17. Employment—The *Fair Work Act 2009* (Cth) Continued

Contents

Summary

17.1 Chapters 16 and 17 provide an overview of the *Fair Work Act 2009* (Cth) and examine possible options for reform to the Act, as well as agreements and instruments made under the Act, to address the needs—and ultimately the safety—of employees experiencing family violence. In particular, this chapter examines:

- family violence clauses in enterprise agreements—the ALRC concludes that the Australian Government should encourage the inclusion of family violence clauses, that such clauses should include a range of minimum requirements and proposes that the Fair Work Ombudsman should develop a guide to negotiating such clauses in agreements;
- 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 proposes that the Fair Work Ombudsman should develop a guide to negotiating IFAs in such circumstances;

- modern awards—the ALRC considers ways in which modern awards might incorporate family violence-related provisions and suggests this should be considered in the course of Fair Work Australia's reviews in 2012 and 2014;
- unfair dismissal—acknowledging the broad formulation of 'harsh, unjust and unreasonable', the ALRC suggests consideration of family violence in determining whether 'exceptional circumstances exist' for the purposes of granting an extension of time in which to make an application; and
- the general protections provisions under the *Fair Work Act*—the ALRC suggests that discrimination on family-violence related grounds under those provisions could be considered in the context of the post-implementation review and by the Australian Human Rights Commission.

Enterprise agreements

17.2 The law of employment, as it relates 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.

17.3 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, that can prevail over contracts of employment. [1]

17.4 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 [Fair Work Australia] to facilitate good faith bargaining and the making of enterprise agreements.[2]

17.5 There are three types of enterprise agreements:

- single-enterprise agreements, involving a single employer or one or more employers cooperating in what is essentially a single enterprise;
- multi-enterprise agreements, involving two or more employers that are not all single-interest employers; and
- greenfields agreements, involving a genuinely new enterprise that has not yet employed employees.[3]

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1 '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'.

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

3 Ibid s 172.

17.6 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.[4]

17.7 The *Fair Work Act* lists several categories of matters that may, must, or must not, be included in enterprise agreements:

- 'permitted' matters that *may* be included in an enterprise agreement—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;[5]
- 'mandatory' terms that *must* be included in an agreement—for example, terms in relation to individual flexibility and consultation;[6] and
- 'unlawful terms' that *cannot* be included in an agreement or that are of no effect, such as terms that are discriminatory.[7]

17.8 There are a number of requirements in order for an enterprise agreement to be approved by Fair Work Australia (FWA), one of which is that it must pass the 'better off overall' test (BOOT). 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.[8]

17.9 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.[9]

Individual flexibility arrangements

17.10 Section 202 of the *Fair Work Act* requires that an enterprise agreement must include a 'flexibility term'. A flexibility term allows an employer and an employee to make a specific 'individual flexibility arrangement' (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.[10]

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4 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); Department of Education, Employment and Workplace Relations, *Trends in Federal Enterprise Bargaining, December Quarter 2010* (2010).

5 *Fair Work Act 2009* (Cth) s 172(1).

6 Ibid ss 202, 205.

7 Ibid ss 194, 195, 253.

8 Ibid s 193.

9 See, eg, Ibid Ch 2, Part 2–4, Div 3.

10 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.

17.11 An IFA must meet a range of requirements. In particular, the IFA must be genuinely agreed to by the employer and the employee and there is a requirement that the employee be better off overall than if no IFA had been agreed to.[11]

17.12 If an enterprise agreement does not include a flexibility term, the model flexibility term (prescribed under the *Fair Work Regulations 2009* (Cth)) is taken to be a term of the agreement.[12]

17.13 As a result, there is provision for employees who are covered by an enterprise agreement and who are experiencing family violence to negotiate an IFA with their employer, for example, to vary work arrangements to account for their experiences of family violence.

17.14 In *Family Violence—Employment and Superannuation Law*, Issues Paper 36 (2010) (Employment Law Issues Paper), the ALRC asked what steps could be taken to ensure that employees who are experiencing family violence are better able to access IFAs made under s 202 of the *Fair Work Act.*

17.15 However, the ALRC also outlined concerns expressed in relation to flexibility terms in the context of family violence. In particular, the ALRC noted that as IFAs are negotiated on an individual basis, some victims of family violence may not be in a position to negotiate an effective or useful IFA, specifically where victims fear disclosure of family violence or where their experiences have undermined their independence and confidence.

Submissions and consultations

17.16 Stakeholders expressed divergent views on the role and appropriateness of IFAs in the context of family violence.

17.17 The submission from the Australian Chamber of Commerce and Industry (ACCI) expressed support for IFAs as an instrument able to

> deliver a level of individual flexibility [which] could accommodate employees with tailored conditions. IFAs have sufficient safeguards, can be terminated at short notice and an employer cannot force an employee to sign one or make it a condition of employment.[13]

17.18 Other stakeholders expressed the view that IFAs are not appropriate to deal with family violence and emphasised that the introduction of other measures, such as family violence clauses in enterprise agreements, was preferable.[14]

17.19 Stakeholders also emphasised that if family violence clauses were included in enterprise agreements, it would supplant the need to negotiate an IFA to deal with

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11 *Fair Work Act 2009* (Cth) s 203.

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

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

14 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

circumstances arising from an employee's experience of family violence.[15] For example, the Australian Council of Trade Unions (ACTU) stated:

> The ACTU has consistently voiced concerns over IFAs in relation to the inherent unequal bargaining power between an individual employee and their employer. We have concerns that employees in vulnerable situations, such as those relating to domestic violence, may be placed in an even more unequal and unfair negotiating position if IFAs are the only mechanism for entitlements to leave or flexible work arrangements in family or domestic violence situations.[16]

17.20 Many stakeholders reiterated concerns about bargaining power and the limited likelihood of victims of family violence negotiating IFAs.[17] For example, the Australian Human Rights Commission (AHRC) submitted that:

> research has shown that generally women are less likely than male employees to engage in individual negotiations with an employer. Low paid, low skilled employees, and those employed part-time or casually—all characteristics of women's employment—have been found to have less bargaining power compared to full-time, higher paid, higher skilled employees.[18]

17.21 In addition to general opposition to the use of IFAs in the context of family violence, stakeholders voiced specific concerns, including that:

- many employees are 'unaware of what regulates the terms and conditions of their employment' and 'the level of knowledge and negotiation skills required to access IFAs is high';[19]
- 'for many employees, the prospect of negotiating an IFA could be daunting as it is likely to involve some degree of disclosure of their changed circumstances, with no guarantee of a positive outcome';[20]
- employees experiencing family violence often require immediate flexibility or altered arrangements in order to deal with unforeseen circumstances arising from family violence and 'IFAs do not really take these emergencies that require flexibility into account' even where employers may be willing to negotiate an IFA;[21]
- the process for the application and determination of the BOOT is 'vague, entered into privately between the employer and employee and such agreements do not need pre-approval by Fair Work Australia';[22]

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15 Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

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

17 National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011; Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011. See also, Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.

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

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

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

21 National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011.

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

- difficulty in monitoring and enforcing IFAs; [23] and
- the scope of an IFA is limited by the flexibility term in the enterprise agreement itself.[24]

17.22 Stakeholders also noted that IFAs must meet the genuine needs of both the employee and the employer. The National Network of Working Women's Centres (NNWWC) indicated that, in their experience, 'most employers ... [do not] see an employee's need to attend to anything to do with family violence as their issue'.[25] The Australian Domestic and Family Violence Clearinghouse (ADFVC) agreed, commenting that in practice,

> employers are unlikely to consent to an IFA unless it offers some operational benefit, limiting their practical usefulness to employees with greater bargaining power, those employees whose skills are in demand or harder to replace.[26]

17.23 Few stakeholders favoured the use of IFAs as the most appropriate mechanism through which to address family violence. However some stakeholders expressed support for access to IFAs, in workplaces not covered by an enterprise agreement containing a family violence clause.[27] For example, the ADFVC suggested:

> Where a workplace is not covered by an enterprise agreement containing a specific family violence clause, an IFA may be negotiated in order to seek temporary changes to working patterns, such as shorter or alternative hours or the ability to work from home to care for children.[28]

17.24 The AHRC considered that IFAs may be useful for employees who are in a position to negotiate and who 'recognise the value of negotiating domestic violence provisions to vary their terms and conditions of employment'.[29]

17.25 ACCI expressed concerns in relation to the current use and limitations on use of IFAs by unions. In particular, ACCI emphasised that female employees may be prejudiced by 'industrial tactics' such as limiting the use of IFAs, and utilising union IFA clauses that 'require a majority of the workforce to agree to changing the application of certain conditions in an agreement'. ACCI submitted:

> It is not fair or equitable for female workers in a workplace dominated by male workers to be locked out of agreeing with their employer on individual matters such as leave and when work is performed. In relation to this issue, female workers may need to start or finish work at different times, in order to deal with personal matters, such as attend counselling, seek advice from advisors, pick up a child from school. There may be reasons associated with relevant court orders regarding them or their children. These are sensitive matters best dealt with through individual mechanisms and not, on a collective basis.[30]

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23 Ibid; ADFVC, *Submission CFV 26*, 11 April 2011; Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.
24 National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011.
25 Ibid.
26 ADFVC, *Submission CFV 26*, 11 April 2011.
27 Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011.
28 ADFVC, *Submission CFV 26*, 11 April 2011.
29 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011.
30 ACCI, *Submission CFV 19*, 8 April 2011.

17.26 Consequently, ACCI suggested amendments to the *Fair Work Act* to require, at a minimum, 'that the terms in an IFA are no less favourable as compared to the model modern award clause/regulation'. ACCI emphasised that 'this is not creating a new right, but is giving effect to an existing law which is not working as the Government, nor Parliament, had intended'.[31]

Education and awareness

17.27 A number of stakeholders also emphasised that, while IFAs are not preferable, there may nonetheless be a need for an awareness-raising campaign to draw attention to the fact that IFAs may be negotiated to accommodate the needs of employees experiencing family violence. Women's Health Victoria noted an education campaign should draw attention to the possible use of IFAs and be directed at both employees and employers.[32]

17.28 Submissions also emphasised the need for the provision of information about negotiating IFAs. For example, Domestic Violence Victoria (DV Victoria) and the Domestic Violence Resource Centre Victoria (DVRC Victoria) emphasised the role for unions, employer organisations and FWA in 'promoting and informing employees about their rights to negotiate individual flexibility arrangements in order to ensure equitable access'.[33]

17.29 Similarly, the AHRC recommended that 'information be produced to raise awareness ... about how individual flexibility arrangements can be used to assist employees affected by domestic violence'.[34]

17.30 Some stakeholders also supported the development and availability of sample or model IFAs. Women's Health Victoria suggested such model IFAs could 'show both employers and employees what an individual flexibility arrangement looks like, and could act as a template'.[35]

17.31 The ADFVC indicated that FWA and the Fair Work InfoLine could provide resources and information, suggesting the development of 'a Guide for Employees Experiencing Family Violence, including a section on IFAs that could be downloaded from the FWA (and/or FWO) website or distributed in hardcopy form via other services would potentially be useful'.[36]

17.32 Similarly, ACCI noted that the Fair Work Ombudsman publishes

> Best Practice Guides (and often consults with industry and unions) on various topics and could include information on types of clauses which may be considered by employers and employees. Whilst no one-size fits all clause is appropriate, ACCI would support additional information to be published by the FWO for the benefit of employers and employees when considering bargaining or formulating policies.[37]

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31 Ibid.
32 Women's Health Victoria, *Submission CFV 11*, 5 April 2011.
33 Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011.
34 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011.
35 Women's Health Victoria, *Submission CFV 11*, 5 April 2011.
36 ADFVC, *Submission CFV 26*, 11 April 2011.
37 ACCI, *Submission CFV 19*, 8 April 2011.

17.33 Finally, Women Everywhere Advocating Violence Elimination (WEAVE) suggested that there

> should be a vulnerable employees advocacy service as part of the Fair Work Office in every state whereby vulnerable employees (these might include domestic violence targets, people with disabilities or chronic illness, people with a first language other than English) could apply for support in negotiating flexibility arrangements with their employer appropriate to their circumstances.[38]

ALRC's views

17.34 The ALRC notes comments made by unions and employer organisations with respect to the approaches taken to IFAs by the other, and in relation to the differing views expressed on the merits of collective as opposed to individual bargaining. In addition, the ALRC recognises that there are differing views held by stakeholders as to the usefulness and appropriateness of IFAs in the context of family violence.

17.35 The ALRC considers that 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. As a result, the ALRC acknowledges the potential role IFAs may play in the context of family violence.

17.36 However, the ALRC also notes potential limitations on the usability and effectiveness of IFAs in cases involving family violence. For example, the ALRC is concerned that many employees, including those experiencing family violence, may not have the level of confidence, knowledge or skill required to negotiate an effective IFA. In addition, given the nature of family violence, an employee's circumstances may change abruptly and frequently. Therefore the ALRC considers that the circumstances in which IFAs could help protect employees experiencing family violence may be limited.

17.37 Overall, the ALRC considers that while IFAs may act as one mechanism through which the *Fair Work Act* could account for the needs of employees experiencing family violence, they may not necessarily be the most appropriate in the family violence context. In any event, the ALRC does not consider that any changes could usefully be made to the legislation with respect to IFAs to protect the safety of employees experiencing family violence.

17.38 However, the ALRC does consider that the FWO should develop a guide to negotiating IFAs to respond to the needs of employees experiencing family violence, in consultation with unions and employer organisations. 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.

38 WEAVE, *Submission CFV 14*, 5 April 2011.

Proposal 17–1 The Fair Work Ombudsman should develop a guide to negotiating individual flexibility arrangements to respond to the needs of employees experiencing family violence, in consultation with the Australian Council of Trade Unions and employer organisations.

Family violence clauses

17.39 Increasingly there have been moves—led by bodies such as the ADFVC and unions—to include family violence clauses in enterprise agreements. There are currently a range of family violence clauses that are either included, or are being negotiated for inclusion, in enterprise agreements around Australia.[39] Such clauses are intended to recognise and address the impact of family violence on employees and workplaces, to provide a flexible way employees and employers can negotiate workplace responses to family violence, and to provide enforceable entitlements.

17.40 Key concerns about the inclusion of family violence clauses in enterprise agreements largely mirror the concerns raised in relation to the inclusion of other statutory or workplace entitlements. In addition, as noted above, enterprise agreements 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. To support the effective operation of such clauses, there may be a need for a range of complementary workplace policies and procedures.

Existing clauses

17.41 There are currently a range of family violence clauses that have either been included, or are being negotiated for inclusion, in enterprise agreements around Australia.

17.42 In 2010 the first family violence clauses were included in the enterprise agreements for the Surf Coast Shire and the University of New South Wales (UNSW) professional staff. Both agreements were subsequently approved by FWA.[40] The Australian Services Union (ASU) clause was included in the Surf Coast Shire, agreement and is reproduced below.[41]

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39 Family violence clauses have been included in: 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, NSW State Government including Transport Accident Commission, Thoroughbred Racing SA. The Maritime Union of Australia is trialling clauses with DP World Stevedores: Australian Domestic and Family Violence Clearinghouse, *Domestic Violence and Workplace Rights and Entitlements Project* <www.austdvclearinghouse.unsw.edu.au/workplace_whats_new.htm> at 28 July 2011.

40 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.

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

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.

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 experience family violence will be given a resource pack of information regarding support services.

17.43 The UNSW clause is more limited, providing a right to request:

- access to 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.[42]

17.44 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.[43]

17.45 While enterprise agreements covering Commonwealth agencies do not currently include family violence clauses, the Government has expressed support for enterprise bargaining on family violence clauses in Commonwealth agency agreements. The Hon Kate Ellis, Minister for the Status of Women stated:

> The government supports enterprise bargaining on domestic violence clauses in Commonwealth Government agency agreements. The Australian Government Bargaining Framework (AGEBF) sets out Australian Government policy as it applies to workplace relations arrangements in Australian Government employment consistent with legislative requirements. Australian Public Service (APS) agencies are required to apply the AGEBF when bargaining and non-APS bodies are encouraged to apply the AGEBF. While there are no specific provisions outlining a relationship between personal leave and its utilisation for domestic violence, Section 4.1 of the AGEBF states that workplace agreements are to include terms and

42 University of New South Wales (Professional Staff), *Enterprise Agreement 2010*.
43 Ibid.

> conditions which assist employees in maintaining a healthy work-life balance. In that regard, at the agency level, employers and employees are allowed to bargain on a wide range of matters and develop specific policies including on the use of personal/miscellaneous leave provisions above the statutory minimums.[44]

Submissions and consultations

17.46 In the Employment Law Issues Paper, the ALRC asked whether the inclusion of family violence clauses in enterprise agreements should be encouraged and if so, what provisions such clauses should contain.

17.47 Many stakeholders supported the inclusion of family violence clauses in enterprise agreements.[45] However, many indicated that other approaches, such as amendment of the NES, are preferable.

17.48 Stakeholders also emphasised that, at times, bargaining items that benefit vulnerable employees, such as family violence leave, may be excluded from mainstream bargaining processes. For example, the AHRC submitted that:

> Competing needs of different workplace constituencies can result in bargaining items which specifically benefit women being excluded from bargaining agendas, or if they are included, being traded off for wages or conditions which benefit both male and female employees. Academics have examined bargaining outcomes and concluded that 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.
>
> Leaving the provision of domestic violence leave to enterprise bargaining runs the risk that this issue will be slow to be negotiated, and where it is, that only higher paid workforces which have more bargaining power will be able to negotiate this provision.[46]

17.49 Similarly, the ACTU highlighted:

> The considerable differences in bargaining power of groups of employees limits the capacity to deliver entitlements equally to workers through workplace bargaining alone. Women generally, and in particular, those employed in low paid sectors and those employed on a part-time or casual basis have the lowest bargaining power. It is for this reason that the Government has legislated a paid parental scheme. Victims of family violence are likely to have a history of disrupted work patterns, be on lower incomes and more often be employed in casual and part-time employment and therefore least likely to have access to domestic violence related provisions delivered through the bargaining process.[47]

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

45 Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011; Women's Health Victoria, *Submission CFV 11*, 5 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Redfern Legal Centre, *Submission CFV 15*, 5 April 2011; National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011.

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

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

17.50 Despite these concerns, as outlined above, many stakeholders expressed the view that the inclusion of family violence clauses in enterprise agreements is a 'positive move to protect the safety and industrial rights of women who have experienced family violence, which has resulted in a negative impact on their work entitlements'.[48]

17.51 Overall, there was a general consensus amongst most stakeholders about the nature and content of the family violence clauses. In particular, many supported the adoption of the provisions included in the ASU family violence clause outlined above as a model,[49] noting that the clause is 'seen as best practice and world leading at this stage'.[50]

17.52 Women's Health Victoria noted that family violence clauses may serve a 'dual purpose of acting as a support mechanism for employees experiencing violence, and an educative tool for the organisation as a whole'.[51]

17.53 The ACTU submitted that:

> workplaces and workplace bargaining priorities vary, and that individual unions are best placed to determine the extent to which provisions designed to protect and support employees who are victims of domestic violence are appropriate and / or achievable in particular workplace bargaining situations.[52]

17.54 Similarly, ACCI submitted that 'whilst not discounting the importance of such clauses, it must be acknowledged that they have not been seen as a priority for the majority of workplaces in Australia'.[53]

17.55 ACCI emphasised that 'one-size does not fit all' and that 'these types of clauses are negotiated with employees on a voluntary basis' and 'where an employer agrees to such clauses, it is because it meets the specific needs of its staff, which may not be true for other workplaces'.[54] Accordingly, ACCI stated that it would not support a mandatory family violence clause in enterprise agreements providing a 'suite of new entitlements that was not negotiated between employers and employees in a particular workplace'.[55]

17.56 ACCI also commented that neither the Surf Coast Shire nor the UNSW family violence clauses should be considered 'a "model clause" for inclusion in all agreements'.[56]

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

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

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

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

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

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

54 Ibid.

55 Ibid.

56 Ibid.

17.57 ACCI suggested that the most appropriate approach to addressing family violence in this context is through workplace policies and practices, rather than through mandatory inclusion of family violence clauses in formalised enterprise agreements.

17.58 The Queensland Law Society opposed the inclusion of family violence clauses in enterprise agreements on the basis that 'the relevant legislation is sufficient to protect these rights'. [57]

Education, training and awareness raising

17.59 Most stakeholders also emphasised the need for family violence clauses to be underpinned by an education campaign.[58] For example, Women's Health Victoria expressed the view that:

> Education should include training and awareness raising about the reasons for including a family violence clause, how a workplace can support employees who might be experiencing family violence, and how employees can support their colleagues that are experiencing family violence.
>
> Without a wider training and awareness raising program, the inclusion of family violence clauses in enterprise agreements has the potential to do harm, particularly in workplaces that are not safe, respectful or supportive of gender equity.[59]

17.60 Several stakeholders supported the development of complementary policies, guidelines and other material.[60] For example, both ACCI and the AHRC suggested the development of a guide in relation to family violence clauses in enterprise agreements. ACCI noted that:

> The Fair Work Ombudsman (FWO) publishes Best Practice Guides (and often consults with industry and unions) on various topics and could include information on types of clauses which may be considered by employers and employees. Whilst no one-size fits all clause is appropriate, ACCI would support additional information to be published by the FWO for the benefit of employers and employees when considering bargaining or formulating policies.[61]

17.61 Similarly, the AHRC recommended that such a guide could include existing and model clauses and could be drafted by FWA, in consultation with the ACTU, peak employer bodies, and experts in the field of family violence.[62]

17.62 In consultations, the ADFVC indicated that as part of the Domestic Violence Workplace Rights and Entitlements Project it is developing, with unions and employer organisations, a set of model workplace information and training resources for staff, human resources personnel, union delegates and supervisors.

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

58 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; Women's Health Victoria, *Submission CFV 11*, 5 April 2011. Other suggestions with respect to training, education and raising awareness are dealt with in the context of the national education campaign discussed in Ch 14.

59 Ibid.

60 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011; Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; ACCI, *Submission CFV 19*, 8 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

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

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

ALRC's views

17.63 The ALRC expressed its view in relation to the appropriateness of amending the NES to provide for minimum statutory entitlements in Chapter 16. The ALRC's reasoning with respect to amendments to the NES was reinforced by several of the submissions made in response to the issue of family violence clauses in enterprise agreements, in particular those noting the effect of leaving the provision of family violence-related entitlements to enterprise bargaining.

17.64 In addition, in light of the relatively low proportion of the workforce covered by enterprise agreements, the ALRC notes the limited effect family violence clauses in enterprise agreements may have on a substantial number of employees.

17.65 However, in addition to amendments to the NES, or in the event that the NES are not amended to provide for flexible working arrangements and family violence leave, 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. Including family violence clauses in enterprise agreements would recognise and address the impact of family violence on employees and workplaces, provide a basis upon which employer and employees can work together and provide enforceable entitlements.

17.66 While the ALRC recognises the potential limits of leaving the negotiation of family violence clauses to enterprise bargaining, the ALRC also acknowledges the benefits of such agreements as, given they are negotiated at an individual workplace level, the inclusion of a family violence clause will necessarily be the product of agreement 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.

Minimum requirements

17.67 The ALRC considers that there are several basic requirements family violence clauses should contain but considers other matters may be more appropriately decided by the Government, unions, employer organisations and employees/employers. The basic requirements should include provisions in relation to:

- verification of family violence;
- confidentiality;
- reporting, roles and responsibilities;
- flexible work arrangements; and
- some form of paid leave.

17.68 The ALRC does not consider that the *Fair Work Act* should be amended to provide that it is mandatory for a family violence clause to be included in enterprise agreements. However, the ALRC does consider that the Government, unions and employer organisations should encourage the inclusion of family violence clauses in

enterprise agreements and that agreements should, at a minimum, provide for the requirements outlined above.

Education, awareness and guidance

17.69 The ALRC acknowledges that no one family violence clause will be appropriate to suit all workplaces. While such entitlements need to be clear and enforceable, clauses must also be sufficiently flexible to allow businesses to meet their particular needs. Therefore the ALRC suggests the development of a number of model family violence clauses.

17.70 The ALRC also suggests that the Government should provide ongoing funding to bodies such as the 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 as well as the development of model family violence clauses appropriate in a range of businesses and industries.

17.71 In addition, the ALRC proposes that the FWO should develop a guide to negotiating family violence clauses in enterprise agreements, in consultation with the ADFVC, the ACTU and employer organisations. 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. Importantly, education and training with respect to family violence clauses in enterprise agreements should form part of the national education campaign recommended in Chapter 14.

Proposal 17–2 The Australian Government should encourage the inclusion of family violence clauses in enterprise agreements. Agreements should, at a minimum:

(a) recognise that verification of family violence may be required;

(b) ensure the confidentiality of any personal information disclosed;

(c) establish lines of communication for employees;

(d) set out relevant roles and responsibilities;

(e) provide for flexible working arrangements; and

(f) provide access to paid leave.

Proposal 17–3 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, the Australian Council of Trade Unions and employer organisations.

Awards

17.72 An award is an industrial instrument that sets out minimum terms and conditions in a particular industry or occupation, in addition to any statutory minimum required. Under the national industrial relations system there are currently two main types of awards:

- modern awards; and
- award-based transitional instruments (including former federal and state awards) which are currently being reviewed.

17.73 Beginning in 2008, the Australian Industrial Relations Commission, replaced by FWA, conducted an award modernisation process aimed at reviewing and rationalising existing awards to create a system of 'modern awards'.[63] As a result of this process, there are now 122 industry and occupation modern awards that commenced on 1 January 2010, many of which include transitional provisions.

17.74 FWA is currently reviewing remaining award-based transitional instruments that apply to a single enterprise and where the employer is a constitutional corporation, including federal awards created before 27 March 2006 and former state awards now incorporated under the national system (which became notional agreements preserving state awards).[64]

17.75 In light of the ongoing award modernisation process, and the fact that most national system employees are now covered by modern awards, the focus of this Discussion Paper is on modern awards.

Modern awards

17.76 Under the *Fair Work Act*, a national system employee who is not covered by an enterprise agreement[65] and is not a 'high income employee'[66] may be covered by a modern award.[67] Evidence suggests that women are likely to be more award-reliant than men.[68]

17.77 A modern award is an industrial instrument that sets out minimum terms and conditions for a particular industry or occupation in addition to the statutory minimum outlined by the NES. A modern award cannot exclude any provisions of the NES but

63 *Workplace Relations Act 1996* (Cth) pt 10A came into operation on 27 March 2008 and provided for the modernisation of the federal award system according to specific criteria in pt 10A itself, as well as award modernisation requests from the Minister for Employment and Workplace Relations: *Workplace Relations Act 1996* (Cth) s 576C. See also: Fair Work Australia, *About Award Modernisation* <http://www.fwa.gov.au/index.cfm> at 10 January 2011.

64 On application, FWA may make a modern award. Such applications can be made under sch 6 of *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) from 1 July 2009 to 31 December 2013.

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

66 Ibid s 47(2).

67 There is an obligation to comply with a modern award: Ibid s 45.

68 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 25.

can provide additional detail in relation to the operation of an NES entitlement. 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.

17.78 The *Fair Work Act* draws a distinction between where a modern award *covers* a an employee, employer, or organisation—where it is expressed to cover them—and where it *applies*—if it actually imposes obligations or grants entitlements.[69]

17.79 The *Fair Work Act* prescribes matters which must, must not, and may, be included under a modern award.[70] In a family violence context, the matters of relevance that are usually included in a modern award include:

- type of employment—for example, full-time, part-time or casual,[71] as well as 'terms about the facilitation of flexible working arrangements, particularly for employees with family responsibilities';[72]
- arrangements for when work is performed—for example, variations to hours of work, rostering, notice periods and working hours;[73]
- leave;[74]
- procedures for consultation, representation and dispute settlement;[75] 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.[76]

17.80 Under the current allowable matters there is some scope for a modern award to recognise and accommodate the needs of victims of family violence.

Modern award objectives

17.81 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. Under the objective, FWA must ensure that modern awards, together with the NES:

> provide a fair and relevant minimum safety net of terms and conditions, taking into account:
>
> (a) relative living standards and the needs of the low paid; and
>
> (b) the need to encourage collective bargaining; and

69 *Fair Work Act 2009* (Cth) ss 46–48.
70 See Ibid ch 2, pt 2–3, div 3.
71 Ibid s 139(1)(b).
72 The Explanatory Memorandum to the Fair Work Bill states that modern awards may include terms about the facilitation of flexible working arrangements: Explanatory Memorandum, Fair Work Bill 2008 (Cth) [531].
73 *Fair Work Act 2009* (Cth) s 139(1)(c).
74 Ibid s 139(1)(h).
75 Ibid ss 139(1)(j), 146.
76 Ibid s 144. Note, there are certain requirements under s 144(4).

> (c) the need to promote social inclusion through increased workforce participation; and
>
> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
>
> (e) the principle of equal remuneration for work of equal or comparable value; and
>
> (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
>
> (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
>
> (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.[77]

17.82 Further, the Explanatory Memorandum to the Fair Work Bill provides, in relation to modern awards, that:

> In ensuring the minimum safety net of terms and conditions is relevant, it is anticipated that FWA will take account of changes in community standards and expectations, and that the terms and conditions will be tailored (as appropriate) to the specific industry or occupation covered by the award.[78]

Existing award provisions in other jurisdictions

17.83 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.

17.84 While this 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.[79]

> **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.

77 Ibid s 134.
78 Explanatory Memorandum, Fair Work Bill 2008 (Cth) [518].
79 *Crown Employees (Public Service Conditions of Employment) Award 2009* (NSW).

> 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.

17.85 The 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 days per calendar year to be used for absences from the workplace to attend to matters arising from domestic violence situations.[80]

17.86 There are a range of other NSW awards which have now been varied to include family violence provisions.[81]

Variation and review of modern awards

17.87 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.[82] The scope of the review is limited to FWA considering whether modern awards achieve the modern awards objectives and are operating effectively, without anomalies or technical problems arising from the award modernisation process.

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80 Ibid.

81 *NSW Public Health System Nurses' & Midwives' (State) Award 2011* (NSW); *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 (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).* The ALRC understands the following awards will be varied in the near future: *Crown Employees (NSW Police Force Administrative Officers and Temporary Employees) Award 2009* (NSW); *Crown Employees (NSW Police Special Constables) (Police Band) Award* (NSW); *Crown Employees (NSW Police Special Constables (Security)) Award* (NSW).

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

17.88 In addition, s 156 of the *Fair Work Act* provides for review of each modern award every four years. The first review of this kind must commence as soon as practicable after 1 January 2014. The Explanatory Memorandum to the Fair Work Bill states that 'these reviews are the principal way in which a modern award is maintained as a fair and relevant safety net of terms and conditions'.[83]

17.89 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.[84]

Submissions and consultations

17.90 In the Employment Law Issues Paper, the ALRC asked whether existing terms in modern awards are sufficient to respond to the needs of employees experiencing family violence.

17.91 In addition, the ALRC considered ways in which modern awards might incorporate family-violence related provisions, whether through the use of flexibility terms or whether a new allowable matter may be required under modern awards. In particular, the ALRC asked for stakeholder comment on whether s 139(1) of the *Fair Work Act* should be amended to include an additional allowable matter dealing with family violence.

17.92 The majority of stakeholders who addressed this issue expressed the view that existing terms in modern awards are not sufficient to respond to the needs of employees experiencing family violence.[85] Many stakeholders expressed the same views underlying support for amendment to the NES and the inclusion of family violence clauses in enterprise agreements.

17.93 Several stakeholders also emphasised that 'at the outset it should be noted that women are both more likely to be award-reliant than men, and more likely to experience family violence'.[86] Some also specifically suggested that modern awards be amended in line with the NSW public sector awards containing 'effective and specific family violence clauses'.[87]

17.94 Stakeholders argued that the current IFA and leave provisions in modern awards are inadequate and are not broad enough to allow employees experiencing family violence to take time off work or reorganise work arrangements to attend

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

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

85 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; Explanatory Memorandum, Fair Work Bill 2008 (Cth); 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; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

86 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.

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

appointments, access services and care for children.[88] Similarly, according to the Redfern Legal Centre,

> there appears to be wide variation in the use of flexible working arrangements depending on which industry, the status and role of the employee, and the views of individual managers. Relying on the flexibility provisions alone will not assist all workers dealing with family violence.[89]

17.95 The ADFVC submitted:

> Although the *Fair Work Act* states that modern awards may provide for averaging of hours of work over a certain period, suggesting scope for temporary variation of regular hours, this merely provides a mechanism for the employer to allow scheduling changes where they are mutually agreeable. 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.[90]

17.96 With respect to considering the ways in which modern awards might better protect victims of family violence, stakeholder views were mixed about incorporating a reference to family violence as an allowable matter under s 139(1) of the *Fair Work Act*, or whether the provision was already sufficiently broad to allow the inclusion of family violence provisions in modern awards.

17.97 A number of stakeholders submitted that it is necessary to amend s 139(1) to include a new allowable matter and/or make specific reference to family violence in the allowable matters.[91] Specifically, stakeholders suggested the amendment would allow the inclusion of clauses in relation to family violence and act as a safeguard for victims of family violence covered solely by an award.[92]

17.98 For example, the AHRC stated:

> Amending s 139(1) of the FWA to enable modern awards to expressly include the facilitation of flexible working arrangements for employees affected by domestic violence would provide these vulnerable employees with an important and useful condition.[93]

17.99 The ADFVC suggested that s 139(1)(b) of the *Fair Work Act* be amended to include an additional sentence—'particularly for employees with family responsibilities and employees experiencing family violence'.[94]

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88 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

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

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

91 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; National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Confidential, *Submission CFV 13*, 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.

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

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

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

17.100 Conversely, several stakeholders indicated that the terms of s 139(1) are already sufficiently broad. For example, the ACTU expressed the view that:

> Section 139(1) of the *Fair Work Act 2009* includes provisions for, inter alia:(b) the facilitation of flexible working arrangements, particularly for employees with family responsibilities;(c) variations to working hours; and(h) leave, leave loadings and arrangements for taking leave. As such, s 139 (1) should not impede the capacity of modern awards to include terms for flexible work and leave arrangements for family or domestic violence purposes ... [Although] specific referral to family or domestic violence in s.139(1) would further clarify the rights of employees experiencing family or domestic violence.[95]

17.101 Similarly, ACCI submitted that:

> FWA is able to insert provisions which are more beneficial than the NES and there is no reason why unions or employees could not make an application under the *Fair Work Act 2009* and for FWA to consider that application. Therefore, there is no legislative imperative to create a new allowable award matter, given the availability to deal with such terms within the existing provisions.[96]

17.102 As was the case in response to other proposed amendments, stakeholders emphasised that moves to address family violence in modern awards need to be accompanied by the provision of additional information for both employees and employers and form part of a sustained education and awareness campaign.[97]

17.103 Finally, in consultations and submissions the ALRC received numerous comments about the upcoming FWA reviews of modern awards. For example, in its submission, ACCI noted:

> The creation of new modern awards was the result of an extensive and some would say, exhaustive, consultation process before the AIRC during 2008 to 2009 ... Whilst the process has concluded with the creation of 122 new awards, the process is ongoing with applications by unions and employers, to vary modern awards still occurring. Employers would consider that the ink is barely dry on modern awards and it would be unfair for all parties to be required to embark on a new modernisation process because of the inclusion of a new allowable award matter in the legislation. There is a two yearly review coming up in 2012 which will review all modern awards in any event.[98]

ALRC's views

17.104 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 clauses in modern awards. For example, it provides for the inclusion of terms about: type of employment; arrangements for when work is performed; leave; and flexibility. However, at a Commonwealth level such clauses have not been included to date and, as a result, existing terms in modern awards are insufficient to respond to the needs of employees experiencing family violence.

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95 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011.
96 ACCI, *Submission CFV 19*, 8 April 2011.
97 See, eg, Women's Health Victoria, *Submission CFV 11*, 5 April 2011.
98 ACCI, *Submission CFV 19*, 8 April 2011.

17.105 The ALRC considers the inclusion of such clauses 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 them retaining their employment.

17.106 The tension between the need to ensure that modern awards are relevant and take account of changes in community standards and expectations, on the one hand, with the need to ensure a simple and stable modern award system, on the other, 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.

17.107 Accordingly, the ALRC considers that, rather than proposing the inclusion of a new allowable matter (which is probably unnecessary in any event), or outlining the form in which family violence-related clauses 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 proposes that FWA should, in the course of its 2012 and 2014 reviews of modern awards, consider the way in which family violence may be incorporated into modern awards. The provision in the *Crown Employees (Public Service Conditions of Employment) Awards 2009* (NSW) provides a useful example.

Proposal 17–4 In the course of its 2012 review of modern awards, Fair Work Australia should consider the ways in which family violence may be incorporated into awards in keeping with the modern award objectives.

Proposal 17–5 In the course of its first four-yearly review of modern awards, beginning in 2014, Fair Work Australia should consider the inclusion of a model family violence clause.

Unfair dismissal

17.108 Under the unfair dismissal provisions of the *Fair Work Act*, a person is dismissed if their employment has been terminated on the employer's initiative.[99] An employee is unfairly dismissed if the dismissal was 'harsh, unjust or unreasonable', was not consistent with the Small Business Fair Dismissal Code (if it applies), or was not a case of genuine redundancy.[100]

99 This provision is intended to capture the case law on this issue: *Mohazab v Dick Smith Electronics Pty Ltd* (1995) 62 IR 200. Dismissal includes circumstances where an employee's employment is terminated by their employer or in the case of constructive dismissal. Constructive dismissal includes a range of circumstance where a person is forced to resign as a result of conduct engaged in by their employer, for example threatened dismissal, or in circumstances where the employee has no choice but to resign. See *Fair Work Act 2009* (Cth) s 386.

100 *Fair Work Act 2009* (Cth) s 385.

17.109 Not all employees have access to unfair dismissal remedies under the *Fair Work Act*. Unfair dismissal is available to employees who have completed a 12-month or six-month period of employment with an employer,[101] and who are covered by a modern award, enterprise agreement or earn less than the 'high income threshold'.[102] Casual employees may only access unfair dismissal remedies if they were employed on a regular and systematic basis and had a reasonable expectation of continuing employment.[103]

17.110 The Explanatory Memorandum to the Fair Work Bill provides that the requirement that an employee serve a minimum employment period before having access to an unfair dismissal remedy enables employers to

> have a period of time to assess the capacity and conduct of a new employee without being subject to an unfair dismissal claim if they dismiss the employee during this period.[104]

17.111 However, in light of the disrupted work history of many victims of family violence and the casualised nature of the victim labour force, there are concerns that existing unfair dismissal provisions may offer limited protection to many victims of family violence, given the qualifying requirements.

17.112 An application for unfair dismissal must be lodged with FWA within 14 days of the dismissal.[105] The Explanatory Memorandum to the Fair Work Bill indicates that the aim of the reduced application time is to 'promote quick resolution of claims and increase the feasibility of reinstatement as an option'.[106]

17.113 However, in 'exceptional circumstances', FWA may grant a further period within which to make an application.[107] In determining whether there are exceptional circumstances, FWA must take 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.[108]

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101 Twelve months if the employer is a 'small business employer', that is employs fewer than 15 employees, or six months in other cases: Ibid ss 382, 383.

102 Currently indexed at $108,300.

103 *Fair Work Act 2009* (Cth) s 384(2)(a).

104 Explanatory Memorandum, Fair Work Bill 2008 (Cth) [1512].

105 Under Work Choices the time limit was 21 days. In the Fair Work Bill the time limit was initially 7 days.

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

107 *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.

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

17.114 The Explanatory Memorandum to the Fair Work Bill states that the principal aim of the unfair dismissal framework is 'balancing the needs of business and employees' and the object is to 'provide a quick, flexible and informal process for the resolution of unfair dismissal'.[109]

17.115 In considering whether an individual dismissal is harsh, unjust or unreasonable, FWA must consider a range of factors, and may consider any other matter it deems relevant.[110]

17.116 There are very few matters in which family violence has been raised before industrial tribunals in Australia.[111] It is likely this arises in part due to the reluctance and barriers to disclosure discussed in Chapters 4 and 14. It may also arise as termination of employment occurs on the basis of other factors, the underlying cause of which may be family violence (of which the employer is often unaware). For example, where family violence has an impact on performance.

17.117 However, as the majority of unfair dismissal matters settle at conciliation, there is limited publicly available data on the basis for applications and, as a result, it is difficult to gauge the frequency with which family violence is a factor in unfair dismissal.[112] Data collection issues with respect to unfair dismissal are discussed in chapter 14.

Submissions and consultations

17.118 In the Employment Law Issues Paper, the ALRC noted that the terms of s 387 of the *Fair Work Act* may already be broad enough to cover consideration of family violence but expressed interest in submissions on the extent to which an employee's experience of family violence is or could be considered in unfair dismissal cases as part of the 'harsh, unjust or unreasonable' formulation in practice.

17.119 The ALRC also noted several concerns with respect to access to unfair dismissal for those experiencing family violence, primarily in relation to the requirement that an employee serve a minimum employment period before having access to an unfair dismissal remedy.

17.120 Most stakeholders indicated that family violence is rarely raised in unfair dismissal matters, for a range of reasons arising from:

- reluctance to disclose family violence due to fear, or concern about responses to the disclosure;

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109 Explanatory Memorandum, Fair Work Bill 2008 (Cth) [1507] and [1508].

110 *Fair Work Act 2009* (Cth) s 387.

111 There are several cases in which family violence has been raised, including: *Tamara Jones v Q-Comp* (Unreported, Queensland Industrial Relations Commission, Fisher C, 15 April 2011); Explanatory Memorandum, Fair Work Bill 2008 (Cth); *Morley v Qantas Holidays Ltd* (Unreported, Australian Industrial Relations Tribunal, Hamberger SDP, 31 August 2006); *Swaran Lata Kumar v Macquarie Partnership Lawyers* [2005] NSWIRComm 202; *G Young v G W Closter & Sons Pty Ltd* (Unreported, Australian Industrial Relations Tribunal, Watson SDP, 12 May 1999).

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

- lack of time or emotional energy to pursue a claim; and
- concern about the way in which the matter will be handled.[113]

17.121 ACCI expressed the view that:

> It is unclear why unfair dismissal laws would impact directly on workers experiencing domestic violence, as distinct from a worker experiencing, as but one example, being a victim of crime generally. ACCI is unaware of any case whereby an employee has been dismissed because they are experiencing domestic violence (even if that were to be an employer who also happened to be a spouse or parent). In saying that, FWA is able to take into account all circumstances leading up to the termination of employment, including whether there was a valid reason for termination.[114]

17.122 Stakeholders also emphasised that, in many cases, termination of employment occurs on the basis of other factors, the underlying cause of which may be family violence, and as a result the application focuses on the manifestations without necessarily involving disclosure of the existence of family violence.[115] For example, the NNWWC commented:

> Where there are other factors present to argue a dismissal has been harsh, unjust or unreasonable our advocates would most likely stick to these but this does not address the power of silencing the issue of family violence and prevents it from ever gaining legitimacy as a genuine consideration when a woman experiencing family violence is terminated.[116]

17.123 Some stakeholders expressed the view that the harsh, unjust or unreasonable formulation is already sufficiently broad to allow consideration of an employee's experience of family violence in an unfair dismissal matter if it were raised.[117]

17.124 Several stakeholders emphasised that victims of family violence often have a disrupted work history and, as a result, are often precluded from making an unfair dismissal application not having satisfied the minimum employment period requirement.[118] The ADFVC suggested this potentially excludes 'the most vulnerable workers' and recommended that the 'current qualifying periods and requirement of regular and continuous service with respect to casuals should be removed with respect to victims of family violence'.[119]

17.125 The 14 day time limit within which an application for unfair dismissal must be lodged, except in 'exceptional circumstances', was also raised by stakeholders as a concern. For example, the ADFVC expressed the view that the time limit is particularly onerous for people experiencing family violence:

> For some victims, unfair dismissal proceedings take a back seat to concurrent legal proceedings for family law, criminal charges against the perpetrator, or a protection

113 National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.
114 ACCI, *Submission CFV 19*, 8 April 2011.
115 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.
116 National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011.
117 Redfern Legal Centre, *Submission CFV 15*, 5 April 2011.
118 National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011.
119 ADFVC, *Submission CFV 26*, 11 April 2011.

> order. This difficulty is compounded by the very short timeframe ... the 14 day cut-off period is extremely onerous for applicants generally, and FWA has taken a strict approach in defining the circumstances in which an out of time application may be accepted, leaving many applicants without a remedy under the Act. 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.[120]

17.126 As a result of these concerns, stakeholders suggested that family violence should be one of the factors to be considered by FWA in determining whether exceptional circumstances exist.[121]

ALRC's views

17.127 The ALRC considers that the 'harsh, unjust or unreasonable' formulation and the terms of s 387 of the *Fair Work Act* are sufficiently broad to allow consideration of an applicant's experience of family violence if it were raised in the context of an unfair dismissal application.

17.128 While there is limited publicly available data on the basis for unfair dismissal applications, clearly there are a range of issues, in addition to general barriers to disclosure, adversely impacting on the willingness of applicant's to raise family violence in the context of unfair dismissal applications.

17.129 A number of proposals in this Discussion Paper—to the extent that they assist in raising recognition and awareness of family violence as a workplace issue—may assist in ensuring unfair dismissal is increasingly seen and utilised as a means of recourse for victims of family violence who have their employment terminated unfairly. In addition, the ALRC considers that increased employer awareness, and family violence provisions that provide access to flexible working arrangements and leave, may in turn play a role in preventing dismissal in circumstances where the grounds for termination relate to workplace manifestations of family violence.

Eligibility requirements

17.130 The ALRC considers that the eligibility requirements for unfair dismissal applications, in particular in relation to the minimum employment period, may adversely affect victims of family violence, to the extent that they are more likely to have a disrupted work history. However, the ALRC also acknowledges the need for employers to have a period of time to assess the capacity and conduct of new employees without necessarily facing an unfair dismissal claim should they decide to terminate the employee's employment.

17.131 While the ALRC proposes the removal of eligibility requirements in relation to requesting flexible working arrangements under the NES, it does so only in relation to requests made on the basis of experiencing family violence. The ALRC does not consider it is appropriate to propose a two-tiered system of eligibility for unfair dismissal. As a result, the ALRC does not intend to make any proposals in relation to

120 Ibid.

121 See, eg, Redfern Legal Centre, *Submission CFV 15*, 5 April 2011.

the current minimum employment periods, or requirements in relation to casual employees, which govern eligibility to make an application for unfair dismissal.

Time limit for applications

17.132 The ALRC considers that the current 14 day time limit for unfair dismissal applications is likely to be particularly onerous for victims of family violence. However, the ALRC considers that FWA's power to allow a further period for application in exceptional circumstances is likely to provide a mechanism through which victims of family violence may be granted additional time to make an application.

17.133 While the matters FWA must take into account in deciding whether exceptional circumstances exist appear to be sufficiently broad to allow consideration of family violence as contributing to the 'reason for the delay', the ALRC would be interested in stakeholder comments on the way in which FWA currently considers family violence-related matters in the course of determining whether there are exceptional circumstances.

17.134 To the extent that FWA takes a strict approach, as suggested by some stakeholders, 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. The ALRC welcomes input from stakeholders as to the nature and content of any such training.

Proposal 17–6 Fair Work Australia members should be provided with training to ensure that the existence of family violence is adequately considered in deciding whether there are 'exceptional circumstances' under s 394(3) of the *Fair Work Act 2009* (Cth) that would warrant the granting of a further period within which to make an application for unfair dismissal.

General protections

17.135 Under the *Fair Work Act*, national system employees are entitled to a range of general workplace protections. Specifically, the Act:

- protects workplace rights, and the exercise of those rights;
- protects freedom of association and involvement in lawful industrial activities; and
- provides other protections, including protection from discrimination.[122]

17.136 Part 3–1 of the *Fair Work Act* contains these general protections which, among other things, prohibit an employer from taking 'adverse action' against an employee or prospective employee on the basis of the employee having, exercising or

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

not exercising, or proposing to exercise or not exercise, a 'workplace right', or to prevent the exercise of a 'workplace right'.

17.137 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,[123] and threatening any of the above.[124]

17.138 A 'workplace right' exists where a person:

- is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument (such as an award or agreement) or an order made by an industrial body;
- is able to initiate, or participate in, a process or proceedings under a workplace law or workplace 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 workplace law or instrument, or in the case of an employee, in relation to their employment.[125]

Discrimination

17.139 Section 351(1) of the *Fair Work Act* prohibits specific forms of 'adverse action' being taken for discriminatory reasons:

> 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.[126]

17.140 Similarly, 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.

17.141 However, employees experiencing family violence may face difficulties in relying on these grounds. As a result, an issue in the context of this Inquiry is whether ss 351(1) and 772(1)(f) of the *Fair Work Act* should be amended to include the 'status of an actual or perceived victim of family violence' as a ground of discrimination. There are difficulties associated with such a change because, for the purposes of s 351(1), s 351(2) only prohibits employer action on grounds that are defined in 'any anti-discrimination law in force in the place where the action is taken'. Consequently, in order to include family violence as a separate ground under s 351(1), either s 351(2)

123 Ibid s 342(1).

124 An employee cannot make a general protections dismissal application at the same time as an unfair dismissal application: Ibid s 725.

125 Ibid s 341. Section 341(2) outlines examples of processes and proceedings under a workplace law or instrument.

126 Ibid s 351(1).

would need to be amended, or family violence would need to be included as a ground under other anti-discrimination law.

17.142 The question of whether family violence should be included as a separate ground of discrimination under anti-discrimination laws falls outside the Terms of Reference for this Inquiry. The consolidation and harmonisation of federal anti-discrimination laws is one of the initiatives proposed in Australia's Human Rights Framework and forms the basis of a project being undertaken by the Australian Government that commenced in 2010.[127]

17.143 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 criminal proceeding, seek a protection order or seek medical attention related to experiences of family violence.[128]

Submissions and consultations

17.144 In the Employment Law Issues Paper the ALRC asked about the effectiveness of the current grounds under ss 351(1) and 772(1)(f) of the *Fair Work Act 2009* (Cth), where an employee has been discriminated against for reasons arising from their experiences of family violence, and whether family violence should be inserted as a separate ground of discrimination.[129]

17.145 Overall, stakeholders expressed the view that employees experiencing family violence are 'subject to direct and indirect adverse treatment in the work place, as a result of their experience of' family violence. The AHRC submitted that 'most commonly the adverse treatment manifests as being denied access to leave, flexible work arrangements or their employment being terminated'.[130]

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127 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 Committee of Attorneys-General.

128 *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.

129 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law, ALRC Issues Paper 36* (2011), Questions 18, 19.

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

Protection provided by current provisions

17.146 Some stakeholders emphasised the limited protection ss 351(1) and 772(1)(f) currently provide for employees who are discriminated against on the basis that they are experiencing family violence.[131]

17.147 In particular, stakeholders expressed the view that it is difficult for a victim of 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.[132] The AHRC noted:

> It may not always be possible for an employee to link adverse action or a dismissal which is in truth based on domestic violence to a ground of discrimination covered by FWA. For example, 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.[133]

17.148 The NNWWC illustrated the limited protection afforded by the current provisions through a case study.[134]

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.

17.149 Victoria Legal Aid emphasised that

> these limitations could also compound feelings of powerlessness on the part of a victim/survivor of family violence, if the focus is moved to, for example, injury or illness, rather than family violence itself.[135]

17.150 The ADFVC also noted the limited coverage of the general protections provisions, which do not cover contract workers and highlighted that 'to date there have been few decisions in this area' and that as the majority of complaints ' settle at conciliation there is little publicly available data on the grounds of individual complaints'.[136]

17.151 Finally, several stakeholders highlighted the difficulty raised by s 351(2), but expressed mixed views as to the meaning and effect of the subsection. Some expressed

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131 Ibid; Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; ADFVC, *Submission CFV 26*, 11 April 2011; National Network of Working Women's Centres, *Submission CFV 20*, 6 April 2011; WEAVE, *Submission CFV 14*, 5 April 2011; Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.

132 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011. See also: ADFVC, *Submission CFV 26*, 11 April 2011.

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

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

135 Victoria Legal Aid, *Submission CFV 25*, 7 April 2011.

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

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 this case, in order for family violence to be included as a separate ground under s 351(1) of the *Fair Work Act*, they suggested 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.[137]

17.152 The other view expressed, with some support in 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'.[138]

New ground of discrimination?

17.153 The proposed insertion of family violence into sections 351(1) and 772(1)(f) of the *Fair Work Act* as a separate ground of discrimination received widespread support from stakeholders.[139]

17.154 DV Victoria and DVRC Victoria submitted 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'.[140] Similarly, the ADFVC submitted that:

> express protection of family violence under these provisions accords with the underlying objects of the Fair Work Act which include: enabling fairness and representation at work and the prevention of discrimination by ... protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms.[141]

17.155 In part, stakeholders expressed support on the basis that it 'should not be necessary for victims of family violence to engage in complex legal analysis to demonstrate discrimination under' the existing grounds.[142]

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137 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Victoria Legal Aid, *Submission CFV 25*, 7 April 2011.

138 Australian Human Rights Commission, *Submission CFV 48*, 21 April 2011. See also Explanatory Memorandum, Fair Work Bill 2008 (Cth).

139 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; Victoria Legal Aid, *Submission CFV 25*, 7 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; Confidential, *Submission CFV 13*, 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. Queensland Law Society, *Submission CFV 21*, 6 April 2011 also expressed the view that the insertion would have 'some merit'.

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

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

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

17.156 In addition, submissions also 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,[143] the applicability of civil penalty provisions[144] and the availability of injunctions to prevent adverse action or unlawful termination.[145]

17.157 The Redfern Legal Centre noted that some of the amendments proposed in this Discussion Paper, primarily in relation to family violence leave and flexible working arrangements, 'would expand the workplace rights on which an adverse action claim under Part 3–1 could be based'.[146]

17.158 Victoria Legal Aid and the ADFVC highlighted that several overseas jurisdictions have incorporated protection for victims of family violence under anti-discrimination legislation and suggested that 'Australia should follow international best practice in this area'.[147]

17.159 Some stakeholders expressed the view that the inclusion of any new ground must be accompanied by an education campaign in relation to family violence as a workplace issue.[148]

17.160 As a related matter, and in some views as a precondition, a number of stakeholders also expressed support for the inclusion of family violence as a protected attribute under Commonwealth, state and territory anti-discrimination legislation.[149]

17.161 Finally, ACCI expressed the view that:

> The existing laws have gone through an extensive consultation process and do provide appropriate protections for employees. The general protections provisions have removed the 'dominant purpose' test which make it easier on an aggrieved person to make a complaint, with the onus on the employer to prove that they did not take 'adverse action' for a proscribed reason. ACCI is unaware of any case whereby a person has relied upon family or domestic violence grounds under the former legislation or the *Fair Work Act 2009*.[150]

ALRC's views

17.162 The ALRC acknowledges that some victims of family violence are subject to discrimination and adverse treatment in the workplace as a result of their experiences of family violence and that current general protections provisions under the *Fair Work Act* offer victims limited protection.

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

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

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

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

147 ADFVC, *Submission CFV 26*, 11 April 2011. Victoria Legal Aid, *Submission CFV 25*, 7 April 2011 highlighted legislation in several states in the US, Philippines and Spain.

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

149 Australian Council of Trade Unions, *Submission CFV 39*, 13 April 2011; Victoria Legal Aid, *Submission CFV 25*, 7 April 2011; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011.

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

17.163 However, the general protections provisions under the *Fair Work Act* do not operate in isolation and are necessarily linked to Commonwealth, state and territory anti-discrimination legislation.

17.164 The Australian Government is currently consolidating and harmonising Commonwealth anti-discrimination laws, as well as considering the inclusion of new grounds. The ALRC is aware of the important role played by the AHRC in informing this process, and in providing an evidence base upon which the Government can consider the inclusion of new grounds.[151]

17.165 The question of whether family violence should be included as a separate ground of discrimination under anti-discrimination laws falls outside the Terms of Reference for this Inquiry. However, the ALRC suggests that, in light of the above, the AHRC may wish to consider examining the possible basis upon which status as an 'actual or perceived victim of family violence' should be included as a ground under Commonwealth anti-discrimination law in the future.

17.166 In addition, as outlined above, the Government has undertaken to conduct a post-implementation review of the *Fair Work Act* by January 2012. The ALRC is conscious of the role played by the general protections provisions and the objects underlying their introduction and considers review of the general protections provisions is a systemic issue best conducted in the course of this review.

17.167 Consequently, in light of these processes, and conscious of the need for the ALRC to consider proposals to promote consistency, uniformity and complementary Commonwealth, state and territory laws,[152] rather than making a proposal about the inclusion of a family violence-related ground in the general protections provisions of the *Fair Work Act*, the ALRC considers it may be more appropriate for this issue to be considered in the course of the post-implementation review as well as in the context of new developments in Commonwealth, state and territory anti-discrimination law.

Temporary absence due to illness or injury

17.168 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*.

17.169 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

151 This was illustrated by the work of the AHRC in relation to the inclusion of sexual orientation and gender identity as a ground under anti-discrimination legislation. The consultation report, Australian Human Rights Commission, *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination* (2011), 'aims to instruct and assist the implementation of the national Human Rights Framework and strengthen human rights safeguards for all Australians': Australian Human Rights Commission, *Website* <www.hreoc.gov.au/human_rights/lgbti/lgbticonsult/index.html> at 28 July 2011.

152 As required by the *Australian Law Reform Commission Act 1996* (Cth).

- 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.[153]

17.170 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.[154]

17.171 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*.[155] 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.

17.172 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.

Submissions and consultations

17.173 In the Employment Law Issues Paper, the ALRC expressed the view that where an employee was 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 evidence of their family violence-related illness or injury to satisfy the requirements.

17.174 The ALRC also outlined that under ss 352 and 772(1) of the *Fair Work Act*, victims of 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. The ALRC invited stakeholder comment on whether, in practice, these

153 *Fair Work Regulations 2009* (Cth) reg 3.01.
154 Ibid reg 3.01.
155 As outlined above, some entitlements under the *Fair Work Act* extend to non-national system employees: *Fair Work Act 2009* (Cth) pts 6–3, 6–4. Note, if the NES were amended to provide for some form of paid family violence leave, reg 3.01 of the *Fair Work Regulations 2009* (Cth) would need to be amended to reflect the change.

sections are used and whether they provide a sufficient basis for victims to make such applications.[156]

17.175 While a limited number of stakeholders responded to this issue, those who did expressed the view that the temporary absence provisions are not sufficient to protect employees who are experiencing family violence as they

> do not provide an explicit statement protecting the rights of victims of family violence, nor are they broad enough to encompass all eventualities that may arise in relation to family violence.[157]

17.176 The ADFVC, DV Victoria and DVRC Victoria submissions emphasised that the current provisions do not make provision for the 'non-health related elements of family violence'.[158] Throughout the Inquiry, stakeholders have also expressed concern about the tendency to 'pathologise' family violence.[159]

ALRC's views

17.177 If Proposals 16–3 and 16–4 are adopted, reg 3.01 of the *Fair Work Regulations* would need to be amended to ensure that family violence leave (as a subset of personal/carer's leave) is considered for the purposes of determining whether a prescribed illness or injury exists or does not exist.

17.178 If proposal 16–2 is adopted, creating a separate category of leave, the ALRC suggests that the Government would need to consider whether amendment to the *Fair Work Regulations* would be appropriate in those circumstances.

17.179 The ALRC would be interested in stakeholder comments on any other ways in which the temporary absence provisions could be used or amended to protect employees who are victims of family violence.

Question 17–1 Section 352 of the *Fair Work Act 2009* (Cth) prohibits employers from dismissing an employee because they are temporarily absent from work due to illness or injury. Regulation 3.01 of the *Fair Work Regulations 2009* (Cth) prescribes kinds of illness or injury and outlines a range of other requirements. In what ways, if any, could the temporary absence provisions be amended to protect employees experiencing family violence?

156 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Employment and Superannuation Law, ALRC Issues Paper 36* (2011), Question 20.
157 Australian Services Union Victorian Authorities and Service Branch, *Submission CFV 10*, 4 April 2011.
158 Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*, 6 April 2011.
159 See, eg, M Winter, *Submission CFV 12*, 5 April 2011.