxpayer outlays through higher Centrelink payments, it is important that they realise that their decision is not revocable if their situation changes, as the following case demonstrates.

Case study 16: But he agreed not to claim child support!
This office received a complaint from Mr CC on behalf of his wife Ms CC about information the CSA provided to her. Ms CC had made a decision to end her child support case against her former partner,

Mr DD and to discharge the child support arrears he owed. Ms CC noted that she did so in order to end her relationship with Mr DD. She and Mr DD made a written agreement not to claim child support from each other.

Mr DD subsequently applied to the CSA for a child support assessment payable by Ms CC. The CSA advised Ms CC that it had no option but to accept Mr DD's claim, and that her agreement with Mr DD was not enforceable. Ms CC said that she wanted an exemption from paying this amount because of domestic violence concerns but the CSA told her that the exemption was only available to her in her role as a payee. Ms CC said that she would never have discharged the arrears if she had understood that Mr DD could still claim child support against her. She said that, instead, her liability could have been offset against Mr DD's. Ms CC was advised to submit a claim for compensation against the CSA, which acknowledged that it had made an error in the information provided to Ms CC when she ended her case.

Requesting that the CSA revoke a Departure Prohibition Order (DPO)

We have been unable to identify any complaints concerning a payee's request for the CSA to revoke a DPO made against their former partner. Indeed, the complaints that we have received from payees suggest that they would generally be quite unlikely to know whether the CSA had made a DPO to aid collection of their child support. The complaints that we receive from payees about CSA collection tend to reveal a pattern of the CSA providing very little information to the payee about the steps taken to collect child support, for fear of breaching the payer's privacy. [15]

We have received at least one complaint about the CSA's refusal to inform a payee whether it has issued a DPO. We consider that it is important for payees to be aware if a DPO has been issued so that, in cases of family violence, they can take measures to protect themselves. We have previously advised the CSA of our view that s 113(2) of the CSRCA operates so as to enable the CSA to inform payees about the status of enforcement action against a payer. We recommend that the CSA utilise this provision to let payees know about particular collection activities, such as a DPO 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.

[15] See for example the Ombudsman's 2009 submission to the *Delivering Quality Outcomes Review: Child Support Program*, available online, at page 17 http://www.ombudsman.gov.au/docs/submissions/submission_on_the_csp_delivering_quality_outcomes_review.pdf

Child support agreements

IP 38: Question 25

In cases where victims of family violence are subject to pressure to enter into child support agreements, are the provisions in the *Child Support (Assessment) Act 1989* (Cth) providing that:

(a) independent legal advice must be provided; or

(b) annual child support assessments may not be decreased

sufficient to protect victims from entering into disadvantageous agreements, and if not, what reforms are needed?

This office sees the value in the requirement that independent legal advice be obtained and that annual child support assessments not be decreased when parties enter into a child support agreement.

However, we have some concerns about the CSA's administration of limited child support agreements, which the parties can end if their circumstances change so that the amount of child support varies by at least 15%. We see this as an important measure to ensure that child support assessments are fairly based upon the parent's current financial situation. However, that policy intention is undermined if parents cannot easily avail themselves of their right to end a limited child support agreement.

The following case study is not one that involved family violence. However, we have included it here to show just how difficult it can be for a parent to end a limited child support agreement. The complicated procedure was made even more difficult by the CSA's delays and confusing advice. We consider that these problems could adversely affect a victim of family violence who wants to end a limited agreement.

Case study 17: Getting all the ducks in a row

Mr EE and his former partner, Ms FF, entered into a limited child support agreement which was accepted by the CSA. Two years later, Mr EE's income dropped significantly and he spoke to the CSA about how to end his limited agreement. The ending of the agreement was conditional upon the CSA making a new notional assessment (the child support that would have been payable but for the child support agreement) that was at least 15% more or less than the existing notional assessment.

The first step was for the CSA to issue a provisional notional assessment (PNA) after which Mr EE could make a request to terminate the limited agreement. Mr EE spoke to four different CSA officers at different times about his request to end the agreement. The advice he received indicated a lack of knowledge about the steps necessary for a parent to end a limited child support agreement. One officer advised Mr EE that 'the system' would not allow the ending of the agreement. The CSA sent Mr EE a letter advising him that the CSA had not accepted his application to end the agreement. It was not until almost two months later that the CSA issued a PNA, after which Mr EE had 14 days to lodge an estimate of his income. Mr EE then had to wait for the CSA to process his election and make a further PNA, which would become the new notional assessment 14 days later. Mr EE was finally able to elect to end the limited agreement four months after he first contacted the CSA.

Then the CSA realised that Mr EE had applied for a Change of Assessment (CoA) before the PNA became a Notional Assessment, which should have delayed the process further. The CSA decided to reinstate the limited agreement. Mr EE had to start the whole process again. The CSA agreed to consider compensation for the delay as the CSA could only end the agreement prospectively.

We believe the steps required for a person to take to end a limited agreement are unnecessarily complex. This could discourage a person from exercising their right to end a limited child support agreement which no longer fairly reflects the other

parent’s capacity to provide financial support for their child. This is of particular concern for a vulnerable person with a fear of family violence.

Disclosure of personal information

IP 38: Question 26
What reforms, if any, are necessary to protect the safety of victims of family violence, where the Child Support Agency discloses information about one party to another in accordance with child support legislation? Are changes to the legislation required, and if so, what changes?

Some complaints show how errors in the administrative implementation of exemptions may place a person at greater risk of violence. The below case study illustrates this point.

Case study 18: Why are you still writing to him?
Centrelink granted Ms GG an exemption from the requirement to take maintenance action, on the basis of family violence. In May 2003, Ms GG received a further 10 letters from the CSA regarding her ended child support case. Mr HH also received notices of assessment from the CSA. Ms GG said that Mr HH had shown up at her house with a letter and she had been forced to explain to him that she had not brought a new claim for child support. When we contacted the CSA, it advised us that, under the child support legislation, it was obliged to send the notices to Ms GG. The CSA subsequently advised us that it had commenced 'flagging' child support cases on its database that involve domestic violence and would vet letters that are sent out to parties involved in such cases.

We are unsure if the CSA is still carrying out its practice of flagging child support cases on its database involving family violence and vetting letters sent to parties in such cases. If it is not, we recommend that special care be taken by the CSA in taking actions on a case where a family violence exemption has been granted.

Child support assessment notices

When the CSA makes an assessment or amends a child support assessment, it is obliged (pursuant to s 76 of the CSAA) to provide written notice of the assessment to both parents. Many amendments are made retrospectively, when the CSA receives updated information about a parent's circumstances (such as information about a late lodged tax return). The CSA is required to make amendments even if the child support case has ended. The CSA is obliged to send notices to both parties, even if the child support case has ended because of a family violence exemption.

Notices of assessment include the current legal names of both the liable parent and the carer. Where a victim of family violence has changed their name in order to escape a perpetrator, they will obviously not want their new name included on notices of assessment sent to that person. We are aware that the CSA's current database system may not have the capacity to retain a victim's previous and new name on the system but ensure that correspondence to the other party only includes the previous name. However, we note that the name of the liable parent and the eligible carer are not included in the list of details in s 76 that the CSA must include in an assessment notice. We therefore wonder whether it is strictly necessary to include the full legal name of both parents. It might be possible to refer to the parties in a different way, such as 'you' and 'the other parent', or the 'mother' and 'father' of the named children. This could still meet the requirements of s 76 and also provide a measure of privacy for a person who fears family violence.

A common feature of complaints to our office regarding the CSA is a concern that a person's 'private' information is not provided to the other party in child support cases. The case study below shows that victims of family violence may be particularly keen that any of their information not be given to the perpetrator.

Case study 19: Feeling safe

Mr II rang our office complaining about s 76 of the CSAA in which assessment notices containing the incomes of parents is sent to both parties. Mr II said that his former partner, Ms JJ, had been diagnosed with a mental illness and an AVO had been put in place against her. Mr II said that he had paid for private security to protect his family and home. He did not want details of his income given to Ms JJ, which he believed would compromise the safety of himself and his family. Mr II confirmed to us that the CSA had not provided his home address or any other personal details to Ms JJ.

Reporting family violence

IP 38: Question 27
Are victims of family violence adequately protected by the Child Support Agency's procedures to deal with threats made to the Child Support Agency against them by family members? What reforms, if any, are needed to protect victims where family members make threats against them to the Child Support Agency?

The following complaint drew our attention to instances where the CSA may inadvertently become a conduit for family violence inflicted by one party against another.

Case study 20: CSA in the middle
Ms KK is a payer. She pays child support through the CSA to Mr LL for their child. There was a history of violence between the parents, with Ms KK having had a domestic violence order against Mr LL in the past. In 2010, Mr LL applied for a change of assessment (COA). Mr LL made a number of abusive comments about Ms KK in his COA application form.

The CSA sent a copy of Mr LL's application COA to Ms KK, as part of the open exchange of information under the COA process, but had redacted the abusive comments about her. Ms KK could still discern from the surrounding text that Mr LL had written a number of offensive comments about her. She complained to the CSA that it was allowing Mr LL to use the COA process to harass and abuse her. The CSA then sent Ms KK a second copy of the COA form, this time with further deletions. Ms KK then asked the CSA to provide her with an unedited version of the document so that she could apply for another domestic violence order against Mr LL, but the CSA refused. The CSA also told her that she would not be entitled to a copy of the document under the freedom of information process but that a subpoena could be issued to the CSA to obtain the document. Following our investigation:

- *the CSA acknowledged that while its intention in editing the document was to alleviate distress to Ms KK, it had the opposite effect*
- *the CSA said it would develop new policies and procedures for dealing with harassment and abuse as part of the COA and objections processes*
- *the CSA apologised to Ms KK and provided the unedited version of the document to the court when the CSA was issued with a subpoena.*

We consider it important that the CSA and Centrelink develop processes that do not tolerate violent behaviour and that it communicates clearly to parties at fault that such behaviour will not be accepted.

Protection of personal information

IP 38: Question 28
Is the personal information of persons at risk of family violence adequately protected by Child Support Agency practices, such as the Restricted Access Customer Service? In what ways, if any, can the protection of personal information be improved?

As we noted in our response to Question 26 (above), victims of family violence may want certain information, such as their new name, to remain secret from the perpetrator. It is important that Commonwealth agencies have systems in place so that certain private information is not disclosed to the other party, as the following complaint shows.

Case study 21: Accidental disclosure
Ms MM complained to our office that the CSA had breached her privacy. She said that shortly after the birth of her child, she changed her name by deed poll. She was a victim of domestic violence and did not want her former partner, Mr NN, to know her new name or contact details so she never asked the CSA to collect child support for her. Mr NN was in prison so Ms MM was aware that his child support assessment would be at the minimum rate.

Ms MM subsequently entered into a new relationship with Mr OO, and they had a child. Ms MM and Mr OO separated, and she applied to Centrelink for FTB Part A for her two children. Centrelink told Ms MM that she needed to apply for child support for them. Ms MM said that when the CSA and Centrelink systems were aligned, the CSA discovered on its system that Mr NN was not paying child support for his child so they contacted him and used Ms MM's new name. Ms MM was extremely annoyed. She said that she has now applied for an exemption on the basis of family violence but felt that 'the damage has been done'. She said that she would now be changing her name again because of the breach of privacy. We referred Ms MM to the Privacy Commissioner to lodge her breach of privacy complaint.

Other complaints have suggested that the CSA does not possess the necessary expertise to determine when family violence is occurring and when special measures should be put in place on a particular case, as the following case study suggests:

Case study 22: Notification of domestic violence to CSA
Ms PP, a payee, contacted our office complaining about the conduct of the CSA in failing to appropriately respond to the domestic violence issues in her case. She said that she had let the CSA know about the threats and abusive behaviour from her former partner, Mr QQ. Ms PP noted that each time she opted out of CSA collection, she made it clear that it was because Mr QQ was being abusive about the issue of child support and she did it for her own safety. She was concerned that the CSA had told her that her case management was affected by the fact that she kept opting in and out of CSA collection.

Ms PP was upset that the case was not already on restricted access and felt it was unfair that she had to formally apply for this to occur. She felt it should be obvious that she wanted her case treated according to CSA guidelines on case management of files involving allegations of family violence. She felt it was ridiculous that the CSA told her it needed a copy of an AVO before her request for a restricted access case would be considered. Upon investigating Ms PP's complaint, the CSA noted that a Restricted Access Customer Service (RACS) classification only gives added protection to Ms PP's information but does not afford her any additional personal protection. It is also not an automatic process that occurs whenever violence is mentioned. The CSA provided further information to Ms PP about RACS and invited her to apply. The CSA said that it would take AVOs or police reports into consideration in a RACS classification but that it did not have the expertise to deal with domestic violence issues and instead makes appropriate referrals. The CSA did not consider that Ms PP was in

fear when she reported the threatening text messages and abusive phone call and did not provide her with a referral to Centrelink to discuss an exemption.

Other issues

IP 38: Question 29
Are there any other concerns about the interaction of child support law and practice and the protection of safety of victims of family violence? What reforms, if any, are necessary to improve the safety of victims of family violence?

Helping people to initiate court proceedings.

Although most child support cases involve an administrative assessment of child support, it is sometimes necessary for a person to make an application to court, against their former partner, to vary the child support assessment.

The CSA is also responsible for registering and collecting court orders for child maintenance or spousal maintenance, which are usually made under the *Family Law Act 1975*. If a person's circumstances change so that their maintenance order is no longer appropriate, the CSA cannot change the order. The person may wish to apply to court to vary it.

To initiate court proceedings, a person must serve a copy of their application upon the other party. In the case of an application about a child support assessment or to obtain or vary a maintenance order, that other party is the person's former partner. A victim of family violence who has relocated for safety reasons may not know their former partner's address. This can make it difficult for them to serve a copy of the application, and trying to find their former partner could place them at risk.

Although the CSA will generally have a current address for each of its customers, it will not disclose a customer's address to his or her former partner. However, the CSA will assist its customers to initiate court proceedings for child support or maintenance by posting a copy of a court application to the other party on request. We believe that it would be appropriate for the CSA to publicise this service more widely, especially for the benefit of CSA customers who might otherwise decide not to take court action because they no longer know their former partner's address because of a fear of family violence.

FAMILY ASSISTANCE

Definition of family violence

IP 38: Question 30
Should family assistance legislation be amended to insert a definition of family violence consistent with that recommended by the Australian Law Reform Commission and NSW Law Reform Commission in *Family Violence – A National Legal Response* (ALRC Report 114)?

As outlined in our response to question 1 of this submission, the Ombudsman's office considers that there is significant value in having a common definition of family violence across Commonwealth legislation.

Family tax benefit

IP 38: Question 31
In what ways, if any, can the legislative basis for Family Assistance Office determinations about the percentage of care, be improved for victims of family violence?

IP 38: Question 32
In what ways, if any, can the rules, as stated in the *Family Assistance Guide*, for the Family Assistance Office to verify actual care when parents dispute the care that is occurring, be improved for victims of family violence?

The Ombudsman's office has received complaints from customers affected by family violence about the difficulties they have experienced in having their claim for FTB granted, or their percentage of care varied. Many of these complaints centre on disputes with perpetrators of family violence, where the complainants report that they feel these disputes are another form of harassment. They also complain that the Family Assistance Office's (FAO's) arrangements for assessing disputed care arrangements are time-consuming and intrusive, in that they require customers to go out of their way to obtain and submit evidence from third parties.

Some customers have argued that the FAO should not assist perpetrators of violence to 'harass' them via the disputed care process. However, it is clear that the principles of procedural fairness require that both parties affected by a potential decision have the opportunity to contribute evidence for consideration in that decision – even where one of them may be a perpetrator of family violence. While the ALRC may wish to consider whether the law or policy around disputed care decisions could be streamlined or sped up for vulnerable customers, this office reiterates that the need to balance the interests of both parties must be paramount in these arrangements.

IP 38: Question 33
What reforms, if any, are needed to ensure that the Family Assistance Office identifies, and refers to social workers, cases in which children living in informal care may be at risk of harm because of family violence?

IP 38: Question 34
What reforms, if any, are needed to improve the safety of children considered at risk of family violence, when the Family Assistance Office, due to a change in care, cancels a former carer's Family Tax Benefit, or starts paying Family Tax Benefit to a new carer?

The Ombudsman's office does not have any complaint data to inform a response to questions 33 or 34.

IP 38: Question 35
What, if any, improvements are needed to ensure that applicants for family assistance are aware of, and using, the exemption from providing their partner's tax file numbers in cases of family violence? Should *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) expressly refer to family violence as an example of an indefinite exemption?

Anecdotally we are aware that many customers do not realise that family violence is something that may impact upon the types of payments or services delivered to them by the FAO, or may be a basis on which to relieve them of claim requirements (such

as the provision of a partner's tax file number) that could expose them to further violence. 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. Further comments on the topic of awareness and information about family violence are included in our submission at questions 10 and 38.

Baby bonus

IP 38: Question 36
What, if any, reforms are needed to ensure that baby bonus applicants who are victims of family violence are referred to social workers, Indigenous Service Officers and Multicultural Service Officers?

We understand that the FAO's service model requires staff to assess the individual circumstances of every customer and to offer them all appropriate payments and referrals to support services, including social workers, Indigenous Service Officers and Multicultural Service Officers. In accordance with this, we expect that all vulnerable customers, including those claiming baby bonus, would be referred to specialist and support services where their circumstances warrant it.

Indeed, as a general principle it is the view of this office that service delivery agencies such as the FAO 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.

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*.[16] Although that report 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 a different type, rate 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 instructions should provide direct links to complementary procedures, such as referrals to social workers and JCAs [Job Capacity Assessments].*

[16] Ombudsman Report 13/2010, September 2010 available at http://www.ombudsman.gov.au/files/Falling-through-cracks_customers-with-mental-illness.pdf

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.

IP 38: Question 37
What, if any, reforms are needed to ensure that social workers, Indigenous Service Officers and Multicultural Service Officers are able to access information about whether a baby bonus applicant has a protection order or a child subject to child protection?

Our views on the question of whether FAO specialist staff should be able to access information about protection orders is addressed in our response to question 13.

Child care benefit

IP 38: Question 38
Are increases in weekly Child Care Benefit hours and higher rates of Child Care Benefit sufficiently accessible in cases of family violence? What reforms, if any, are needed to improve accessibility?

This office does not have any complaint data that would allow us to comment on whether there is sufficient awareness of, and access to, the increased hours and rates of Child Care Benefit by customers experiencing family violence. Similarly, we have no information about the level of awareness of this increased assistance among child care providers.

However, it is possible the FAO may be missing out on opportunities to identify customers who are eligible for increased hours and rates of CCB. We are aware that many customers receiving family assistance payments are encouraged to claim and manage their entitlements via online self-service arrangements. While these arrangements are convenient and preferred by many customers, they also minimise the opportunities for direct contact with FAO staff and, in turn, minimise opportunities for an assessment of any increased assistance needs.

With this in mind, there may be merit in providing information about the relevance of family violence to the assessment of family assistance entitlements in all claim forms (paper and online), letters, payment information booklets and general customer information. This information could encourage customers to contact the FAO to discuss their personal circumstances if they require additional assistance as a result of family violence. This issue is further discussed at question 10 of this submission, with the comments about the Child Support Agency's processes being equally applicable to the Family Assistance Office.

ALRC issues paper 38: Question 39
Does the legislative requirement that the child be at 'risk of serious abuse' serve as an unreasonable barrier to eligibility for higher rates of Child Care Benefit and increased weekly hours of Child Care Benefit?

Our office does not have any comments in respect of question 39.

ALRC issues paper 38: Question 40
Should *A New Tax System (Family Assistance) Act 1999* (Cth) and *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) be amended to insert definitions of 'abuse' or 'serious abuse'? Should the *Family Assistance Guide* provide definitions of 'abuse' or 'serious abuse'?

Currently, the higher hours and rates of CCB require that a child be at 'risk of serious abuse'. Given the potential for varying applications of the term 'serious abuse', this office agrees there would be value in inserting a definition of this term in either the family assistance law or policy guide.

Other issues

ALRC issues paper 38: Question 41
Are there any other concerns about the interaction of family assistance law and practice and the protection of safety of victims of family violence? What reforms, if any, are needed to improve the safety of victims of family violence?

The Ombudsman's office does not wish to respond to this question.

CONCLUSION

The case studies that we have included in this submission demonstrate a range of concerns about the way that the CSA and Centrelink identify and respond to family violence when administering child support and family payments. We consider that this is an in need of reform, both of policy and practice.

Preparing this submission has given us the opportunity to look more deeply at the data that we have about individual CSA and Centrelink complaints about the reasonable maintenance action test. This analysis revealed that in many cases, carers are confused about the respective roles of the CSA and Centrelink in the administration of their child support and FTB, and may be making decisions about applying for and collecting child support, based upon an imperfect understanding of about the effect that it will have upon their FTB.

It is also apparent that some carers with a fear of family violence are either not identifying this to the CSA or Centrelink. Some carers who disclosed their fear or experience of family violence were not given the information that they needed to make an informed choice about whether to collect child support or not. There are several who appear to have chosen to do without their FTB Part A, because of their fear of violence, or who did without child support without realising that they might end up having to repay FTB when Centrelink found out. We believe there is a clear need for the CSA and Centrelink to routinely screen all applicants for child support and FTB Part A to find out whether they are experiencing, or have previously experienced family violence. This will allow the two agencies to provide detailed and relevant information to the person about their options in relation to child support and family tax benefit. We believe the CSA and Centrelink need to publicise the fact that there are special rules for cases where family violence is involved, to encourage people to disclose violence and ask for help.

We consider it is appropriate for every person who discloses a history of family violence to be referred to a Centrelink social worker to discuss whether it is reasonable for them to be required to collect child support. It is also important that people be given the opportunity to seek a review of a decision to require them to apply for and collect child support, despite an expressed fear of family violence.

At present, it would seem that very few cases are directed down the review and appeal path when Centrelink decides that the carer has failed to take reasonable maintenance action. We suspect that some carers will reluctantly decide to apply for and collect child support, rather than challenge Centrelink's decision. Others will decide to 'pretend' to privately collect the amount assessed by the CSA and not disclose to Centrelink the fact that they are being underpaid child support, or not paid at all. Some will just have their FTB Part A cut because they are not taking 'reasonable maintenance action'. We consider that this is an issue worthy of further research. It is a serious problem that undermines the policy intent of the family payment and child support schemes.

We also believe that the present system of 'all or nothing' exemptions' should be reconsidered. In some cases, the outcomes for carers are disproportionate and could cause unintended hardship to their children, especially when the carer is found to have retrospectively failed the reasonable maintenance action test. It would seem that an FTB overpayment raised because the person has not collected child support

can exceed the total amount of child support the person failed to collect. We consider that there is room within the current legislation for Centrelink to apply the reasonable maintenance action test more flexibly, with regard to the individual circumstances of the carer and their children.

We believe that there is a real need for Centrelink and CSA to work together to ensure that they efficiently administer their intersecting responsibilities for child support and family tax benefit assessments and payments. At present, customers seem to be shuttled between the two agencies, both to get advice and for decisions about exemptions and ending assessment. It needs to be borne in mind that people who experience family violence are vulnerable. They need information about their options, and about the impact of making particular decisions. They need time to consider and make a reasoned choice, without undue pressure imposed by the threat of losing, or having to repay their FTB Part A. They may also need professional advice, for example from a lawyer, or a family relationship centre, so they can work out what is best for them and their children.

Finally, we believe that it is important that the child support and family payment systems support a carer who has a fear of family violence to apply for and collect child support if they wish to do so. In our view, this means the CSA needs to proactively keep the payee informed about the collection actions being taken against the payer. This would allow the payee to consider whether to take any additional measures for his or her own safety, as well as the children.