

## 16. Employment—The *Fair Work Act 2009* (Cth)

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### Summary

16.1 Chapters 16 and 17 focus on the *Fair Work Act 2009* (Cth). This chapter provides an overview of the *Fair Work Act* and examines possible options for reform to the Act, and the institutions created under the Act, to address the needs—and ultimately the safety—of employees experiencing family violence. The chapter examines the background, constitutional basis, coverage and objects of the *Fair Work Act*, as well as the role and processes of Fair Work Australia (FWA) and the Fair Work Ombudsman (FWO). The ALRC suggests ways in which those institutions or their processes do, or could, function to protect the safety of those experiencing family violence.

16.2 The key focus of the chapter however, is on the National Employment Standards (NES). The ALRC makes two key proposals—first, that family violence be included as a circumstance in which an employee should have a right to request flexible working arrangements and, secondly, that family violence-related leave be included as a minimum statutory entitlement under the NES.

## Overview of the *Fair Work Act 2009* (Cth)

16.3 The *Fair Work Act* is the key piece of Commonwealth legislation regulating employment and workplace relations. It provides for terms and conditions of employment and sets out the rights and responsibilities of employees, employers and employee organisations in relation to that employment.

16.4 The *Fair Work Act* establishes a safety net comprising: the NES, modern awards and national minimum wage orders; and a compliance and enforcement regime.<sup>1</sup> It also establishes an institutional framework for the administration of the system comprising FWA and the FWO. The Fair Work Divisions of the Federal Court and Federal Magistrates Court and, in some cases, state and territory courts, perform the judicial functions under the *Fair Work Act*.<sup>2</sup>

### Background

16.5 The *Fair Work Act* was introduced into the House of Representatives in November 2008 and was given Royal Assent on 7 April 2009. Most provisions of the Act took effect on 1 July 2009, replacing the *Workplace Relations Act 1996* (Cth).

16.6 The history surrounding the enactment of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), the Federal election campaign in 2007—including *Forward with Fairness*,<sup>3</sup> which preceded the *Fair Work Act*—and the introduction of the *Fair Work Act*, have been the subject of much debate and commentary.

16.7 The introduction of the *Fair Work Act* was the result of extensive consultation with stakeholders throughout the drafting process. There was also significant lobbying by various groups prior to its introduction, in particular unions and business groups, for changes to the proposed Act. The Government engaged in consultation with key non-government stakeholders, primarily through the:

- National Workplace Relations Consultative Council and sub-committees;<sup>4</sup>
- Business Advisory Group;<sup>5</sup>
- Workers Advisory Group;<sup>6</sup> and
- Small Business Working Group.<sup>7</sup>

1 Part 4-1 of *Fair Work Act 2009* (Cth) (Civil remedies).

2 Part 4-2 of *Ibid* (Jurisdiction and powers of courts).

3 See, eg, K Rudd and J Gillard, *Forward with Fairness: Policy Implementation Plan* (2007).

4 Established by the *National Workplace Relations Consultative Council Act 2002* (Cth). A tripartite body constituted by seven ACTU representatives and seven employer representatives which is chaired by the Deputy Prime Minister and meets every six months to consider workplace relations at a national level.

5 Established in 2008 and constituted by representatives from a range of industries and sectors to discuss the *Fair Work Bill 2008* (Cth): Explanatory Memorandum, *Fair Work Bill 2008* (Cth).

6 Established in 2008 and constituted by high-level union representatives to discuss the *Fair Work Bill 2008* (Cth): Explanatory Memorandum, *Fair Work Bill 2008* (Cth).

7 Established in 2008 and constituted by small businesses, including peak small business organisations to advise in relation to the development of the *Fair Dismissal Code*: Explanatory Memorandum, *Fair Work Bill 2008* (Cth).

16.8 The Government also conducted a number of other specific consultations in relation to the NES.<sup>8</sup>

### Constitutional basis

16.9 Prior to 2006, the limitations inherent in the conciliation and arbitration power under s 51(xxxv) of the *Australian Constitution*, essentially led to a dual industrial relations system in Australia, in which the power to legislate with respect to industrial relations was one held by both Commonwealth and State governments.<sup>9</sup> According to Sir Anthony Mason, the limitations under s 51(xxxv) meant that there was a ‘dual (federal and state) system of arbitration and that it [had] unnecessary complexity and technicality’.<sup>10</sup>

16.10 However, the *Work Choices* legislation, and later the *Fair Work Act*, sought to rely on the corporations,<sup>11</sup> territory<sup>12</sup> and external affairs<sup>13</sup> powers under the *Australian Constitution* as well as a referral of power to the Commonwealth, in order to create, as far as possible, a new national industrial relations system.<sup>14</sup>

### Coverage

16.11 The *Fair Work Act* regulates ‘national system’ employers and employees.<sup>15</sup> From 1 January 2010, all states other than Western Australia referred their industrial relations powers to the Commonwealth, essentially creating a new national industrial relations system.<sup>16</sup> As a result, the national system covers the Commonwealth, Commonwealth authorities and constitutional corporations,<sup>17</sup> as well as all other:

- employment in Victoria, ACT and the Northern Territory;
- private sector employment in New South Wales, Queensland and South Australia; and

8 Ibid, vii, viii.

9 Section 51(xxxv) of the Constitution allows the Commonwealth to make laws with respect to ‘conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state’: *Australian Constitution* s 51(xxxv).

10 A Mason, ‘The Australian Constitution 1901–1988’ (1988) 62 *Australian Law Journal* 752, 759.

11 Section 51(xx) of the Constitution allows the Commonwealth to make laws with respect to foreign, trading or financial corporations: *Australian Constitution* s 51(xx).

12 Section 122 of the Constitution allows the Commonwealth to make laws with respect to territories: *Australian Constitution* s 122.

13 Section 51(xxix) of the Constitution allows the Commonwealth to make laws with respect to external affairs: *Australian Constitution* s 51(xxix).

14 Section 51(xxxvii) of the Constitution allows the Commonwealth to make laws with respect to ‘matters referred to the Parliament of the Commonwealth’ by any state: *Australian Constitution* s 51(xxxvii). The states challenged the constitutional validity of the *Work Choices* legislation, however it was upheld by the High Court in *New South Wales v Commonwealth* (2006) 219 CLR 1.

15 The definition of ‘national system employee’ and ‘national system employer’ are contained in ss 13 and 14 of the *Fair Work Act 2009* (Cth) and are extended by ss 30C, 30D, 30M and 30N to cover employers in referring states: *Fair Work Act 2009* (Cth) ss 13, 14, 30C, 30D, 30M and 30N.

16 In 1996 Victoria was the first state to refer key industrial relations powers to the Commonwealth.

17 Constitutional corporations are those to which the federal corporations power applies. The corporations power allows the Australian Parliament to make laws with respect to certain types of corporations: *Australian Constitution* s 51(xx).

- private sector and local government employment in Tasmania.

16.12 The system does not cover:

- state public sector or local government employment or employment by non-constitutional corporations in the private sector in Western Australia;
- state public sector and local government employment in NSW, Queensland and South Australia; or
- state public sector employment in Tasmania.

16.13 Employment that is not covered under the national industrial relations system remains regulated by the relevant state industrial relations systems. However, some entitlements under the *Fair Work Act* extend to non-national system employees.<sup>18</sup>

16.14 The *Fair Work Regulations 2009* (Cth) address matters of detail within the framework established by the *Fair Work Act*. For example, the Regulations provide additional definitions, explain the application of the Act and elaborate on certain terms and conditions of employment.

## Objects

16.15 Section 3 of the *Fair Work Act* contains the objects of the Act, as well as the manner in which the Act intends to achieve its specific objectives, which are to:

provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

- providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
- ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
- ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
- assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
- enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and

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<sup>18</sup> For example, non-national system employees are entitled to unpaid parental leave, notice of termination, payment in lieu or notice and protection from unlawful termination of employment: *Fair Work Act 2009* (Cth) pts 6–3, 6–4.

- (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and
- (g) acknowledging the special circumstances of small and medium-sized businesses.<sup>19</sup>

16.16 The objects reflect, on the one hand, the need to provide a legislative framework which is flexible for businesses and promotes productivity and economic growth and, on the other, the desire to ensure the framework is fair and protects the rights of employees to a guaranteed safety net, flexible working arrangements and fairness and representation at work.

16.17 Of particular importance in the context of this Inquiry is the incorporation of both references to, and actual entitlements based on, the concept of social inclusion. For example, the extension of parental leave and the right to request flexible working arrangements appear to indicate a commitment

to provide an opportunity for federal employees to improve the balance between their work and family life and thus support the social inclusion policy objective.<sup>20</sup>

16.18 The need for a balanced legislative framework is the main challenge faced by the ALRC in considering what improvements could be made to the *Fair Work Act* to protect the safety of those experiencing family violence. In light of the need for balance, the ALRC also recognises the need, in the context of considering proposed amendments to the *Fair Work Act*, to protect the safety of those experiencing family violence while, at the same time, ensuring proposals are consistent with the objects of the Act.

### **Review and amendment**

16.19 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 some amendments to the *Fair Work Act* may be necessary.

16.20 However, in light of the relatively recent introduction of the *Fair Work Act* and the detailed consultation processes involved in enacting this legislation, in some areas the ALRC recognises there may be more appropriate processes and reviews into which the ALRC's discussion of the issues faced by employees experiencing family violence may be incorporated. This Inquiry therefore provides an opportunity to identify relevant areas for consideration and the responses of stakeholders.

16.21 For example, within two years of the full implementation of the *Fair Work Act*—by 1 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

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<sup>19</sup> Ibid s 3.

<sup>20</sup> J Murray and R Owens, 'The Safety Net: Labour Standards in the New Era' in A Forsyth and A Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (2009) 40, 66.

regulatory impacts of the legislation and whether the Act is meeting its objectives.<sup>21</sup> The ALRC considers that many of the issues raised in this Discussion Paper could also be considered in the context of the PIR. In addition to the PIR, from 1 January 2012, there will be several reviews of modern awards, which will be discussed below.

## Fair Work Australia

16.22 Part 5–1 of the *Fair Work Act* establishes FWA as the national independent workplace relations tribunal. FWA is an independent statutory agency, with both administrative and judicial roles, carried out by separate independent divisions. It commenced operation on 1 July 2009, assuming the functions of the Australian Industrial Relations Commission (AIRC), the Australian Industrial Registry, the Australian Fair Pay Commission and some functions of the Workplace Authority.<sup>22</sup>

16.23 Under s 577 of the *Fair Work Act*, FWA is required to perform its functions and power in a manner which:

- (a) is fair and just; and
- (b) is quick, informal and avoids unnecessary technicalities; and
- (c) is open and transparent; and
- (d) promotes harmonious and cooperative workplace relations.

## Jurisdiction and appeals

16.24 FWA has its functions conferred by s 576 of the *Fair Work Act*, including the following subject areas of relevance to this Inquiry:

- the National Employment Standards (Part 2–2);
- modern awards (Part 2–3);
- enterprise agreements (Part 2–4);
- general protections (Part 3–1);
- unfair dismissal (Part 3–2);
- the extension of the National Employment Standards entitlements (Part 6–3); and
- unlawful termination protections (Part 6–4).

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21 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 Explanatory Memorandum, Fair Work Bill 2008 (Cth), 360; and Department of Education, Employment and Workplace Relations, *Agency Budget Statement 2011–2012* (2011) Outcome 5, 130.

22 There are three types of FWA members: Primary FWA members including the President, Deputy Presidents and Commissioners who are appointed until the age of 65 and are full-time; Minimum Wage Panel members who are appointed for a set period of not more than five years and are part-time; and Members of state industrial tribunals who hold also hold an appointment with FWA: Fair Work Australia, *Website* <<http://www.fwa.gov.au/index.cfm>> at 20 June 2011.

16.25 Decisions of FWA (other than decisions of the Full Bench or the Minimum Wage Panel) can be appealed upon application to FWA, provided the Full Bench has granted permission.<sup>23</sup>

### Options for reform

16.26 To examine what improvements could be made to the *Fair Work Act* to protect those experiencing family violence, any consideration of systemic reforms to the role or powers of FWA is beyond the scope of the Terms of Reference for this Inquiry. However, some of the changes to the *Fair Work Act* proposed by the ALRC in this chapter and Chapter 17 will necessarily have an impact on the work of FWA, for example by requiring FWA to:

- consider whether family violence clauses in enterprise agreements pass the ‘better-off-overall’ test;
- vary awards; and
- deal with disputes under the general protections provisions concerning any new family violence ground.

16.27 As a result, the ALRC is interested in stakeholder views on other ways FWA does, or could, function to protect the safety of those experiencing family violence. At this stage, two areas for reform have emerged in the course of the Inquiry—application fees, dealt with below, and data collection, dealt with in Chapter 14.

### Application fees

16.28 Waiver of application fees may be one area in which FWA processes could be improved in order to respond to the needs of employees experiencing family violence, and to increase the accessibility of the system. The *Fair Work Act* provides that the *Fair Work Regulations 2009* (Cth) may prescribe an application fee, a method for indexing the fee and the circumstances in which all or part of the fee may be waived or refunded.<sup>24</sup> Accordingly, the *Fair Work Regulations* set out matters relating to the payment of application fees.

16.29 In order to lodge an application with FWA under the unfair dismissal provisions, general protections or temporary absence provisions, applicants are currently required to pay an application fee of \$60.60.<sup>25</sup> However, the Regulations provide that an application fee may be waived if FWA is satisfied that the person making the application will suffer ‘serious hardship’ if they are required to pay the fee.<sup>26</sup>

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23 *Fair Work Act 2009* (Cth) pt 5–1, div 3.

24 See, eg, *Ibid* s 395.

25 *Fair Work Regulations 2009* (Cth) regs 3.02, 3.03, 3.07, 6.05. Note the fee is indexed according to a formula outlined in the Regulations: *Fair Work Regulations 2009* (Cth) regs 3.02(3), 3.03(3), 3.07(3), 6.05(3).

26 *Fair Work Regulations 2009* (Cth), regs 3.02(7), 3.03(7), 3.07(7), 6.05(7).

16.30 Some stakeholders commented, in response to the *Family Violence—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011) (Employment Law Issues Paper), that

the application fee may provide a disincentive to lodge for a woman already experiencing financial hardship after losing her income (even acknowledging capacity to have the fee waived).<sup>27</sup>

16.31 In its submission, the Australian Domestic Violence Clearinghouse (ADFVC) emphasised that:

The prescribed application fee may also serve as a disincentive to some of the most vulnerable victims of family violence seeking redress for unfair dismissal. Although FWA has the discretion to waive fees in the case of serious financial hardship, the Clearinghouse is aware of instances where community legal centres have been unable to obtain a fee waiver for welfare-dependent clients with no realisable assets. Accordingly, the Clearinghouse recommends that FWA reassess its internal guidelines on what circumstances constitute ‘serious hardship’ and ‘exceptional circumstances’ in the context of out of time applications to improve access to unfair dismissal remedies for victims of family violence.<sup>28</sup>

16.32 As a result, the ALRC would be interested comment about whether FWA application fees restrict people experiencing family violence from making applications and whether, in practice, there is difficulty in establishing ‘serious hardship’.

16.33 The FWA application ‘Waiver of Application Fee’ form currently requires general financial information and provides a space for ‘other comments’. The ALRC suggests there may be a need to provide a separate space for people to respond to a question about the impact of family violence on the applicant’s ability to pay the fee. For example, where family violence may affect access or control over his or her income or the partner’s income.

**Question 16–1** How do, or how could, Fair Work Australia’s role, functions or processes protect the safety of applicants experiencing family violence?

**Question 16–2** In making an application to Fair Work Australia, applicants are required to pay an application fee. Under the *Fair Work Regulations 2009* (Cth) an exception applies if an applicant can establish that he or she would suffer ‘serious hardship’ if required to pay the relevant fee. In practice, do people experiencing family violence face difficulty in establishing that they would suffer ‘serious hardship’? If so, how could this be addressed?

**Question 16–3** In applying for waiver of an application fee, referred to in Question 16–2, applicants must complete a ‘Waiver of Application Fee’ form. How could the form be amended to ensure issues of family violence affecting the ability to pay are brought to the attention of Fair Work Australia?

<sup>27</sup> National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011.

<sup>28</sup> ADFVC, *Submission CFV 26*, 11 April 2011.



## Fair Work Ombudsman

16.34 The FWO is an independent statutory office created by the *Fair Work Act*.<sup>29</sup> The primary aim of the FWO is to promote harmonious, productive and cooperative workplace relations as well as compliance, through education, assistance and advice. The FWO also plays a role in monitoring compliance, carrying out investigation, and in some cases, commencing proceedings or representing employees or outworkers in order to promote overall compliance.<sup>30</sup>

16.35 The key proposals that relate to the role of the FWO are overarching Proposal 14–1 in relation to privacy, and Proposals 17–1 and 17–3 in relation to developing guides to negotiating individual flexibility arrangements and family violence clauses in enterprise agreements. However, the ALRC is interested in comment about other ways, if any, the FWO’s role, function or processes could be amended to protect employees experiencing family violence.

**Question 16–4** In Proposals 14–1, 17–1 and 17–3 the role of the Fair Work Ombudsman is discussed. In what other ways, if any, could the Fair Work Ombudsman’s role, function or processes protect employees experiencing family violence?

## National Employment Standards

16.36 The National Employment Standards (NES) enshrine 10 minimum statutory requirements that apply to all national system employees.<sup>31</sup> Some NES have broader application, and as a result the NES will apply to most employees in Australia and any amendment would have a wide-ranging impact on entitlements.

16.37 The NES encompass areas such as working hours and arrangements, leave, and termination and redundancy pay. Relevantly for the purposes of this Inquiry, the NES set out key minimum conditions in relation to the right to request flexible working arrangements and the provision of, and access to, leave.

## Background

16.38 Prior to the introduction of the *Fair Work Act*, the statutory set of minimum conditions for all employees under the national industrial relationship system was included in the Australian Fair Pay and Conditions Standard (AFPCS).<sup>32</sup> Prior to 2005, Commonwealth law in Australia ‘had not previously sought to regulate employment conditions so directly outside the public sector’.<sup>33</sup>

29 *Fair Work Act 2009* (Cth) s 681.

30 *Ibid* s 682(1).

31 *Ibid*, ch 2, pt 2–2. Some NES have broader coverage: *Fair Work Act 2009* (Cth) pt 6–3.

32 Introduced by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) which amended the *Workplace Relations Act 1996* (Cth).

33 A Stewart and A Forsyth, ‘The Journey from Work Choices to Fair Work’ in, *Fair Work: The New Workplace Laws and the Work Choices Legacy* (2009) 1, 4.

16.39 The *Fair Work Act* replaced the AFPCS with the NES, incorporating new standards in relation to redundancy pay, community service leave and requests for flexible work arrangements. In many cases, the entitlements under the AFPCS and then NES arise from a long history of test cases before the AIRC. The NES came into effect from 1 January 2010.

16.40 Prior to the introduction of the NES, the Government published an Exposure Draft, in response to which it received 129 submissions from stakeholders as well as engaging in broader consultations. The proposed NES were subsequently released on 16 June 2008. The Act retains the substance of the Exposure Draft, with some amendments.

### Interaction

16.41 As outlined in the Explanatory Memorandum to the Fair Work Bill with respect to enterprise agreements and modern awards:

The NES is designed to ‘lock in’ to modern awards and enterprise agreements. It does this by including provisions that specifically allow awards and agreements to deal with specific issues. Modern awards and enterprise agreements can also ‘build on’ the NES by including terms that supplement, or are ancillary or incidental to, the NES. But, other than as expressly allowed, an award or agreement cannot be detrimental to an employee in any respect when compared to the NES.<sup>34</sup>

16.42 These rules governing the interaction of the NES, enterprise agreements and modern awards are outlined in s 55 of the *Fair Work Act*.

16.43 The NES are an absolute legislative safety net, which cannot be excluded or overridden by a less beneficial individual contract, enterprise agreement or modern award.<sup>35</sup> With respect to contracts, the Explanatory Memorandum to the Fair Work Bill explains that:

No specific rule is provided about the relationship between the NES and contracts of employment. That relationship is governed by well established principles (e.g., a term in the contract of employment that is less favourable than a statutory entitlement is not effective) and does not require additional legislative elaboration.<sup>36</sup>

### The roles of the NES, government and business

16.44 To provide a basis for the proposals in this chapter about access or amendment to the NES, the ALRC considers that it is appropriate to provide an outline of stakeholder perspectives—and ultimately to express a view—with respect to the role of the NES, as well the roles of government and business in addressing family violence as a workplace issue in a general sense.

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34 Explanatory Memorandum, Fair Work Bill 2008 (Cth), 233.

35 Enterprise agreements and modern awards are instruments which govern the terms and conditions of employment and are discussed in more detail below.

36 Explanatory Memorandum, Fair Work Bill 2008 (Cth), 207.

**The NES**

16.45 The NES play a fundamental role in providing minimum statutory entitlements as a safety net for all national system employees. The Explanatory Memorandum to the Fair Work Bill states that the Government's key objective in introducing the NES was to:

address public concern about the adequacy of the safety net under the [existing] workplace relations system by providing a safety net which is fair for employers and employees and supports productive workplaces.<sup>37</sup>

16.46 Accordingly, in order to remain consistent with the regulatory purpose of the NES, any proposed amendment to the NES must be fair to both employees and employers and support a productive workplace.

**Submissions and consultations**

16.47 In the Employment Law Issues Paper, the ALRC focused on access to entitlements under the NES. This prompted comments from stakeholders about the role and purpose of the NES. It is consistent with the approach taken throughout this Inquiry to consider the role and purpose of the NES, particularly in light of strong stakeholder views on this issue. It also provides background to other proposals made in relation to the NES and the employment law system more broadly, particularly given the safety net function of the NES.

16.48 The ALRC has heard differing views throughout this Inquiry as to the role of minimum statutory entitlements such as the NES in addressing family violence through the employment law system. For example, the Australian Domestic and Family Violence Clearinghouse (ADFVC) emphasised that minimum statutory entitlements are 'fundamental to achieving widespread change to address the impact of family violence in the workplace'.<sup>38</sup> Stakeholders also highlighted the role of the NES in avoiding fragmentation and ensuring consistency of entitlement and in employer decision-making.<sup>39</sup>

16.49 Stakeholders have also emphasised that policy or mechanisms other than minimum statutory entitlements alone are inadequate. For example, the Australian Human Rights Commission (AHRC) submitted that *Fair Work Act* amendments, to include domestic violence leave as an NES,

are preferable to this issue being left for parties to negotiate in collective workplace agreements. History has shown that clauses which primarily benefit women are slow to become common bargaining claims and be negotiated into workplace agreements.<sup>40</sup>

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37 Ibid, 25.

38 ADFVC, *Submission CFV 26*, 11 April 2011.

39 See, eg. Ibid; Women's Health Victoria, *Submission CFV 11*, 5 April 2011.

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

16.50 The AHRC cited the example of the provision of paid parental leave in support of its argument:

As far back as 1992, the ACTU was urging unions to negotiate with employers for paid parental leave. By 2007–09, paid parental leave was only included in 12.6 per cent of collective workplace agreements although approximately half of all employees were eligible for paid parental leave through an industrial instrument. The low incidence of paid parental leave in collective agreements shows that these provisions were either a low bargaining priority for unions and were not being negotiated, or were being negotiated and refused by employers.<sup>41</sup>

16.51 Other stakeholders have expressed concern about the use of the NES in this area, emphasising that ‘Industrial Tribunals and Parliaments have a long history of creating a limited number of minimum employment standards of general application’, and that there ‘must be recognition that one-size does not fit all’.<sup>42</sup>

### ***Government and business***

16.52 In discussing proposals that would potentially impose an additional financial burden on employers, the ALRC considers that it is important to recognise the history of debate about the particular roles of government and business in achieving public policy objectives and outcomes. As noted by the AHRC in their submission referred to above, this debate has most recently been raised in relation to the introduction of paid parental leave.

16.53 Some of the key objects underlying the introduction of paid parental leave were the promotion of labour market engagement and attachment, the promotion of work/life balance and gender equity.<sup>43</sup>

### ***Submissions and consultations***

16.54 In its submission to this Inquiry, the Australian Chamber of Commerce and Industry (ACCI) stated that ‘government should not expect business to carry the weight of their responsibilities’, but can assist individuals in other ways.<sup>44</sup>

16.55 Conversely, the Redfern Legal Centre expressed the view that minimum statutory entitlements, such as paid family violence leave, may highlight and underscore acknowledgement by government that ‘dealing with family violence is a community rather than just an individual responsibility’.<sup>45</sup>

### ***ALRC’s views***

16.56 The ALRC acknowledges that amendment to the NES would involve a significant change to the *Fair Work Act* framework, but considers that such changes are necessary to protect victims of family violence in an employment context and ultimately appropriately balance the needs of employees and employers.

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41 Ibid.

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

43 J Murray and R Owens, ‘The Safety Net: Labour Standards in the New Era’ in A Forsyth and A Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (2009) 40, 48.

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

45 Redfern Legal Centre, *Submission CFV 15*, 5 April 2011.

16.57 The ALRC considers that minimum statutory entitlements, such as those provided for under the NES, are important to ensuring fairness and consistency in access to the entitlements and, ideally, to consistent decision making and employer responses. Statutory entitlements also have a normative effect on the community.

16.58 The ALRC's view is that both government and business have a role to play in addressing family violence as a workplace issue. As a result, there is a need to balance the needs of employees with the economic and practical realities faced by businesses.

16.59 The stated objects of the *Fair Work Act*, the inclusion of the right to request flexible working arrangements, and the entitlement to a variety of forms of leave under the NES, all provide explicit recognition of the need for employees to balance their work with their personal lives and commitments, and the role of employers in allowing them to do so.

16.60 As outlined in detail in earlier chapters, family violence has enormous economic costs and may affect the productivity of individual employees and workplaces. While some of the ALRC's proposals may impose some additional cost on employers, in addressing family violence, they may also go some way to enhancing productivity in workplaces.

16.61 Given the prevalence and impact of family violence on employees, workplaces and productivity, the ALRC considers that the introduction of a statutory minimum entitlement to request flexible working arrangements and leave in circumstances related to family violence is necessary. Accordingly, the ALRC makes a range of proposals in relation to these below.

### **Flexible working arrangements**

16.62 Under the NES, an employee who satisfies the eligibility requirements—who is a parent or otherwise has responsibility for a child who is under school age, or who is under 18 and has a disability—may request that his or her employer change the employee's working arrangements to assist with the care of the child.<sup>46</sup>

16.63 In order to be eligible to request flexible work arrangements, the employee must have 12 months continuous service, or for a casual employee be a long-term casual employee with a reasonable expectation of continuing employment on a regular and systemic basis.<sup>47</sup>

16.64 An employer must respond to any request by an employee in writing within 21 days and, if refusing the request, must give reasons for doing so.<sup>48</sup>

16.65 Section 65(5) of the *Fair Work Act* provides that such a request may only be refused on 'reasonable business grounds'.<sup>49</sup> The Act does not identify what may, or

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46 *Fair Work Act 2009* (Cth) s 65(1), (2). The Note to s 65(1) states that examples of changes in working arrangements include changes in hours of work, patterns of work and location of work.

47 *Ibid* s 65.

48 *Ibid* ss 65(4), 65(5).

49 *Ibid* s 65(5).

may not, comprise ‘reasonable business grounds’. However, the Explanatory Memorandum to the Fair Work Bill 2008 (Cth) states:

The reasonableness of the grounds is to be assessed in the circumstances that apply when the request is made. Reasonable business grounds may include, for example:

- The effect on the workplace and the employer’s business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity and customer service;
- The inability to organise work among existing staff; or
- The inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee’s request.

It is envisaged that FWA will provide guidance on this issue.<sup>50</sup>

16.66 There has been no case law considering the interpretation of ‘reasonable business grounds’ since the introduction of the provision. However, there has been significant commentary regarding the meaning of the phrase, much of it critical of the lack of legislative guidance as to what might constitute such grounds.<sup>51</sup>

16.67 In the *Family Provisions Test Case*, decided prior to the introduction of the provision, the AIRC formulated an entitlement similar to the right to request flexible working arrangements.<sup>52</sup> The AIRC suggested that, where refusal could only be on ‘reasonable grounds related to the effect on the workplace or the employer’s business’ such grounds may include: cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service’.<sup>53</sup>

16.68 In the Employment Law Issues Paper, the ALRC considered whether experiencing family violence should be included as a basis upon which an employee should be entitled to request flexible working arrangements under the NES.<sup>54</sup> The ALRC noted that some overseas jurisdictions have enacted legislation that entitles victims of family violence to reduce or reorganise their working hours, change workplaces and make other flexible working arrangements.<sup>55</sup>

16.69 In the context of family violence, a victim of family violence may need to access flexible working arrangements in the form of, for example, changes to working times and patterns, changes to specific duties, redeployment or relocation. A change to

50 Explanatory Memorandum, Fair Work Bill 2008 (Cth), xii.

51 See, eg, J Wells, ‘Flexible Work in 2010: The impact of the Fair Work Act 2009 (Cth) on Employer Control of, and Employee Access to, Flexible Working Hours’ (Paper presented at Our Work, Our Lives National Conference on Women and Industrial Relations, Darwin, 12 August 2010) 5–7. See also: M Baird and W Williamson, ‘Women, Work and Industrial Relations in 2008’ (2008) 51 *Journal of Industrial Relations* 338, 340.

52 *Family Provisions Test Case* (2005) 143 IR 245. The decision was not incorporated into the AFPCS under *Work Choices*.

53 *Ibid.*, 333.

54 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011), Question 8.

55 See, eg, *Employment Rights Act 1996* (UK) pt 8A; *Employment Relations Act 2000* (NZ) pt 6AA; *Organic Act on Integrated Protection Measures Against Gender Violence 2004* (Spain) art 21.

arrangements may be required to ensure the safety of the victim, for example through changes to working time or location or work contact details; to allow the victim to attend appointments or make arrangements outside of work; or to care for children also affected by family violence.

16.70 There are however, a number of concerns in relation to the current structure and operation of s 65 of the *Fair Work Act*. The concerns relate to eligibility requirements, the procedural nature of the provision and the limited availability of enforcement mechanisms. For example, women who have experienced family violence generally have a more disrupted work history,<sup>56</sup> while it may make it more difficult to satisfy eligibility requirements. Further, in its current form, the provision is procedural rather than substantive. It provides that an employee is entitled to request flexible working arrangements, receive a response and, if that request is refused, be provided with a written statement of reasons.<sup>57</sup>

16.71 The Discussion Paper released with the NES Exposure Draft in March 2008 explained the rationale behind the creation of a procedural rather than substantive provision. It indicated that a similar provision in the UK had demonstrated that:

Simply encouraging employers and employees to discuss options for flexible working arrangements has been very successful in promoting arrangements that work for both employers and employees.<sup>58</sup>

16.72 There are also limited enforcement mechanisms available where an employee considers a request has been unreasonably refused. Section 44 of the *Fair Work Act* provides that an order cannot be made under the civil remedies provisions in relation to contraventions of s 65(5). As a result, civil remedies for breaches of the flexible working arrangement NES do not apply if an employer refuses a request, other than on reasonable business grounds. In addition, s 739 of the *Fair Work Act* provides that FWA must not deal with a dispute about whether an employer had reasonable business grounds to decline a request for flexible working arrangements unless the clause is replicated in an enterprise agreement.<sup>59</sup>

### ***Submissions and consultations***

16.73 In the Employment Law Issues Paper, the ALRC invited stakeholder comment on whether experiencing family violence should be included as a basis upon which an employee should be entitled to request flexible working arrangements under the NES.<sup>60</sup>

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56 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); 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.

57 *Fair Work Act 2009* (Cth) s 65.

58 Department of Education, Employment and Workplace Relations, *National Employment Standards Exposure Draft: Discussion Paper* (2008), 61.

59 *Fair Work Act 2009* (Cth) s 739.

60 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law*, ALRC Issues Paper 36 (2011), Question 8.

16.74 Overall, stakeholders who considered this issue strongly supported the inclusion of family violence as a ground upon which an employee should be entitled to request flexible working arrangements.<sup>61</sup>

16.75 Stakeholders expressed the view that the provision of flexible working arrangements would ‘enhance the participation and job security’ of employees experiencing family violence, while allowing employees to deal with issues arising from family violence which may impact on their ability to attend work, or work safely and productively.<sup>62</sup>

16.76 Whilst recognising that, in many workplaces, ‘employers and employees work through and deal with many challenging issues affecting workers in their professional and personal lives’,<sup>63</sup> including the impact of family violence, several submissions expressed the view that existing legislative provisions are insufficient, and that there is a need for a ‘more secure entitlement to access flexible working arrangements’.<sup>64</sup>

16.77 The educative and normative effect of the inclusion of family violence as a basis for requesting flexible working arrangements was noted by the Redfern Legal Centre.<sup>65</sup>

16.78 Submissions highlighted that the amendment would avoid, for instance, the need for victims of family violence to seek casual employment to achieve flexibility, or to rely solely on the ‘goodwill’ of their particular employer to access flexible working arrangements,<sup>66</sup> particularly as victims of family violence are often casual employees, and with little power to negotiate such changes.<sup>67</sup>

16.79 The Queensland Law Society also noted that this amendment may ‘enhance the capacity of the employer to support the employee and to respond appropriately’.<sup>68</sup>

16.80 However, two submissions, from Women’s Health Victoria and ACCI did not support amendment to s 65. Women’s Health Victoria suggested that s 65 ‘may not be the best place to promote flexible leave arrangements for victims of family violence’, noting it would require a shift in the focus of the provision. The submissions

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61 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Women’s Legal Services NSW, *Submission CFV 28*, 11 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; National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 17*, 5 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011; Northern Rivers Community Legal Centre, *Submission CFV 08*, 28 March 2011.

62 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011.

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

64 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

65 Redfern Legal Centre, *Submission CFV 15*, 5 April 2011.

66 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011. See also R Braaf and I Meyering, *Seeking Security: Promoting Women’s Economic Wellbeing Following Domestic Violence* (2011), 90.

67 National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011.

68 Queensland Law Society, *Submission CFV 21*, 6 April 2011.



highlighted that it is a relatively new provision and suggested there is a need to evaluate the current effectiveness of the provision prior to any amendment.<sup>69</sup> Women's Health Victoria did note, however, that if the provision were to be amended to include family violence,

it would send a strong message to employers and employees that family violence is a serious and widespread issue that impacts on the workplace. This could begin conversations about family violence within workplaces and would go some way to challenging violence supportive attitudes and behaviours in our community.<sup>70</sup>

16.81 In its submission, ACCI indicated that it would not support any changes to the *Fair Work Act* at this stage, but noted that 'this is not to say that ACCI believes that all of the laws currently operate as intended and will not require amendment in the future'.<sup>71</sup> In particular, ACCI expressed the view that:

Many employers already provide important support in the form of employment opportunities and income, access to confidential advice and counselling, time off for personal circumstances in line with employment legislation or on a needs basis.<sup>72</sup>

16.82 Instead, ACCI suggested that individual flexibility arrangements under enterprise agreements may be the most appropriate mechanism to address the needs of employees experiencing family violence.<sup>73</sup>

#### **Other issues**

16.83 A range of other issues, such as: the appropriate definition of family violence, verifying entitlement, and the need for confidentiality in relation to any information about family violence disclosed to employers are dealt with in Chapters 3 and 14.

16.84 Several stakeholders emphasised the importance of flexible working arrangements in ensuring employees with children are able to care for their children, particularly where they have been affected by family violence. For example, the National Network of Working Women's Centres (NNWWC) emphasised that family violence 'impacts on the whole family group or those living in the immediate domestic environment and that children may also have special needs at this time'.<sup>74</sup> On this basis, the NNWWC supported the amendment, as well as the need to ensure that the existing provision could be used by employees to care for children who are affected by family violence.

16.85 The Australian Council of Trade Unions (ACTU) argued that eligibility for the right to request flexible working arrangements should be extended 'to all employees who care for or support (or are expected to care for or support) a person who reasonably relies on the employee for care or support'. The ACTU suggested that this wording would

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69 Women's Health Victoria, *Submission CFV 11*, 5 April 2011.

70 Ibid.

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

72 Ibid.

73 Ibid.

74 National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011.

accommodate employees who are victims of domestic violence with dependants, as well as employees on whom a person suffering domestic violence reasonably relies on for care or support.<sup>75</sup>

16.86 Finally, Women’s Health Victoria emphasised the need to accompany any amendment with the provision of materials for employers and employees

explaining the reason for its inclusion, legal definitions of what constitutes family violence, situations in which the clause might be enlivened, and a list of family violence support services for victims.<sup>76</sup>

### ***Limitations of current provision***

16.87 In the Employment Law Issues Paper, the ALRC outlined a number of concerns in relation to the current structure and operation of s 65. Stakeholders reiterated the concerns identified by the ALRC in relation to the procedural nature of the provision and the lack of appeal mechanisms. In addition, concerns were expressed with respect to eligibility and the timeframe within which an employer must respond to the request for flexible working arrangements.

16.88 With respect to the procedural nature of the provision, the NNWWC emphasised that ‘there are limitations with only having a right to request and not an entrenched clear entitlement’.<sup>77</sup>

16.89 Two others expressed particular concern about the lack of enforcement mechanism or grievance procedure where an employee considers a request has been unreasonably refused.<sup>78</sup> In particular, the AHRC suggested that the ‘same rights of redress applicable to the other nine NES be extended to the unreasonable refusal of a request for flexible work arrangements’.<sup>79</sup>

16.90 Similarly, the ACTU submitted that denial of appeal rights to FWA, except where specifically provided for in an enterprise agreement, raised issues of justice, stating that ‘it is wholly inappropriate that such a basic right to procedural fairness be left to the vagaries of the bargaining framework’.<sup>80</sup> The ACTU also submitted that preventative measures should be taken to ensure employers cannot make unreasonable refusals in response to requests for flexible working arrangements. The ACTU suggested the provision should outline an employer’s obligations to have ‘properly considered’ and ‘reasonably endeavoured to accommodate the request’.<sup>81</sup> The ACTU proposed the inclusion of wording from s 14A of the *Equal Opportunity Act 1995* (Vic).<sup>82</sup>

<sup>75</sup> Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

<sup>76</sup> Women’s Health Victoria, *Submission CFV 11*, 5 April 2011.

<sup>77</sup> National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011.

<sup>78</sup> Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

<sup>79</sup> Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011.

<sup>80</sup> Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

<sup>81</sup> *Ibid.*

<sup>82</sup> Section 14A of the *Equal Opportunity Act 1995* (Vic) provides that employer must demonstrate that they have considered all the relevant circumstances and provides a non-exhaustive list of the types of circumstances, including in relation to the employee’s personal circumstances, the nature and size of the workplace and the consequences of making or not making an accommodation.

16.91 In addition to the concerns identified by the ALRC in the Employment Law Issues Paper, stakeholders such as the AHRC highlighted that:

Women constitute the majority of those experiencing domestic violence and many have broken labour market participation ... It may therefore be unrealistic to expect an employee in danger to fulfil the eligibility criteria before being formally able to request flexible working arrangements. The ALRC may therefore wish to consider whether eligibility requirements which restrict the categories of employees who can make a request for flexible working arrangements should be removed.<sup>83</sup>

16.92 Other stakeholders, such as the ADFVC, Domestic Violence Victoria and the Domestic Violence Resource Centre Victoria (DV Vic and DVRC Vic) and Women's Legal Services NSW (Women's Legal NSW), suggested that there be no qualifying period for eligibility to request flexible working arrangements. The ADFVC, in particular, argued that it is 'necessary to overcome the disadvantage faced by victims of family violence who are more likely to have disrupted employment as a result of the violence'.<sup>84</sup>

16.93 The NNWWC submitted that if family violence were included as a ground upon which an employee could request flexible working arrangements, 'the timeframes for making such a request would also have to be significantly less than those in the current s 65 (21 days) because of the unpredictable nature of domestic violence,' suggesting that a seven day period would be more appropriate.<sup>85</sup> The NNWWC also suggested that if a request is declined, the employee should be able to access alternative options, including leave.

#### *ALRC's views*

16.94 In many cases, employers and employees will be able to negotiate flexible working arrangements to suit the needs of both parties in the particular employment context. Under existing arrangements, while employees are able to request flexible working arrangements outside the scope of the NES, they are not entitled to a response or reasons under the NES.

16.95 When granted, flexible working arrangements may assist employees to deal with issues arising as a result of family violence that may have an impact on their ability to attend work, or work safely and productively. Arrangements that may assist victims of family violence include: a change in shifts or working hours; changes to work contact details; and changes to work location—all of which are likely to contribute to the safety of the employee.

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

84 ADFVC, *Submission CFV 26*, 11 April 2011. See also: Women's Legal Services NSW, *Submission CFV 28*, 11 April 2011 and Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011.

85 National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011.

16.96 While many of the provisions considered in this Discussion Paper are relatively new, and are the product of lengthy consultation processes, the ALRC considers that many are inadequate to deal with the particular impact of family violence on employees and workplaces, such as the flexible working arrangements provision.

16.97 Accordingly, the ALRC considers that the amendment of s 65 of the *Fair Work Act*, to provide employees experiencing family violence with the *right* to request flexible working arrangements, is a significant, but necessary, amendment.

16.98 In addition, the ALRC considers that the evaluation of the effectiveness of the current provision is necessary and could usefully form part of the Post-Implementation Review of the *Fair Work Act*. As a result, the ALRC does not intend to make any proposals in relation to concerns expressed about the operation of the current provision insofar as they reflect systemic issues—for example in relation to the procedural nature of the provision, or the limited appeal mechanisms, or general eligibility for access to flexible working arrangements.

16.99 However, in proposing that family violence be included as a ground upon which an employee should be entitled to request flexible working arrangements, there are two aspects of the current provision that are likely to be particularly restrictive for victims of family violence—eligibility and the employer response period. The ALRC therefore proposes that s 65 of the *Fair Work Act* be amended to provide that an employee who is experiencing family violence, or who is providing care or support to a member of the employee’s immediate family or household who is experiencing family violence, may request the employer for a change in working arrangements to assist the employee to deal with circumstances arising from the family violence.

16.100 This formulation would provide employees with the right to request flexible working arrangements in order to deal with their own family violence-related issues, or to provide care or support to an immediate family member experiencing family violence. The ALRC considers that this would address the concern expressed in relation to employees who have children affected by family violence, but who are not eligible to request changes under s 65 as their children are over the school age.

16.101 The ALRC considers that the new provision should mirror the existing requirements in s 65, with two exceptions. First, the ALRC considers that, for the purposes of the new ground, there should be no eligibility requirements such as those required under s 65(2) of the *Fair Work Act*. The ALRC has formed this view in light of evidence about the often disrupted work history of victims of family violence that may preclude victims from requesting flexible working arrangements despite the need to do so. As the provision is procedural rather than substantive, providing employees with access to the right to request will not, in the ALRC’s view, impose a substantial additional burden on employers, as employers are still able to refuse requests on reasonable business grounds.

16.102 Secondly, the ALRC considers that the new provision should mirror s 65(4), except that it should provide that an employer must give the employee a written response to the request within *seven* days, stating whether the employer grants or refuses the request. In light of the unpredictable nature of family violence, employees

requesting flexible working arrangements are likely to require an immediate change to working arrangements, particularly where they are necessary to ensure the employee's safety. The ALRC would be interested in stakeholder views of the appropriateness of the proposed seven day response period.

16.103 As outlined above, several stakeholders made submissions in relation to the expansion of eligibility to the right to request flexible working arrangements. For example, the ACTU suggested an expansion to 'all employees who care for or support (or are expected to care for or support) a person who reasonably relies on the employee for care or support'.<sup>86</sup> While noting these concerns, the ALRC considers that expansion of eligibility to the right to request flexible working arrangements in the existing provision, where not directly related to family violence, extends beyond the Terms of Reference for this Inquiry.

**Proposal 16–1** Section 65 of the *Fair Work Act 2009 (Cth)* should be amended to provide that an employee who is experiencing family violence, or who is providing care or support to a member of the employee's immediate family or household who is experiencing family violence, may request the employer for a change in working arrangements to assist the employee to deal with circumstances arising from the family violence.

This additional ground should:

- (a) remove the requirement that an employee be employed for 12 months, or be a long-term casual and have a reasonable expectation of continuing employment on a regular and systemic basis, prior to making a request for flexible working arrangements; and
- (b) provide that the employer must give the employee a written response to the request within seven days, stating whether the employer grants or refuses the request.

### **Family violence-related leave**

16.104 Under the NES, employees are entitled to a range of types of paid and unpaid leave, including: parental leave; annual leave; personal/carer's leave; compassionate leave; community service leave; and long service leave.<sup>87</sup>

16.105 An employee who is a victim of family violence may use a range of combinations of leave entitlements in order to take time off work for purposes related to family violence. For example, an employee may access accrued annual or personal/carer's leave and, in some instances, discretionary miscellaneous leave, where he or she needs time, for example, to apply for a protection order or attend court proceedings, relocate, care for children or receive medical attention. However, this may

<sup>86</sup> Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

<sup>87</sup> *Fair Work Act 2009 (Cth)* ch 2, pt 2–2, div 5–9.

mean that victims of family violence exhaust their leave entitlements, particularly where the family violence occurs over a prolonged period of time.

16.106 Section 107 of the *Fair Work Act* includes notice and evidence requirements in order to access leave under the NES:

- An employee must give his or her employer notice of the taking of leave as soon as practicable (which may be a time after the leave has started) and advise the employer of the expected period of the leave.<sup>88</sup>
- To access personal/carer's leave, an employee must, if required, give their employer, evidence that would satisfy a reasonable person that the leave is taken for the specified reason or permissible occasion.<sup>89</sup>

16.107 Contravention of the leave-related NES (other than unpaid parental leave) is prohibited under s 44 of the *Fair Work Act*, which is a civil remedy provision. Currently, if an employer breaches the NES, an employee, employee organisation or an inspector may make an application for orders in relation to that contravention and the employer may be liable to pay a civil penalty of a maximum of 60 penalty units for each contravention.<sup>90</sup>

16.108 As a preliminary matter, the considerations outlined earlier in this chapter with respect to the history, nature and role of the NES; the need to consider and balance the role played by government and business; and the introduction of entitlements on the basis of family violence (as opposed to some other circumstance or characteristic) discussed in Chapter 14, also apply in the context of discussions about family violence leave.

### ***Issues Paper***

16.109 In the Employment Law Issues Paper, the ALRC considered whether employees should be entitled to some form of family violence-related leave. Provision for such leave was discussed through possible amendments to the NES, inclusion in family violence clauses as part of enterprise agreements, and/or in the context of modern awards.<sup>91</sup>

16.110 With respect to the NES, the ALRC asked whether the NES should be amended to provide for an entitlement to family violence leave. In addition, the ALRC asked stakeholders to make submissions on the circumstances under which an employee should be entitled to take such leave, the amount of days an employee should be entitled to take, and whether such leave should be paid or unpaid.

16.111 The ALRC noted that a number of overseas jurisdictions have enacted legislation which entitles victims of family violence to take leave from work, including

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88 Ibid s 107.

89 Ibid s 107(3).

90 Ibid, pt 4–1, div 2.

91 Enterprise agreements and modern awards are discussed in Ch 17.

specifically identified family violence leave, or requirements to grant ‘reasonable and necessary leave’ for purposes related to experiencing family violence.<sup>92</sup>

16.112 The ALRC also commented that as at March 2011, when the Employment Law Issues Paper was released, entitlements to additional leave in Australia had been introduced under family violence clauses included in some enterprise agreements and through state awards. The number of enterprise agreements and awards including such provisions has since increased.<sup>93</sup>

### **Submissions and consultations**

16.113 Submissions received in relation to this issue were overwhelmingly supportive of the introduction of a minimum statutory entitlement to family violence leave.<sup>94</sup> The exception to this was the submission received from ACCI which is discussed below.

16.114 Many stakeholders expressed their support for family violence leave by reference to the need for a minimum statutory entitlement. The AHRC emphasised that:

Existing leave provisions in the FWA may not be adequate for employees affected by domestic violence, as there are no provisions which specifically aim to assist such employees ... The Commission notes the inadequacy of the leave provisions contained in the FWA and supports further consideration of the FWA being amended to specifically provide paid domestic/family violence leave.<sup>95</sup>

16.115 In its submission, the Redfern Legal Centre highlighted the need for family violence leave by way of a case study.<sup>96</sup>

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92 For example, entitlements in some US jurisdictions range from three days to 12 weeks, or ‘reasonable and necessary’ leave: *Victims Economic Security and Safety Act* 820 Illinois Compiled Statutes 180 (US) § 20; *Maine Revised Statutes* 26 § 850 (US); *Revised Code of Washington* 49 § 4976 (US); *Hawaii Revised Statutes* 21 § 378–72 (US).

93 See, eg, Australian Domestic and Family Violence Clearinghouse, *Domestic Violence and Workplace Rights and Entitlements Project* <[www.austdvclearinghouse.unsw.edu.au/workplace\\_whats\\_new.htm](http://www.austdvclearinghouse.unsw.edu.au/workplace_whats_new.htm)> at 28 July 2011.

94 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Women’s Legal Services NSW, *Submission CFV 28*, 11 April 2011; Confidential, *Submission CFV 27*, 11 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; National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 17*, 5 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; Northern Rivers Community Legal Centre, *Submission CFV 08*, 28 March 2011.

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

96 Redfern Legal Centre, *Submission CFV 15*, 5 April 2011.

#### Case Study

Jenny is a very experienced accountant whose employment with a large commercial firm was initially undermined when her abusive partner, Paul, began phoning her workplace to speak to her work colleagues about his failing relationship with Jenny. When Jenny was badly assaulted by Paul in front of her two children, she and the children moved into her mother's small unit. Police charged Paul with assault and over the following months, Jenny was required on numerous occasions to take time off work to attend both the local court for the assault charges and related Apprehended Violence Order and the Family Court for parenting orders. Jenny also needed to take time off work to have maxillary surgery as a result of the injuries she sustained in the assault. During the court process, Jenny described herself as desperate to attend counselling with her children, but was afraid to ask for any more time off work. When Jenny did request a day's leave to organise alternative accommodation, she was called to a formal meeting at her workplace and was accused by colleagues of not pulling her weight. Jenny resigned and now has casual employment as a bookkeeper, and as a result has not been able to afford to move out of her mother's small unit

16.116 Amongst those submissions that supported the introduction of family violence leave there was some variation of views with respect to the way any such leave should operate. Submissions reflected broad consensus around the need for leave to be:

- a minimum statutory entitlement under the NES;<sup>97</sup>
- introduced in the context of a range of initiatives aimed at addressing family violence in the workplace;<sup>98</sup>
- accessible in a range of circumstances arising from family violence, including for example, to: attend appointments with support services; receive medical attention; receive legal advice or attend court; arrange or undertake child care; arrange accommodation or relocate; or attend to other immediate safety issues;<sup>99</sup>

97 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Women's Legal Services NSW, *Submission CFV 28*, 11 April 2011; Confidential, *Submission CFV 27*, 11 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; National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 17*, 5 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; Northern Rivers Community Legal Centre, *Submission CFV 08*, 28 March 2011.

98 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; Women's Health Victoria, *Submission CFV 11*, 5 April 2011.

99 Women's Legal Services NSW, *Submission CFV 28*, 11 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; Women's Health Victoria, *Submission CFV 11*, 5 April 2011.



- paid;<sup>100</sup>
- accessible as consecutive or single days, or as a fraction of a day;<sup>101</sup>
- not subject to a minimum employment or qualifying period, or need to be accrued in advance;<sup>102</sup> and
- subject to verification of entitlement.<sup>103</sup>

16.117 However, there were two issues in relation to which stakeholders who supported the introduction in a general sense differed to a varying degree—whether family violence leave should be an additional category or form part of personal/carer’s leave, and the appropriate period of leave.

16.118 Broadly, issues arising in relation to support for minimum statutory entitlements related to employee experiences of family violence and the need for initiatives to be introduced in the context of a national campaign have been discussed above and in Chapter 14. Issues raised in relation to the privacy and confidentiality of any information disclosed to employers are also discussed in Chapter 14.

#### ***Minimum statutory entitlement to leave***

16.119 As outlined above, stakeholders expressed strong views about the need for a minimum statutory entitlement to family violence leave in order to provide a universal approach to, and understanding of, family violence as a workplace issue.<sup>104</sup>

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100 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Women’s Legal Services NSW, *Submission CFV 28*, 11 April 2011; Confidential, *Submission CFV 27*, 11 April 2011; ADFVC, *Submission CFV 26*, 11 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; 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.

101 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

102 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Women’s Legal Services NSW, *Submission CFV 28*, 11 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011.

103 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.

104 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Women’s Legal Services NSW, *Submission CFV 28*, 11 April 2011; Confidential, *Submission CFV 27*, 11 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; National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011; Australian Association of Social Workers (Qld), *Submission CFV 17*, 5 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

16.120 In addition to general arguments about the need for minimum statutory entitlements outlined earlier in the chapter, the ADFVC argued:

The inclusion of a statutory entitlement to family violence leave in the NES is necessary to demonstrate a clear commitment to reducing the economic impact of family violence and supporting victims of family violence to remain in the labour market ... This type of leave is too important to be left to develop through the bargaining process alone, as demonstrated through the example of paid parental leave: despite several decades of bargaining, success was incremental at best and ultimately, real change has only eventuated through the recently-adopted federal legislative Paid Parental Leave scheme.<sup>105</sup>

16.121 A joint submission from DV Vic and DVRC Vic strongly supported the inclusion, stating:

Adoption in the NES of such a universal entitlement would send a clear message (coupled with a communication campaign) to employers and to the Australian community that family violence has a significant impact on the Australian economy, and that preventing and responding to it is a whole of community responsibility.<sup>106</sup>

16.122 The educative effect of a minimum statutory family leave provision was also noted by the NNWWC.<sup>107</sup>

16.123 The ACTU also favoured the introduction of family violence leave under the NES, in addition to making provision for the inclusion under other mechanisms such as enterprise agreements. In particular, the ACTU supported the inclusion ‘to ensure all employees have access to the leave regardless of their capacity to bargain for workplace agreements’.<sup>108</sup>

16.124 Conversely, ACCI submitted that it was not appropriate to amend the NES to provide for family violence leave, emphasising that ‘businesses are not homogenous and any regulatory proposal must be acutely aware of these differences’.<sup>109</sup> ACCI argued that:

employers often provide paid and unpaid leave where employees need to take time off work for a variety of personal reasons. The reason to take leave doesn’t necessarily involve issues such as domestic violence, but often can ... These issues are dealt with every day across hundreds of thousands of workplaces in Australia and in the absence of a dedicated law or regulation.<sup>110</sup>

16.125 ACCI cautioned that employers are unlikely to ‘accept being forced to take on additional obligations above and beyond what is currently required by existing laws unless a strong case is made out for doing so’.<sup>111</sup>

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Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011; Northern Rivers Community Legal Centre, *Submission CFV 08*, 28 March 2011.

105 ADFVC, *Submission CFV 26*, 11 April 2011.

106 Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011.

107 National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011.

108 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

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

110 Ibid.

111 Ibid.

***Paid leave***

16.126 Many stakeholders expressed the view that any entitlement to family violence leave must provide for paid leave, or a combination of paid and unpaid leave, or else risk further disadvantaging victims of family violence and failing to achieve the objects underlying its introduction.<sup>112</sup> For example, the ASU argued:

A person experiencing family violence is already subjected to tremendous emotional, psychological and physical stress without the need to further compound pressure due to a loss of income. Further, paid leave enables the person experiencing family violence to maintain economic independence at a critical time when income security is vital to maintaining suitable housing, ensure future safety and on the ability to secure on-going family stability for them and their children.<sup>113</sup>

16.127 These sentiments were echoed in the submission from the ADFVC:

We do not support a hollow entitlement to take unpaid leave as it is likely to further disadvantage victims of family violence who may be less likely to be in a financial position to afford to take unpaid leave. An entitlement to take unpaid leave undermines financial security: conversations with stakeholders indicate that employees are unlikely to take the leave that they need where it is unpaid due to financial hardship. Therefore, any entitlement to leave must be to paid leave to provide genuine assistance for victims of family violence.<sup>114</sup>

16.128 Other submissions emphasised that victims of family violence are predominantly women, and as a result, family violence leave must be paid, in recognition of

the fact that it is largely women, who, as a result of the violence, have broken employment histories, are in low paid jobs and can least afford to take unpaid leave at a time where financial security is critical.<sup>115</sup>

***Entitlement to leave by others***

16.129 Some stakeholders expressed the view that access to family violence leave should not be restricted to employees who are themselves direct victims of family violence. This issue was reiterated in the context of access to other forms of leave, including carer's leave, discussed in more detail below. For example, the AHRC suggested:

Friends, relatives, household members and others who are able to assist employees affected by domestic violence may also benefit from flexible working arrangements and leave to enable them to provide this support. The ALRC may wish to consider whether domestic violence provisions not be limited only to those directly

112 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Women's Legal Services NSW, *Submission CFV 28*, 11 April 2011; Confidential, *Submission CFV 27*, 11 April 2011; ADFVC, *Submission CFV 26*, 11 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; 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.

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

114 ADFVC, *Submission CFV 26*, 11 April 2011.

115 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

experiencing the violence and its aftermath, but also be available to those who are assisting and supporting employees who are affected by domestic violence.<sup>116</sup>

16.130 The NNWWC noted that family violence ‘impacts on the whole family group or those living in the immediate domestic environment and that children may also have special needs at this time’.<sup>117</sup>

16.131 Further, several stakeholders emphasised the need to ensure that any entitlement to family violence leave is not subject to a minimum employment or qualifying period or need to be accrued in advance to be accessed.<sup>118</sup> For example, the ADFVC argued:

A qualifying period would undermine the beneficial nature of this type of leave and potentially exclude the employees most likely to be adversely affected by family violence: given the link between family violence and interrupted employment, some victims may not have been in their employment long enough to meet other Fair Work Act leave qualifying periods.<sup>119</sup>

16.132 Another entitlement issue raised in submissions was whether both victims and perpetrators of family violence should be entitled to access family violence leave. The Queensland Law Society stated:

An employer should not be required to determine who is a victim and who is a perpetrator of domestic violence. It may often be impossible for the employer to do so and such a determination would require an unwarranted intrusion into the employee’s personal life ... To ensure access to justice for all parties, these circumstances should apply to both the applicant and the respondent of any family violence action.<sup>120</sup>

#### ***Separate or additional family violence leave?***

16.133 While broadly supporting the introduction of some form of family violence leave, stakeholders expressed differing views as to whether:

- a new statutory minimum entitlement to ‘family violence’ leave should be incorporated into the NES; or
- additional leave for family violence purposes should be incorporated as a subset of personal/carer’s leave under the NES.

16.134 In consultations, stakeholders in favour of a new form of family violence leave expressed the view that it was necessary to label it as separate family violence leave in order to draw attention to the issue and its impact on employees and the workplace in order to highlight it as an issue requiring attention.

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

117 National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011.

118 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Women’s Legal Services NSW, *Submission CFV 28*, 11 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011.

119 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

120 Queensland Law Society, *Submission CFV 21*, 6 April 2011.

16.135 The AHRC commented that, in circumstances where employees already have caring responsibilities, those employees in particular would benefit from ‘additional, specific domestic violence leave’ through a ‘separate entitlement to carer’s leave in the NES’.<sup>121</sup>

16.136 On the other hand, stakeholders who submitted that leave should be incorporated as a subset of existing personal/carer’s leave, expressed particular concern about labelling of leave as family violence leave having the effect of exacerbating barriers to disclosure already faced by employees discussed in Chapter 14.

### ***Period of leave***

16.137 Submissions received in response to the issue of family violence leave were mixed with respect to the appropriate period. Stakeholders suggested:

- no more than two days per occasion;<sup>122</sup>
- five days paid plus access to other forms of leave;<sup>123</sup> and
- 20 days, in line with existing family violence leave entitlements under enterprise agreements;<sup>124</sup>

16.138 Several submissions referred to the Surf Coast Shire *Enterprise Agreement 2010–2013*, which provides for 20 days of paid family violence leave, as providing an appropriate period of leave.<sup>125</sup>

16.139 It was also suggested that further analysis of the actual periods of leave taken and potential costs to businesses is required before determining an appropriate quantum.<sup>126</sup> In addition, the NNWWC submitted:

Before making specific recommendations about the period of leave that an employee may be entitled to, specific to domestic violence, 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.<sup>127</sup>

### ***Verification of entitlement***

16.140 While submissions overwhelmingly supported the introduction of family violence leave, many recognised the need to ensure that employees accessing such

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

122 Queensland Law Society, *Submission CFV 21*, 6 April 2011.

123 Redfern Legal Centre, *Submission CFV 15*, 5 April 2011.

124 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 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.

125 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 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.

126 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011.

127 National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011.

leave are able to demonstrate their entitlement or experience of family violence in a way that maintains the integrity of the leave system and does not place an undue administrative burden on employers.

16.141 The Queensland Law Society noted that ‘some employers may be concerned about potential abuse of an additional category of leave entitlements’ but suggested this could be mitigated by reference to documentary verification, or referral to an ‘employee assistance scheme, where one exists’.<sup>128</sup>

16.142 Other stakeholders echoed this approach, suggesting that a number of forms of documentary verification may be appropriate to demonstrate an entitlement to family violence leave. These include 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.<sup>129</sup>

16.143 In addition to general comments about the need for confidentiality of information disclosed, discussed primarily in Chapter 14, the Office of the Australian Information Commissioner (OAIC) also noted:

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.<sup>130</sup>

### ***Access to other forms of leave***

16.144 Many stakeholders argued that, in addition to some form of family violence leave (whether as a separate category or as a subset of personal/carer’s leave), employees should also be able to access other forms of existing leave for circumstances arising from family violence.<sup>131</sup> The Queensland Law Society commented that:

128 Queensland Law Society, *Submission CFV 21*, 6 April 2011.

129 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.

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

131 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; National Network of Working Women’s Centres, *Submission CFV 20*, 6 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011.

It would be appropriate to add an entitlement to leave to deal with family violence to the existing provisions in place for employees to take leave, including annual leave, long service leave and personal/carer's leave ... If an employee was subject to family violence, the employee should have the option of taking leave in one of the existing categories or in a new category of family violence leave.<sup>132</sup>

16.145 Other stakeholders supported this view, noting that access to other forms of leave would be particularly important where any family violence leave had been exhausted.<sup>133</sup> In some cases this may already be possible, for example where an employee experiences injury or illness arising from family violence they may already access personal leave. However, stakeholders also expressed the view that employees experiencing family violence should be able to access carer's leave in order to care for, support or make necessary arrangements for a person experiencing family violence.<sup>134</sup>

#### ***ALRC's views***

16.146 As is the case with flexible working arrangements, the ALRC recognises that, in many cases, employers will grant employees access to forms of existing leave in circumstances where it may be required as a result of family violence. However, evidence suggests that, in many cases of family violence, victims exhaust their existing leave entitlements. In addition, there is currently a discretionary element associated with the granting of leave in cases of family violence, particularly in such circumstances.

16.147 In light of this, the ALRC considers existing leave provisions provided for in the NES may not be adequate to provide for the needs of employees experiencing family violence. As a result, the ALRC has formed the preliminary view that amending the NES to provide for some form of family violence leave is a necessary change to provide employees with a minimum statutory entitlement to such leave.

16.148 In proposing this amendment, the ALRC reiterates its comments made earlier in this chapter in relation to the role of governments and business in responding to family violence as well as in relation to issues surrounding the need for minimum statutory entitlements.

#### ***Minimum statutory entitlement***

16.149 As outlined above, the ALRC has formed the view that it may be appropriate for the government to amend the *Fair Work Act* to provide for a minimum statutory entitlement to family violence-related leave. While recognising the important role played by other forms of regulation in this area, such as enterprise agreements, the

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132 Queensland Law Society, *Submission CFV 21*, 6 April 2011.

133 ADFVC, *Submission CFV 26*, 11 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011. See also, National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011.

134 ADFVC, *Submission CFV 26*, 11 April 2011. See also, Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011. The ACTU advocated for the wholesale expansion and extension of personal/carer's leave, which would also accommodate the needs of employees who care for or support a person experiencing family violence.

ALRC considers a minimum statutory entitlement is necessary and is likely to serve a number of purposes as follows.

16.150 First, it would ensure a universal entitlement to leave for employees experiencing family violence. This is consistent with the themes identified in the conceptual framework for this Inquiry. This would ensure all national system employees would have access to the leave. In light of evidence that it is predominantly women who experience family violence at higher rates than men, and who are not covered by enterprise agreements, the ALRC considers that access to family violence leave through bargaining and enterprise agreements may not be sufficient to protect the safety of employees experiencing family violence.

16.151 Secondly, the ALRC considers the introduction of family violence leave as part of the minimum safety net under the NES is likely to play an educative role. It gives express recognition to family violence as a national issue that has a significant impact on the Australian economy and that both the government and workplaces have a responsibility to address family violence. This would build on the work already undertaken by the government under the National Plan to Reduce Violence Against Women and Their Children and similar initiatives noted in Chapter 1.

16.152 The ALRC also notes the importance of the availability of enforcement mechanisms with respect to any entitlement to family violence leave through the application of civil remedy provisions.

#### ***Basic requirements***

16.153 The ALRC heard a range of views about the most appropriate form of family violence leave. The ALRC considers that there should be a core of basic requirements with respect to family violence leave, including that it is paid, flexible and easily accessible where necessary, whilst containing sufficient safeguards to maintain the integrity of the leave system. The ALRC considers there is a need for any family violence leave introduced under the NES to be:

- introduced in the context of a range of initiatives aimed at addressing family violence in the workplace;
- accessible in a range of circumstances arising from family violence;
- accessible as consecutive or single days, or as a fraction of a day;
- available to employees who are victims of family violence as well employee's who need to access such leave to provide care or support to a member of the employee's immediate family or household who is experiencing family violence;
- not be subject to a minimum employment or qualifying period, or to be accrued in advance;
- paid; and
- subject to verification of entitlement.



***Complementary initiatives***

16.154 The ALRC considers that there is a need to introduce a range of initiatives to address family violence as a workplace issue. Recognising the need for a holistic approach to addressing family violence and its impact on Australian workplaces, the ALRC has made a number of overarching proposals such as Proposal 14–2 with respect to the need for a national education campaign, and other initiatives.

***Paid leave***

16.155 Stakeholders made strong arguments in favour of the need for paid family violence leave to avoid provision of a ‘hollow’ entitlement. In light of the focus of this aspect of the Inquiry on ensuring the economic security and independence of employees experiencing family violence, and in light of stakeholder concerns about the possible compounding effect unpaid family violence leave may have, the ALRC has formed the view that any entitlement to family violence leave should provide for a combination of paid and unpaid leave.

***Accessibility***

16.156 The ALRC is aware that employees may need to access family violence leave in a range of circumstances. Accordingly, the ALRC suggests that any provision under the NES be broadly formulated to enable an employee to deal with a range of circumstances arising from family violence, including for example, to attend appointments with support services; receive medical attention; receive legal advice or attend court; arrange or undertake child care; arrange accommodation or relocate; or attend to other immediate safety issues.

16.157 In order to facilitate the taking of leave in a diverse range of circumstances, the ALRC considers it would be appropriate to allow the taking of family violence leave to be accessible as consecutive or single days, or as a fraction of a day.

***Entitlement***

16.158 Several stakeholders, including the AHRC, highlighted the impact that family violence often has on the victim themselves, as well as friends, relatives and other household members and suggested the ALRC consider the extension of family violence leave to those assisting and supporting employees affected by family violence.

16.159 In light of these submissions, the ALRC considers an employee who is themselves experiencing family violence, or who is required to provide care or support to a member of their immediate family or household who is experiencing family violence, should be entitled to family violence leave.

16.160 The ALRC suggests any definition of member of immediate family or household should recognise kinship and family relationships of Indigenous people as well as people from CALD communities and those in same-sex relationships.

16.161 Under s 96 of the *Fair Work Act*, personal/carer’s leave under the NES accrues on the basis of 10 days paid personal/carer’s leave per year of service. The entitlement accrues progressively during a year of service according to the employee’s

ordinary hours of work, and accumulates from year to year.<sup>135</sup> However, the ALRC considers that the nature of family violence itself, and the often interrupted work history of victims of family violence, are such that family violence leave should not be subject to a minimum employment or qualifying period, or need to be accrued in advance.

16.162 As outlined above, the notice requirements under s 107 of the *Fair Work Act* provide that an employee must give his or her employer notice of the taking of leave as soon as practicable (which may be a time after the leave has started) and advise the employer of the expected period of the leave.<sup>136</sup> While the ALRC considers that in some cases it may be difficult for a victim to notify their employer in advance, s 107 appears to strike a balance between the needs of an employee to take leave, often at short notice, with the need for employers to be informed as soon as practicable in order to make appropriate arrangements where an employee will not be attending work. As a result, the ALRC considers the notice requirements under s 107 of the *Fair Work Act* relating to personal/carer's leave should be mirrored in any provision relating to family violence leave.

#### ***Period of leave***

16.163 The ALRC has heard a range of views as to the most appropriate period of any family violence leave. Many stakeholders submitted that 20 days of paid leave would be appropriate. However, while the ALRC considers this period may be appropriate in the context of an enterprise agreement negotiated to take into account the circumstances of an individual employer, it may not be appropriate as a statutory minimum.

16.164 Other stakeholders supported an entitlement of up to two days of leave per occasion. This approach would be in line with the enterprise agreement negotiated at UNSW. However, the ALRC considers that in circumstances of ongoing family violence, this entitlement is likely to result in an employee being entitled to a potentially unlimited amount of leave in any year. Further, conscious of the concerns expressed by employers, the ALRC considers the need to process applications on this basis is likely to impose an unnecessary burden on employers.

16.165 Two submissions expressed the view that the best approach may be to undertake further analysis of actual periods of leave taken and the projected cost to business before determining an appropriate quantum. The introduction of any additional leave will undoubtedly result in increased costs to business, particularly small business. Amongst other factors, the ALRC is required, under the *Australian Law Reform Commission Act 1996* (Cth), to consider the cost implications of any proposal. The ALRC has formed the view that analysis of actual periods of leave taken would provide a useful pool of data upon which future policy decisions could be made. However, the ALRC considers any such analysis could usefully be conducted following the introduction of the provision, or form part of the PIR.

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135 *Fair Work Act 2009* (Cth) s 96.

136 *Ibid* s 107.

16.166 Overall, the ALRC is conscious of the need to balance the needs, rights and responsibilities of employees and employers. Accordingly, the ALRC has formed the view that, in line with the leave periods provided for other forms of leave under the NES, family violence leave under the NES should be for a period of 10 days per year.

***Verification of entitlement***

16.167 In order to preserve the integrity of the leave system, the ALRC recognises 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. That said, stakeholders have clearly indicated that the types of verification that a victim of family violence may be able to provide to an employer upon request are varied and may include documentation from a range of professionals and support services.

16.168 The ALRC considers that the existing, generally expressed, evidence requirements provided for under s 107 that apply to personal/carer's leave should also apply to any family violence leave.

16.169 Further, providing employers information about what might constitute appropriate verification could form part of the national education campaign referred to in Proposal 14–2.

***Access to other forms of leave***

16.170 The ALRC considers it is appropriate to provide that employees experiencing family violence are able to access other forms of existing leave for circumstances arising from family violence, particularly where they have exhausted any entitlement to family violence leave. The ALRC considers that it is already possible to do so in relation to the forms of leave where it is not necessary to demonstrate an entitlement, such as annual leave. However, in light of submissions the ALRC considers it is appropriate to allow employees to access both existing personal/carer's leave for purposes arising from family violence, as well as any additional family violence leave.

16.171 Under s 97 of the *Fair Work Act* an employee may take paid personal/carer's leave if the leave is taken where the employee is not fit for work because of a personal illness, or personal injury, affecting the employee; or to provide care or support to a member of the employee's immediate family, or a member of the employee's household who requires care or support because of personal illness/injury or an unexpected emergency. The ALRC proposes that s 97 be amended to allow for the taking of leave for circumstances arising as a result of family violence.

***Options for reform***

16.172 Building on the core of basic requirements outlined above, that the ALRC considers should be part of any family violence leave under the NES, the ALRC considers there are two key models for reform in order to introduce family violence leave under the NES.

16.173 The first model, Proposal 16–2, provides a new minimum statutory entitlement to 10 days family violence leave. The second model, Proposals 16–3 and 16–4, provides for the inclusion of an additional 10 days leave, accessible for family violence purposes, as a subset of the existing personal/carer’s leave provided for under the NES.

16.174 The ALRC is interested in stakeholder views on the alternate proposals as well as the issues raised with respect to the basic requirements, including the provision of paid leave as well as accessibility, entitlement, verification of entitlement and period of leave.

**OPTION ONE: Proposal 16–2**

**Proposal 16–2** The Australian Government should amend the National Employment Standards under the *Fair Work Act 2009* (Cth) to provide for a new minimum statutory entitlement to 10 days paid family violence leave. An employee should be entitled to access such leave for purposes arising from the employee’s experience of family violence, or to provide care or support to a member of the employee’s immediate family or household who is experiencing family violence.

**OPTION TWO: Proposals 16–3 and 16–4**

**Proposal 16–3** The Australian Government should amend the National Employment Standards under the *Fair Work Act 2009* (Cth) to provide for a minimum statutory entitlement to an additional 10 days paid personal/carer’s leave. An employee should be entitled to access the additional leave solely for purposes arising from the employee’s experience of family violence, or to provide care or support to a member of the employee’s immediate family or household who is experiencing family violence.

**Proposal 16–4** The Australian Government should amend the National Employment Standards under the *Fair Work Act 2009* (Cth) to provide that an employee may access the additional personal/carer’s leave referred to in Proposal 16–3:

- (a) because the employee is not fit for work because of a circumstance arising from the employee’s experience of family violence; or
- (b) to provide care or support to a member of the employee’s immediate family, or a member of the employee’s household, who requires care or support as a result of their experience of family violence.