

14. Employment Law—Overarching Issues and a National Approach

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Summary

14.1 This chapter provides an overview of Commonwealth employment law and, together with Chapters 15–17, examines possible options for reform to employment-related legislative, regulatory and administrative frameworks to improve the safety of people experiencing family violence. The chapter examines the relevance of family violence to the employment law system; issues associated with disclosure of family violence—including verification of family violence and privacy issues; the need for national initiatives which address family violence in the context of employment; and associated reforms to data collection.

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

Family violence and employment

14.3 Family violence is increasingly recognised as a significant and complex issue and one which is not simply a private or individual issue, but rather a systemic one arising from wider social, economic and cultural factors. Accordingly, effective measures to address family violence must operate in both the private and public spheres. This is particularly so in the context of employment, given that unless addressed at a systemic level, these same factors can affect the workplace, ‘with the effects of one sphere positively or negatively influencing the other’.¹

14.4 Two thirds of Australian women who report violence by a current partner are in paid employment.² Research in the United States has indicated that between 50% and 74% of employed women experiencing family violence are harassed by their partners while at work.³ This illustrates the point made by lawyers John Stanton and Gordon Jervis that family violence ‘has no boundaries and doesn’t stop at the front door of the workplace’.⁴

The effect of family violence on employees

14.5 Many victims of family violence face ongoing difficulties in gaining and retaining paid employment and in disclosing family violence where it may have an impact on their employment. For example, women who have experienced family violence generally have a more disrupted work history, receive lower incomes, and are more often in casual and part-time employment.⁵

14.6 Where victims of family violence are employed, family violence may arise in the workplace in one of three commonly identified categories of occupational violence: ‘internal’ violence, ‘client-initiated’ violence, or ‘external’ violence.⁶ Internal violence refers to violence between employees within the same organisation, for example where employees work together in a family business or where a majority of residents in a particular area are employed by the same organisation. Client-initiated and external violence largely occurs in client-service based organisations that may provide ‘accessibility for partners or ex-partners to be targeted at their place of work’.⁷

1 S Murray and A Powell, *Working It Out: Domestic Violence Issues in the Workplace* (2008) 1, referring to J Swanberg, T Logan and C Macke, ‘Intimate Partner Violence, Employment and the Workplace. Consequences and Future Directions’ (2005) 6 *Trauma, Violence and Abuse* 286.

2 Australian Bureau of Statistics, *Personal Safety Survey*, Catalogue No 4906.0 (2005), 11, 34.

3 L McFerran and R Braaf, ‘Domestic Violence is a Workplace Issue’ (Paper presented at Balance Brings Everything to Life Conference, Sydney, 11 September 2007) referring to Family Violence Prevention Fund, *The Workplace Guide for Employers, Unions and Advocates* (1998). Note, in light of the lack of available statistics in Australia, the comparative US statistics are used for illustrative purposes.

4 J Stanton and G Jervis, ‘Domestic Violence and the Workplace’ (2010) 7 *National Safety Magazine* 36.

5 M Costello, D Chung and E Carson, ‘Exploring Pathways Out of Poverty: Making Connections Between Domestic Violence and Employment Practices’ (2005) 40 *Australian Journal of Social Issues* 253, 256; S Franzway, C Zufferey and D Chung, ‘Domestic Violence and Women’s Employment’ (Paper presented at Our Work, Our Lives National Conference on Women and Industrial Relations, Adelaide, 21 September 2007).

6 S Murray and A Powell, *Working It Out: Domestic Violence Issues in the Workplace* (2008), 3.

7 *Ibid.*, 4.

14.7 In brief, within these categories, family violence may present itself in the workplace in numerous ways, including by:

- stalking or harassing the victim at a place of work or making harassing telephone calls;
- actively undermining the victim's work by hiding or destroying work property, such as paperwork or uniforms;
- promising to mind children, then refusing to do so;
- physically preventing the victim from leaving the house or preventing access to transport;
- where the victim works from home, interfering or preventing the victim from working; or
- using work time or resources to facilitate violent behaviour.⁸

14.8 There may also be broader consequences, including:

- victim sleep deprivation, stress and reduced concentration affecting relations with colleagues and work performance and safety;
- effects on co-workers, including increased workloads due to absenteeism or dealing with disruptions such as harassing phone calls in the workplace; and
- in the most extreme cases, workplace family violence-related homicide.⁹

14.9 As a result, family violence can affect workplace productivity, by absenteeism and staff turnover as well as, in some instances, employee and workplace safety.

The benefits of employment for victims of family violence

14.10 The traditional approach to family violence has focused on crisis intervention. Increasingly however, there has been recognition of the impact of family violence in an employment context and on the benefits of employment for people experiencing family violence.

14.11 Employment may afford victims of family violence a measure of financial security, independence, confidence and, therefore, safety. While some evidence suggests that victims of family violence may experience higher levels of abuse when

8 See, eg.: L McFerran and R Braaf, 'Domestic Violence is a Workplace Issue' (Paper presented at Balance Brings Everything to Life Conference, Sydney, 11 September 2007); A Moe and M Bell, 'Abject Economics: The Effects of Battering and Violence on Women's Work and Employability' (2004) 10(1) *Violence Against Women* 29. See also Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

9 See, eg.: L McFerran and R Braaf, 'Domestic Violence is a Workplace Issue' (Paper presented at Balance Brings Everything to Life Conference, Sydney, 11 September 2007); C Reeves and A O'Leary-Kelly, 'The Effects and Costs of Intimate Partner Violence for Work Organisations' (2007) 22 *Journal of Interpersonal Violence* 327.

they initially gain employment,¹⁰ employment is a key factor in enabling victims to leave violent relationships,¹¹ providing longer-term benefits associated with financial security.¹²

14.12 The importance of financial security and independence through employment has been emphasised by Sex Discrimination Commissioner Elizabeth Broderick:

The primary way the majority of us lay the foundations of our economic security is through participation in paid work. We must develop better workplace responses to domestic and family violence to ensure that women can stay attached to the workforce. Doing this will mean three things. Firstly, we will protect women's financial security in the immediate term—women will be less likely to lose their job in a period of crisis. Secondly, if we can keep women attached to the labour market, we will better protect their economic security in the longer term—they will be less likely to live in poverty in their twilight years. But thirdly, and most importantly from an employer's perspective, individual businesses will be better able to prevent the unnecessary loss of talented staff.¹³

14.13 As a result, in considering safety in the context of employment law, the ALRC acknowledges the role that financial security and independence through paid employment can play in protecting victims of family violence.

The social and economic cost of family violence

14.14 In addition to the negative effects of family violence on employees and the benefits of employment, family violence also generates an enormous economic and social cost, with broader implications for employers and the economy.

14.15 As outlined in Chapter 1, family violence is projected to cost the Australian economy an estimated \$15.6 billion in 2021–22.¹⁴ In 2004, it reportedly cost the corporate and business sectors over \$1.5 billion through direct costs.¹⁵ Where family violence affects employees in the workplace, or leads to them leaving employment, individual employers face costs associated with:

10 This may result from the threat that employment poses to the power and control exercised by those who use family violence—referred to as the 'backlash hypothesis': S Franzway, 'Framing Domestic Violence: Its Impact on Women's Employment' (Paper presented at Re-Imagining Sociology Conference, Melbourne, 20 December 2008).

11 S Potton, *Pathways: How Women Leave Violent Men* (2003), 71.

12 See, eg: M Costello, D Chung and E Carson, 'Exploring Pathways Out of Poverty: Making Connections Between Domestic Violence and Employment Practices' (2005) 40 *Australian Journal of Social Issues* 253.

13 E Broderick, 'Launch of Domestic Violence Clauses' (Paper presented at Launch of UNSW Domestic Violence Clause, Sydney, 15 April 2010).

14 In terms of the overall economic impact of family violence, several key studies have been conducted estimating the total annual cost of violence against women by their partners. While the focus of the studies has been on women, the results are also useful to indicate the enormous economic impact of family violence more broadly. See, eg, National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 43. KPMG, *The Cost of Violence against Women and their Children* (2009), prepared for the National Council to Reduce Violence Against Women and their Children.

15 See, eg, Victorian Community Council Against Violence, *Family Violence is a Workplace Issue: Workplace Models to Prevent Family Violence* (2004).

- absenteeism, including administration costs;
- decreased productivity;
- recruitment following staff turnover—estimated as 150 per cent of an employee’s salary annually,¹⁶ and
- training for new employees and loss of corporate knowledge.¹⁷

14.16 The employment law system in Australia is premised on the need to provide a balanced framework that promotes labour market engagement, economic productivity and social inclusion. In light of the enormous social and economic costs of family violence, and the high proportion of victims of family violence who are employed, ensuring the employment law system appropriately identifies, responds and addresses family violence, is central to achieving these aims.

Disclosure of family violence

14.17 People experiencing family violence may wish to disclose family violence to individuals and organisations within the employment law system—such as job services providers, employers or union representatives—for many reasons, including:

- to ensure their experiences of family violence are considered in attempting to gain or retain employment;
- to alert them to the impact of family violence on their attendance or performance;
- to seek assistance or access to entitlements; or
- because of safety concerns.

14.18 As a result, workplaces have the potential to play a key role in supporting and protecting the safety of victims of family violence. However, victims may be reluctant to disclose family violence.

Barriers to disclosure

14.19 In *Family Violence—A National Legal Response*, Issues Paper 36 (2011) (Employment Law Issues Paper), the ALRC and the NSW Law Reform Commission (the Commissions) identified a range of reasons for non-disclosure of family violence:

A victim of family violence may hide the abuse due to feelings of shame, low self esteem or a sense that he or she, as the victim, is responsible for the violence. A victim may feel that he or she will not be believed. A victim may hope that the violence will stop, or might believe that violence is a normal part of relationships.

16 ADFVC, *Why Domestic Violence Entitlements Makes Economic Sense: The Economic Costs of Domestic Violence on the Workplace*, referring to Australian Human Resources Institute, ‘Love ’Em don’t Lose ’Em: Identifying Retention Strategies that Work’ (2008) 2(1) *HR Pulse* 1.

17 ADFVC, *Why Domestic Violence Entitlements Makes Economic Sense: The Economic Costs of Domestic Violence on the Workplace*. For US research see: C Reeves and A O’Leary-Kelly, ‘The Effects and Costs of Intimate Partner Violence for Work Organisations’ (2007) 22 *Journal of Interpersonal Violence* 327.

Because of the family violence, a victim may feel powerless and unable to trust others, or fear further violence if caught disclosing it.¹⁸

14.20 General barriers to disclosure of family violence include:

- difficulty in recognising their experiences as family violence;
- shame;
- fear of not being believed, of adverse consequences, or of stigma associated with family violence;
- having to repeat an account of family violence multiple times; and
- lack of opportunity to disclose family violence.

14.21 In the context of the employment law system, there are particular manifestations of these general barriers, as well as a range of additional barriers.

Barriers in the employment law context

14.22 In the Employment Law Issues Paper, the ALRC sought stakeholder comment about barriers faced by victims of family violence in disclosing family violence in the employment context.

14.23 Stakeholder responses indicated a range of barriers, including that victims may be reluctant to disclose family violence because they fear such disclosure will jeopardise their job or career, they will be stigmatised, or that their employer will not be responsive. Stakeholders also suggested that, in some cases, employees experiencing family violence consider work to be a ‘safe haven’ away from the violence and were therefore reluctant to disclose.

14.24 In particular, stakeholders suggested that employees fear that an ‘employer may lose confidence in the ability of the victim’¹⁹ following disclosure of family violence.

14.25 Stakeholders also emphasised that privacy concerns inhibit disclosure.²⁰ For example, the Australian Services Union expressed the view that

One of the most significant barriers preventing employees experiencing family violence from disclosing family violence in employment related contexts is the lack of assuredness around privacy. Victims cannot be certain that their experience will be kept confidential and fear that should they make a disclosure of family violence, their disclosure will be discovered by others in the workplace.²¹

18 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [18.4].

19 Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

20 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 17*, 5 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011; Women’s Health Victoria, *Submission CFV 11*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

21 Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

14.26 Organisational culture and its impact on disclosure was also discussed in some submissions. For example, Women’s Health Victoria expressed the view that:

Disclosure may also be affected by the prevailing organisational culture within a workplace ... An organisational culture in which there exists a traditional gender divide, where women are not respected, and where there is widespread sexism, may not be one in which a victim of family violence would feel comfortable disclosing ... In contrast, a workplace that is respectful and supportive of women, that also sends a clear message that family violence is not tolerated, will foster employee disclosure.²²

14.27 In addition, employees from particular groups or communities may face additional barriers or have different concerns preventing disclosure of family violence. For example, an Indigenous victim may be reluctant to disclose family violence in an employment context where they work in an organisation with family or kin, or in a business in a small community. An employee who is a member of a same-sex couple, but who is not ‘out’ at work, may fear stigmatisation or discrimination on the basis of their sexuality, as well as their experiences of family violence.

14.28 Addressing systemic social, economic and cultural factors perpetuating family violence is a principal way to reduce barriers to disclosure.²³ However, the ALRC also considers that the introduction of national initiatives such as those outlined below, ensuring systems identify and respond to disclosures of family violence and that those experiencing family violence are protected, will assist in addressing barriers to disclosure within the employment law system.

Impact of disclosure in certain areas and on certain professions

14.29 In the Employment Law Issues Paper, the ALRC expressed concerns about the potential impact that disclosure of family violence may have on the responsibility or liability of those to whom violence is disclosed. In particular, the ALRC suggested that union representatives, or individuals in the Northern Territory (NT) to whom mandatory reporting provisions apply under the *Domestic and Family Violence Act 2007* (NT) may have concerns about the potential impact of encouraging disclosure of family violence in employment-related contexts.²⁴

Submissions and consultations

14.30 Submissions received in response to the ALRC’s question about the impact disclosure of family violence may have on the responsibility or liability of employers, union delegates or others, largely indicated there would be no additional responsibility or liability. Stakeholders emphasised that some of these concerns may be addressed by

22 Women’s Health Victoria, *Submission CFV 11*, 5 April 2011.

23 The ALRC acknowledges the work done by the Australian Government in this respect, including in particular the Australian Government, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (2009).

24 Under the *Domestic and Family Violence Act 2007* (NT) s 124A (1), an adult commits an offence if he or she believes on reasonable grounds that another person has caused, or is likely to cause, harm to someone else (the victim) with whom the other person is in a domestic relationship; or the life or safety of the victim is under serious or imminent threat because domestic violence has been, is being or is about to be committed; and he or she does not report that to a police officer. Note, under s 124A(2) there is a defence available if the defendant has a reasonable excuse for failing to report.

ensuring that there is clarity around the role and responsibilities of those to whom an employee has disclosed family violence.²⁵

14.31 Several stakeholders expressed opposition to the current mandatory reporting system in the NT.²⁶

14.32 Stakeholders also indicated that disclosure of family violence may also have a particular impact in certain professions. For example, the Australian Domestic Violence Clearinghouse (ADFVC) submitted that:

The New South Wales Police Service is currently considering the ramifications for its unsworn officers and employees of disclosure of domestic violence under their current code of conduct. The Clearinghouse understands, for example, that disclosure of a domestic violence assault (though not an apprehended violence order) triggers a risk assessment process. The Clearinghouse is consulting with NSW Police on this matter.²⁷

ALRC's views

14.33 The ALRC acknowledges the need to ensure that family violence-related measures and workplace instruments and policies clearly outline the obligations and responsibilities of those to whom an employee has disclosed family violence. As reiterated throughout Chapters 14–18, workplace approaches and policies will need to be tailored to meet the needs of individual workplaces and employees within those workplaces. The impact of disclosure of family violence as a trigger for risk assessment is a matter for particular workplaces to address in their enterprise agreement, workplace policy or similar.

14.34 However, the ALRC considers that it is likely that obligations, such as employer duties of care, are already sufficiently broad to cover any responsibility arising from disclosure of family violence by an employee.

14.35 Consideration of issues arising in relation to child protection reporting and the operation and impact of mandatory reporting provisions under the *Domestic and Family Violence Act 2007* (NT) is beyond the Terms of Reference for this Inquiry.²⁸

Verifying family violence

14.36 While ensuring that the needs of employees experiencing family violence are met, there is also a need to preserve the integrity of the system to ensure disclosure of family violence is not seen as an easy way to, for example, gain additional leave, thereby ‘incentivising’ a claim of family violence—a theme of this Inquiry discussed in Chapter 2. As a result, to ensure the integrity of the employment system, it is necessary, in certain circumstances, to require verification of claims of family violence.

25 See, eg, Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

26 See, eg, ADFVC, *Submission CFV 26*, 11 April 2011.

27 Ibid.

28 These issues, in particular child protection and mandatory reporting, were considered in Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010).

14.37 Verification of family violence within the employment law system is discussed in Chapters 16 and 17, in particular, in relation to requirements under s 107 of the *Fair Work Act* for accessing leave under the NES and as a component of a family violence clause in an enterprise agreement or modern award. In Chapter 17, the ALRC recognises that in order to preserve the integrity of the leave system there is a need to ensure that employees accessing family violence leave are subject to the same requirements to demonstrate their entitlement to the leave as other forms of leave.

14.38 Throughout the Inquiry, stakeholders have consistently recognised that verification of family violence by employers and others may be required in certain circumstances.²⁹

14.39 A key issue that arises is what type of verification of family violence should be required. For example, in the context of access to family violence leave, stakeholders suggested a wide range of documentary verification to support a claim of family violence may be appropriate, including a document issued by a:

- police officer;
- court;
- health professional, including doctor, nurse or psychiatrist/psychologist;
- lawyer;
- family violence service or refuge worker; and/or
- the employee, in the form of a signed statutory declaration.³⁰

14.40 The Office of the Australian Information Commissioner (OAIC) emphasised the importance of individual choice with respect to verification, or demonstration of an entitlement to a particular benefit:

Where there is more than one acceptable way of demonstrating an entitlement it is often better practice to offer alternatives and give individuals the choice as to the personal information they provide. Providing choice as to the source of information enables individuals to exercise a level of control over their personal information and may assist in minimising barriers to disclosure.³¹

14.41 Where relevant in Chapters 15–17, the ALRC has noted the need for verification of family violence. The ALRC also considers that providing employees and employers with information about what might constitute appropriate verification could form part of the national education campaign or workplace policy referred to below, as well as

29 See, eg, Office of the Australian Information Commissioner, *Submission CFV 18*, 6 April 2011.

30 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; Queensland Law Society, *Submission CFV 21*, 6 April 2011; Office of the Australian Information Commissioner, *Submission CFV 18*, 6 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Women’s Health Victoria, *Submission CFV 11*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

31 Office of the Australian Information Commissioner, *Submission CFV 18*, 6 April 2011.

being included in material developed in relation to developing family violence clauses in enterprise agreements.

Privacy and confidentiality

14.42 A key challenge is to ensure that measures that are likely to lead to disclosure of family violence contain appropriate privacy safeguards regarding the handling of that personal information. This is particularly important given concerns about privacy appear to be a central barrier to disclosure of family violence in the context of employment law.

14.43 There are several key issues considered in this chapter—general obligations under the *Privacy Act 1988* (Cth) and *Fair Work Act*, the employee records exemption under the *Privacy Act*, as well as the need for workplace policies regarding the protection of employees' personal information.

14.44 The need to ensure appropriate privacy safeguards are introduced as part of any reforms is also discussed in Chapter 15 with respect to information-sharing arrangements in the pre-employment system and Chapter 17 in the context of family violence clauses in enterprise agreements and awards.

The *Privacy Act* and the *Fair Work Act*

14.45 Where employees experiencing family violence disclose family violence to Job Services Australia (JSA) providers, employers or others within the employment law system, issues of privacy arise.

14.46 The principal piece of federal legislation governing information privacy in Australia is the *Privacy Act 1988* (Cth), which regulates the handling of personal information by the Australian Government and the ACT Government—to which 11 Information Privacy Principles apply—and the private sector—to which 10 National Privacy Principles apply.³²

14.47 There is limited privacy protection for private sector employees under either the *Privacy Act* or the *Fair Work Act*. That said the *Fair Work Act* does contain some provisions with respect to employer obligations in relation to employee records.³³ For example, s 107 of the *Fair Work Act* notes that personal information disclosed to an employer for the purposes of accessing leave under the NES may be regulated by the *Privacy Act*.

32 In June 2010, the Government released an exposure draft of legislation intended to unify the Information Privacy Principles and the National Privacy Principles in a single set of 13 Australian Privacy Principles (APPs), as recommended by the ALRC in Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008). The Senate Standing Committee on Finance and Public Administration was considering the exposure draft at the time of writing. The Government has indicated that it will consider the exemptions under the *Privacy Act 1988* (Cth).

33 In addition to ss 107 and 535, the *Fair Work Act 2009* (Cth) also imposes certain privacy obligations on permit holders (usually a union official) in relation to information obtained from the exercise of a right of entry.

14.48 Further, s 535 of the *Fair Work Act* requires employers to make, and keep for seven years, employee records of the kind prescribed in the *Fair Work Regulations*, which include: basic employment details; leave entitlements; and individual flexibility arrangements.³⁴ Of particular relevance in light of discussion of these issues in Chapters 16 and 17, is the requirement that employers must make and keep records which, in relation to leave, set out any leave the employee takes,³⁵ and in relation to individual flexibility arrangements, include a copy of the agreement.³⁶ However, the *Fair Work Regulations* only require employers to maintain, provide access to, and correct records for inspection and auditing purposes, rather than to protect the privacy of those records.

Employee records exemption

14.49 Under the *Privacy Act*, the handling of an ‘employee record’ by a public sector employer is treated differently from the handling of such a record by a private sector employer. Section 6 of the *Privacy Act* defines ‘employee record’ as a record of personal information relating to the employment of the employee. Examples of such personal information include information about the employee, such as terms and conditions of employment, personal details, performance, conduct and hours of employment and leave.

14.50 To the extent that disclosure of family violence to employers is related to the employment of the employee—for example, for the purposes of obtaining leave or utilising provisions of a family violence clause in an enterprise agreement—it is personal information that constitutes an employee record.

14.51 Government agencies must handle employee records in compliance with the *Privacy Act*. Private organisations however, are exempt from the operation of the Act where an act or practice is related directly to: the employment relationship between the organisation and the individual; and an employee record held by the organisation.³⁷ This exemption is usually referred to as the ‘employee records exemption’.

14.52 While this type of information was considered ‘deserving of privacy protection’ when the privacy legislation was extended to the private sector in 2000, the Government noted that ‘such protection is more properly a matter for workplace relations legislation’.³⁸

14.53 In *For Your Information: Australian Privacy Law and Practice*, ALRC Report 108 (2008) (*For Your Information*), the ALRC concluded that there is no sound policy justification for retaining the employee records exemption and recommended its removal.³⁹ Specifically, the ALRC stated that there is a lack of adequate privacy

34 Ibid s 535; *Fair Work Regulations 2009* (Cth) ch 3, pt 3–6, div 3.

35 *Fair Work Regulations 2009* (Cth) reg 3.36.

36 Ibid reg 3.38.

37 *Privacy Act 1988* (Cth) ss 7(1)(ee), 7B(3).

38 *Debates*, House of Representatives, 12 April 2000, 15752 (D Williams—Attorney-General). See also Revised Explanatory Memorandum, Privacy Amendment (Private Sector) Bill 2000 (Cth) 4, [109].

39 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008), Rec 40–1.

protection for employee records in the private sector, despite the sensitivity of personal information held by employers and the potential for economic pressure to be exerted over employees to provide personal information to their employers.

14.54 The ALRC concluded that privacy protection of employee records should be located in the *Privacy Act* to ensure maximum coverage of agencies and organisations and to promote consistency, but commented that this protection should be in addition to that provided by other laws, such as the relevant provisions in the then *Workplace Relations Regulations*.⁴⁰

Submissions and consultations

14.55 In the Employment Law Issues Paper, the ALRC expressed the view that to the extent that the employee records exemption creates additional barriers to the disclosure of family violence by private sector employees, this provides further reason for the amendment of the *Privacy Act* to remove the employee records exemption.

14.56 However, as the ALRC did not directly ask a question about the employee records exemption, few stakeholders addressed the issue in the course of this Inquiry. However, both the Office of the Australian Information Commissioner (OAIC) and the Australian Chamber of Commerce and Industry (ACCI) expressed particularly strong, but opposing views.

14.57 OAIC expressed the view that:

As previously outlined, concern over the way in which those who receive disclosures of family violence handle that information may further contribute to individuals choosing not to disclose the information. Where employers receive such sensitive information they should be required to accord that information comparable protection to that provided under the *Privacy Act*. Despite the sensitivity of the personal information held, where the employee records exemption applies private sector organisations are not required to comply with obligations under the *Privacy Act*. The OAIC supports the removal of the employee records exemption provided in section 7B(3) of the *Privacy Act* to better protect and support those experiencing family violence.⁴¹

14.58 In contrast, in response to the statement that the employee records exemption may create an additional barrier to disclosure of family violence, ACCI submitted that there is ‘no evidence that ACCI is aware of that justifies such a statement’ and that

this statement pre-supposes there is a common occurrence where employees have disclosed matters affecting them in their personal lives to their employer, such information is not treated and handled with standard of care and sensitivity. It is the experience of many thousands of employers that they treat these matters with the

40 Ibid, Ch 40.

41 Office of the Australian Information Commissioner, *Submission CFV 18*, 6 April 2011. Similarly, Redfern Legal Centre supported the removal of the employee records exemption for private sector employers, suggesting that ‘it is vital for the safety of a victim of family violence that her residential address, email address and telephone numbers are not disclosed by her employer to any person’: Redfern Legal Centre, *Submission CFV 15*, 5 April 2011.

utmost confidentiality and would not seek to break that trust and confidence with their valued staff.⁴²

14.59 Ultimately, ACCI expressed the view that the employee records exemption should be retained and that

there is no evidence that employers have abused, mishandled or treated confidential personal information from employees other than on a proper and legitimate basis. Employee concerns that such information may be mishandled does not count. And where isolated events do occur, they should not provide a policy reason for the removal of a perfectly working and appropriate exemption, *holus bolus*.⁴³

14.60 ACCI also submitted that the Senate Committee ‘is currently examining exposure draft legislation and the issue is therefore being considered by other inquiries in more detail and the ALRC should make no findings in this inquiry as a result’.⁴⁴

14.61 With respect to privacy provisions under the *Fair Work Act*, the Australian Human Rights Commission (AHRC) submitted that:

The Commission notes the provisions in the Australian Services Union model enterprise agreement clause which include that information concerning domestic violence will be kept confidential, and that ‘no information will be kept on an employee’s personnel file without their express written permission’. The Commission supports the inclusion of this, or similar wording, in the FWA.⁴⁵

ALRC’s views

14.62 In *For Your Information*, the ALRC recommended that the employee records exemption under the *Privacy Act* be repealed on the basis that removing the exemption would ensure that the privacy of employee records held by private organisations is protected under the *Privacy Act*.

14.63 The ALRC notes that concerns by an employee about privacy may lead to reluctance to disclose family violence. However, the ALRC is unaware of evidence to suggest, either way, that employers have or do intentionally abuse or mishandle the personal information of employees. However, to the extent that the employee records exemption may create any additional concerns or barriers on behalf of employees, which may discourage disclosure of family violence, the ALRC considers that this (in addition to the policy reasons expressed in *For Your Information*) provides an additional consideration in support of amendment of the *Privacy Act* to remove the employee records exemption.

14.64 Where employees disclose family violence for the purposes of accessing new entitlements recommended in Chapters 16 and 17, such as family violence leave or flexible working arrangements under the NES, care must be taken to ensure that appropriate privacy protection is provided. As a result, while some privacy issues are discussed in more detail in other chapters, in light of the interactions between the

42 ACCI, *Submission CFV 19*, 8 April 2011.

43 *Ibid.*

44 *Ibid.*

45 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011.

employer obligations under the *Fair Work Act*, the ALRC welcomes stakeholder comment on what other changes, if any, are needed to protect the personal information of employees who disclose family violence in such circumstances.

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

Guidance material and workplace policies

14.65 In this Inquiry, the ALRC makes a number of proposals which, if adopted, are likely to increase disclosure of family violence by employees in an employment context to, for example, access family violence leave or flexible working arrangements.

14.66 Accordingly, in order to assist employers to comply with their obligations under the *Privacy Act*, or where they are exempted from such obligations to handle the personal information of employees experiencing family violence sensitively and appropriately, there may be a need for the provision of additional information and guidance in this area.

14.67 In *For Your Information*, the ALRC recommended that the then Office of the Privacy Commissioner, should develop and publish specific guidance on the application of the *Privacy Act* to employee records to assist employers in fulfilling their obligations.⁴⁶

14.68 The OAIC and the Fair Work Ombudsman (FWO) currently produce a range of material. For example, the OAIC produces a range of information sheets, case notes and other publications. FWO produces a Best Practice Guide on Workplace Privacy.⁴⁷

Submissions and consultations

14.69 In the Employment Law Issues Paper, the ALRC noted that a number of privacy issues may arise where family violence is disclosed in the context of employment. A number of submissions emphasised the need to maintain the confidentiality of any information about family violence disclosed to an employer, particularly where such disclosure is required to access workplace rights or entitlements.⁴⁸ For example, the Australian Association of Social Workers (Queensland) (AASW) emphasised that

46 ALRC actually suggested guidance on application of Unified Privacy Principles to employee records to assist employers fulfil obligations under the Privacy Act: Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008).

47 Fair Work Ombudsman, *Best Practice Guide: Workplace Privacy*.

48 Australian Association of Social Workers (Qld), *Submission CFV 17*, 5 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011.

where family violence is disclosed, there is a need to consider ‘how information is used, who has access to this, how is it shared and so on’.⁴⁹

14.70 Several stakeholders highlighted the role played by the FWO in publishing Best Practice Guides and similar material. For example, ACCI suggested that:

Whilst no one-size fits all clause is appropriate, ACCI would support additional information to be published by the FWO for the benefit of employers and employees when ... formulating policies.⁵⁰

ALRC’s views

14.71 Disclosure of family violence in the employment law context will necessarily require the development or revision of existing workplace approaches and policies to ensure the information is handled sensitively and appropriately. While in many cases workplaces may already have adequate privacy policies in place, the ALRC considers that additional guidance that addresses safeguarding the personal information of employees who have disclosed family violence may be necessary.

14.72 As a result, the ALRC proposes that the OAIC and FWO should, in consultation with unions and employer organisations, develop a model privacy policy and develop or revise guidance for employers which, as well as ensuring compliance with obligations arising under the *Privacy Act 1988* (Cth), specifically safeguards the personal information of employees who have disclosed family violence.

Proposal 14–1 There is a need to safeguard the personal information of employees who have disclosed family violence in the employment context. The Office of the Australian Information Commissioner and the Fair Work Ombudsman should, in consultation with unions and employer organisations:

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

National initiatives

14.73 A central theme that has emerged in the course of this Inquiry is the need for effective education and training of all those within the employment law system. A proper appreciation and understanding of the nature, features and dynamics of family violence, and its potential impact on an employee, and in the workplace, is fundamental to ensuring that the employment law system is able to respond

⁴⁹ Australian Association of Social Workers (Qld), *Submission CFV 17*, 5 April 2011.

⁵⁰ ACCI, *Submission CFV 19*, 8 April 2011.

appropriately to the needs of employees experiencing family violence, and ultimately, protect their safety to the relevant extent in the employment context.

14.74 A range of family violence strategies and projects have included an education component about family violence in the employment context, or at a minimum, about workplace family violence prevention strategies. For example, at a Commonwealth level, in 2010, the Government provided the ADFVC funding for the Domestic Violence Workplace Rights and Entitlements Project, with a focus on large-scale employers, which involves:

- briefing unions and employers nationally on family violence as a workplace issue;
- promoting the adoption of family violence clauses in enterprise agreements and other workplace instruments;
- developing with unions and employers a set of model workplace information and training resources for staff, human resources personnel, union delegates and supervisors;
- producing model domestic violence and the workplace policies and safety plans to assist in the informed introduction of domestic and family violence clauses;
- surveying union members to provide baseline qualitative and quantitative data on the impact of domestic and family violence in the workplace; and
- developing a framework for future monitoring and evaluation of the outcomes of introducing domestic violence clauses and other instruments.⁵¹

14.75 A number of state and territory family violence initiatives have also included an education component about workplace family violence prevention strategies.⁵² While stakeholders and commentators have emphasised the need for a national and ongoing community education campaign about the effect of family violence in the workplace,⁵³ with the exception of the ADFVC project, there has been no systemic Government-funded initiatives to examine or address family violence in the employment context.

14.76 In submissions and consultations, stakeholders suggested initiatives such as:

- education and training in workplaces around Australia, including by employees, employers, managers and supervisors;

51 ADFVC, *Domestic Violence Workplace Entitlements Project Factsheet*.

52 For example, the Western Australian Government funded Freedom from Fear Campaign Against Domestic Violence, which commenced in 1998; the Northern Territory Government's Domestic Violence Strategy which was introduced in 1994; and the Victorian Government's Safer Streets and Homes Violence Prevention Strategy, which included research on models of family violence workplace prevention strategies: S Murray and A Powell, *Working It Out: Domestic Violence Issues in the Workplace* (2008) 15–16.

53 See, eg, C Zufferey and others, 'Domestic Violence and Multidimensional Factors: Investigating the Impact of Domestic Violence on Women's Employment, Health and Housing' (Paper presented at Our Work, Our Lives National Conference, Darwin, 12 August 2010).

- development of model policies, guides, guidelines and other resources to complement legislative or workplace entitlements;
- posters, newsletters, factsheets, online information and advertisements;
- material relating to risk assessment and safety plans; and
- additional research into family violence as a workplace issue.⁵⁴

ALRC's views

14.77 To complement the proposals made by the ALRC in Chapters 14–18, the ALRC considers it is necessary for the Australian Government to initiate a national education campaign in relation to family violence in the employment context.

14.78 The ALRC considers that the project being undertaken by the ADFVC may provide the basis for the development of the campaign, but that a national campaign should be funded by the Australian Government and be based on a coordinated approach involving all key stakeholders and participants in the employment law system, including: employees, employers, government agencies and departments, job services providers, unions, employer organisations, family violence support services and legal services. Bodies such as the FWO, the Equal Opportunity in the Workplace Agency, the AHRC, Safe Work Australia and the OAIC should also play a key role in the campaign.

14.79 The development and delivery of any campaign needs to be tailored to meet the particular needs of employers and businesses of all sizes as well as specific groups within the community.

14.80 While the content of the national education campaign should be developed in consultation with the groups outlined above, the ALRC considers it could encompass:

- the definition of family violence;
- the nature, features and dynamics of family violence;
- barriers to disclosure of family violence;
- the effect of family violence on job seekers, employees, workplaces and the economy;
- verification of family violence where necessary to access entitlements; and
- privacy issues arising from disclosure of family violence.

54 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011; Women's Health Victoria, *Submission CFV 11*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

14.81 It could also include assistance, information and support for:

- employees experiencing family violence—in particular in relation to the entitlements proposed in Chapters 16 and 17; and
- employers and employer organisations—with a focus on new responsibilities and obligations arising from proposals in Chapters 16–18, and adapting workplace responses to suit particular business needs and realities.

14.82 The ALRC considers that further work and consultation will be required to establish the most effective approach to national education, training and measures aimed at increase awareness about family violence in the employment context and welcomes stakeholder feedback on this.

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

Data collection

14.83 In *Time for Action*, the National Council highlighted that ‘data relating to violence against women and their children in Australia is poor’.⁵⁵ The Council noted that:

Data on services sought by, and provided to, victims is not readily available, and the way in which information is reported is generally inconsistent and does not allow for a comprehensive understanding of family violence against women.⁵⁶

14.84 Similarly, there is a lack of Australian data about the intersections between family violence and employment. This lack of meaningful data collection and analysis has been identified by stakeholders, commentators and governments who have emphasised the importance of accurate and comprehensive data in informing policy initiatives in this area.

14.85 In Chapters 14–18, the ALRC makes a range of proposals, in light of which there is a need to ensure data collection mechanisms allow meaningful analysis to support policy change and to assess its impact. In particular, data could be collected in relation to:

- the NES—requests for flexible working arrangements and family-violence related inclusions in individual flexibility arrangements;
- family violence clauses in enterprise agreements;
- family violence clauses or provisions in modern awards; and

55 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 49.

56 *Ibid.*, 47.

- instances in which family violence is raised in the context of unfair dismissal and general protection proceedings.

14.86 Under s 653 of the *Fair Work Act*, the General Manager of FWA is required to review developments in making enterprise agreements and conduct research about, amongst other things individual flexibility arrangements and requests for flexible working arrangements under the NES. In doing so, the General Manager must consider the effect of these on certain groups including, for example, women and part-time employees.

14.87 Section 653 also requires the General Manager of FWA to give the Minister a written report of the review and research as soon as practicable, and in any event, within six months after the end of the period to which it relates. The Minister must table a copy of the report within 15 sitting days.⁵⁷

The NES

14.88 In Chapter 16, the ALRC proposes amendment to the NES to include family violence as a basis upon which an employee may request flexible working arrangements. Chapter 17 also includes discussion about the use of individual flexibility arrangements in circumstances where an employee is experiencing family violence.

14.89 Under s 653 of the *Fair Work Act*, the General Manager of FWA is required to conduct research into the extent to which individual flexibility arrangements under modern awards and enterprise agreements are being agreed to, and the content of those arrangements. Research is also required in relation to the operation of the provisions of the NES relating to requests for flexible working arrangements, including the circumstances in which they are made, the outcome and the circumstances in which such requests are refused.

FWA proceedings

14.90 There is a lack of publicly available data about the frequency with which family violence is raised in the context of FWA proceedings as the majority of unfair dismissal and general protection matters are resolved prior to any formal hearing.⁵⁸

14.91 However, in facilitating the resolution of applications, FWA is privy to certain information, including the basis for the application. In some cases manifestations of family violence, such as performance or behaviour issues are raised before FWA, but family violence itself may not be.

57 *Fair Work Act 2009* (Cth) s 653(3),(4).

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

Enterprise agreements and modern awards

Enterprise agreements

14.92 As discussed in Chapter 17, there are now a range of family violence clauses included in enterprise agreements around Australia. However, there is no central publicly available source of data about the inclusion of the clauses.

14.93 In 2011, the Social Policy Research Centre at UNSW developed a framework for the ADFVC to monitor and evaluate the outcomes of the introduction of family violence clauses. The framework acknowledges that there is no one data set available to monitor the inclusion of family violence clauses in enterprise agreements or the effectiveness of complementary measures. As a result, it recommends a mixed method approach to data collection including:

- use of data already routinely collected—such as the ABS Survey of Employment Arrangements, Retirement and Superannuation;
- modification and expansion of existing instruments used for routine data collection; and
- collection and analysis of project-specific data on implementation and impact—such as workplace and union surveys.⁵⁹

14.94 In addition, the Department of Education, Employment and Workplace Relations (DEEWR) maintains the Workplace Agreements Database (WAD) which contains information on federal enterprise agreements that have been lodged with or approved by FWA.⁶⁰ The WAD includes information on agreement details such as the sector and industry of the enterprise agreement, duration and employee coverage as well as data on wage increases and employment conditions in each agreement.

14.95 The ALRC is advised that:

Prior to the start of each calendar year, a review is conducted on the conditions data collected for the WAD with an aim to improve the efficiency and relevance of data collection. The recent review in 2010 included both internal and external stakeholders and achieved the capture of a range of new data on enterprise agreement content, modification of some data to enhance relevancy and usage and discontinuation of other lower priority data.⁶¹

14.96 The General Manager of FWA is also required to review the developments, in Australia, in making enterprise agreements.⁶²

59 Social Policy Research Centre, *Framework to Monitor and Evaluate the Outcomes of the Introduction of Domestic Violence Clauses* (2011).

60 It also contains information about agreements lodged with or approved by the AIRC and Workplace Authority.

61 Department of Education, Employment and Workplace Relations, *Correspondence*, 27 June 2011.

62 *Fair Work Act 2009* (Cth) s 653(1)(a).

Modern awards

14.97 Under the *Fair Work (Transitional Provisions and Consequential Amendments Act 2009* (Cth), FWA is required to undertake an initial two year review of modern awards.⁶³ This review is due to commence from 1 January 2012. The scope of the review is limited to FWA considering whether modern awards achieve the modern awards objectives. In addition, s 156 of the *Fair Work Act* also provides for review of each modern award every four years. The first review of this kind must commence as soon as practicable after 1 January 2014.

ALRC's views

14.98 A commitment to quality data collection and evaluation is crucial to ensuring systemic change and improvement—and is an important element in an effective and ongoing national response to family violence as a workplace issue. Comprehensive, up to date and accurate data help to underpin evidence-based policy and legal responses to family violence, and inform quality education and training programs.

14.99 There are a range of existing data collection mechanisms and processes that may be utilised in order to create a mixed method approach to data collection in the employment law system.

14.100 In the ALRC's view, where possible, FWA is the most appropriate body to collect information about family violence in an employment law context. The ALRC suggests that the Australian Government should amend s 653 of the *Fair Work Act* to provide that the General Manager of FWA must, in conducting the review and research required in relation to enterprise agreements, individual flexibility arrangements and the NES, consider family violence-related developments and the effect on the employment of those experiencing family violence.

14.101 The ALRC also considers that the framework developed by the Social Policy Research Centre (UNSW), as well as the use of DEEWR's Workplace Agreements Database may be useful and appropriate mechanisms through which to collect and make available data in relation to the inclusion of family violence clauses in enterprise agreements. The ALRC welcomes stakeholder comment on the most appropriate data collection methods with respect to the inclusion of family violence clauses in enterprise agreements.

14.102 With respect to the lack of publicly available data on the basis for unfair dismissal applications, the ALRC would be interested in stakeholder comment on any ways in which FWA may be able to monitor the frequency with which family violence is raised in unfair dismissal applications, whether resolved at conciliation or not.

14.103 Finally, the ALRC is also of the view that FWA should consider data collection issues, primarily relating to the inclusion of family violence clauses in modern awards, in the course of the reviews referred to above.

63 *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) sch 5, s 6.

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

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

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

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

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