



Australian Domestic & Family Violence Clearinghouse

From: Ludo McFerran [<mailto:ludo.mcferran@unsw.edu.au>]

Sent: Friday, 8 April 2011 5:31 PM

To: tina obrien

Cc: Sabina Wynn; Amanda Alford

Subject: ADFVC submission

Dear ALRC

Please find attached our submission on the employment and super issues paper.

Ludo McFerran

Australian Domestic and Family Violence Clearinghouse

Phone: (02) 9385 1806

Mobile: 0423231058

Fax: (02) 9385 2993

Web: http://www.adfvc.unsw.edu.au/dv_workplace_rights_entitlements_project.htm



Australian Domestic & Family Violence Clearinghouse

Ms Sabina Wynn
Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

5 April 2011

Dear Ms Wynn

Re: ALRC Issues Paper on Family Violence and Commonwealth Laws – Employment and Superannuation

The Australian Domestic and Family Violence Clearinghouse (the Clearinghouse) submits this response to ALRC Issues Paper on *Family Violence and Commonwealth Laws – Employment and Superannuation*. The submission responds to a number of opportunities to improve the legal and administrative response to victims of family violence in the area of employment and superannuation.

The Clearinghouse's ongoing campaign with unions and employers around promotion of domestic violence provisions in work enterprise agreements has significantly informed this submission. Additionally, recent research undertaken by the Clearinghouse on the impact of family violence on women's financial security and, in turn, safety, published this year has informed this response. The submission also draws on the Clearinghouse's expertise and resource base.

The Clearinghouse is a national, non government organisation, providing high quality information about domestic and family violence issues and practice. The primary goal of the Clearinghouse is to prevent domestic and family violence.

Please do not hesitate to contact me regarding the content of this submission or if you have further questions.

Yours sincerely

Gaby Marcus
Director



Australian Domestic & Family Violence Clearinghouse

**ALRC Issues Paper on Family Violence and
Commonwealth Laws – Employment and
Superannuation**

Prepared by Tashina Orchiston

April 2011

Question 1. What barriers, if any, do employees who are experiencing family violence currently face in disclosing family violence in employment related contexts?

As the Issue Paper points out, there are numerous barriers that employees face in disclosing family violence in employment related contexts. This may be the case for victims who are still in the relationship, as well as for those who have separated, as abuse may continue long after the relationship has ended.

The Clearinghouse project on domestic violence workplace rights and entitlements has collected a number of case stories from working women's centres and trade unions. An email to The Clearinghouse from Sandra Dann, Director of the South Australian Working Women's Service (10 Feb 2010) highlights the serious barriers posed to victims in disclosing family violence at work:

We had another case just this week of a woman who'd had to pack up and leave her workplace at very short notice as she'd received a call that indicated she was at high risk. Her employer is now saying she abandoned her work and is refusing to pay her notice period. She was too scared and embarrassed to let anyone at work know she had to leave so technically they have an argument not to pay her. We are assisting her to write a letter to see if we can appeal to their better judgment.

This is a pretty typical situation that women find themselves in. If they let the boss know they are exposing the workplace to a threat if they stay there, they tend to get dismissed anyway. Classic catch 22.

In an email to the Australian Services Union commending the union's domestic violence clauses, a member wrote:

I've had to take large amounts of sick leave and, when that ran out, annual leave to deal with the effects of an abusive partner. I thought I was going to lose my job. The fear of losing my job made dealing with the emotional and legal issues even more stressful than it already was. Losing all my sick leave and much of my annual leave further adds to the stress.

I've never told my employer the reason for my 'disappearances', as I feared they might use it against me ('allowing personal life to interfere with job'). It would have been a huge help if I could have been upfront about what was going on and also to have known that my job was secure.

American research suggests that women may attend work rather than stay, or take time off as a result of domestic violence.¹

The Clearinghouse has conducted a recent research study on the financial impacts of family violence for women which included consideration of the role that employment plays in offering women greater financial stability and options in terms of gaining safety.² In that research, of 57 women affected by domestic violence, twenty were in paid employment. Only some of these women had

¹ O'Leary-Kelly, A, Reeves, C & Lean, E (2008) *Coming into the light: intimate partner violence and its effects at work*, University of Arkansas, Fayetteville, Arkansas (2008); O'Leary-Kelly, A, Liou, R & Reeves, C (2010) *When the personal is professional: intimate partner violence and the workplace*, University of Arkansas, 2010, p. 27. This study involved 3,892 employed men and women.

² Braaf R & Barrett Meyering, I (2011), *Seeking Security: promoting women's economic wellbeing following domestic violence*, Australian Domestic and Family Violence Clearinghouse, Sydney.

disclosed the abuse to their employers, in order to gain support to take leave to address the violence or to seek protective measures at work. Of the participants who did disclose to their employers, many did not disclose the full extent or seriousness of the abusive situation.

Some women interviewed by Braaf & Barrett Meyering (2011) saw the workplace as a safe haven from the abuse and drama going on at home, and endeavoured to keep their home and work lives completely separate. The following comments reflect this view (Braaf & Barrett Meyering 2011, p. 90):

Nope. I didn't talk to anyone about what I'm going through. I kept everything about my private life totally separate... I just tried to keep up... I regard work as being escape from this life. (p. 90)

The research indicated that organisational culture is a critical barrier to employee disclosure of family violence. Participants' reasons for non-disclosure included shame about the abuse, feeling that the abuse is something private, having concerns about a lack of confidentiality in the workplace and the perception that disclosure would be viewed negatively or insensitively by their employer. Women expressed a fear of discrimination, as well as a desire to be seen to be reliable and focused on work. One woman's comments illustrate these sentiments (Braaf & Barrett Meyering 2011, p. 90):

I don't want to tell everybody. They don't need to know. I guess at the end for the day my manager could step in and say, 'She's going through a tough time'. But I don't need to, I just try to do the brave face stuff and get out there. [Service 5 Client 3].

The Clearinghouse strongly supports the rights of victims to choose whether or not they disclose at work if they are experiencing domestic violence. **We recommend that domestic violence should only be considered a 'workplace issue' where it negatively affects work performance or workplace safety.** Organisational culture needs to be conducive to disclosure: victims of family violence are more likely to disclose their circumstances where the workplace is an informed and supportive environment in which they feel safe to disclose.

Question 2. What impact might disclosure of family violence by employees have on the responsibility or liability of employers, union delegates or others?

We recognise that employee disclosure of family violence to their employer may trigger the following responsibilities for employers, depending on circumstances:

- Mandatory reporting, where the employer is an organisation with mandatory reporting obligations;
- Occupational health and safety duties, where the family violence amounts to a 'workplace issue' (see Questions 21 – 25 below).

Some concerns have been expressed to the Clearinghouse that union delegates may be required to report disclosed matters of family violence. As discussed in the ALRC report on family violence (2010), mandatory reporting of family violence to police for all adults has been introduced in the

Northern Territory (NT).³ The Clearinghouse strongly opposed mandatory reporting of domestic and family violence by health professions in a submission to the NT Justice Department (2008).

In its report, the ALRC expressed reservations about mandatory reporting of violence against adults (p. 385), and commented that that criminalising the failure to report may be ‘an overreach of the criminal law’. The Clearinghouse agrees that the outcome of the current evaluation of the NT measures should be carefully examined, and notes that to date, there have been no prosecutions for failure to notify.

Following the inclusion of domestic violence clauses in the Crown Employees (Public Service Conditions of Employment) Award (NSW) 2009 in March 2010, a further 14 associated awards were varied, and another four awards are pending. The Crown Employees (NSW Police Force Administrative Officers and Temporary Employees) Award 2009 is one of these four. The New South Wales Police Service is currently considering the ramifications for its unsworn officers and employees of disclosure of domestic violence under their current code of conduct. The Clearinghouse understands, for example, that disclosure of a domestic violence assault (though not an apprehended violence order) triggers a risk assessment process. The Clearinghouse is consulting with NSW Police on this matter.

Question 4. What changes would facilitate jobseekers’ disclosure of family violence in completing the Job Seeker Classification Instrument?

The Clearinghouse is concerned about the how information about family violence is sought in the JSCI. Victims of family violence are constantly required to retell their experience of violence to a whole range of criminal justice and government agencies and service personnel, and the retelling can be a traumatic experience in itself, particularly if handled insensitively.

The Clearinghouse recommends specialised training for JSCI staff around family violence and the introduction of standard questions for raising family violence issues with clients. These questions could be similar in structure to those currently adopted by the New South Wales Health Routine Screening for Domestic Violence Program (though they are limited to Interpersonal Violence):

- *Within the last year have you been hit, slapped or hurt in any other ways by your partner or ex partner?*
- *Are you frightened of your partner or ex partner?*
- *Are you safe to go home when you leave here?*

Another general question which may indicate a family violence issue might be: *do you currently have/are applying for a domestic violence protection order?*

We also recommend that any discussions about family violence issues be conducted in a private space wherever possible to encourage disclosure, protect client confidentiality and minimise the possibility that the perpetrator of the violence is in the vicinity of the client when the above questions are posed.

For some victims, this may be the first time they have disclosed the violence, in which case it would be extremely helpful if the person administering the JSCI was able to provide an information pack

³ ALRC, *Family Violence: A National Legal Response*, ALRC Report 114, Part C, Section 8.

about family violence and help available, and to refer the client to a specialised family/domestic violence service. This again ties in with appropriate training for JSCI staff so that staff members are confident in providing appropriate referrals.

Additionally, **we recommend that JSCI and Centrelink staff have ready access to family violence materials, such as strategically placed posters, to assist staff in administering the JSCI with consideration of family violence issues.**

Question 5. Does the Job Seeker Classification Instrument adequately assist Centrelink in evaluating the level of disadvantage face by jobseekers experiencing family violence? How might the assessment be improved?

The Clearinghouse does not have any information about how the JSCI is used to evaluate the level of disadvantage. However, there were three major barriers identified in the Clearinghouse financial security study to women affected by domestic violence securing employment. These were to do with ongoing trauma, the cost of child care and the need to attend appointments related to the abuse – these are discussed below. These issues need to be given adequate weight in the assessment to ensure its accuracy.

A considerable number of the women in the Clearinghouse study stated that they were unable to work because they were experiencing ongoing physical and mental health trauma from the abuse. This trauma manifested itself in various ways, such as: anxiety attacks, agoraphobia, insomnia, depression, suicidal ideation, poor memory and inability to concentrate, and physical injuries. Most of these women were actively seeking assistance with these problems, as far as their financial resources would allow, such as through: counselling, psychological or psychiatric treatment, medication and other health treatment. Women and workers spoken with in the study expressed a need for healing time for victims prior to taking up paid employment; a time frame that may differ considerably for different women.

Some women also referred to their children not being emotionally ready to be left on their own or in child care (including older children who might access after school care), due to their own trauma from the abuse. These caring responsibilities prevented women from working. Women spoke about their children exhibiting physical, emotional and behavioural difficulties resulting from domestic and sexual abuse, such as soiling themselves, self-harming, nightmares, insomnia and acting out at school. Some children were being repeatedly sent home from school for poor behaviour or other reasons, which required women to be available to look after them.

A majority of the fifty-seven women in the study had children under the age of sixteen. A large number of those who were not working stated outright that childcare costs would equal or exceed any earnings gained from their employment. This was particularly the case for women who were more likely to take up part-time, casual or low paid work. It was also an issue for women who would have their Centrelink entitlements reduced at the same time as incurring child care costs, resulting in a net loss in taking up paid employment.

Finally, women spoke of being required to attend multiple appointments associated with the abuse, such as: doctors' and other health appointments for them and their children, appointments with police and lawyers, domestic violence services, accommodation services and court appointments. Court appointments could go on for years, due to ongoing and multiple court cases relating to the abuse. As one woman told us: *'You can't work when you're going to court every month'* (p. 58).

The following woman's observation sums up these issues:

I was working last year, I'm currently not working, I'm not doing much, coping at the moment. Working would definitely be wonderful but at the moment I'm going through depression, a whole lot of up and down. I've got a lot of court dates and things at the moment so it's very difficult to even contemplate going back to work... Working would be wonderful but I'm not sure if in the foreseeable future it's a possibility. I don't know how reliable I'll be (p. 86).

Question 6. What are the practical effects of disclosing family violence for a jobseeker?

The Clearinghouse is not in a position to indicate what the practical effects of disclosing family violence might be for a jobseeker. One area where disclosure is likely to impact is on jobseeker categorisation. This will be expanded on in the forthcoming Clearinghouse submission on the ALRC's Family Violence and Social Security Issues Paper.

The Clearinghouse would like to see the following outcomes for jobseekers who disclose family violence:

- An exemption from seeking work for victims of family violence experiencing ongoing trauma, or whose children are experiencing ongoing trauma.
- Information provided to jobseekers about domestic violence and referrals to targeted assistance for those who wish it (for example, referrals to counselling or other health services, or support groups for victims of violence for those who wish it).
- Assistance for those who want to become more job ready, such as through:
 - i. Subsidised education and training to build skills and knowledge
 - ii. Programs to get clients job ready (for example, assisting with money for clothes for victims escaping violence who have left all their possessions behind; assistance in preparing resumes and training in interview techniques)
 - iii. Targeted job placement program, for example, a program that screens prospective employers who might be more supportive of employees who are victims of violence, and likely to provide flexible hours other measures to enable workforce participation.

Question 8. Should the Australian Government amend s 65 of the *Fair Work Act 2009* (Cth) to include experiencing family violence as a basis upon which an employee may request flexible working arrangements?

The Clearinghouse strongly supports the amendment of section 65 of the *Fair Work Act 2009* (Cth) (*'Fair Work Act'*) to provide a specific right to request flexible working arrangements for employees who are victims of family violence.

This could be achieved through the insertion of an additional ground for requesting flexible working arrangements for employees 'experiencing family violence', section 65(1A). Family violence could be defined in the dictionary to the *Fair Work Act* to include physical, sexual, financial, verbal or

emotional abuse by an immediate family member or person in a kinship relationship with the employee.

We suggest that the amendment may take the following form:

Requests for Flexible Working Arrangements

- (1) An employee who is experiencing domestic or family violence may request a change in working arrangements having regard to the safety and needs of the employee arising from the domestic or family violence.
- (2) Flexible working arrangements may include:
 - (a) temporary or permanent changes to working times and patterns;
 - (b) changes to specific duties, for example to avoid potential contact with an abuser in a customer facing role or if they are a fellow employee; and/or
 - (c) redeployment or relocation.
- (3) Employers will endeavour to keep all requests and all records for flexible working arrangements concerning domestic violence confidential. There will be no adverse impact on the employment records of victims of domestic or family violence.
- (4) For the purposes of this section, 'domestic or family violence' includes physical, sexual, mental, verbal or emotional abuse by a member of the employee's immediate family or a member of the employee's household.

The Clearinghouse recommends that there be no qualifying period that an employee needs to work in order to access the right to request provision.⁴ This is necessary to overcome the disadvantage faced by victims of family violence who are more likely to have disrupted employment as a result of the violence.⁵

Question 9. Should the Australian Government amend the National Employment Standards under the *Fair Work Act 2009* (Cth) to provide for a minimum statutory entitlement to family violence leave?

The Clearinghouse strongly supports the inclusion of an entitlement to family violence leave in the National Employment Standards ('NES'). Murray and Powell (2008) writing for the Clearinghouse on domestic violence and the workplace found that a number of Australian initiatives to address the issue of domestic violence and the workplace had been valuable but had relied on the commitment of one or more influential individuals within the organisation.⁶ The challenge for Australia, they concluded, remained to introduce sustainable and widespread change.

Minimum statutory entitlements are fundamental to achieving widespread change to address the impact of family violence in the workplace. The NES provides a base of minimum entitlements for all

⁴ Under the current right to request flexible working arrangements provision for parents of children under 6 (or disabled children), employees must have served 12 months with the employer before being able to access the provision. Additionally, casual employees must have worked on a regular and systematic basis and possess the expectation of continuing employment: *Fair Work Act 2009* (Cth) s 65(2).

⁵ As noted by the ALRC at paragraphs 4 and 99 of the Issues Paper.

⁶ Murray, S, & Powell, A (2008) *Working It Out: domestic violence issues and the workplace*, Issues Paper 16, ADFVC, Sydney.

national system employees. Accordingly, the inclusion of a statutory entitlement to family violence leave in the NES is necessary to demonstrate a clear commitment to reducing the economic impact of family violence and supporting victims of family violence to remain in the labour market. Policy alone is inadequate at driving widespread systemic change, as inconsistency in policy between employers leads to 'fragmentation' and fails to achieve the type of widespread change necessary to address the issue of keeping victims of family violence in paid work.⁷ The Clearinghouse recommends the introduction of legislative minimum entitlements to provide a foundation for improvements, there will always be an opportunity for employers to do more and improve on existing entitlements.⁸

This type of leave is too important to be left to develop through the bargaining process alone, as demonstrated through the example of paid parental leave: despite several decades of bargaining, success was incremental at best and ultimately, real change has only eventuated through the recently-adopted federal legislative Paid Parental Leave scheme.⁹

Question 10. If the National Employment Standards under the *Fair Work Act 2009* (Cth) should be amended to provide for a minimum statutory entitlement to family violence leave:

(a) under what circumstances should employees be entitled to take such leave?

The Clearinghouse recommends that employees experiencing family violence be entitled to take family violence leave where such leave is necessary to attend court dates, for example where the perpetrator of family violence has been charged with a criminal offence or where a domestic violence protection order has been applied for. In relation to certain court dates, the victim's attendance may be mandatory, and the court can issue a warrant in the event a witness fails to attend. Further, non-attendance may result in the protection order, or the criminal charges against the perpetrator being dismissed. Therefore, it is imperative that victims of family violence have the ability to take paid leave when it is necessary to enable court attendance.

Further, we recommend that victims of family violence may take leave to attend appointments with family violence services, arrange crisis or emergency accommodation or take other steps to ensure their safety. Support services are likely to only open during ordinary business hours. These types of appointments and court dates are not specifically accommodated for under existing leave entitlements in the NES, such as the entitlement to sick leave.

Case study: Danni

Danni was employed as a fulltime member of a Commonwealth government agency. Danni had experienced significant violence in her relationship and the police applied for a protection order on her behalf. She was told that if she didn't come to the first court date, the protection order could be dismissed. Danni did not want to tell her employer what had happened because she feared judgment so she took sick leave to cover her court dates. Ultimately, Danni's employer found out she had improperly used sick leave and her employment was terminated. After her union successfully intervened, Danni was reinstated.

If Danni had been entitled to leave, she would have been able to attend court without the need to misuse sick leave for this purpose and remain in her job.

⁷ See generally, Baird, M, 'Parental Leave and the Industrial Relations System' (2005) 23 *Law in Context: Work Family and the Law* (special issue) 45.

⁸ Ibid at 61.

⁹ Ibid at 57-58.

The Clearinghouse also recommends that family violence leave not be subject to a qualifying period where the leave must first be accrued before it can be used. A qualifying period would undermine the beneficial nature of this type of leave and potentially exclude the employees most likely to be adversely affected by family violence: given the link between family violence and interrupted employment, some victims may not have been in their employment long enough to meet other *Fair Work Act* leave qualifying periods. Accordingly, this type of leave is necessary to assist workers to break the cycle of interrupted employment by supporting victims to stay in paid work.

The Clearinghouse recommends that any of the following documents be sufficient to demonstrate proof of family violence for the proposed leave entitlements: documents issued by police, a court, health professional such as a doctor or community health nurse, family violence service, solicitor; or a statutory declaration provided by the employee.

In addition to the express family violence leave entitlement set out above, **the Clearinghouse recommends that employees in a support role for victims of family violence are able to access carer's leave entitlements for this purpose.** We refer the ALRC to the ASU Family Violence Clause proviso which states: *An employee who supports a person experiencing family violence may take carer's leave to accompany them to court, to hospital, or to mind their children.*

(b) how many days should employees be entitled to take?

The Clearinghouse recommends that the *Fair Work Act* is amended to include an express family violence leave entitlement in the NES, providing victims of family violence with a minimum of twenty days paid family violence leave per year. The entitlement to twenty days paid family violence leave is currently available to employees of several local government employers in New South Wales and Victoria, and Australia should maintain world best practice in its federal workplace law by implementing this entitlement in the NES.

Additionally, **the Clearinghouse supports the amendment of the NES to allow employees who are victims of family violence to exercise their other leave entitlements for this purpose where they have exhausted the specific family violence leave entitlement.**

(c) should such leave be paid or unpaid?

As stated above, **the Clearinghouse strongly supports the entitlement to take paid leave.** We do not support a hollow entitlement to take unpaid leave as it is likely to further disadvantage victims of family violence who may be less likely to be in a financial position to afford to take unpaid leave. An entitlement to take unpaid leave undermines financial security: conversations with stakeholders indicate that employees are unlikely to take the leave that they need where it is unpaid due to financial hardship. Therefore, any entitlement to leave must be to paid leave to provide genuine assistance for victims of family violence.

The Clearinghouse proposes that the NES be amended as follows:

Domestic and family violence leave

- (1) An employee experiencing domestic or family violence is entitled to twenty days of paid special personal leave in connection with relevant appointments, including with support agencies, solicitors, to rearrange housing or childcare and/or for court appearances.

- (2) This leave will be in addition to any other entitlement the employee has with respect to personal or carer's leave.
- (3) This leave may be taken as a full week, as consecutive or single days, or as a fraction of a day.

Question 11. What steps could be taken to ensure that employees who are experiencing family violence are better able to access individual flexibility arrangements made under s 202 of the Fair Work Act 2009 (Cth)?

The Clearinghouse sees the inclusion of specific family violence clauses in enterprise agreements and modern awards as strongly preferable to Individual Flexibility Agreements ('IFAs') in the context of assisting victims of family violence (see further at Question 12 below). Where an award or enterprise agreement contains an existing family violence clause, the need for an employee experiencing family violence to negotiate an IFA is negated as the family violence clause would ideally cover the same matters, such as changes in span of working hours or shift patterns.

Where a workplace is not covered by an enterprise agreement containing a specific family violence clause, an IFA *may* be *negotiated* in order to seek temporary changes to working patterns, such as shorter or alternative hours or the ability to work from home to care for children. It should be noted that the *Fair Work Act* provides a mechanism for IFA *negotiation* only, as opposed to an actual *entitlement* to a concluded IFA. In practice, employers are unlikely to consent to an IFA unless it offers some operational benefit, limiting their practical usefulness to employees with greater bargaining power: those employees whose skills are in demand or harder to replace.¹⁰

For many employees, the prospect of negotiating an IFA could be daunting as it is likely to involve some degree of disclosure of their changed circumstances, with no guarantee of a positive outcome. Research has shown that women are less likely to negotiate with their employers over the conditions of employment¹¹ and are more likely to be victims of family violence.¹²

Although IFAs are subject to the 'better off overall' test, they are concluded privately between the employer and employee and do not require pre-approval by Fair Work Australia ('FWA'). As such, it is foreseeable that victims of family violence who are forced to use IFAs to negotiate flexible working arrangements could be unwittingly worse off under the IFA than the terms of their relevant award or enterprise agreement. Due to the lack of monitoring of these types of agreements, the employee would need to know to raise the issue before there could be any scrutiny by FWA.

Another practical disadvantage with IFAs is that even where an employer may be willing to negotiate an IFA, employees experiencing family violence are likely to need flexible measures straight away to deal with unforeseen changes in their personal circumstances. An IFA takes time to negotiate. This again demonstrates the need for express family violence provisions in modern awards and enterprise agreements.

¹⁰ Rentsch, A & Easteal, P, 'Gendered Work "Choices": The Impact of Industrial Relations Law' (2007) 10 *Flinders Journal of Law Reform* 315 at 334 (in the context of AWAs).

¹¹ *Ibid* at 327.

¹² National Council to Reduce Violence Against Women and their Children, *Time for Action: The National Council's Plan to Reduce Violence Against Women and their Children, 2009-2021* (2009) at 25.

FWA and employee associations are best placed to publicise access to IFAs in this context. Employees who are members of a trade union may be able to receive advice on the use of IFAs through their union. For other employees, the FWA website and Fair Work InfoLine could provide resources and information: a 'Guide for Employees Experiencing Family Violence', including a section on IFAs that could be downloaded from the FWA (and/or FWO) website or distributed in hardcopy form via other services would potentially be useful.

Question 12. Should the inclusion of family violence clauses in enterprise agreements be encouraged? If so, what provisions should such clauses contain?

The Clearinghouse strongly recommends the inclusion of family violence clauses in enterprise agreements, and recommends the provisions included in the ASU Victorian Authorities and Services Branch Family Violence Clause.

The Clearinghouse recommends the following model clause for inclusion in enterprise agreements:

General Measures

- (a) Proof of family violence may be required and can be in the form of an agreed document issued by the Police Service, a court, a doctor, district nurse, maternal and child health care nurse a Family Violence Support Service or lawyer.
- (b) All personal information concerning family violence will be kept confidential in line with Council/Shire Policy and relevant legislation. No information will be kept on an employee's personnel file without their express written permission.
- (c) No adverse action will be taken against an employee if their attendance or performance at work suffers as a result of experiencing family violence.
- (d) The organization will identify a contact in Human Resources who will be trained in family violence and privacy issues for example training in family violence risk assessment and risk management. The Council/Shire will advertise the name of the contact within the Council/Shire.
- (e) An employee experiencing family violence may raise the issue with their immediate supervisor or the Human Resources contact. The supervisor may seek advice from Human Resources if the employee chooses not to see the Human Resources contact. The Human Resources contact will liaise with the employee's supervisor on the employee's behalf, and will make a recommendation on the most appropriate form of support to provide in accordance with [the other clauses].
- (f) The Council/Shire will develop guidelines to supplement this clause, and which will detail the appropriate action to be taken in the event that an employee reports family violence.

Leave

- (a) An employee experiencing family violence will have access to 20 days per year of paid special leave for medical appointments, legal proceedings and other activities related to family violence. This leave will be in addition to existing leave

entitlements and may be taken as consecutive or single days or as a fraction of a day and can be taken without prior approval.

- (b) An employee who supports a person experiencing family violence may take carer's leave to accompany them to court, to hospital, or to mind children.

Individual support

- (a) In order to provide support to an employee experiencing family violence and to provide a safe work environment to all employees, the employer will approve any reasonable request from an employee experiencing family violence for:
 - (i) changes to their span of hours or pattern or hours and/or shift patterns
 - (ii) job redesign or changes to duties
 - (iii) relocation to suitable employment within the organisation/department
 - (iv) a change to their telephone number or email address to avoid harassing contact
 - (v) any other appropriate measure including those available under existing provisions for family friendly and flexible work arrangements.
- (b) An employee experiencing family violence will be referred to the Employee Assistance Program (EAP) and/or other local resources. The EAP shall include professionals trained specifically in family violence.

Question 13. What other measures could be introduced to ensure employers are responsive to the needs of employees who are experiencing family violence?

We recommend that the Department of Education, Employment and Workplace Relations (DEEWR) in consultation with the Clearinghouse develops resources for employers, such as factsheets and safety planning tools that will assist employers to respond to the needs of their employees experiencing family violence. The Clearinghouse recognises that employers need to be sufficiently resourced in order to recognise family violence and in turn, provide a workplace environment where victims of family violence feel safe to disclose.

At paragraph 83 of the Issues Paper, the ALRC identifies a range of complementary workplace policies and procedures needed to support the effective operation of domestic violence clauses. These include workplace safety plans and policies which contribute to such plans, including policies providing guidance about how to respond to abusive calls and emails received by employees at work from their (ex) partner. This is the most common form of domestic violence which employees report experiencing at work¹³ and has serious impacts on an employee's work performance.¹⁴

¹³ See Swanberg, J E, Macke, C & Logan, T K, 'Intimate Partner Violence, Women and Work: Coping on the Job' (2006) 21 *Violence and Victims* 565, which examined data from a US study of 518 domestic violence victims who had been employed in the previous 12 months and had protective orders. Of the 85% who had suffered domestic violence relating to work, nearly 60% had received a harassing phone call with nearly 2/3 of those indicating they were repeatedly harassed.

¹⁴ *Ibid.* Where partner harassment interfered with an employee's work, they reported loss of concentration (over 70%), not going to work or having to go home (45-60%) and leaving or losing their jobs (approximately a fifth).

A policy for managing harassing and abusive calls has a dual purpose: to stop the calls and/or emails and prevent the associated distress and impacted work performance for the employee, and secondly, to enable such calls and/or emails to be used as evidence of the need for a domestic violence protection order, or to support the prosecution of a breach of one.

In general, it is unlawful for a recipient of a phone call to monitor or record it without the consent of the person making the call. Exceptions arise in the case of voicemail.¹⁵ The *Telecommunications (Interception) Act 1979* (Cth) ('TIA') regulates (amongst other things) recording equipment which is an integral part of a telephone system such as voicemail. Exceptions to the prohibition on recording calls without consent are very limited when where integral devices such as voicemail are used. State and Territory laws regulate recordings made by equipment external to the telecommunications system, such as a tape recorder¹⁶ and provide wider exceptions. For example, section 7(1)(b) of the *Surveillance Devices Act 2007* (NSW) provides that the need for both parties to consent to the recording of the conversation is unnecessary if, for example, the recipient agrees to a tape recording of a conversation and it is reasonably necessary for the protection of the person's 'lawful interests'. This would presumably include safety. Similar provisions exist in other states.¹⁷

We suggest that a similar exception is considered for inclusion in the TIA but expressly extended to recording of calls where the calls may be able to be used as evidence in proceedings for a domestic violence protection order or for its breach. This exception should only be available on business telephones and communication of the recording permissible in order to try to initiate such proceedings.¹⁸

Question 14. In practice, are existing terms in modern awards sufficient to respond to the needs of employees responding to family violence?

At the outset, it should be noted that women are both more likely to be award-reliant than men, and more likely to experience family violence.¹⁹ Therefore, it is imperative that modern awards provide sufficient accommodation and flexibility for victims of domestic violence to enable them to retain stable employment, which in turn increases the victim's likelihood of leaving the violent relationship.

The Clearinghouse considers existing modern awards terms largely inadequate in addressing the needs of employees experiencing family violence, offering no automatic right to request flexible working arrangements or time off. Although the *Fair Work Act* states that modern awards may provide for 'averaging of hours of work' over a certain period, suggesting scope for temporary variation of regular hours, this merely provides a mechanism for the employer to allow scheduling changes where they are mutually agreeable.²⁰ It does not provide a right or entitlement to temporary (or ongoing) rearrangement of shifts, hours or spans for employees who need time off for court or other appointments, or simply cannot work their regular scheduled hours due to the emotional impact of the violence on their work capacity.

¹⁵ *Telecommunications (Interception) Act 1979* (Cth).

¹⁶ Australian Communications Industry Forum (2004) *Participant monitoring of voice communications*, Industry Guideline No 516, App C.

¹⁷ *Ibid.*

¹⁸ Such a provision would need to be consistent with the overarching National Privacy Principles in the *Privacy Act 1988* (Cth).

¹⁹ National Council to Reduce Violence Against Women and their Children, *Time for Action: The National Council's Plan to Reduce Violence Against Women and their Children, 2009-2021* (2009) at 25.

²⁰ *Fair Work Act 2009* (Cth) s 63.

The Clearinghouse recommends that these matters not be left solely to managerial discretion, resulting in inconsistency and uncertainty for affected employees. Instead, appropriate provisions recognising the needs of victims of family violence should be included in all modern awards. This would include amending the list of ‘allowable matters’ under section 139(1) of the *Fair Work Act* to include matters related to employees experiencing family violence.

The Clearinghouse recommends that modern awards be amended in line with the growing number of state public sector awards containing effective and specific family violence clauses. For example, the Crown Employees (Public Service Conditions of Employment) Award 2009 (NSW) now provides that victims of ‘domestic violence’ may use existing sick leave, and family and community service leave entitlements.²¹ More importantly, the award entitles victims to five days additional special paid leave per year, to be used for absences from the workplace related to domestic violence. It further empowers departmental heads to provide flexible working arrangements where appropriate, including changes to ‘work location, telephone number and email address’.²²

As stated at Question 2 above, there are at least fourteen other state awards adopting parallel family violence provisions including the Crown Employees (Home Care Service of New South Wales – Administrative Staff) Award 2004 (NSW), Crown Employees (Institute Managers in TAFE) Salaries and Conditions Award 2006 (NSW), Crown Employees (Roads and Traffic Authority of New South Wales – Salaried Staff) Award 2008 (NSW) and Independent Commission Against Corruption Award 2009 (NSW).

Question 15. Should s 139(1) of the *Fair Work Act 2009* (Cth) be amended to allow for the inclusion of a matter related to family violence in the allowable matters in modern awards?

As stated above, **the Clearinghouse recommends that ‘family violence’ is included as an ‘allowable matter’ under section 139(1) of the *Fair Work Act*** which would allow modern awards to include clauses in relation to family violence, operating as a safeguard for victims of family violence where their employment is covered solely by award provisions rather than a contract of employment or enterprise agreement.

The Clearinghouse suggests that section 139(1) of the *Fair Work Act* could be amended as follows:

139 Terms that may be included in modern awards—general

(1) A modern award may include terms about any of the following matters:

(a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:

- (i) skill-based classifications and career structures; and
- (ii) incentive-based payments, piece rates and bonuses;

(b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities and

²¹ ‘Domestic violence’ is defined using the definition adopted by the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

²² Crown Employees (Public Service Conditions of Employment) Award 2009 (NSW) cl. 84A.6

employees experiencing family violence;

(c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours.

Question 16. In practice, are employees' experiences of family violence being considered in unfair dismissal cases as part of the 'harsh, unjust or unreasonable' formulation?

The Clearinghouse is aware of a single relevant decision of the Australian Industrial Relations Commission where a terminated employee was successful in gaining reinstatement due to being sacked for extended periods of absence from work, which by inference, may have been related to domestic violence.²³ Family violence has been raised in a limited number of other cases before Australian industrial tribunals, involving both perpetrators²⁴ and victims.²⁵ As the majority of unfair dismissal complaints settle at conciliation there is limited publicly available data on the grounds of complaints and consequently, the issue of unfair dismissal on the basis of family violence is impossible to quantify.²⁶

As noted by the ALRC at paragraph 99 of the Issues Paper, access to the federal statutory unfair dismissal regime is only available to applicants who earn under the high income threshold or covered by a modern award or enterprise agreement;²⁷ have been employed for a 'minimum employment period';²⁸ and in the case of casual workers, were employed on a 'regular and systemic basis' through the qualifying period, had a 'reasonable expectation of continuing employment'.²⁹ Once these pre-conditions are satisfied, the applicant must demonstrate that the dismissal was 'harsh, unjust or unreasonable' and not a case of genuine redundancy.³⁰

As noted by the ALRC, at paragraphs 14 and 100 of the Issues Paper, victims of family violence are likely to have a disrupted work history, and more likely to be employed on a casual basis.³¹ Consequently, **many victims of family violence are unlikely to be able to satisfy the pre-conditions prescribed by section 383 and 384 of the *Fair Work Act* in relation to duration and regularity of employment in order to access the statutory unfair dismissal regime: potentially excluding the most vulnerable workers.** This again illustrates the need for express protection on the basis of family violence under section 351 and 772 of the *Fair Work Act*. **The Clearinghouse also recommends that the current qualifying periods and requirement of regular and continuous service with respect to casuals should be removed with respect to victims of family violence.**

²³ *Morley v Qantas Holidays Ltd* [2006] AIRC U2005/5526 (Unreported, Hamberger SDP, 31 August 2006). Although family violence was not pleaded specifically, it is implicit in the judgment that the employee's prolonged absences from work related to injury were at least in part linked to domestic violence: see [58].

²⁴ See eg, *G Young v G W Closter & Sons Pty Ltd* [1998] AIRC U1998/34580 (Unreported, Watson SDP, 12 May 1999).

²⁵ See eg, *Moulang v Federal-Mogul Pty Ltd* [2007] AIRC 453.

²⁶ Fair Work Australia (2010) *Annual Report 2009-10* at 12: During the 2009/10 period 93 percent of termination of employment applications to Fair Work Australia (including general protections applications involving dismissal) were finalised at or prior to conciliation.

²⁷ *Fair Work Act 2009* (Cth) s 382.

²⁸ *Fair Work Act 2009* (Cth) s 383: 12 months where employer is a small business or 6 months where employer is not a small business. Section 23 defines 'small business employer' as 15 full-time equivalent employees or less.

²⁹ *Fair Work Act 2009* (Cth) s 384.

³⁰ *Fair Work Act 2009* (Cth) s 385.

³¹ Citing Costello, M, Chung, D & Carson, E, 'Exploring Pathways Out of Poverty: Making Connections Between Domestic Violence and Employment Practices' (2005) 40 *Australian Journal of Social Issues* 253 at 256; Franzway, S, Zufferey, C & Chung, D, (2007) 'Domestic Violence and Women's Employment' (Paper presented at Our Work, Our Lives National Conference on Women and Industrial Relations, Adelaide).

Discussions with stakeholders indicate that it may be difficult for victims of family violence to make an unfair dismissal claim: for some victims, unfair dismissal proceedings take a back seat to concurrent legal proceedings for family law, criminal charges against the perpetrator, or a protection order. This difficulty is compounded by the very short timeframe in which a sacked employee has to make an unfair dismissal claim, the 14 day cut-off period is extremely onerous for applicants generally, and FWA has taken a strict approach in defining the circumstances in which an out of time application may be accepted, leaving many applicants without a remedy under the Act.³² **In instances where victims of family violence are also dealing with other legal proceedings and under intense emotional strain, 14 days is unlikely to be enough time to seek legal advice and make an application.**³³

The prescribed application fee may also serve as a disincentive to some of the most vulnerable victims of family violence seeking redress for unfair dismissal.³⁴ Although FWA has the discretion to waive fees in the case of serious financial hardship, the Clearinghouse is aware of instances where community legal centres have been unable to obtain a fee waiver for welfare-dependent clients with no realisable assets. Accordingly, **the Clearinghouse recommends that FWA reassess its internal guidelines on what circumstances constitute 'serious hardship' and 'exceptional circumstances' in the context of out of time applications to improve access to unfair dismissal remedies for victims of family violence.**

Question 17. If employee's experiences of family violence are not being raised or considered in unfair dismissal cases, in what other ways do victims of family violence raise the issue, where the violence caused or affected the termination of their employment?

Discussions with stakeholders in this area indicate that where family violence is not perceived as a 'workplace issue', victims will not disclose their experiences. In practical terms, once a worker is terminated they are less likely to have an ongoing dialogue with their former employer, and it is unrealistic that victims would reveal sensitive details of family violence after the employment relationship has terminated at their former employer's behest, including where the victim is 'edged out' and ultimately resigns.

The Clearinghouse is aware of instances where workers terminated as a consequence of performance-related issues caused by family violence have sought to negotiate the terms of the reference provided by their former employer in order to obtain a new job. In this context, disclosure of family violence may be raised.

Case study: family violence and termination

Sylvia was experiencing significant violence at home by her partner which resulted in her often being absent or late to work. The violence impacted on her work performance generally and ultimately, Sylvia's employment was terminated for performance-related issues. Sylvia never told her employer about the violence because she was embarrassed and didn't think it was relevant. She sought the advice of a working women's service who advised her that she had little prospect of making a successful unfair dismissal claim.

³² See eg, *Vee Kelly v William Stewart Bentley* [2011] FWA 2062 cf *Rajeev Prasad v Alcatel-Lucent Australia Ltd* [2011] FWA 1515.

³³ This highlights the need for express protection under sections 351(1) and 772(1)(f) which provide a 60 day time limit to make an application in the case of termination.

³⁴ The current filing fee is \$60.60.

After leaving the abusive relationship, Sylvia applied for a new job at another organisation. She did very well at the interview and was told she was shortlisted for the position, subject to a reference check. When her prospective employer phoned her former employer, her former employer stated that Sylvia had been unreliable and had been sacked for poor performance. Ultimately, the job was awarded to someone else and Sylvia found out when she asked for feedback.

Question 18. In practice, how effective are the current grounds under ss 351(1) and 772(1)(f) of the *Fair Work Act 2009* (Cth), where an employee has been discriminated against for reasons arising from their experiences of family violence?

The Clearinghouse submits that the current grounds under sections 351(1) and 772(1)(f) of the *Fair Work Act* are ineffective in protecting victims of family violence from workplace discrimination. A practical assessment of the utility of these provisions makes it clear that they offer little protection for victims of family violence from discrimination at work, unless the impact of the family violence results in temporary absence from work due to illness or injury or can be connected with associated family or carer's responsibilities.

It is foreseeable that an employee affected by family violence may be able to rely on section 351(1) or section 772(1)(f) where family violence has impacted on their family or carer's responsibilities or resulted in temporary absence from work due to illness or injury, ultimately leading to the employee being terminated or adversely treated on the basis of family violence as a characteristic of one of these attributes. However, victims who do not have family or carer's responsibilities or are not ill or injured as a result of the family violence have no protection under these provisions, therefore their scope is limited in addressing discrimination against victims of family violence in the workplace.

Whilst family violence disproportionately impacts women, the Clearinghouse does not consider 'sex' as a potentially relevant ground for establishing a workplace discrimination claim by a female victim of family violence; in our opinion, family violence is unlikely to be held to be a characteristic of someone's gender.³⁵

The Clearinghouse is aware that to date there have been few decisions in this area generally, and as is the case with unfair dismissal applications, discussed above at Question 16, the majority of general protections complaints settle at conciliation there is little publicly available data on the grounds of individual complaints. Potential applicants under these provisions may not understand the concept of 'constructive dismissal' or identify indirect forms of discrimination.

Finally, it should also be noted that these provisions apply to employee workers only, and provide no protection for contractor workers who experience family violence discrimination. For this reason, **the Clearinghouse recommends that state and federal anti-discrimination laws be amended to include family violence victim status as a protected attribute**, with broad coverage extending to contract workers.

Question 19. Should family violence be inserted into ss 351(1) and 772(1)(f) of the *Fair Work Act 2009* (Cth) as a separate ground of discrimination?

The Clearinghouse strongly supports the inclusion of family violence as a separate protected ground under sections 351(1) and 772(1)(f). The inclusion of family violence as a protected ground

³⁵ Issues Paper at [108].

under these provisions provides support for victims by addressing discrimination, thereby enhancing protection for victims to remain in paid employment. As the ALRC has noted at paragraph 111 of the Issues Paper, several overseas jurisdictions already provide victims of family violence with express protection from discriminatory treatment on the basis of victim status and Australia should follow international best practice in this area.

The Clearinghouse submits that express protection of family violence under these provisions accords with the underlying objects of the *Fair Work Act* which include: 'enabling fairness and representation at work and the prevention of discrimination by... protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms'.³⁶

As a precondition to the inclusion of family violence as a protected ground under sections 351(1) and 772(1)(f), the Clearinghouse recommends the amendment of state and territory and federal anti-discrimination law to include family violence victim status as a protected attribute, triggering a basis for protection under the *Fair Work Act*. This is also desirable for consistency across Australian jurisdictions. The Clearinghouse supports the suggested formulation cited by the ALRC for protection under these provisions: 'actual or perceived victim of family violence'.³⁷

Express protection for victims of family violence under sections 351(1) and 772(1)(f) provides additional compliance incentives for employers: firstly, inclusion of family violence as a specific, enforceable ground allows FWO to investigate discrimination against employee victims of family violence, and FWO may investigate on its own initiative.³⁸ Secondly, sections 351(1) and 772(1)(f) attract the civil penalty provisions under Part 4-1 of the *Fair Work Act*, allowing employees, unions and FWO to commence penalty order proceedings against employers who contravene the protections.³⁹ Finally, the *Fair Work Act* allows employees to apply for an injunction to prevent adverse action or unlawful termination occurring, a right not currently afforded by anti-discrimination laws.⁴⁰

Question 20. In practice, are ss 351(1) and 772(1)(f) of the *Fair Work Act 2009* (Cth) sufficient to protect employees who are experiencing family violence from having their employment terminated while they are absent from work as a result of family violence-related or induced illness or injury?

Discussions with stakeholders suggest that it is easier for victims of family violence to take leave in relation to the health-related consequences of family violence as the entitlement to take sick leave is sufficient to cover these situations. Additionally, the protection from termination as a result of temporary absence from work due to illness or injury is clear, and is coupled with a civil penalty provision which provides a compliance incentive for employers and boost protection for employees. However, as stated above, these provisions do not negate the need for an additional, separate category of leave for victims of family violence to cover the non-health related manifestations of

³⁶ *Fair Work Act 2009* (Cth) s 3(e).

³⁷ Issues Paper at [113].

³⁸ See further on the potential role of FWO to investigate and enforce the discrimination provisions. Belinda Smith, 'Fair and Equal in the World of Work: Two Significant Developments in Australian Anti-Discrimination Law' (2010) 23 *Australian Journal of Labour Law* 199 at 217-18.

³⁹ A maximum fine of \$33,000 can be imposed with respect to a corporation.

⁴⁰ Belinda Smith, 'Fair and Equal in the World of Work: Two Significant Developments in Australian Anti-Discrimination Law' (2010) 23 *Australian Journal of Labour Law* 199 at 217.

family violence including the need for time off to go to court for the purpose of obtaining a protection order.

Occupational Health and Safety ('OHS')

There are two important caveats to any measures designed to address family violence in the workplace:

- Workers who are targeted by or threatened with family violence should not be adversely impacted as a result of disclosing family violence at work; and
- Reporting of family violence incidents and associated employee records should be kept private and confidential, unless disclosure is required by law.

Question 21. What measures would improve employers' understanding of their obligations to protect the safety of workers threatened by family violence in the workplace?

The safety duties under the Model Work Health and Safety Bill ('Model Bill') ostensibly encompass employer responsibility for employee safety, whether or not a workplace safety risk stems from the impact of family violence. The Clearinghouse is concerned that family violence in the workplace has not been included as an emerging issue in Safe Work Australia's OHS harmonisation agenda. The Clearinghouse would like Safe Work Australia to clarify its position on whether, and to what extent, family violence is considered an issue for the purposes of OHS duties in Australia.

To improve employers' understanding of safety obligations with respect to family violence in the workplace, **family violence should be included in the national OHS law agenda and adequately publicised** to raise employer consciousness around this issue. **The Clearinghouse recommends that Australian work safety agencies provide duty holders with educational resources and other guidance material in order to enhance understanding of family violence in the workplace context.** This will equip duty holders with the tools they need to identify potential risks and respond appropriately by developing measures to eliminate risk. The Clearinghouse recognises the important role that employer organisations play in educating members on OHS issues in some industry sectors, and ideally, any education initiatives should also be driven by the private sector.

Question 22. Should the definition of 'notifiable incident' in the Safe Work Australia model Bill be amended to include acts or threats of violence, including family violence, directed toward workers? If so, how?

The Clearinghouse supports the inclusion of acts of family violence directed at workers in the definition of 'notifiable incident' contained in the Model Bill. Failure to do so perpetuates the invisibility of domestic violence as a workplace issue, potentially compromising the safety of individual staff and their co-workers and masking the magnitude of the problem. As stated by the ALRC at paragraph 137 of the Issues Paper, mandatory reporting would allow the collection of statistics about family violence at work, and assist in enhancing recognition of family violence as a workplace issue.

This could be achieved either by amending section 35(1) of the Model Bill to include an express reference to ‘an act of family violence’ as a ‘notifiable incident’ or by including ‘an act of family violence’ in the Regulations which set out circumstances giving rise to the section 35(1)(c) definition of ‘dangerous incident’.⁴¹

There is currently great difficulty in establishing the number of intimate partner homicides occurring at work, or on the way to or from work. We have collected a number of cases where women were killed at work but their cases were not been recorded as work-related deaths. One such death was Carole Schaer, see case study below. National data collected by the Australian Institute of Criminology suggests that nearly twenty-five percent intimate partner homicides occur outside the home (in a ten year period 427 women lost their lives at home, and 123 outside the home), but their classifications which besides ‘work’, include ‘street’, ‘car park’, ‘open area’ do not tell us if the victim was on her way to or leaving work. This is a problem often sourced back to police reporting, which does not record if the victim was going to or leaving work.

Case Study: Carole Schaer – intimate partner homicide at the workplace

In 1996 Carole and Simon Schaer separated after a long marriage and she moved out of their shared home. They had very little contact over the ensuing years when she met and began living with a new partner.

In 2004 Simon decided to sell their marital home and go travelling. He informed her of this decision and it is then that she instituted formal divorce proceedings and applied for a financial settlement, whilst making plans to remarry.

Resenting this action, on Wednesday 17th November 2004 Simon set fire to the home where he had continued to live and went to the Myer store where Carole worked as a sales assistant. He walked in carrying a gun, unchallenged and shot her multiple times in front of customers and staff. She later died in hospital.

It was revealed that Carole had been concerned that Simon was a danger to her and she had planned to be out of town on a holiday when he was served the divorce papers. This arrangement failed as the papers were served four days earlier than she had requested.

A year later Simon killed himself by jumping off a mezzanine floor where he was being held inside the Adelaide Remand Centre. The detailed coroner’s report noted that ‘he was evidently a universally liked inmate’.

To improve data collection on family violence at work, **the Clearinghouse recommends that the duty imposed on persons conducting a business or undertaking under section 38 of the Model Bill, to report notifiable incidents, includes the duty to inform safe work regulators as to whether or not the incident occurred in connection to family violence.** This could be achieved by incorporating a question about family violence into the approved form for reporting of a section 35 ‘notifiable incident’.

Question 23. Should family violence as an occupational health and safety risk be addressed in the regulations, a code of practice, and guidance material? How would its inclusion in any of these affect the likelihood that employers will be aware of, and responsive to, the occupational health and safety risks posed by family violence?

The Clearinghouse recommends that Safe Work Australia create a specific Code of Practice for family violence related workplace safety risks, and that this Code of Practice be developed in collaboration with the Clearinghouse. Codes of practice are an important touchstone for duty

⁴¹ Model Bill (2010) s 37(l) provides that ‘dangerous incident’ includes ‘any other event prescribed by the regulations’.

holders in relation to workplace safety issues as code of practice obligations are admissible as evidence in OHS legal proceedings and can assist in demonstrating compliance with general safety duties. Therefore, it is imperative that a Code of Practice be developed to provide duty holders with necessary guidance in relation to identifying and responding to family violence related workplace risks. Further, a Code of Practice would assist in raising recognition of family violence as a workplace issue.

Additionally, **resources should be developed for employees experiencing family violence and made available in the workplace.** The Occupational Health & Safety Council of Ontario have developed a booklet as part of their Workplace Violence Prevention series of resources called *Domestic Violence Doesn't Stop When You go to Work: How to get Help or Support a Colleague who may need Help*. This is important because under the Model Bill employees are also safety duty holders and have a role in minimising risk.⁴² Resources should also be developed to address the concerns of co-workers of persons experiencing family violence, to provide them with tips on how they can assist victims.

Question 24. What steps should an employer be required to take in assessing and responding to risks associated with family violence entering the workplace? In what ways might workplace risks associated with family violence be minimised or eliminated?

The Clearinghouse submits that employers need only respond to family violence issues where they impact on workplace performance and safety. The Clearinghouse is currently developing resources designed to assist employers in assessing and responding to risks associated family violence in the workplace. These resources will be available nationally, to all workplaces free of charge.

The Clearinghouse recommends that employers encourage workers to obtain protection orders specifically listing their work address. This risk management strategy minimises the likelihood of violent behaviour occurring at the workplace. In addition, **we recommend the creation and implementation of general and individualised safety plans.** General safety plans can provide OHS officers with a basis from which to develop individual safety plans which can be tailored to the individual business or undertaking and needs of the worker experiencing family violence.

Employer awareness of family violence issues is critical to risk management. **The Clearinghouse supports compulsory training for OHS officers, union delegates and human resources staff on family violence issues in the workplace. Training on family violence should be incorporated in existing training modules which focus on workplace violence.**

Finally, **the Clearinghouse recommends the introduction of clear, statutory minimum entitlements to family violence leave and flexibility measures** (as stated above at Questions 9, 10, 12, 15 and 19), which assist in facilitating a workplace environment where employees are more likely to disclose family violence and raise the corresponding duty on employers to minimise risk.

Question 25. What requirements, suggestions or information should be included in regulations, codes of practice or guidance materials addressing family violence as an occupational health and safety risk?

As stated above, in the introduction to this section on OHS, it is vital that employers respond to employee disclosure of family violence in a supportive, non-discriminatory way in order to facilitate

⁴² Model Bill (2010) s 28.

disclosure and protect victims from further harm. Any requirements, suggestions or information provided through regulatory measures should accord with this objective.

Question 31. Should the *Superannuation Industry (Supervision) Regulations 1994 (Cth)* be amended to provide a specific ‘compassionate ground’ to enable the early release of superannuation benefits to a victim of family violence?

The Clearinghouse supports amendment of the *Superannuation Industry (Supervision) Regulations 1994 (Cth)* to provide a specific ‘compassionate ground’ to enable the early release of superannuation benefits to a victim of family violence, as a last resort only. The Clearinghouse recognises that early access to superannuation has a flow-on consequences for older women, who on average, live longer than men, and could potentially be left wholly reliant on Centrelink benefits if they access their superannuation early.

In the Clearinghouse research project on the impact of domestic violence on women’s financial security, the vast majority of the women interviewed were experiencing some financial hardship as a consequence of the abuse. For some women, their financial situation was dire. These women were likely to: have incurred significant debts related to the relationship or incurred by their ex-partner; have become homeless as a result of fleeing the family home (often leaving behind all their possessions); have significant health issues/injuries as a result of the abuse, preventing them from working; or be embroiled in prolonged or multiple legal matters (particularly if they were unable to access Legal Aid). One woman put her situation in stark terms (Braaf & Barrett Meyering 2011, p. 26):

I’ve got no money. I don’t know where the money for the next meal is coming from. I’ve got nothing. [Service 3 Client 2]

For women in the study who were unable to stabilize their financial situation quickly, they typically found themselves in a downward spiral of debt and poverty. Being able to access superannuation funds could halt this spiral and provide much needed financial relief, for example, to make mortgage repayments to retain home ownership, and thus remain in stable accommodation. Moreover, the research showed that financial hardship impacted on women’s capacity to gain safety. For example, it impacted on their decisions to leave the relationship, their capacity to take up safety measures (like locks, alarms, or to relocate), to seek treatment for recovery (e.g. physiotherapy, psychiatric treatment, operations, dental or optical treatment/surgery). Some women spoke about returning to violent partners because of being unable to support themselves (and their children) on their own. Superannuation funds could make the difference between staying safe and experiencing ongoing danger posed by violent (ex)partners.

The Clearinghouse recognises that the early release of benefits on the basis of severe financial hardship or compassionate grounds may be of benefit to a limited number of victims of abuse. Some women may have limited or no superannuation funds to draw on. There is also the risk that early access poses to women’s retirement investment. However, access to funds at a critical time of risk may be more beneficial than access to funds in the long term.

The Clearinghouse acknowledges and supports the ALRC’s suggestion at paragraph 182 of the Issues Paper, that **early access to super funds should be considered in a broader context of the adequacy of current social security measures and access to victims compensation payments.** In conclusion, **early access to superannuation should be seen as a last resort for those experiencing financial difficulties.**