

15. Employment Law—Overarching Issues and a National Approach

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Summary

15.1 This chapter examines the intersections between family violence and Commonwealth employment law and, together with Chapters 16–18, recommends reforms to employment-related legislative, regulatory and administrative frameworks to improve the safety of people experiencing family violence. Prior to making specific recommendations, the ALRC outlines a suggested strategy for phased implementation of reforms in this area.

15.2 The ALRC’s key recommendation in this chapter is that the Australian Government should initiate a coordinated and whole-of-government national education and awareness campaign around family violence and its impact in the employment

context. The ALRC also examines issues associated with disclosure of family violence—including verification of family violence and privacy issues—and recommends that the Office of the Australian Information Commissioner and Fair Work Ombudsman should develop or revise guidance materials with respect to privacy obligations arising from disclosure of family violence in an employment context. In addition, the ALRC makes a number of recommendations in relation to research and data collection, focusing on the role of the Department of Education, Employment and Workplace Relations, Fair Work Australia and other bodies.

Family violence and employment

Workplaces—our new communities?

15.3 Family violence is increasingly recognised as a significant and complex issue and one which is not simply a private or individual issue, but rather a systemic one arising from wider social, economic and cultural factors. Accordingly, effective measures to address family violence must operate in both the private and public spheres. This is particularly so in the context of employment, as the line between private and public—or family life and work—is increasingly unclear, ‘with the effects of one sphere positively or negatively influencing the other’.¹ As one stakeholder in this Inquiry commented during a consultation, ‘workplaces are becoming our new communities and therefore they must be a place for change’.²

15.4 Two thirds of Australian women who report violence by a current partner are in paid employment.³ The results of the National Domestic Violence and the Workplace Survey conducted in 2011 on behalf of the Australian Domestic and Family Violence Clearinghouse (ADFVC) emphasise the extent of the impact of family violence in an employment context. The survey found that, of those who reported experiencing family violence:

- nearly half the respondents reported that the violence affected their capacity to get to work—the major reason being physical injury or restraint; and
- in the last 12 months, 19% reported that family violence continued in the workplace, with 12% indicating it occurred in the form of abusive phone calls and emails, and 11% stating that it occurred by way of the violent person attending the workplace.⁴

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

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

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

4 ADFVC, *ADFVC National Domestic Violence and the Workplace Survey* (2011). The survey sample was 3,611 respondents of which 81% were women and 90% were either a member of the National Tertiary Education Union or the NSW Nurses Association.

15.5 Similarly, research in the United States has indicated that between 50% and 74% of employed women experiencing family violence are harassed by their partners while at work.⁵ This illustrates the point made by lawyers John Stanton and Gordon Jervis that family violence ‘has no boundaries and doesn’t stop at the front door of the workplace’.⁶

The effect on employees

15.6 Many people experiencing family violence face ongoing difficulties in gaining and retaining paid employment and in disclosing family violence where it may have an impact on their employment. For example, women who have experienced family violence generally have a more disrupted work history, receive lower incomes, and are often in casual and part-time employment.⁷

15.7 Where people experiencing family violence are employed, family violence may arise in the workplace in one of three commonly identified categories of occupational violence: ‘internal’ violence; ‘client-initiated’ violence; or ‘external’ violence.⁸ Internal violence refers to violence between employees within the same organisation, for example where employees work together in a family business or where a majority of residents in a particular area are employed by the same organisation.⁹ Client-initiated and external violence largely occurs in client-service based organisations, for example banks and retail shops, that may provide ‘accessibility for partners or ex-partners to be targeted at their place of work’.¹⁰

15.8 Within these categories, employees experiencing family violence may be affected by family violence in an employment context in numerous ways, including:

- by stalking or harassment at a place of work, or receipt of harassing telephone calls or emails;
- by having their work actively undermined as a result of having work property, such as paperwork or uniforms, hidden or destroyed;

5 L. McFerran and R Braaf, ‘Domestic Violence is a Workplace Issue’ (Paper presented at Balance Brings Everything to Life Conference, Sydney, 11 September 2007) referring to Family Violence Prevention Fund, *The Workplace Guide for Employers, Unions and Advocates* (1998). See also: ILO (Bureau for Gender Equality), *Gender-based violence in the world of work: Overview and selected annotated bibliography*, Working Paper 3 (2011), 13.

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

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

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

9 The ADFVC survey results indicate 12% of those who reported experiencing family violence work in the same workplace as the person using family violence: ADFVC, *ADFVC National Domestic Violence and the Workplace Survey* (2011).

10 S Murray and A Powell, *Working It Out: Domestic Violence Issues in the Workplace* (2008), 4.

- through facing difficulties attending work as a result of the person using family violence promising to mind children, then refusing to do so,¹¹ physically preventing the victim from leaving the house, or preventing access to transport;¹²
- where working from home, being prevented from work or facing interference; or
- in the case of someone using family violence, using work time or resources to facilitate violent behaviour.¹³

15.9 There may also be broader consequences, including:

- sleep deprivation, stress and reduced concentration affecting relations with colleagues and work performance and safety;¹⁴
- effects on co-workers, including increased workloads due to absenteeism or dealing with disruptions, such as harassing phone calls in the workplace;¹⁵ and
- in the most extreme cases, workplace family violence-related homicide.¹⁶

15.10 As a result, family violence can have a significant effect on employees, co-workers and workplaces and, more broadly, workplace productivity and safety.

Benefits of employment for victims

15.11 Employment may afford victims of family violence a measure of financial security, independence, confidence and, therefore, safety. While some evidence suggests that victims of family violence may experience higher levels of abuse when they initially gain employment,¹⁷ employment is a key factor in enabling victims to

11 The ADFVC survey results indicate 22% of those who reported experiencing family violence and who reported that the violence affected their capacity to get to work cited refusal or failure to show up to care for children by the person using family violence as the cause: ADFVC, *ADFVC National Domestic Violence and the Workplace Survey* (2011).

12 The ADFVC survey results indicate 67% of those who reported experiencing family violence and who reported that the violence affected their capacity to get to work cited physical injury or restraint by the person using family violence as the cause: *Ibid.*

13 For discussion of each of these issues see, eg, L McFerran and R Braaf, 'Domestic Violence is a Workplace Issue' (Paper presented at Balance Brings Everything to Life Conference, Sydney, 11 September 2007); A Moe and M Bell, 'Abject Economics: The Effects of Battering and Violence on Women's Work and Employability' (2004) 10(1) *Violence Against Women* 29. See also ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

14 The ADFVC survey results indicate 16% of those who reported experiencing family violence in the last 12 months reported a negative effect on work performance arising from being distracted, tired or unwell: ADFVC, *ADFVC National Domestic Violence and the Workplace Survey* (2011)

15 See, eg, ILO (Bureau for Gender Equality), *Gender-based violence in the world of work: Overview and selected annotated bibliography*, Working Paper 3 (2011), 13.

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

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

leave violent relationships,¹⁸ providing longer-term benefits associated with financial security.¹⁹

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

The primary way the majority of us lay the foundations of our economic security is through participation in paid work. We must develop better workplace responses to domestic and family violence to ensure that women can stay attached to the workforce. Doing this will mean three things. Firstly, we will protect women's financial security in the immediate term—women will be less likely to lose their job in a period of crisis. Secondly, if we can keep women attached to the labour market, we will better protect their economic security in the longer term—they will be less likely to live in poverty in their twilight years. But thirdly, and most importantly from an employer's perspective, individual businesses will be better able to prevent the unnecessary loss of talented staff.²⁰

15.13 As a result, in considering safety in the context of employment law, the ALRC acknowledges the role that financial security and independence through paid employment can play in protecting people experiencing family violence.²¹

Social and economic costs

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

15.15 Family violence is projected to cost the Australian economy an estimated \$15.6 billion in 2021–22.²² In 2004, it reportedly cost the corporate and business sectors over \$1.5 billion through direct costs.²³ Where family violence affects employees in the workplace, or leads to their leaving employment, individual employers face costs associated with:

- absenteeism—including administration costs;
- decreased productivity;

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

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

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

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

22 See Ch 1. In terms of the overall economic impact of family violence, several key studies have been conducted estimating the total annual cost of violence against women by their partners. While the focus of the studies has been on women, the results are also useful to indicate the enormous economic impact of family violence more broadly. See, eg, National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence Against Women and their Children, 2009–2021* (2009), 43; KPMG, *The Cost of Violence against Women and their Children* (2009), prepared for the National Council to Reduce Violence Against Women and their Children.

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

- recruitment following staff turnover—estimated as 150% of an employee’s salary annually;²⁴ and
- training for new employees and loss of corporate knowledge.²⁵

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

Disclosure

15.17 People experiencing family violence may wish to disclose family violence to individuals and representatives within the employment law system—such as co-workers, human resources personnel, managers/supervisors, or union representatives—for many reasons, including:

- to ensure their experiences of family violence are considered in attempting to gain or retain employment;
- to alert them to the impact of family violence on their attendance or performance;
- to seek assistance or access to entitlements; or
- because of safety concerns.²⁶

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

Barriers to disclosure

15.19 In the context of the employment law system, there are particular manifestations of the general barriers identified in *Family Violence—A National Legal Response*, ALRC Report 114 (2010) and in Chapter 1 of this Report, as well as a range of additional barriers.

15.20 Forty-five per cent of respondents to the ADFVC survey who indicated they had experienced family violence in the previous 12 months reported that they had discussed

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

25 ADFVC, *Why Domestic Violence Entitlements Makes Economic Sense: The Economic Costs of Domestic Violence on the Workplace*. For US research see, eg, C Reeves and A O’Leary-Kelly, ‘The Effects and Costs of Intimate Partner Violence for Work Organisations’ (2007) 22 *Journal of Interpersonal Violence* 327. Generally, see also ILO (Bureau for Gender Equality), *Gender-based violence in the world of work: Overview and selected annotated bibliography*, Working Paper 3 (2011), 13, 14.

26 See, eg, Women’s Health Victoria, *Submission CFV 133*.

the violence with someone at work, but that they had disclosed to a work colleague or friend rather than supervisor, human resources representative or union representative.²⁷

15.21 Stakeholder responses to this Inquiry indicated a range of barriers, including that victims may be reluctant to disclose family violence because they fear such disclosure will jeopardise their job or career, they will be stigmatised, or that their employer will not be responsive.²⁸ In particular, stakeholders suggested that employees fear that an ‘employer may lose confidence in the ability of the victim’,²⁹ following disclosure of family violence. Stakeholders also emphasised that privacy concerns inhibit disclosure.³⁰ The Australian Services Union, for example, emphasised the barrier presented by ‘lack of assuredness around privacy’.³¹

15.22 Stakeholders also suggested that, in some cases, employees experiencing family violence consider work to be a ‘safe haven’ away from the violence and were therefore reluctant to disclose.³²

15.23 Organisational culture and its impact on disclosure was also discussed in some submissions and may go some way to explaining why disclosure is predominantly to a work colleague or friend, rather than management. For example, Women’s Health Victoria expressed the view that:

An organisational culture in which there exists a traditional gender divide, where women are not respected, and where there is widespread sexism, may not be one in which a victim of family violence would feel comfortable disclosing ... In contrast, a workplace that is respectful and supportive of women, that also sends a clear message that family violence is not tolerated, will foster employee disclosure.³³

15.24 Employees from particular groups or communities may face additional barriers or have different concerns preventing disclosure of family violence.³⁴ For example, an Indigenous person experiencing family violence may be reluctant to disclose it in a context where they work in an organisation with family or kin, or in a business in a small community.³⁵ An employee who is a member of a same-sex couple, but who is

27 ADFVC, *ADFVC National Domestic Violence and the Workplace Survey* (2011).

28 See, eg, National Network of Working Women’s Centres, *Submission CFV 20*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*; Women’s Health Victoria, *Submission CFV 11*. See also S Franzway, C Zufferey and D Chung, ‘Domestic Violence and Women’s Employment’ (Paper presented at Our Work, Our Lives National Conference on Women and Industrial Relations, Adelaide, 21 September 2007).

29 ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

30 ACTU, *Submission CFV 39*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; AASW (Qld), *Submission CFV 17*; Redfern Legal Centre, *Submission CFV 15*; Women’s Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

31 ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

32 ADFVC, *Submission CFV 26*.

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

34 See, eg, Federation of Ethnic Communities’ Councils of Australia, *Submission CFV 126*.

35 See, eg, Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*, which discusses general barriers to disclosure faced by Indigenous women.

not ‘out’ at work, may fear stigmatisation or discrimination on the basis of his or her sexuality, as well as experiences of family violence.³⁶

15.25 Addressing systemic social, economic and cultural factors perpetuating family violence is a principal way to reduce barriers to disclosure. The ALRC acknowledges the work done by the Australian Government in this respect, including in particular, the *National Plan to Reduce Violence against Women and their Children* (the *National Plan*).³⁷ In addition, the ALRC also considers that the introduction of national initiatives such as those outlined later in this chapter, ensuring systems identify and respond to disclosures of family violence, and that those experiencing family violence are protected, will assist in addressing barriers to disclosure within the employment law system.

Responding to disclosure

15.26 Where an employee discloses family violence in a workplace context there is a need to ensure that disclosure is dealt with sensitively and appropriately. In order to ensure this occurs, family violence-related measures as well as workplace instruments and policies must clearly outline the obligations and responsibilities of those to whom an employee has disclosed, and be tailored to meet the needs of individual workplaces and employees within those workplaces. The ALRC considers that information and guidance provided as part of the national education and awareness campaign will assist in ensuring sensitive and appropriate workplace responses.

15.27 The impact of disclosure of family violence as a trigger for risk assessment, a concern raised by some stakeholders, is a matter for particular workplaces to address in enterprise agreements, workplace policies or similar. Similarly, where the disclosure of family violence may affect particular groups of employees that is a matter for employer organisations, unions and workplaces to consider and respond to appropriately.³⁸ Consideration of issues arising in relation to child protection reporting and the operation and impact of mandatory reporting provisions under the *Domestic and Family Violence Act 2007* (NT) is beyond the Terms of Reference for this Inquiry.³⁹

Phases of reform

15.28 Throughout this Inquiry, the ALRC has heard a range of views about how the employment law framework in Australia might be reformed to improve the safety of people experiencing family violence.

36 LGBTI Community Roundtable, *Consultation*, Sydney, 28 September 2011.

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

38 For example, the New South Wales Police Service is currently considering the ramifications for its unsworn officers and employees of disclosure of domestic violence under their current code of conduct. The ALRC understands that disclosure of a domestic violence assault (though not an apprehended violence order) triggers a risk assessment process: ADFVC, *Submission CFV 26*.

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

15.29 While implementation is ultimately a matter for government, the ALRC suggests that it would be most appropriate to implement the reforms outlined in Chapters 15–18 by way of a whole-of-government five-phase approach as outlined below. The ALRC emphasises that none of the phases are mutually exclusive, nor must they necessarily be sequential. Phases One and Two, in particular, are intended to continue throughout the implementation period and beyond, although the strategies as part of those phases may need to be reviewed and updated where appropriate. It is also vital that any such strategy include a ‘clear timeline’.⁴⁰

15.30 The ALRC suggests implementation should incorporate the following phases:

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



Diagram: A phased approach to reform.

40 AEU, *Submission CFV 125*.

15.31 The ALRC considers that such an approach is appropriate for a number of reasons. First, despite important work done by the Government and community organisations, awareness about, and recognition of, the possible impact of family violence in an employment context could be improved. Without associated understanding, and in some cases attitudinal change—by employees, employers and others within the employment law system—attempts to reform the employment law framework are unlikely to be effective.

15.32 Secondly, the *Fair Work Act*, as the pillar of the framework, is a relatively recent piece of legislation that significantly changed the Australian employment law landscape. Its introduction followed extensive stakeholder consultation, and its provisions and interpretation remain controversial. As a result, rather than recommending wholesale changes to the Act at this point in time, the ALRC suggests that, in many cases, it is more appropriate to recommend that the issues raised in this Report be considered in the course of upcoming reviews—such as those in relation to modern awards, as well as the Post-Implementation Review of the *Fair Work Act* scheduled for 2012.

15.33 Finally, given the complexity of this issue and the potentially pervasive effect of family violence on many aspects of employment, it is clear that a considered, multifaceted and whole-of-government approach is required to effect meaningful change and to increase the safety of people experiencing family violence.

15.34 While suggesting a phased approach, the ALRC emphasises the importance of capitalising on the momentum towards change embodied by the increasing discussion of family violence and employment law at a national level, the inclusion of family violence clauses in enterprise agreements, and changes to modern awards in some states.

Phase One—improved understanding

15.35 Phase One consists of three key aspects. First, the ALRC recommends that the Australian Government initiate a national education and awareness campaign about the effect of family violence in an employment context—aimed at increasing ‘awareness amongst employees, employers and the community’.⁴¹ The campaign, the details of which are outlined later in this chapter, must be coordinated, adequately resourced and ongoing throughout the phases of implementation of reform in this area.

15.36 Secondly, given the relative lack of research and data with respect to family violence in an employment law context and its importance in providing an evidence base for use in the course of the reviews in Phases 3–5, the ALRC recommends a number of research approaches and data collection mechanisms. These include research, monitoring and evaluation by the ADFVC and other bodies, Fair Work Australia (FWA) research and Department of Education, Employment and Workplace Relations (DEEWR) utilisation of existing databases.

41 ACCL, *Submission CFV 128*.

15.37 Thirdly, the ALRC suggests that, as a preliminary step, implementation of the recommendations contained in this Report aimed at the government and statutory bodies, such as FWA, the Fair Work Ombudsman (FWO), Safe Work Australia, the Office of the Australian Information Commissioner (OAIC) and the Australian Human Rights Commission (AHRC), are vital to ensuring systemic change. These recommendations encompass the development or revision of guidance material and Codes of Practice, education and training, process reviews, as well as research and data collection.⁴²

Phase Two—family violence clauses

15.38 As outlined in Chapter 16, there has been a move to include family violence clauses in enterprise agreements, with several agreements around Australia now containing such clauses and the Australian Government expressing its support for their inclusion.⁴³ The ALRC considers the inclusion of such clauses is likely to serve an important educative function and increase the safety of employees experiencing family violence.

Phase Three—modern award reviews

15.39 Beginning in 2012 there will be several reviews of modern awards. First, FWA is required to undertake an initial review of modern awards to be conducted from 1 January 2012.⁴⁴ The scope of the review is limited to FWA considering whether modern awards achieve the modern awards objectives and are operating effectively, without anomalies or technical problems arising from the award modernisation process. In addition, s 156 of the *Fair Work Act* provides for review of each modern award every four years. The first review of this kind must commence as soon as practicable after 1 January 2014. The Explanatory Memorandum to the Fair Work Bill states that ‘these reviews are the principal way in which a modern award is maintained as a fair and relevant safety net of terms and conditions’.⁴⁵

15.40 The ALRC suggests that these reviews provide a timely and constructive opportunity during which to consider the inclusion of family violence-related terms in modern awards.

Phase Four—Post-Implementation Review of the *Fair Work Act*

15.41 By January 2012, the Australian Government has committed to commencing a Post-Implementation Review (PIR) of the *Fair Work Act*. The PIR will report on the regulatory impacts of the legislation and whether the Act is meeting its objectives.⁴⁶

42 See, eg, Recs 15–2, 15–3, 15–4, 16–2, 16–3, 16–5, 16–8, 18–1, 18–2, 18–3.

43 ‘The government supports enterprise bargaining on domestic violence clauses in Commonwealth Government agency agreements’: G Marcus, ‘Interview with Hon Kate Ellis, Federal Minister for Status of Women’ (2011) 44 *Australian Domestic and Family Violence Clearinghouse Newsletter* 12.

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

45 Explanatory Memorandum, Fair Work Bill 2008 (Cth), [600].

46 The Post-Implementation Review is consistent with the Government’s objective of improving the effectiveness and efficiency of regulation. The PIR was referred to in *Ibid*, 360; and DEEWR, *Agency Budget Statement 2011–2012* (2011) Outcome 5, 130.

15.42 In considering what improvements could be made to the *Fair Work Act* to protect employees experiencing family violence, the ALRC is of the view that, at some point, amendments to a range of provisions under the *Fair Work Act* may be necessary. The ALRC is of the view that the PIR is likely to provide an appropriate forum in which the ALRC's discussion of the issues relating to family violence, in the context of the Act, may be considered.

Phase Five—review of the NES

15.43 Amendment to the NES would involve a significant change to the *Fair Work Act* framework following the extensive consultations surrounding the introduction of the Act. With this, and similar considerations discussed in Chapter 17 in mind, the ALRC considers that, rather than recommending changes to the NES in this Report, the NES should be reviewed following implementation of some (but not necessarily all) of the reforms discussed in Phases 1–4.

15.44 The ALRC has formed the view, however, that further consideration of extending the right to request flexible working arrangements and entitlement to additional paid leave for family violence-related purposes is warranted, given the importance of minimum statutory entitlements in protecting people experiencing family violence. The ALRC suggests that phased implementation of the reforms in this Report, particularly those aimed at increasing awareness, establishing an evidence base, and the negotiation of enterprise agreements and development of workplace policies capturing family violence, is likely to inform any review of the NES.

National education and awareness campaign

15.45 A central theme that has emerged in the course of this Inquiry is the need for increased awareness and effective education and training about family violence in an employment context. A proper appreciation and understanding of the nature, features and dynamics of family violence, and its potential impact on employees and the workplace, is fundamental to ensuring that the employment law system is able to respond appropriately to the needs of those experiencing family violence and to protect their safety.

15.46 As a result, the ALRC recommends that the Australian Government initiate a national education and awareness campaign in relation to family violence and its impact in the employment context. Such a campaign would complement the proposals made by the ALRC in Chapters 15–18 and has received stakeholder support.⁴⁷

15.47 The ALRC considers that such a campaign can play an important role within the framework established by the *National Plan*.⁴⁸ For example, several of the strategies under the *National Plan* aimed at ensuring that communities are safe and free from violence are relevant in the employment context. They involve, among other things: promoting community ownership and engagement, including by workplaces;

47 See, eg, Ai Group, *Submission CFV 141*; ADFVC, *Submission CFV 124*; ADFVC, *Submission CFV 26*.

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

promoting ‘positive and equitable workplace cultures’; and developing ‘workplace measures to support women experiencing and escaping’ from family violence.⁴⁹

15.48 The rationale for an ongoing national education and awareness campaign includes:

- the need for recognition that family violence is a whole-of-government, business and community responsibility;
- limited current awareness and understanding about family violence as an employment issue in some sections of the community; and
- the need for awareness and understanding followed by education and training to support rights and entitlements.

15.49 The national campaign should complement rather than substitute the implementation of legislative and workplace entitlements in the course of the other phases outlined in this Report.

Key stakeholders and approaches

15.50 The ALRC considers that a national campaign should be funded by the Australian Government and be based on a coordinated whole-of-government approach involving all key stakeholders and participants in the employment law system, including: employees, employers, unions, employer organisations, government agencies and departments, family violence support services and legal services. Bodies such as the FWO and Safe Work Australia should also play a key role in the campaign.

15.51 Stakeholders have voiced concerns about the lack of government coordination and the short-term focus of current government-funded initiatives in this area. The ALRC emphasises the need for a whole-of-government approach to education and increasing awareness in this area. This approach should be gender-neutral, coordinated, and focused on family violence and its impact in the employment context, as distinct from other forms of violence, bullying or harassment.

15.52 There are a number of key existing Australian approaches which, combined in a coordinated way, could provide a useful basis for the national education and awareness campaign. These include:

- a rights and entitlements approach—focusing on the development of rights and entitlements as well as best practice guidance material;
- primary prevention—focusing on changes to attitudes, including through business and industry partnerships and a workplace accreditation framework; and

⁴⁹ One of the immediate national initiatives to achieve this strategy was to provide funding to the ADFVC, discussed in more detail below. See, National Council to Reduce Violence Against Women, *National Plan to Reduce Violence Against Women and Their Children (2010-2022)* (2011), Commonwealth of Australia, Outcome One, Strategies 1.1–1.3, 3.1, 4.3.

- community and business partnerships—focusing on changing workplace attitudes and culture.

15.53 A number of state and territory family violence initiatives have also included education about workplace family violence prevention strategies.⁵⁰

Rights and entitlements approach

15.54 The key example of an existing rights and entitlements approach is the Domestic Violence Workplace Rights and Entitlements Project coordinated by the ADFVC, using funding provided by DEEWR to the Centre for Gender-Related Violence Studies at the University of New South Wales (UNSW) for a period of 18 months. This project involves:

- briefing unions and employers nationally and promoting the adoption of family violence clauses in enterprise agreements and other workplace instruments;
- developing model workplace information, policies and plans to assist in the informed introduction of family violence clauses as well as training resources for staff, human resources personnel, union delegates and supervisors;⁵¹
- surveying union members to provide baseline qualitative and quantitative data on the impact of domestic and family violence in the workplace; and
- developing a framework for future monitoring and evaluation of the outcomes of introducing clauses and other instruments.⁵²

15.55 The ADFVC's work creates a solid foundation for ongoing work at a national level in order to implement reforms aimed at addressing family violence and its impact in the employment context. The ALRC considers the ADFVC has the expertise to play a key and ongoing role in any national campaign.

Primary prevention

15.56 In addition to rights and entitlements, and in light of the focus of the *National Plan* on primary prevention, the ALRC considers that primary prevention based programs and strategies, such as the White Ribbon Workplace Program, could play an important role in any national education and awareness campaign.

15.57 The White Ribbon Campaign is the largest global male-led primary prevention strategy based movement which aims to stop violence against women.⁵³ In early 2011, White Ribbon received 'one-off' funding from the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) through the General Equality

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

51 See, eg, ADFVC, *Domestic Violence and the Workplace: Employee, Employer and Union Resources*.

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

53 White Ribbon, *Submission CFV 112*.

for Women program for a period of four years to establish a Workplace Program. The aim of the Workplace Program is to set up a National Business and Industry Partnerships program to work with businesses and industrial organisations. The program aim is to establish and maintain a national workplace approach to creating long-term sustainable change in attitudes to violence and to implement workplace strategies. The program has a number of components, the main goals being to develop: a White Ribbon Workplace Accreditation Framework; Workplace National Recognition Strategy; and Ambassador Program.

15.58 The program also aims to develop an evaluation strategy for monitoring and evaluating development and progress as part of the program. The ALRC understands that White Ribbon is currently in the preliminary stages of developing the program, including through consultation with an established Reference Group.⁵⁴

Community and business partnerships

15.59 The ALRC also considers there is a role for partnership-based approaches and training, such as those advocated by organisations like CEO Challenge, in any national education and awareness campaign.

15.60 By way of example, CEO Challenge is a charity based in Queensland that creates partnerships between businesses and violence prevention services to give stability to women and children fleeing family violence. It provides a range of corporate education and training sessions in recognising and responding to family violence. CEO Challenge does not receive government funding.⁵⁵ Through the partnership program, businesses take an active role in providing support and resources to community-based prevention services such as refuges, shelters and offender programs. In return, awareness about the impact of family violence is said to be raised and ‘CEOs and their people become educated to recognise and respond to violence’.⁵⁶

The role of statutory bodies

15.61 Government departments such as DEEWR and FaHCSIA, and statutory bodies such as FWA, FWO, Safe Work Australia and the Equal Opportunity for Women in the Workplace Agency (EOWA) have a key role to play in the campaign. The ALRC makes a number of recommendations about FWA, FWO and Safe Work Australia throughout Part E this Report.

15.62 In addition, the ALRC suggests that EOWA could play an important role in any national education and awareness campaign. EOWA is a statutory authority with a role in administering the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) and focuses on assisting organisations to achieve equal opportunity for women,

54 White Ribbon, *Consultation*, Sydney, 28 September 2011.

55 CEO Challenge website <<http://ceochallengeaustralia.org>> at 17 November 2011.

56 CEO Challenge, *Partnerships That Work: A Strategic Approach to Corporate-Community Engagement*, Booklet, 2.

including through education.⁵⁷ EOWA has a number of initiatives through which it could play a role in any national education and awareness campaign, including:

- taking family violence-related developments, policies, entitlements and training into account as part of the ‘Employer of Choice’ citation;
- playing a role in data collection by including family-violence related questions relating to employment initiatives and opinion data in surveys conducted of organisations reporting to EOWA; and
- conducting research and providing information about family violence as a key issue for women in the workplace.⁵⁸

The role of unions and employer organisations

15.63 Both unions and employer organisations have played, and will play, a crucial role in recognition of family violence and its impact in the employment context.⁵⁹ Both have also played an active role in the ALRC’s Inquiry.⁶⁰

15.64 Unions and employer organisations have expressed differing views on many of the issues raised. Some employer organisations have not expressed support for such measures, in large part because family violence was not seen by them as an employment issue.⁶¹ However, many unions and employer organisations have expressed support for non-regulatory measures such as the initiation of a national education and awareness campaign.⁶²

Nature of the campaign

15.65 The development and delivery of any national campaign needs to be tailored to meet the particular needs of employees, employers and businesses of all sizes as well as specific groups within the community. The focus of the campaign should be on family violence, as distinct from other forms of violence that may occur in the workplace.⁶³

57 EOWA, *Consultation*, Sydney, 10 October 2011; EOWA website <www.eowa.gov.au> at 17 November 2011.

58 EOWA, *Consultation*, Sydney, 10 October 2011.

59 The ILO suggests that ‘strong commitment of both trade unions and management is instrumental in progressively reducing the incidence of workplace violence’: ILO (Bureau for Gender Equality), *Gender-based violence in the world of work: Overview and selected annotated bibliography*, Working Paper 3 (2011), 14.

60 AFEI, *Submission CFV 158*; CPSU, *Submission CFV 147*; Ai Group, *Submission CFV 141*; ACCI, *Submission CFV 128*; CCIWA, *Submission CFV 123*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 113*; ACTU, *Submission CFV 100*; Business SA, *Submission CFV 98*; ACTU, *Submission CFV 39*; ACCI, *Submission CFV 19*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

61 AFEI, *Submission CFV 158*.

62 Ai Group, *Submission CFV 141*; ACCI, *Submission CFV 128*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 113*; ACTU, *Submission CFV 100*.

63 ADFVC, *Submission CFV 124*.

15.66 Stakeholders have outlined a range of initiatives that the ALRC suggests could usefully form part of the national education and awareness campaign, including:

- education and training in workplaces around Australia, including of employees, employers, and their representatives;
- development of guidelines and other resources to complement legislative or workplace entitlements;
- posters, newsletters, factsheets, online information and advertisements;
- material relating to risk assessment and safety plans; and
- additional research into family violence as an employment issue.⁶⁴

15.67 While the content of the national education and awareness campaign should be developed in consultation with stakeholders and involve significant community consultation and involvement, the ALRC suggests it could encompass:

- the definition of family violence;
- the nature, features and dynamics of family violence;
- barriers to disclosure of family violence;
- the effect of family violence on employees, workplaces and the economy;
- responding to disclosures of family violence—both individual and organisational best practice responses;
- relevant rights and entitlements—both existing and the potential for new entitlements;
- verification of family violence where necessary to access entitlements; and
- privacy issues arising from disclosure of family violence.

15.68 It could also include assistance, information and support for particular groups who have specific needs or perspectives such as:

- employees experiencing family violence;
- employees generally and their representatives, including unions;
- employers and employer organisations—with a focus on responding to family violence, including consideration of adapting workplace responses to suit particular business needs and realities; and
- Indigenous employees and employers, members of culturally and linguistically diverse communities, people with disability and members of the lesbian, gay, bisexual, trans and intersex community, all of whom may face particular issues with respect to family violence in an employment context.

⁶⁴ Ibid; ACTU, *Submission CFV 39*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; National Network of Working Women's Centres, *Submission CFV 20*; Women's Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

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

Issues arising from disclosure

Privacy and confidentiality

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

15.70 There are several key issues with respect to privacy and confidentiality: general obligations under the *Privacy Act 1988* (Cth) and the *Fair Work Act*; the employee records exemption under the *Privacy Act*; and the need for guidance material and workplace policies regarding the protection of employees' personal information. The ALRC ultimately recommends that the OAIC and the FWO should, in consultation with unions and employer organisations, develop or revise guidance material with respect to privacy obligations arising in relation to disclosure of family violence in an employment context.

The Privacy Act and the Fair Work Act

15.71 Where employees experiencing family violence disclose family violence to employers or others, issues of privacy arise.

15.72 The principal piece of federal legislation governing information privacy in Australia is the *Privacy Act 1988*, which regulates the handling of personal information by the Australian Government and the ACT Government—to which 11 Information Privacy Principles apply; and the private sector—to which 10 National Privacy Principles apply.⁶⁵

15.73 There is limited privacy protection for private sector employees under either the *Privacy Act* or the *Fair Work Act*. However, the *Fair Work Act* does contain some provisions with respect to employer obligations in relation to employee records.⁶⁶ For example, s 107 of the *Fair Work Act* notes that personal information disclosed to an

⁶⁵ In June 2010, the Government released an exposure draft of legislation intended to unify the Information Privacy Principles and the National Privacy Principles in a single set of 13 Australian Privacy Principles (APPs), as recommended in Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008). The Senate Standing Committee on Finance and Public Administration completed an inquiry into the exposure drafts in October 2011. The Government has indicated that it will consider the exemptions under the *Privacy Act 1988*: Australian Government, *Enhancing National Privacy Protection—Australian Government First Stage Response to the Australian Law Reform Commission Report 108 For Your Information: Australian Privacy Law and Practice* (2009).

⁶⁶ In addition to ss 107 and 535, the *Fair Work Act 2009* (Cth) also imposes certain privacy obligations on permit holders (usually a union official) in relation to information obtained from the exercise of a right of entry.

employer for the purposes of accessing leave under the NES may be regulated by the *Privacy Act*. Further, s 535 of the *Fair Work Act* requires employers to make, and keep for seven years, employee records of the kind prescribed in the *Fair Work Regulations*, which include: basic employment details; leave entitlements; and individual flexibility arrangements.⁶⁷ Of particular relevance in light of discussion of these issues in Chapters 16 and 17, is the requirement that employers must make and keep records which, in relation to leave, set out any leave the employee takes,⁶⁸ and in relation to individual flexibility arrangements, include a copy of the agreement.⁶⁹ The *Fair Work Regulations* only require employers to maintain, provide access to, and correct records for inspection and auditing purposes, rather than to protect the privacy of those records.

Employee records exemption

15.74 Under the *Privacy Act*, the handling of an ‘employee record’ by a public sector employer is treated differently from the handling of such a record by a private sector employer. Section 6 of the *Privacy Act* defines ‘employee record’ as a record of personal information relating to the employment of the employee.⁷⁰ To the extent that disclosure of family violence to employers is related to the employment of the employee—for example, for the purposes of obtaining leave or utilising provisions of a family violence clause in an enterprise agreement—it is personal information that constitutes an employee record.

15.75 Government agencies must handle employee records in compliance with the *Privacy Act*. Private organisations, however, are exempt from the operation of the Act where an act or practice is related directly to: the employment relationship between the organisation and the individual; and an employee record held by the organisation.⁷¹ This exemption is usually referred to as the ‘employee records exemption’.

15.76 While this type of information was considered ‘deserving of privacy protection’ when the privacy legislation was extended to the private sector in 2000, the Government noted that ‘such protection is more properly a matter for workplace relations legislation’.⁷²

15.77 In *For Your Information: Australian Privacy Law and Practice*, ALRC Report 108 (2008) (*For Your Information*), the ALRC concluded that there is no sound policy justification for retaining the employee records exemption and recommended its removal.⁷³ Specifically, the ALRC stated that there is a lack of adequate privacy protection for employee records in the private sector, despite the sensitivity of personal information held by employers and the potential for economic pressure to be exerted

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

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

69 Ibid reg 3.38.

70 Examples of such personal information include information about the employee, such as terms and conditions of employment, personal details, performance, conduct, and hours of employment and leave.

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

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

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

over employees to provide personal information to their employers. The ALRC concluded that privacy protection of employee records should be located in the *Privacy Act* to ensure maximum coverage of agencies and organisations and to promote consistency, but commented that this protection should be in addition to that provided by other laws, such as the relevant provisions in the then *Workplace Relations Regulations*.⁷⁴

15.78 Stakeholders in this Inquiry expressed differing views with respect to the employee records exemption. As outlined in the *Family Violence—Commonwealth Laws*, ALRC Discussion Paper 76 (2011), stakeholders such as the Australian Chamber of Commerce and Industry opposed its removal,⁷⁵ however the OAIC and others supported the removal of the exemption to ‘better protect and support those experiencing family violence’.⁷⁶

15.79 Concerns about privacy may result in employees being reluctant to disclose family violence. To the extent that the employee records exemption may create any additional concerns or barriers on behalf of employees, which may discourage disclosure of family violence, the ALRC considers that this (in addition to the policy reasons expressed in *For Your Information*) provides an additional consideration in support of amendment of the *Privacy Act* to remove the employee records exemption. In light of the ALRC’s previous exposition of this issue and the Australian Government’s commitment to considering whether the employee records exemption should be retained,⁷⁷ rather than making a recommendation in this Report, the ALRC simply reiterates the views expressed in *For Your Information*.

Guidance material and workplace policies

15.80 In this Report, the ALRC makes a number of recommendations likely to increase disclosure of family violence by employees in an employment context, for example to access leave or flexible working arrangements. A number of stakeholders emphasised the need to maintain the confidentiality of any information about family violence disclosed to an employer, particularly where such disclosure is required to access workplace rights or entitlements.⁷⁸

15.81 As a result, the development or revision of existing workplace approaches and policies may be required to ensure that information about family violence is handled sensitively and appropriately. While, in many cases, workplaces may already have

74 Ibid, Ch 40.

75 ACCI, *Submission CFV 19*. See also Ai Group, *Submission CFV 141*; CCIWA, *Submission CFV 123*; Business SA, *Submission CFV 98*.

76 Office of the Australian Information Commissioner, *Submission CFV 142*. See also: ADFVC, *Submission CFV 124*; Redfern Legal Centre, *Submission CFV 15*.

77 Australian Government, *Enhancing National Privacy Protection—Australian Government First Stage Response to the Australian Law Reform Commission Report 108 For Your Information: Australian Privacy Law and Practice* (2009).

78 AASW (Qld), *Submission CFV 17*; Redfern Legal Centre, *Submission CFV 15*.

adequate privacy policies in place, the ALRC considers that additional guidance may be necessary.⁷⁹

15.82 The OAIC and the FWO currently produce a variety of material. For example, the OAIC produces a range of information sheets, case notes and other publications. FWO produces a Best Practice Guide on Workplace Privacy.⁸⁰ The ALRC recommends that the OAIC and FWO, in consultation with unions and employer organisations, should develop or revise guidance for employers which, as well as ensuring compliance with obligations arising under the *Privacy Act*, specifically safeguards the personal information of employees who have disclosed family violence.⁸¹

15.83 While some stakeholders supported the development of a model policy or clause,⁸² the ALRC considers that the development of comprehensive guidance material, rather than a model policy, would be more effective. As noted by the OAIC, the ‘availability of a model privacy policy may encourage organisations to adopt such a policy without consideration for the particular circumstances of that specific workplace’.⁸³

15.84 The ALRC considers that any guidance material should contain information in relation to existing privacy obligations; roles and responsibilities; processes and procedures; and the potential effects of any applicable mandatory reporting or other requirements.⁸⁴

15.85 In *For Your Information*, the ALRC recommended that the then Office of the Privacy Commissioner, should develop and publish specific guidance on the application of the *Privacy Act* to employee records to assist employers in fulfilling their obligations.⁸⁵ The OAIC supported the development and publication of guidance if the Australian Government removed the employee records exemption from the *Privacy Act*.⁸⁶

79 Ai Group, *Submission CFV 141*; Business SA, *Submission CFV 98*. See also ADFVC, *Submission CFV 124*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 113*.

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

81 ACCI, *Submission CFV 128*.

82 ADFVC, *Submission CFV 124*; ACTU, *Submission CFV 100*.

83 Office of the Australian Information Commissioner, *Submission CFV 142*.

84 ACTU, *Submission CFV 100*.

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

86 Office of the Australian Information Commissioner, *Submission CFV 142*.

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

Verifying family violence

15.86 While ensuring that the needs of employees experiencing family violence are met, there is also a need to preserve the integrity of the system to ensure disclosure of family violence is not seen as an easy way to gain additional entitlements. The need to avoid ‘incentivising’ a claim of family violence is a theme of this Inquiry discussed in Chapter 2. To ensure the integrity of the employment system, it is necessary, in certain circumstances, to require verification of claims of family violence.⁸⁷

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

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

- a police officer;
- a court;
- a health professional, including doctor, nurse or psychiatrist/psychologist;
- a lawyer;
- a family violence service or refuge worker; and/or
- the employee, in the form of a signed statutory declaration.⁸⁸

87 See, eg, Office of the Australian Information Commissioner, *Submission CFV 18*.

88 Kingsford Legal Centre, *Submission CFV 161*; Australian Human Rights Commission, *Submission CFV 48*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; Queensland Law Society, *Submission CFV 21*; Office of the Australian Information Commissioner, *Submission CFV 18*; Redfern Legal Centre, *Submission CFV 15*; WEAVE, *Submission CFV 14*; Women’s Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

15.89 The OAIC emphasised the importance of individual choice with respect to verification or demonstration of an entitlement to a particular benefit:

Where there is more than one acceptable way of demonstrating an entitlement it is often better practice to offer alternatives and give individuals the choice as to the personal information they provide. Providing choice as to the source of information enables individuals to exercise a level of control over their personal information and may assist in minimising barriers to disclosure.⁸⁹

15.90 Where relevant in Chapters 16 and 17, the ALRC has noted the need for verification of family violence. The ALRC considers that providing employees and employers with information about what might constitute appropriate verification could form part of the national education and awareness campaign or a workplace policy and be included in material about developing family violence clauses in enterprise agreements.

Research and data collection

15.91 In *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021*, the National Council to Reduce Violence against Women and their Children (the National Council) highlighted that 'data relating to violence against women and their children in Australia is poor'.⁹⁰ The National Council noted that the way in which information is reported is 'generally inconsistent and does not allow for a comprehensive understanding of family violence'.⁹¹

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

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

15.94 In Part E, the ALRC makes a range of recommendations, in light of which there is a need to ensure data collection mechanisms allow meaningful analysis to support policy change and to assess its impact. In particular, data could be collected, in relation to:

- workplace family violence policies;

89 Office of the Australian Information Commissioner, *Submission CFV 18*.

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

91 *Ibid.*, 47.

- family violence-related inclusions in individual flexibility arrangements;
- family violence-related inclusions and clauses in enterprise agreements—including the taking of leave;
- family violence clauses or provisions in modern awards; and
- ‘business implications and costs’ associated with each of the above.⁹²

15.95 There are a range of existing data collection mechanisms and processes that may be utilised to collect such data, some of which are outlined below. However, the ALRC is of the view that several of the existing mechanisms could be used for other purposes and there are a number of additional data collection sites and mechanisms that may assist in building an evidence base in this area.

Fair Work Australia

15.96 Two key sections of the *Fair Work Act* are relevant to the scope of FWA research—ss 590 and 653.

15.97 Section 590 provides that FWA may inform itself in relation to any matter before it in such a manner as it considers appropriate, including by conducting inquiries or undertaking or commissioning research.⁹³ Where family violence is relevant to a particular matter before FWA, the ALRC considers this provision is sufficiently broad to allow FWA to inform itself appropriately.

15.98 A question arises in relation to the other provision—s 653 of the *Fair Work Act*—as to whether an amendment is required to the Act in order to facilitate the conduct of reviews and research into family violence as an emerging development in the making of enterprise agreements, and its effect more broadly in the employment law system.

15.99 Under s 653, the General Manager of FWA is required to review developments in making enterprise agreements and conduct research about, amongst other things, individual flexibility arrangements and requests for flexible working arrangements under the NES. In doing so, the General Manager must consider the effect of these on certain groups including, for example, women and part-time employees. Section 653 also requires the General Manager of FWA to give the Minister a written report of the review and research as soon as practicable, and in any event, within six months after the end of the period to which it relates.⁹⁴

15.100 Some stakeholders expressed the view that, as there are no associated reporting requirements, FWA may have limited information available to it in order to inform such research.⁹⁵

92 Business SA, *Submission CFV 98*.

93 *Fair Work Act 2009* (Cth) ss 590, 653.

94 The Minister must table a copy of the report in Parliament within 15 sitting days: *Ibid* s 653(3), (4).

95 See, eg. ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 113*; ACTU, *Submission CFV 100*.

15.101 In its submission, DEEWR indicated that whether family violence could be considered in the review and research of the effect these arrangements have on the employment of women is a ‘matter for FWA’.⁹⁶ In consultations, FWA noted the resource implications of expanding current research under s 653.⁹⁷

15.102 The ALRC considers that s 653 is a broad provision and that, in order to ensure the General Manager has continued discretion to conduct research and review of a wide range of employment developments, rather than being limited by being overly prescriptive, ‘it would not be appropriate to create or add specific consideration of this issue’.⁹⁸ As a result, amendment to the *Fair Work Act* is unnecessary. Instead, the ALRC recommends that the General Manager of FWA should, in conducting the review and research required under s 653 in relation to enterprise agreements and individual flexibility arrangements, consider family violence-related developments and the effect on the employment of those experiencing family violence.

DEEWR

15.103 As discussed in Chapter 16, there are now a range of family violence clauses included in enterprise agreements around Australia. However, there is no central, publicly-available source of data about the inclusion of such clauses.

15.104 DEEWR maintains the Workplace Agreements Database (WAD) which contains information on federal enterprise agreements that have been lodged with, or approved by, FWA.⁹⁹ The WAD includes information on agreement details such as the sector and industry of the enterprise agreement, duration and employee coverage as well as data on wage increases and employment conditions in each agreement.

15.105 In response to the ALRC’s suggestion that DEEWR collect data about the inclusion of family violence clauses in enterprise agreements as part of the WAD, DEEWR has advised that ‘it is possible, and it is willing to collect data on the incidence of references to domestic violence in enterprise agreements’, including specific family violence clauses as well as broader reference to family violence in the agreement. DEEWR suggests that ‘it would be possible to commence collection of the data for the June quarter 2011 onwards’ and this data would be available on request.¹⁰⁰ As a result, the ALRC recommends that DEEWR should collect data on the incidence of family violence-related clauses and references in enterprise agreements and include it as part of the WAD.

96 DEEWR, *Submission CFV 130*.

97 Fair Work Australia, *Consultation*, By telephone, 30 September 2011.

98 ACCL, *Submission CFV 128*.

99 The ALRC understands that the WAD is reviewed annually with the aim of improving the ‘efficiency and relevance of data collection’: Department of Education, Employment and Workplace Relations, *Correspondence*, 27 June 2011.

100 DEEWR, *Submission CFV 130*.

The ADFVC and other bodies

15.106 In addition to data collection by DEEWR and FWA, the ADFVC submitted that there is a need for ‘independent research, monitoring and evaluation of the incidence of domestic/family violence in the workplace on a national basis’.¹⁰¹

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

- use of data already routinely collected—such as the Australian Bureau of Statistics Survey of Employment Arrangements, Retirement and Superannuation;
- modification and expansion of existing instruments used for routine data collection; and
- collection and analysis of project-specific data on implementation and impact—such as workplace and union surveys.¹⁰²

15.108 This framework outlines useful and appropriate mechanisms through which to collect and make available data in relation to the inclusion of family violence clauses in enterprise agreements. The ALRC considers the ADFVC would be well placed to facilitate the collection of such data using this method and to consider additional data collection methods with respect to the inclusion of other workplace rights and entitlements as well as their broader impact, particularly in the context of the national education and awareness campaign.

15.109 In addition, the ALRC understands that part of the White Ribbon Workplace Program is to develop an evaluation program to assess progress by individual businesses and industry organisations, specific sub-programs and the national partnerships program. This program may provide another useful model for data collection.¹⁰³

15.110 There is also a need for research and economic modelling to inform reviews such as the one of the NES as part of Phase 5, to assist in the determination of an appropriate quantum of any family violence leave under the NES. Stakeholders like the National Network of Working Women’s Centres have suggested that ‘a meta analysis of available research should be conducted to discover average or median periods of the duration of the most significant impacts of domestic violence’.¹⁰⁴ Data collected in

101 ADFVC, *Submission CFV 124*.

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

103 White Ribbon, *Consultation*, Sydney, 28 September 2011.

104 National Network of Working Women’s Centres, *Submission CFV 20*.

relation to the utilisation of leave under family violence clauses in enterprise agreements may also assist in this regard.

15.111 The ALRC suggests that the Productivity Commission may play a constructive role in examining the impact of possible reforms on businesses and undertaking economic modelling, for example by analysing data collected by FWA, DEEWR, the ADFVC and other bodies, in order to inform the recommended review of the NES.

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

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

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

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

