

16. *Fair Work Act 2009* (Cth)

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Summary

16.1 The *Fair Work Act 2009* (Cth) 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. The *Fair Work Act* establishes a safety net comprising: the National Employment Standards (NES), modern awards and national minimum wage orders; and a compliance and enforcement regime. It also establishes an institutional framework for the administration of the system comprising Fair Work Australia (FWA) and the Fair Work Ombudsman (FWO).¹

16.2 Chapters 16 and 17 provide an overview of the *Fair Work Act* and examine possible options for reform within the context of the ALRC's recommended five-phase approach to reforms in this area. The focus of this chapter is on potential reform of the

¹ The Fair Work Divisions of the Federal Court and Federal Magistrates Court and, in some cases, state and territory courts, perform judicial functions under the *Fair Work Act: Fair Work Act 2009* (Cth) pt 4–2.

Act, its institutions, and agreements and instruments made under the Act, to address the needs—and ultimately the safety—of employees experiencing family violence. The chapter examines the background, coverage and objects of the *Fair Work Act*, as well as the role and processes of FWA and the FWO. The ALRC suggests ways in which those institutions or their processes may function to protect the safety of those experiencing family violence. In addition, this chapter examines:

- family violence clauses in enterprise agreements—the ALRC concludes the Australian Government should support the inclusion of family violence clauses which, at a minimum, should contain several basic requirements and recommends that the FWO should develop a guide to negotiating such clauses;
- individual flexibility arrangements in enterprise agreements—the ALRC considers the appropriateness of individual flexibility arrangements (IFAs) in circumstances where an employee is experiencing family violence and recommends that the FWO should include information on negotiating an IFA in such circumstances in existing guidance material;
- modern awards—the ALRC considers ways in which modern awards might incorporate family violence-related terms and suggests this should be considered in the course of the modern award reviews to be conducted by FWA in 2012 and 2014; and
- the general protections provisions under the *Fair Work Act*—the ALRC recommends that prior to the Australian Government considering inclusion of a family violence-related ground under the general protections provisions, the Australian Human Rights Commission (AHRC) should examine the possible inclusion of a family violence-related protected attribute under Commonwealth anti-discrimination law.

Fair Work Act 2009 (Cth)

16.3 The *Fair Work Act* replaced the *Workplace Relations Act 1996* (Cth) and most provisions of the Act took effect on 1 July 2009. The history surrounding the enactment of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), the Federal election campaign in 2007—including the policy announcement *Forward with Fairness*,² which preceded the *Fair Work Act*—and the introduction of the *Fair Work Act*, have been the subject of much debate and commentary.

16.4 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 establishment of a number of advisory

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

groups.³ The Government also conducted a number of other specific consultations in relation to the NES.⁴ The present Inquiry comes not long after the conclusion of those consultative processes and shortly before a planned Post-Implementation Review of the *Fair Work Act*.

Coverage

16.5 The *Fair Work Act* regulates ‘national system’ employers and employees.⁵ 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.⁶ As a result, the national system covers the Commonwealth, Commonwealth authorities and constitutional corporations,⁷ and

- all other employment in Victoria, ACT and the Northern Territory;
- all private sector employment in New South Wales, Queensland and South Australia; and
- all private sector and local government employment in Tasmania.

16.6 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.

16.7 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.⁸

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

3 National Workplace Relations Consultative Council and sub-committees, Business Advisory Group, Workers Advisory Group and Small Business Working Group: *National Workplace Relations Consultative Council Act 2002* (Cth); Explanatory Memorandum, Fair Work Bill 2008 (Cth), [r19].

4 Explanatory Memorandum, Fair Work Bill 2008 (Cth), [r20].

5 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.

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

7 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).

8 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.

Objects

16.9 Section 3 of the *Fair Work Act* contains the objects of the Act and sets out the manner in which the Act is intended 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:

- (a) 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
- (b) 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
- (c) 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
- (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
- (e) 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
- (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.

16.10 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.

16.11 Of particular importance in the context of this Inquiry is the incorporation of references to, and actual entitlements based on, the concept of social inclusion. For example, the inclusion 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'.⁹

⁹ 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.

16.12 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, while ensuring proposals are also consistent with the objects of the Act.

Post-Implementation Review

16.13 By January 2012, the Australian Government has committed to commencing a Post-Implementation Review (PIR) of the *Fair Work Act*. The PIR will report on the regulatory impacts of the legislation and whether the Act is meeting its objectives.¹⁰

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

Recommendation 16–1 The Australian Government should consider family violence-related amendments to the *Fair Work Act 2009 (Cth)* in the course of the 2012 Post-Implementation Review of the Act.

Institutions

Fair Work Australia

16.15 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 divisions. It commenced operation on 1 July 2009, assuming the functions of the Australian Industrial Relations Commission, the Australian Industrial Registry, the Australian Fair Pay Commission and some functions of the Workplace Authority.¹¹

16.16 FWA has functions conferred by s 576 of the *Fair Work Act*, including in relation to: the NES; modern awards; enterprise agreements; and general protections. Decisions of FWA (other than decisions of the Full Bench or the Minimum Wage Panel) can be appealed upon application to FWA, with leave from the Full Bench.¹²

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

- (a) is fair and just; and

10 The PIR 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)*, [r360]; and DEEWR, *Agency Budget Statement 2011–2012 (2011)*, Outcome 5, 130.

11 There are several types of FWA members: Primary FWA members including the President; Deputy Presidents and Commissioners; and Minimum Wage Panel members: *Fair Work Act 2009 (Cth)* s 575.

12 *Ibid* pt 5–1, div 3.

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

Options for reform

16.18 The ALRC considers that there are a number of specific reforms which would ensure FWA members and processes are better able to respond to the needs of those experiencing family violence. These relate to waiver of application fees, time limits for making applications and the general conduct of matters. Broader consideration of systemic reform to the role or powers of FWA is beyond the scope of the Terms of Reference for this Inquiry.

Waiver of application fees

16.19 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.¹³ Where applicants are experiencing financial hardship, the fee may act as a disincentive to lodge an application.¹⁴ Family violence may be the cause of financial hardship—for example, where the family violence affects an applicant's access or control over his or her income or partner's income.

16.20 The *Fair Work 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.¹⁵ Stakeholders have emphasised that while FWA has discretion to waive the fee, there are instances in which 'community legal centres have been unable to obtain a fee waiver for welfare-dependent clients with no realisable assets'.¹⁶

16.21 In order to apply for a waiver, an applicant must complete a 'Waiver of Application Fee' form. The ALRC suggests that this form could be amended 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.¹⁷ In addition, the ALRC recommends that FWA members and other relevant personnel undertake training, including in relation to the potential effect of family violence on an applicant's financial circumstances.

Time limits for making an application

16.22 An application for unfair dismissal must be lodged with FWA within 14 days of the dismissal.¹⁸ The Explanatory Memorandum to the Fair Work Bill indicates that the

13 The fee is currently \$60.60. See: *Fair Work Regulations 2009* (Cth) regs 3.02, 3.03, 3.07, 6.05.

14 National Network of Working Women's Centres, *Submission CFV 20*.

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

16 ADFVC, *Submission CFV 26*.

17 As suggested by Kingsford Legal Centre, *Submission CFV 161*.

18 Under Work Choices the time limit was 21 days. In the Fair Work Bill 2008 (Cth) the time limit was initially 7 days.

aim of the reduced application time is to ‘promote quick resolution of claims and increase the feasibility of reinstatement as an option’.¹⁹

16.23 The 14-day time limit within which an application for unfair dismissal must be lodged, except in ‘exceptional circumstances’, may be particularly onerous for people experiencing family violence:

FWA has taken a strict approach in defining the circumstances in which an out of time application may be accepted, leaving many applicants without a remedy under the Act. In instances where victims of family violence are also dealing with other legal proceedings and under intense emotional strain, 14 days is unlikely to be enough time to seek legal advice and make an application.²⁰

16.24 However FWA may grant a further period within which to make an application if satisfied that there are ‘exceptional circumstances’,²¹ taking into account:

- (a) the reason for the delay; and
- (b) whether the person first became aware of the dismissal after it had taken effect; and
- (c) any action taken by the person to dispute the dismissal; and
- (d) prejudice to the employer (including prejudice caused by the delay); and
- (e) the merits of the application; and
- (f) fairness as between the person and other persons in a similar position.²²

16.25 FWA’s power to allow a further period for application in ‘exceptional circumstances’ may provide a mechanism through which victims of family violence may be granted additional time to make an application. However, to the extent that FWA takes a strict approach, as suggested by some stakeholders,²³ the ALRC suggests that appropriate training of FWA members may assist to ensure that, where appropriate, family violence is considered in determining whether ‘exceptional circumstances’ exist.

Conduct of matters

16.26 FWA has a range of powers under the *Fair Work Act* with respect to determining the conduct of conferences and hearings as well as in relation to restricting the publication of confidential evidence.²⁴ Stakeholders have emphasised that FWA’s use of such powers to ‘issue orders regarding privacy and restricted presence at hearings and conferences as well as suppression of publication of personal details,

19 Explanatory Memorandum, Fair Work Bill 2008 (Cth) [r 222].

20 ADFVC, *Submission CFV 26*. See also Kingsford Legal Centre, *Submission CFV 161*.

21 *Fair Work Act 2009* (Cth) ss 729, 394. The exceptional circumstances factors are largely based on the principles outlined in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298.

22 *Fair Work Act 2009* (Cth) s 394(3).

23 ADFVC, *Submission CFV 26*. See also Kingsford Legal Centre, *Submission CFV 161*.

24 *Fair Work Act 2009* (Cth) ss 394(3), 593, 594.

evidence and documents may assist in encouraging and supporting victims of family violence to pursue matters' in FWA.²⁵

16.27 The ALRC understands that FWA members are involved in ongoing professional development, both internally and externally.²⁶ The ALRC recommends that Fair Work Australia should review its processes, and members and other relevant personnel should be provided with training, to ensure that the existence of family violence is appropriately and adequately considered at relevant times in the conduct of matters. This would include in deciding whether:

- the applicant would suffer 'serious hardship' if they were required to pay an application fee;
- there are 'exceptional circumstances' under s 394(3) of the *Fair Work Act* that would warrant the granting of a further period within which to make an application for unfair dismissal;
- to make orders in relation to a hearing under s 593 of the *Fair Work Act*; and
- to make orders restricting the publication of confidential evidence under s 594 of the *Fair Work Act*.

Recommendation 16–2 Fair Work Australia should review its processes, and members and other relevant personnel should be provided with consistent, regular and targeted training to ensure that the existence of family violence is appropriately and adequately considered at relevant times.

Fair Work Ombudsman

16.28 The FWO is an independent statutory office created by the *Fair Work Act*.²⁷ The primary aim of the FWO is to promote harmonious, productive and cooperative workplace relations and compliance with the Act, through education, assistance and advice. The FWO also plays a role in monitoring compliance, carrying out investigations, and in some cases, commencing proceedings or representing employees or outworkers in order to promote overall compliance.²⁸ The FWO has an obligation to consult with FWA in producing guidance material that relates to FWA's functions.²⁹

16.29 Key recommendations in Part E of this Report that relate to the role of the FWO are: Recommendation 15–2—privacy guidance material; Recommendation 16–3—IFA's; and Recommendation 16–5—family violence clauses in enterprise agreements.

25 ACTU, *Submission CFV 100*.

26 Fair Work Australia, *Consultation*, by telephone, 30 September 2011.

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

28 *Ibid* s 682(1).

29 *Ibid* s 682(2).

Enterprise agreements

16.30 The law of employment, as it related to the relationship between an individual employer and employee, has its basis in the common law—specifically the law of contract. The rights and obligations of an employer and an employee are generally governed by, and arise from, the terms of a contract of employment. However, rights and obligations also arise from a range of other sources, including under legislation, the terms of which may prevail over the contract of employment. One such source is the *Fair Work Act*, which provides that there are several types of agreements, referred to as enterprise agreements, which can prevail over contracts of employment.³⁰

16.31 The objects of Part 2–4 of the *Fair Work Act*, which deals with enterprise agreements, are to:

provide a simple, flexible and fair framework that enable collective bargaining in good faith, particularly at an enterprise level, for enterprise agreements that deliver productivity benefits; and to enable [FWA] to facilitate good faith bargaining and the making of enterprise agreements.³¹

16.32 There are three types of enterprise agreements: single-enterprise agreements; multi-enterprise agreements; and ‘greenfields’ agreements.³² Enterprise agreements govern the terms and conditions of employment and can be made between one or more employers and either their employees, or one or more employee organisations. However, a large proportion of the workforce in Australia is not covered by an enterprise agreement.³³

16.33 The *Fair Work Act* lists several categories of matters in relation to enterprise agreements: permitted matters that may be included;³⁴ mandatory terms that must be included;³⁵ and unlawful terms that cannot be included or that are of no effect.³⁶ In order to be approved by FWA, there are a number of requirements, one of which is that it must pass the ‘better off overall’ test. That is, FWA must be satisfied that employees are better off overall under the enterprise agreement, as opposed to the conditions under the relevant modern award.³⁷

30 ‘Enterprise agreement’ was a term introduced as of 1 January 2010 under the *Fair Work Act 2009* (Cth). Previously, under the *Workplace Relations Act 1996* (Cth), agreements were referred to as ‘certified agreements’ (until 27 March 2006) and ‘collective agreements’.

31 *Fair Work Act 2009* (Cth) s 171.

32 Single-enterprise agreements involve a single employer or one or more employers cooperating in what is essentially a single enterprise; multi-enterprise agreements involve two or more employers that are not all single-interest employers; ‘greenfield’ agreements involve a genuinely new enterprise that has not yet employed employees: *Ibid* s 172.

33 There are approximately 11.5 million Australian employees, however only approximately 2.6 million Australian employees are covered by an enterprise agreement: Australian Bureau of Statistics, *Labour Force, Australia* (2011); DEEWR, *Trends in Federal Enterprise Bargaining, December Quarter 2010* (2010).

34 For example, terms about matters pertaining to the relationship between an employer and their employees or employee organisation, as well as deductions from wages and the operation of the agreement: *Fair Work Act 2009* (Cth) s 172(1).

35 For example, terms in relation to individual flexibility and consultation: *Ibid* ss 202, 205.

36 For example, terms that are discriminatory. *Ibid* ss 194, 195, 253.

37 *Ibid* s 193.

16.34 The *Fair Work Act* also contains a range of requirements with respect to the enterprise agreement bargaining process; for example, a requirement that parties bargain in good faith, as well as detailed provisions in relation to representation during bargaining.³⁸

16.35 IFAs and family violence clauses in enterprise agreements provide two mechanisms that may assist to account for the needs, and protect the safety, of those experiencing family violence.

Individual flexibility arrangements

16.36 There is a need to ensure that workplace responses to family violence are consistent, but also sufficiently flexible to allow an employee and employer the opportunity to tailor specific working arrangements to meet the needs of both parties.

16.37 Section 202 of the *Fair Work Act* requires that an enterprise agreement must include a ‘flexibility term’.³⁹ A flexibility term allows an employer and an employee to make a specific IFA that would vary the effect of the enterprise agreement to account for the employee’s particular circumstances in order to meet the genuine needs of the employee and employer.⁴⁰ Where a flexibility term is included in an enterprise agreement, the scope of an IFA is limited by the flexibility term in the enterprise agreement itself.⁴¹ If an enterprise agreement does not include a flexibility term, the model flexibility term is taken to be a term of the agreement.⁴²

16.38 The ALRC considers that while IFAs may act as one mechanism through which to account for the needs of employees experiencing family violence, they may not necessarily be the most appropriate in the family violence context. However, the ALRC acknowledges the potential role IFAs may play in some circumstances where an employee is experiencing family violence and recommends that the FWO include information in existing guidance material on negotiating IFAs where an employee is experiencing family violence.

Is there a role for IFAs where an employee is experiencing family violence?

16.39 Stakeholders have expressed differing views on the usefulness of IFAs generally and more specifically in relation to the use of IFAs in circumstances where an employee is experiencing family violence.⁴³

38 See, eg, *Ibid* ch 2, pt 2–4, div 3.

39 *Ibid* s 202.

40 *Ibid* s 202. Further, particular requirements must be met for an IFA to be enforced, including genuine agreement between the parties and that the employee is better off overall under the IFA: *Fair Work Act 2009* (Cth) s 203.

41 Some stakeholders have expressed concern about the inclusion of restrictive flexibility terms in enterprise agreements and the flow-on effect that has on the usefulness of IFAs: AFEI, *Submission CFV 158*; Ai Group, *Submission CFV 141*.

42 *Fair Work Act 2009* (Cth) ss 202(4), 202(5). See *Fair Work Regulations 2009* (Cth) sch 2.2, reg 2.08.

43 For example, a number of stakeholders have expressed concern about a range of aspects of the operation of IFAs generally: AFEI, *Submission CFV 158*; Ai Group, *Submission CFV 141*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 113*; ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*; National Network of Working Women’s Centres, *Submission CFV 20*; ACCI, *Submission CFV 19*.

16.40 In some circumstances, where no other entitlements exist, IFAs may prove useful in responding to the needs of employees experiencing family violence.⁴⁴ IFAs may ‘deliver a level of individual flexibility [which] could accommodate employees with tailored conditions’.⁴⁵ For example, where an employee is in a position to negotiate, an IFA may be negotiated ‘in order to seek temporary changes to working patterns, such as shorter or alternative hours or the ability to work from home to care for children’.⁴⁶

16.41 However, the circumstances in which IFAs could help protect employees experiencing family violence are limited and the introduction of other measures, such as those recommended in relation to family violence clauses, modern awards and ultimately the NES, may be preferable.⁴⁷ Stakeholders have expressed a range of concerns with respect to the usefulness and appropriateness of IFAs in circumstances where an employee is experiencing family violence. Concerns primarily arise in relation to: unequal bargaining power;⁴⁸ the level of confidence, knowledge and skill required to negotiate an IFA;⁴⁹ and the limited likelihood of victims of family violence negotiating IFAs.⁵⁰ In addition, employees experiencing family violence often require immediate flexibility or altered arrangements in order to deal with unforeseen circumstances arising from family violence—‘IFAs do not really take these emergencies that require flexibility into account’, even where employers may be willing to negotiate an IFA.⁵¹

Development of a guide to negotiating IFAs

16.42 The ALRC acknowledges the concerns of some stakeholders with respect to the appropriateness of IFAs in circumstances involving family violence and, by extension, inclusion of material in guidance about negotiating an IFA in such circumstances.⁵² However, despite the limitations of IFAs, both generally and in a family violence context, there is nonetheless a need for additional guidance for employees and employers to highlight the fact that IFAs may be negotiated to accommodate the needs

44 See, eg, Kingsford Legal Centre, *Submission CFV 161*; CCIWA, *Submission CFV 123*; Australian Human Rights Commission, *Submission CFV 48*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*. For example, where a family violence clause is included in an enterprise agreement, in line with Recommendation 16–4, that would supplant the need to negotiate an IFA to deal with circumstances arising from an employee’s experience of family violence.

45 ACCI, *Submission CFV 19*.

46 ADFVC, *Submission CFV 26*.

47 ACTU, *Submission CFV 39*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; ADFVC, *Submission CFV 26*; National Network of Working Women’s Centres, *Submission CFV 20*; Redfern Legal Centre, *Submission CFV 15*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

48 ADFVC, *Submission CFV 26*; National Network of Working Women’s Centres, *Submission CFV 20*.

49 Australian Human Rights Commission, *Submission CFV 48*; ACTU, *Submission CFV 39*; National Network of Working Women’s Centres, *Submission CFV 20*.

50 For example, the AHRC submitted that ‘women are less likely than male employees to engage in individual negotiations with an employer’: Australian Human Rights Commission, *Submission CFV 48*. See also ADFVC, *Submission CFV 26*.

51 National Network of Working Women’s Centres, *Submission CFV 20*; ADFVC, *Submission CFV 26*.

52 ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 113*.

of employees experiencing family violence where an employee chooses to negotiate one.⁵³

16.43 The FWO has developed Best Practice Guide 03, *Use of Individual Flexibility Arrangements*.⁵⁴ While some stakeholders advocated the development of family violence-specific material,⁵⁵ the ALRC recommends that the FWO, in consultation with unions and employer organisations, should include information in the existing guide with respect to negotiating an IFA in circumstances where an employee is experiencing family violence. The guide should include information on IFAs tailored to meet the needs of particular employees experiencing family violence and examples of IFA clauses which can be adapted for these purposes.⁵⁶

16.44 The amendment of the FWO guide should involve consultation with unions and employer organisations, all of whom have a role in ‘promoting and informing employees about their rights to negotiate individual flexibility arrangements in order to ensure equitable access’.⁵⁷

Recommendation 16–3 The Fair Work Ombudsman, in consultation with unions and employer organisations, should include information in Best Practice Guides with respect to negotiating individual flexibility arrangements in circumstances where an employee is experiencing family violence.

Family violence clauses

16.45 A number of stakeholders considered that the inclusion of family violence clauses in enterprise agreements is a ‘positive move to protect the safety and industrial rights of [people] who have experienced family violence, which has resulted in a negative impact on their work entitlements’.⁵⁸

16.46 However, the ALRC does not consider that the *Fair Work Act* should be amended to mandate the inclusion of family violence clauses. Rather, the ALRC recommends that the Australian Government support the inclusion of family violence clauses which, at a minimum, should contain several basic requirements. Beyond that however, given enterprise agreements are negotiated at an individual workplace level, the inclusion of a family violence clause will necessarily be the product of agreement

53 Australian Human Rights Commission, *Submission CFV 48*; ACCI, *Submission CFV 19*; Women’s Health Victoria, *Submission CFV 11*; ADFVC, *Submission CFV 26*.

54 Fair Work Ombudsman, *Best Practice Guide: Use of Individual Flexibility Arrangements*.

55 ADFVC, *Submission CFV 26*.

56 The inclusion of sample IFAs was supported by Women’s Health Victoria, *Submission CFV 11*.

57 Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*.

58 National Network of Working Women’s Centres, *Submission CFV 20*. See also: Australian Human Rights Commission, *Submission CFV 48*; ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; National Network of Working Women’s Centres, *Submission CFV 20*; Redfern Legal Centre, *Submission CFV 15*; WEAVE, *Submission CFV 14*; Women’s Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

between the employer and employees (or employee organisations) as to the nature and content of the clause, in light of the specific circumstances of the workplace.⁵⁹

Should family violence clauses be encouraged?

16.47 The ALRC considers that family violence clauses in enterprise agreements are likely to serve an important function and to increase the safety of employees experiencing family violence. Family violence clauses recognise and address the impact of family violence on employees and workplaces, and may provide a flexible way to negotiate workplace responses to family violence, and provide enforceable entitlements.

16.48 There are currently a range of family violence clauses that are either included, or are being negotiated for inclusion, in enterprise agreements around Australia.⁶⁰ In 2010, the first family violence clauses were included in the enterprise agreements for Surf Coast Shire and University of New South Wales (UNSW) professional staff. Both agreements were subsequently approved by FWA.⁶¹ The Australian Services Union (ASU) clause was included in the Surf Coast Shire agreement and is reproduced below.⁶²

ASU Victorian Authorities and Services Branch Family Violence Clause

FAMILY VIOLENCE

1 General Principle

- (a) This Council/shire recognises that employees sometimes face situations of violence or abuse in their personal life that may affect their attendance or performance at work. Therefore, the Council/shire is committed to providing support to staff that experience family violence.

2 Definition of Family Violence

- (a) This Council/shire accepts the definition of family violence as stipulated in the Family Violence Protection Act 2008 (Vic). And the definition of family violence includes physical, sexual, financial, verbal or emotional abuse by a family member.

59 A range of stakeholders supported the inclusion of family violence clauses on this basis: ACTU, *Submission CFV 39*; ACCI, *Submission CFV 19*.

60 Family violence clauses have been included in: *Thoroughbred Racing SA Ltd Barrier Staff/AWU, Enterprise Agreement 2011*; University of New South Wales (Professional Staff), *Enterprise Agreement 2010*; Surf Coast Shire, *Enterprise Agreement 2010–2013*; *TransGrid Employees Agreement 2010* (NSW); *Brimbank City Council Enterprise Agreement 6 2010* (Vic); *Moyne Shire Council Enterprise Bargaining Agreement No 6 2010* (Vic). They have been logged in: The City of Greater Geelong; St Luke's Family Services Bendigo; Coliban Water Victoria; Health and Community Services Victoria; and the NSW State Government including the Transport Accident Commission. The Maritime Union of Australia is trialling clauses with DP World Stevedores: ADFVC, *Domestic Violence and Workplace Rights and Entitlements Project* <www.austdvclearinghouse.unsw.edu.au/workplace_whats_new.htm> at 28 July 2011.

61 An enterprise agreement only comes into operation after approval by FWA: *Fair Work Act 2009* (Cth) s 54. In addition to ensuring several pre-approval steps have been undertaken by the employer, FWA must be satisfied as to a number of things, including that certain content requirements are met, there are no unlawful terms and that the agreement passes the 'better off overall' test: See *Fair Work Act 2009* (Cth) ss 186–188, 193, 196–200.

62 Surf Coast Shire, *Enterprise Agreement 2010–2013*.

3 General Measures

- (a) Proof of family violence may be required and can be in the form an agreed document issued by the Police Service, a Court, a Doctor, district nurse, maternal and child health care nurse, a Family Violence Support Service, or Lawyer.
- (b) All personal information concerning family violence will be kept confidential in line with Council/shire Policy and relevant legislation. No information will be kept on an employee's personnel file without their express written permission.
- (c) No adverse action will be taken against an employee if their attendance or performance at work suffers as a result of experiencing family violence.
- (e) The council/shire will identify a contact in Human Resources who will be trained in family violence and privacy issues for example training in family violence risk assessment and risk management. The Council/shire will advertise the name of the contact within the Council/shire.
- (f) An employee experiencing family violence may raise the issue with their immediate supervisor or the Human Resources contact. The supervisor may seek advice from Human Resources if the employee chooses not to see the Human Resources contact.
- (g) Where requested by an employee, the Human Resources contact will liaise with the employee's supervisor on the employee's behalf, and will make a recommendation on the most appropriate form of support to provide in accordance with sub clauses 4 and 5.
- (h) The Council/shire will develop guidelines to supplement this clause and which details the appropriate action to be taken in the event that an employee reports family violence.

4 Leave

- (a) An employee experiencing family violence will have access to 20 days per year of paid special leave for medical appointments, legal proceedings and other activities related to family violence. This leave will be in addition to existing leave entitlements and may be taken as consecutive or single days or as a fraction of a day and can be taken without prior approval.
- (b) An employee who supports a person experiencing family violence may take carer's leave to accompany them to court, to hospital, or to mind children.

5 Individual Support

- (a) In order to provide support to an employee experiencing family violence and to provide a safe work environment to all employees, the Council/shire will approve any reasonable request from an employee experiencing family violence for:
 - (i) changes to their span of hours or pattern or hours and/or shift patterns;
 - (ii) job redesign or changes to duties;
 - (iii) relocation to suitable employment within the Council/shire;
 - (iv) a change to their telephone number or email address to avoid harassing contact;
 - (v) any other appropriate measure including those available under existing provisions for family friendly and flexible work arrangements.

- (b) An employee experiencing family violence will be referred to the Employee Assistance Program (EAP) and/or other local resources. The EAP shall include professionals trained specifically in family violence. An employee that discloses to HR or their supervisor that they are experienc[ing] family violence will be given a resource pack of information regarding support services.

16.49 The UNSW clause is more limited, providing a right to request access to existing sick, carer's and compassionate leave for family violence-related purposes; flexible working arrangements, including changes to working hours consistent with the needs of the work unit; and changes to work location, telephone number or email address.⁶³ The clause also states that 'proof' of domestic violence may be required in the form of an agreed document issued by the police service, a court, a medical practitioner, a domestic violence support service or lawyer, or a counselling professional.⁶⁴

16.50 While enterprise agreements covering Commonwealth agencies do not currently include family violence clauses, the Government has expressed support for 'enterprise bargaining on domestic violence clauses in Commonwealth Government agency agreements'.⁶⁵

16.51 Despite their introduction in a number of agreements, there are also a range of concerns about the inclusion of such clauses. On the one hand, stakeholders have expressed concerns about the limited application of enterprise agreements as they do not apply to a large proportion of the Australian workforce and may be insufficient to respond to the needs of employees experiencing family violence. Stakeholders also emphasised that, at times, bargaining items that benefit vulnerable employees, such as family violence clauses, may be excluded from mainstream bargaining processes.⁶⁶ Such a conclusion is borne out by academic research on bargaining outcomes: 'the interests of the majority, based on a male, full-time breadwinner ideal, are often negotiated instead of entitlements which meet women's industrial needs'.⁶⁷

16.52 On the other hand, employer concerns have mirrored those raised in relation to other statutory or workplace entitlements, in particular with respect to the potential costs to business associated with the inclusion of such clauses.⁶⁸

Should there be basic requirements for a family violence clause?

16.53 While some stakeholders advocated the adoption of the ASU clause, or a model family violence clause, the ALRC acknowledges that 'one-size does not fit all'.⁶⁹ As emphasised by the Australian Chamber of Commerce and Industry (ACCI), 'these types of clauses are negotiated with employees on a voluntary basis' and, 'where an

⁶³ University of New South Wales (Professional Staff), *Enterprise Agreement 2010*.

⁶⁴ Ibid.

⁶⁵ G Marcus, 'Interview with Hon Kate Ellis, Federal Minister for Status of Women' (2011) 44 *Australian Domestic and Family Violence Clearinghouse Newsletter* 12.

⁶⁶ Australian Human Rights Commission, *Submission CFV 48*; ACTU, *Submission CFV 39*.

⁶⁷ Australian Human Rights Commission, *Submission CFV 48*.

⁶⁸ See, eg, AFEL, *Submission CFV 158*; Ai Group, *Submission CFV 141*; ACCI, *Submission CFV 128*; ACCI, *Submission CFV 19*.

⁶⁹ ACCI, *Submission CFV 19*.

employer agrees to such clauses, it is because it meets the specific needs of its staff, which may not be true for other workplaces'.⁷⁰ While such entitlements need to be clear and enforceable, clauses must also be sufficiently flexible to allow businesses to meet their particular needs. As a result, the ALRC does not recommend a 'model' family violence clause.

16.54 However, the ALRC considers that family violence clauses should include certain minimum content. Other matters may be more appropriately decided by unions, employer organisations and employees/employers. The ALRC recommends that, at a minimum, family violence clauses should include provisions in relation to:

- when verification of family violence is required and the type of verification;
- confidentiality;
- reporting, roles and responsibilities;
- flexible work arrangements; and
- access to paid leave.⁷¹

16.55 The form these basic requirements take in family violence clauses in specific enterprise agreements is a matter for negotiation.

Verification of family violence

16.56 To ensure the integrity of a workplace human resources system, where there is access to entitlements under a family violence clause, verification of family violence may be required. As discussed in Chapter 15, employees should be entitled to provide a range of 'proof'.

Access to paid leave

16.57 In many cases an employee experiencing family violence will quickly exhaust his or her leave entitlements but will require leave, for example, to attend court proceedings or medical appointments. Employers' provision of additional paid family violence leave is an important component of workplace responses to family violence. However, as stakeholders have emphasised throughout this Inquiry, not all employers are in a position to be able to provide such leave.⁷² Consequently, a family violence clause should specify the leave entitlements of an employee experiencing family violence in a particular workplace, whether in the preferred form of additional family violence leave, access to miscellaneous paid leave, or some other form of existing paid leave.

70 Ibid.

71 A range of stakeholders supported these requirements: ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; National Network of Working Women's Centres, *Submission CFV 20*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

72 See, eg, Ai Group, *Submission CFV 141*; ACCI, *Submission CFV 19*.

Development of guidance material

16.58 The ALRC suggests that the Australian Government should provide ongoing funding to bodies such as the Australian Domestic and Family Violence Clearinghouse (ADFVC) to continue to improve the knowledge and capacity of unions and employer organisations to support employees experiencing family violence, including through provision of training and resources and the development of family violence clauses appropriate in a range of businesses and industries. The ALRC emphasises the need for guidance material to account for the differing size and resources of businesses, recognising that many businesses are ‘small to medium sized without dedicated human resource professionals’.⁷³

16.59 In addition, the ALRC recommends that the FWO should develop a guide to negotiating family violence clauses in enterprise agreements, in consultation with the ADFVC, unions, and employer organisations.⁷⁴ The guide should include information about where and how a clause could be included in an enterprise agreement, what it could encompass and how it could interact with existing workplace policies and initiatives.

16.60 To support the effective operation of such clauses, there is a need for a range of complementary education, training and awareness-raising measures and the development of workplace policies and procedures.⁷⁵ Importantly, education and training with respect to family violence clauses in enterprise agreements should form part of the national education campaign recommended in Chapter 15.

Recommendation 16–4 The Australian Government should support the inclusion of family violence clauses in enterprise agreements. At a minimum, agreements should:

- (a) include a statement outlining when and what type of verification of family violence may be required;
- (b) ensure the confidentiality of personal information supplied;
- (c) establish lines of communication for employees;
- (d) set out relevant roles and responsibilities of employers and employees;
- (e) provide for flexible working arrangements; and
- (f) provide access to paid leave.

⁷³ ACCI, *Submission CFV 128*.

⁷⁴ Suggested by Australian Human Rights Commission, *Submission CFV 48* and supported by Women’s Health Victoria, *Submission CFV 133*; ADFVC, *Submission CFV 124*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 113*; Business SA, *Submission CFV 98*; ACCI, *Submission CFV 19*.

⁷⁵ Australian Human Rights Commission, *Submission CFV 48*; ACTU, *Submission CFV 39*; ACCI, *Submission CFV 19*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

Recommendation 16–5 The Fair Work Ombudsman should develop a guide to negotiating family violence clauses in enterprise agreements, in conjunction with the Australian Domestic and Family Violence Clearinghouse, unions and employer organisations.

Modern awards

16.61 A modern award is an industrial instrument that regulates the minimum terms and conditions for a particular industry or occupation in addition to the statutory minimum outlined by the NES.⁷⁶ A modern award cannot exclude any provisions of the NES but can provide additional detail in relation to the operation of an NES entitlement.

16.62 Under the *Fair Work Act*, a national system employee who is not covered by an enterprise agreement⁷⁷ and is not a ‘high income employee’⁷⁸ may be covered by a modern award.⁷⁹ Evidence suggests that women are likely to be more award-reliant than men.⁸⁰ In general, a modern award applies to employees in a particular industry or occupation and is used as the benchmark for assessing enterprise agreements before they are approved by FWA.

16.63 A number of stakeholders argued that, at the Commonwealth level, existing terms in modern awards are insufficient to respond to the needs of employees experiencing family violence,⁸¹ despite the provisions of the *Fair Work Act* being sufficiently broad to allow scope for the inclusion of family violence-related terms. In 2012 and 2014, FWA will conduct reviews of modern awards. The ALRC recommends that in the course of those reviews, the way in which family violence may be incorporated into modern awards should be considered. The provisions in the *Crown*

76 Beginning in 2008, the Australian Industrial Relations Commission, and then its successor FWA, conducted an award modernisation process which reviewed and rationalised existing awards to create streamlined ‘modern awards’. The award modernisation process was completed by the end of 2009, with 122 modern awards commencing operation on 1 January 2010. FWA continues the modernisation process in relation to enterprise instruments and certain former state awards preserved by the national system. See Fair Work Australia, *About Award Modernisation* <www.fwa.gov.au/index.cfm> at 8 November 2011; A Stewart and P Alderman, ‘Awards’ in CCH Australia, *Australian Master Fair Work Guide* (2010) 147.

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

78 *Ibid* s 47(2).

79 The *Fair Work Act* draws a distinction between where a modern award *covers* an employee, employer, or organisation (where it is expressed to cover them) and where it *applies* (if it actually imposes obligations or grants entitlements): *Ibid* ss 46–48. There is an obligation to comply with a modern award: *Fair Work Act 2009* (Cth) s 45.

80 Australian Government, *Submission to the Fair Work Australia Annual Wage Review 2010*, 19 March 2010, [1.38]. See also ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; National Network of Working Women’s Centres, *Submission CFV 20*.

81 ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*; National Network of Working Women’s Centres, *Submission CFV 20*; Redfern Legal Centre, *Submission CFV 15*; WEAVE, *Submission CFV 14*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

Employees (Public Service Conditions of Employment) Award 2009 (NSW) provides a useful example.

Scope for the inclusion of family violence-related terms

16.64 The *Fair Work Act* prescribes terms which must, must not, or may, be included under a modern award.⁸² While some stakeholders expressed the view that it is necessary or preferable to amend s 139(1) to include a new allowable term or to make specific reference to family violence in the allowable terms,⁸³ the ALRC considers that s 139(1) of the *Fair Work Act* is sufficiently broad to allow scope for the inclusion of family violence-related terms in modern awards.⁸⁴ For example, it provides for the inclusion of terms about:

- type of employment—for example, full-time, part-time or casual,⁸⁵ and ‘terms about the facilitation of flexible working arrangements, particularly for employees with family responsibilities’;⁸⁶
- arrangements for when work is performed—for example, variations to hours of work, rostering, notice periods and working hours;⁸⁷
- leave;⁸⁸ and
- flexibility—although IFAs may only be made to vary the effect of modern award terms including arrangements for when work is performed, rates, allowances and leave loading.⁸⁹

16.65 While the ALRC agrees that specific reference to family violence in s 139(1) might ‘further clarify’ the rights of employees experiencing family violence,⁹⁰ it is not necessary in order to allow the inclusion of family violence-related terms.

16.66 The key Australian precedent for the recognition of family violence in awards is the *Crown Employees (Public Service Conditions of Employment) Award 2009* (NSW), amended in 2011, under which NSW public servants are entitled to five days special leave and use of other forms of leave for the purposes of responding to family violence, as well as flexible working arrangements. There are also a range of other NSW awards

82 See *Fair Work Act 2009* (Cth) ch 2, pt 2–3, div 3.

83 Australian Human Rights Commission, *Submission CFV 48*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; Queensland Law Society, *Submission CFV 21*; National Network of Working Women’s Centres, *Submission CFV 20*; WEAVE, *Submission CFV 14*; Confidential, *Submission CFV 13*; Women’s Health Victoria, *Submission CFV 11*.

84 This view was supported by a number of stakeholders in consultations and submissions. See, eg, ACTU, *Submission CFV 39*; ACCI, *Submission CFV 19*.

85 *Fair Work Act 2009* (Cth) s 139(1)(b).

86 The Explanatory Memorandum to the Fair Work Bill states that the provision which allows terms about type of employment to be included in modern awards would allow modern awards to include terms about the facilitation of flexible working arrangements: Explanatory Memorandum, Fair Work Bill 2008 (Cth) [531].

87 *Fair Work Act 2009* (Cth) s 139(1)(c).

88 *Ibid* s 139(1)(h).

89 *Ibid* s 144. Note, there are certain requirements under s 144(4).

90 ACTU, *Submission CFV 39*.

which have now been varied to include family violence provisions.⁹¹ While the NSW *Crown Employees Award* is a state award, the provision provides a useful guide as to the way an award may incorporate a family violence provision. The provision is reproduced below.⁹²

Crown Employees (Public Service Conditions of Employment) Award 2009 (NSW)

84A. Leave for Matters Arising from Domestic Violence

84A.1 The definition of domestic violence is found in clause 3.71 of this award.

84A.2 Leave entitlements provided for in clause 71, Family and Community Service Leave, clause 79, Sick Leave and clause 81, Sick Leave to Care for a Family Member, may be used by staff members experiencing domestic violence.

84A.3 Where the leave entitlements referred to in subclause 84A.2 are exhausted, Department Heads shall grant Special Leave as per clause 84.11.

84A.4 The Department Head will need to be satisfied, on reasonable grounds, that domestic violence has occurred and may require proof presented in the form of an agreed document issued by the Police Force, a Court, a Doctor, a Domestic Violence Support Service or Lawyer.

84A.5 Personal information concerning domestic violence will be kept confidential by the agency.

84A.6 The Department Head, where appropriate, may facilitate flexible working arrangements subject to operational requirements, including changes to working times and changes to work location, telephone number and email address.

16.67 The NSW *Crown Employees Award* was also varied to incorporate a definition of ‘domestic violence’ as defined in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) and to provide that, where an employee’s leave for matters arising from domestic violence has been exhausted, the Department Head shall ‘grant up to five

91 *NSW Public Health System Nurses’ & Midwives’ (State) Award 2011* (NSW); *Crown Employees (Police Officers) Interim Award 2011*; *Crown Employees (Public Service Conditions of Employment) Award 2009* (NSW); *Crown Employees (Independent Pricing and Regulatory Tribunal 2009) Award 2009* (NSW); *Crown Employees (Independent Transport Safety and Reliability Regulator) Award 2009* (NSW); *Crown Employees (NSW Police Force Administrative Officers and Temporary Employees) Award 2009* (NSW); *Crown Employees (Institute Managers in TAFE) Salaries and Conditions Award 2006* (NSW); *Crown Employees (NSW TAFE Commission—Administrative and Support Staff Conditions of Employment) Award 2005* (NSW); *Crown Employees (Home Care Service of New South Wales—Administrative Staff) Award 2004* (NSW); *Casino Control Authority—Casino Inspectors (Transferred from Department of Gaming and Racing) Award 2004* (NSW); *Crown Employees (Parliament House Conditions of Employment 2004) Award*; *Crown Employees (School Administrative and Support Staff) Award* (NSW); *Crown Employees (Trades Assistants) Award* (NSW); *Zoological Parks Board of New South Wales Employees (State) Award* (NSW); *Crown Employees (Roads and Traffic Authority of New South Wales—Salaried Staff) Award* (NSW); *Independent Commission Against Corruption Award* (NSW); *Crown Employees (Parliamentary Electorate Officers) Award* (NSW); *Crown Employees (Tipstaves to Justices) Award* (NSW); *Livestock Health and Pest Authorities Salaries and Conditions Award* (NSW); *Crown Employees (NSW Police Special Constables) (Police Band) Award* (NSW); *Crown Employees (NSW Police Special Constables (Security)) Award* (NSW).

92 *Crown Employees (Public Service Conditions of Employment) Award 2009* (NSW).

days per calendar year to be used for absences from the workplace to attend to matters arising from domestic violence situations'.⁹³

Should family violence-related terms be included?

16.68 The ALRC considers the inclusion of such terms is consistent with the modern awards objective of promoting social inclusion through increased workforce participation—primarily by ensuring employees experiencing family violence can make flexible working arrangements or access leave to deal with circumstances arising from family violence, which increases the likelihood of their retaining employment.

16.69 The majority of stakeholders who addressed this issue expressed the view that existing terms in modern awards are inadequate to respond to the needs of employees experiencing family violence.⁹⁴ A range of stakeholders supported the inclusion of family violence-related terms in modern awards, in particular to provide a safeguard for victims of family violence covered solely by an award.⁹⁵ For example, the ADFVC submitted that while modern awards may provide for

averaging of hours of work over a certain period, suggesting scope for temporary variation of regular hours, this merely provides a mechanism for the employer to allow scheduling changes where they are mutually agreeable. It does not provide a right or entitlement to temporary (or ongoing) rearrangement of shifts, hours or spans for employees who need time off for court or other appointments, or simply cannot work their regular scheduled hours due to the emotional impact of the violence on their work capacity.⁹⁶

Upcoming reviews of modern awards

16.70 The tension between the need to ensure that modern awards are relevant and take account of changes in community standards and expectations, and the need to ensure a simple and stable modern award system, appears to be resolved in part by the requirement that FWA conduct reviews of the modern award system. FWA will undertake reviews of modern awards in 2012 and 2014 and in the course of those reviews FWA may make determinations varying modern awards. The manner in which the reviews will be conducted is yet to be decided, but is likely to involve public submissions and hearings.⁹⁷

16.71 Under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), FWA is required to undertake an initial review of modern awards to be conducted from 1 January 2012.⁹⁸ The scope of the review is limited to FWA considering whether modern awards achieve the modern awards objectives and are

93 Ibid.

94 ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*; National Network of Working Women's Centres, *Submission CFV 20*; Redfern Legal Centre, *Submission CFV 15*; WEAVE, *Submission CFV 14*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

95 See, eg, ADFVC, *Submission CFV 26*.

96 Ibid.

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

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

operating effectively, without anomalies or technical problems arising from the award modernisation process.⁹⁹

16.72 In addition, s 156 of the *Fair Work Act* provides for review of each modern award every four years. The first review of this kind must commence as soon as practicable after 1 January 2014. The Explanatory Memorandum to the Fair Work Bill stated that ‘these reviews are the principal way in which a modern award is maintained as a fair and relevant safety net of terms and conditions’.¹⁰⁰

16.73 In the course of the reviews, FWA may make determinations varying modern awards, making additional modern awards or revoking existing modern awards. FWA may also vary or revoke a modern award outside of the four-yearly review process if necessary to meet the modern award objectives.¹⁰¹ Accordingly, the ALRC considers that, rather than proposing the inclusion of a new allowable term (which is probably unnecessary in any event), or outlining the form in which family violence-related terms may be incorporated into modern awards, it is more appropriate to defer consideration of these issues as part of the FWA reviews in 2012 and 2014. Therefore, the ALRC recommends that in the course of the 2012 and 2014 reviews of modern awards by FWA, the ways in which family violence may be incorporated into modern awards should be considered.

Recommendation 16–6 In the course of the 2012 review of modern awards by Fair Work Australia, the ways in which family violence terms may be incorporated into awards, consistent with the modern award objectives should be considered.

Recommendation 16–7 In the course of the first four-yearly review of modern awards by Fair Work Australia, beginning in 2014, the inclusion of a model family violence term should be considered.

General protections

16.74 Some victims of family violence are subject to discrimination and adverse treatment in the workplace as a result of their experiences of family violence.¹⁰² Current general protections provisions under the *Fair Work Act* offer limited protection in such circumstances.

16.75 Whether family violence should be included as a separate ground of discrimination under the *Fair Work Act* should be considered in the context of anti-discrimination law more generally. However, the question of whether family violence should be included as a separate ground of discrimination under anti-discrimination

99 Section 134 of the *Fair Work Act* contains the modern awards objective that applies to the performance or exercise of FWA’s modern award powers.

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

101 *Fair Work Act 2009* (Cth) s 157.

102 See, eg. Australian Human Rights Commission, *Submission CFV 48*.

laws falls outside the Terms of Reference for this Inquiry. The ALRC nevertheless recommends that the AHRC examine the possible basis upon which status as an actual or perceived victim of family violence should be included as a protected attribute under Commonwealth anti-discrimination law in the future. The ALRC also suggests that possible inclusion in the *Fair Work Act* be considered once any new ground is included in anti-discrimination legislation.

Overview of the provisions

16.76 Under the *Fair Work Act*, national system employees are entitled to a range of general workplace protections.¹⁰³ Specifically, the Act protects workplace rights and the exercise of those rights, freedom of association and involvement in lawful industrial activities, and provides other protections, including protection from discrimination.¹⁰⁴ Part 3–1 of the *Fair Work Act* contains these general protections which, among other things, prohibit an employer from taking ‘adverse action’,¹⁰⁵ against an employee or prospective employee on the basis of the employee having, exercising or not exercising, or proposing to exercise or not exercise, a ‘workplace right’, or to prevent the exercise of a ‘workplace right’.¹⁰⁶

16.77 It is important to note that where, for example, family violence clauses are included in enterprise agreements, or other family violence-related entitlements are included under workplace laws or instruments, this necessarily expands the workplace rights upon which an adverse action claim under Part 3–1 could be based.

Discrimination

Are the current provisions sufficient?

16.78 Employees experiencing family violence may be ‘subject to direct and indirect adverse treatment in the workplace, as a result of their experience’ of family violence.¹⁰⁷ Stakeholders such as the AHRC submitted that ‘most commonly the adverse treatment manifests as being denied access to leave, flexible work arrangements or their employment being terminated’.¹⁰⁸

103 The Act protects workplace rights and the exercise of those rights; freedom of association and involvement in lawful industrial activities; and provides other protections, including from discrimination.

104 *Fair Work Act 2009* (Cth) ch 3, pt 3–1.

105 Measures that may constitute ‘adverse action’ taken by an employer against an employee include dismissal, injury or discrimination, or, in the case of a prospective employee, refusing to employ or discriminating in the terms or conditions of offer, and threatening any of the above: Ibid s 342(1).

106 A ‘workplace right’ exists where an employee is: entitled to the benefit of, or has a role or responsibility under, a workplace law, instrument, or an order made by an industrial body; able to initiate, or participate in, a process or proceedings under a workplace law or instrument; or has the capacity under a workplace law to make a complaint or inquiry to a person or body to seek compliance with that law or instrument, or in the case of an employee, in relation to their employment: Ibid s 341. Section 341(2) outlines examples of processes and proceedings under a workplace law or instrument.

107 Australian Human Rights Commission, *Submission CFV 48*.

108 Ibid.

16.79 However, employees experiencing family violence may face difficulties in relying on the protected attributes articulated in s 351(1) of the *Fair Work Act*, which prohibits specific forms of ‘adverse action’ being taken for discriminatory reasons:¹⁰⁹

An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person’s race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.¹¹⁰

16.80 In many cases, it is difficult for a person experiencing family violence to prove a ‘causal nexus between the discrimination and an attribute that is currently covered’ by the *Fair Work Act*, for example family responsibilities, disability or sex.¹¹¹ By way of example, the AHRC noted that

an individual who is discriminated against because she or he requires time off work to attend court or to relocate to escape violence may be unable to make a claim under any ground covered by the FWA.¹¹²

16.81 The National Network of Working Women’s Centres illustrated the limited protection afforded by the current provisions through a case study.¹¹³

Case Study

Anne was in an abusive relationship and subject to domestic violence. She was employed as a casual employee. After her employer became aware of the situation the organisation indicated it was prepared to relocate her providing she left the partner. If she failed to provide a written statement indicating she had left, the transfer would be withdrawn. This adverse treatment could not be addressed through current anti-discrimination measures provided for in the *Fair Work Act*. If domestic violence victim status were a stand-alone attribute, the law may have protected Anne.

16.82 In addition, where a person experiencing family violence is able to establish a claim under the existing attributes, where the focus is moved from family violence itself to disability, Victoria Legal Aid has suggested that this may ‘compound feelings of powerlessness’.¹¹⁴

109 Ibid; ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*; National Network of Working Women’s Centres, *Submission CFV 20*; WEAVE, *Submission CFV 14*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

110 *Fair Work Act 2009* (Cth) s 351(1). Note, s 772(1)(f), which extends coverage to non-national system employees, prohibits termination of an employee’s employment on the basis of the same discriminatory grounds. Section 772(1)(f) is more limited than s 351(1) as it only applies to termination of employment, rather than ‘adverse action’ more generally: *Fair Work Act 2009* (Cth) s 772(1)(f).

111 Australian Human Rights Commission, *Submission CFV 48*. See also: ADFVC, *Submission CFV 26*; A Heffernan and L Matahaere, ‘Domestic Violence Discrimination in the Workplace: Is Statutory Protection Necessary?’ (Paper presented at Our Work, Our Lives National Conference on Women and Industrial Relations, Darwin, August 12–13 2010).

112 Australian Human Rights Commission, *Submission CFV 48*.

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

114 Victoria Legal Aid, *Submission CFV 25*. See also Women with Disabilities ACT, *Submission CFV 153*.

16.83 Conversely, stakeholders such as ACCI expressed the view that the existing general protections provisions ‘do provide appropriate protections for employees’.¹¹⁵

A new ground of discrimination?

Anti-discrimination legislation

16.84 Some stakeholders considered that family violence should be included as a protected attribute under Commonwealth, state and territory anti-discrimination legislation as a precondition to including family violence as a ground under the general protections provisions of the *Fair Work Act*.¹¹⁶

16.85 The Australian Government is currently consolidating and harmonising Commonwealth anti-discrimination laws, as well as considering the inclusion of new grounds of discrimination.¹¹⁷ In September 2011, the Attorney-General released a Discussion Paper which, among other things, noted that initial submissions in relation to the consolidation supported the inclusion of ‘domestic violence victim status’ or ‘victim or survivor of domestic violence’ as a protected attribute particularly in the areas of employment and accommodation.¹¹⁸ Submissions in response to the Discussion Paper close on 1 February 2012.¹¹⁹

16.86 The question of whether family violence should be included as a protected attribute under anti-discrimination laws is considered beyond the Terms of Reference for this Inquiry. However, the ALRC is aware of the role played by the AHRC in informing the consolidation process, and in providing an evidence base upon which the Government can consider the inclusion of new grounds. As a result, the ALRC recommends that the AHRC, in consultation with relevant stakeholders, should examine the possible basis upon which status as an actual or perceived victim of family violence should be included as a protected attribute under Commonwealth anti-discrimination law.

16.87 It is instructive to note that several overseas jurisdictions have enacted legislation that prohibits employers from terminating an employee’s employment or otherwise discriminating against them where the employee is, or is perceived to be, a victim of family violence, or where they take time off work, for example, to testify in a

115 See, eg, ACCI, *Submission CFV 19*.

116 ACTU, *Submission CFV 39*; Victoria Legal Aid, *Submission CFV 25*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*.

117 One of the initiatives proposed in Australia’s Human Rights Framework, in April 2010, the Australian Government announced its intention to streamline federal anti-discrimination legislation—*Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); and *Age Discrimination Act 2004* (Cth)—into one piece of legislation to address current inconsistencies and make the system more user-friendly by clarifying relevant rights and obligations. The project is to be delivered through a Better Regulation Ministerial Partnership and will form the basis for the development of harmonised anti-discrimination laws at a state and territory level—a project which is currently being progressed through the Standing Council on Law and Justice (formerly the Standing Committee of Attorneys-General).

118 Commonwealth Attorney-General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws, Discussion Paper* (2011), 23-24.

119 Australian Government Attorney-General’s Department, *Anti-Discrimination Consolidation* <www.ag.gov.au/antidiscrimination> at 2 November 2011.

criminal proceeding, seek a protection order or seek medical attention related to experiences of family violence.¹²⁰ Stakeholders such as Victoria Legal Aid and the ADFVC suggested that ‘Australia should follow international best practice in this area’.¹²¹

Fair Work Act

16.88 Essentially, it should not be necessary for people experiencing family violence to ‘engage in complex legal analysis to demonstrate discrimination’ under the existing grounds.¹²² However, the general protections provisions under the *Fair Work Act* do not operate in isolation and are designed to complement, and are necessarily linked to, Commonwealth, state and territory anti-discrimination legislation. As a result, the ALRC considers that including family violence as a ground under the *Fair Work Act* should be considered, following its inclusion under Commonwealth, state and territory anti-discrimination law.

16.89 Without amendments to anti-discrimination legislation, there are a range of difficulties associated with including family violence as a ground of discrimination under ss 351(1) and 772(1)(f) of the *Fair Work Act*—primarily in relation to how any such ground would be formulated, and the interpretation and operation of s 351(2).

16.90 There are differing views on the meaning and effect of s 351(2) in the context of proposed amendments to s 351(1). Some stakeholders expressed the view that the protection does not apply to action that is not unlawful under any anti-discrimination law in force in the place where the action is taken. In that case, in order for family violence to be included as a separate ground under s 351(1) of the *Fair Work Act*, it would also need to be incorporated under federal, state or territory anti-discrimination laws; or s 351(2) would need to be amended to remove the requirement that the action also be unlawful under anti-discrimination law.¹²³ The other view expressed, with some support from the Explanatory Memorandum to the Fair Work Bill 2008, is that s 351(2) covers action which is covered by federal, state or territory anti-discrimination law but is not unlawful because an exemption or defence applies under that law:

On this view, the prohibition on adverse action contained in the FWA will not apply where an action that would otherwise be unlawful under an anti-discrimination law falls within an existing exemption or defence, making it ‘not unlawful’.¹²⁴

120 See, eg, *California Labor Code* (US) §§ 230, 230.1; *Victims Economic Security and Safety Act* 820 Illinois Compiled Statutes 180 (US) § 30; *New York State Executive Law* (US) §§ 296-1(a); *New York City Administrative Code* (US) § 8-107.1; *Revised Code of Washington* 49 § 4976 (US) § 49.76; *Unlawful Action Against Employees Seeking Protection 2007* Fla Stat §741–313 (US) § 741.313; *Colorado Revised Statutes* (US) §24-34-402.7; *Anti-Violence Against Women and Their Children Act 2004* (Philippines) s 43.

121 ADFVC, *Submission CFV 26*. See also Victoria Legal Aid, *Submission CFV 25*.

122 Redfern Legal Centre, *Submission CFV 15*.

123 ACTU, *Submission CFV 39*; Victoria Legal Aid, *Submission CFV 25*.

124 Australian Human Rights Commission, *Submission CFV 48*. See also Explanatory Memorandum, Fair Work Bill 2008 (Cth), ch 3, pt 3–1.

16.91 Despite these difficulties, the insertion of family violence into ss 351(1) and 772(1)(f) of the *Fair Work Act* as a separate ground of discrimination received widespread support from stakeholders.¹²⁵ Some submitted that the inclusion would ‘align with the objects of the *Fair Work Act* and would provide a significant safeguard to victims of family violence and support their capacity to remain in employment’.¹²⁶ In addition, submissions highlighted that the inclusion would be likely to provide additional compliance incentives for employers, including in light of: the FWO’s role in investigating discrimination;¹²⁷ the applicability of civil penalty provisions;¹²⁸ and the availability of injunctions to prevent adverse action or unlawful termination.¹²⁹

Recommendation 16–8 The Australian Human Rights Commission, in the context of the consolidation of Commonwealth anti-discrimination laws, should examine the possible basis upon which status as an actual or perceived victim of family violence could be included as a protected attribute under Commonwealth anti-discrimination law.

Temporary absence due to illness or injury

16.92 Under ss 352 and 772(1) of the *Fair Work Act*, employees experiencing family violence who have their employment terminated while they are absent from work as a result of a family violence-related illness or injury are entitled to make an application to FWA to deal with a general protections or unlawful termination dispute.¹³⁰

16.93 A prescribed illness or injury exists if the employee:

- provides a doctor’s certificate or statutory declaration for the illness or injury within 24 hours, or within a reasonable period in the circumstances; or

125 ACTU, *Submission CFV 39*; Women’s Legal Services NSW, *Submission CFV 28*; ADFVC, *Submission CFV 26*; Victoria Legal Aid, *Submission CFV 25*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; National Network of Working Women’s Centres, *Submission CFV 20*; Redfern Legal Centre, *Submission CFV 15*; WEAVE, *Submission CFV 14*; Confidential, *Submission CFV 13*; Women’s Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*; Northern Rivers Community Legal Centre, *Submission CFV 08*. Queensland Law Society, *Submission CFV 21* also expressed the view that the insertion would have ‘some merit’.

126 Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*. See also ADFVC, *Submission CFV 26*.

127 The FWO can investigate discrimination against employees and investigate on its own initiative.

128 Sections 351(1) and 772(1)(f) of the *Fair Work Act 2009* (Cth) attract civil penalty provisions under pt 4–1, allowing employees, unions and FWO to commence penalty order proceedings against employers who contravene the general protections provisions.

129 ADFVC, *Submission CFV 26*.

130 Section 352 of the *Fair Work Act* prohibits employers from dismissing an employee because they are temporarily absent from work due to illness or injury of a kind prescribed by the *Fair Work Regulations*. Similarly, s 772(1)(a) of the *Fair Work Act* prohibits employers from terminating the employment of non-national system employees for reasons including temporary absence from work because of illness or injury of a kind prescribed by the *Fair Work Regulations: Fair Work Act 2009* (Cth) ss 352, 772(1)(a).

- is required by the terms of a workplace instrument to notify their employer of an absence from work and to substantiate the reason for the absence, and has complied with those terms; or
- has provided the employer with evidence that would satisfy a reasonable person that the leave is taken for a reason specified in s 97 of the *Fair Work Act* for the taking of paid personal/carer's leave for a personal illness or injury.¹³¹

16.94 An illness or injury is not a prescribed kind of illness or injury if:

- the employee's absence extends for more than three months, or the total absences of the employee amount to more than three months within a 12-month period; and
- the employee is not on paid personal/carer's leave for a purpose mentioned in s 97(1) of the *Fair Work Act* for the duration of the absence.¹³²

16.95 The temporary absence provisions under ss 352 and 772(1)(a) of the *Fair Work Act* only apply in situations involving termination of employment and are both civil remedy provisions.

16.96 For the purposes of the temporary absence provisions, the type of evidence an employee may provide to substantiate the reason for their absence includes: a medical certificate; statutory declaration; and other forms of evidence that would satisfy a reasonable person that the leave is taken for the reasons requested or specified. As a result, where an employee is temporarily absent from work due to a family violence-related illness or injury, the evidentiary requirements appear to be sufficiently broad to ensure that victims of family violence could provide satisfactory evidence of their family violence-related illness or injury.

16.97 If the circumstances under which an employee can access personal/carer's leave under the NES are extended, or additional family violence leave is included, the *Fair Work Regulations* may need to be amended, either to expand the meaning of prescribed illness or injury, or to add an additional provision. Such amendment would be necessary to provide protection to employees experiencing family violence who have their employment terminated while they are temporarily absent from work as a result of a family violence. The ALRC considers that the Australian Government may need to consider this issue in due course.

131 *Fair Work Regulations 2009* (Cth) reg 3.01.

132 *Ibid* reg 3.01.