

17. The National Employment Standards

Contents

Summary	413
The NES	414
Statutory safety net	414
Interaction with modern awards and enterprise agreements	414
Family violence—a role for the NES?	415
Extending the right to request flexible working arrangements	415
Family violence and the right to request	416
Potential limitations with the current provision	417
Family violence-related leave	420
Current leave entitlements under the NES	420
A need for family violence leave under the NES?	420
Options for reform	422
Basic requirements	424

Summary

17.1 This chapter considers the National Employment Standards (NES) under the *Fair Work Act 2009* (Cth) which came into effect from 1 January 2010 and enshrine ten minimum statutory entitlements for all national system employees.¹ There are a number of changes to the *Fair Work Act* and employment law in Australia more broadly that will assist in increasing the safety, and responding to the needs, of employees experiencing family violence. Minimum statutory entitlements, such as those provided for under the NES, are important to ensuring fairness and consistency in access to the entitlements and, ideally, to consistent decision making and employer responses.

17.2 As a result, as part of Phase Five of the ALRC's suggested strategy for phased implementation of reforms contained in Part E of this Report, the ALRC recommends that the Australian Government should consider amending the NES. In particular, the ALRC recommends that there should be consideration of: whether family violence should be included as a circumstance in which an employee should have a right to request flexible working arrangements; and whether additional paid family violence-related leave should be included as a minimum statutory entitlement under the NES.

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

The NES

Statutory safety net

17.3 The NES were introduced following significant consultation² to provide a ‘safety net which is fair for employers and employees and supports productive workplaces’.³ The NES replaced the Australian Fair Pay and Conditions Standard (AFPCS)⁴ and many of the entitlements under the AFPCS and then NES arise from a long history of test cases.⁵

17.4 As a result, amendment to the NES, for example to provide for additional leave, would involve a significant change to the *Fair Work Act* framework. With this in mind, the ALRC does not recommend that the NES be amended at this time.

Interaction with modern awards and enterprise agreements

17.5 The intent of the NES to provide 10 minimum and enforceable entitlements is in part reflected in the interaction between the NES, modern awards and enterprise agreements, the rules of which are outlined in s 55 of the *Fair Work Act*.⁶

17.6 The NES is designed to ‘lock in’ to modern awards and enterprise agreements:

It does this by including provisions that specifically allow awards and agreements to deal with specific issues. Modern awards and enterprise agreements can also ‘build on’ the NES by including terms that supplement, or are ancillary or incidental to, the NES.⁷

17.7 The NES are an absolute legislative safety net that cannot be excluded or overridden by a less beneficial individual contract, enterprise agreement or modern award, other than as expressly allowed.⁸ While there is no specific legislative rule about the interaction between the NES and contracts, it is governed by ‘well established principles’ including, for example, that a term in a contract of employment that is less favourable than a statutory entitlement is not effective.⁹

2 Prior to the introduction of the NES, the Australian Government published an Exposure Draft, in response to which it received 129 submissions from stakeholders as well as engaging in broader consultations. The proposed NES were subsequently released on 16 June 2008. The *Fair Work Act 2009* (Cth) retains the substance of the Exposure Draft, with some amendments.

3 Explanatory Memorandum, Fair Work Bill 2008 (Cth), 25.

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

5 See, eg, ACCI, *Submission CFV 19*. See also J Murray and R Owens, ‘The Safety Net: Labour Standards in the New Era’ in A Forsyth and A Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (2009) 40–42.

6 *Fair Work Act 2009* (Cth) s 55.

7 Explanatory Memorandum, Fair Work Bill 2008 (Cth), [233].

8 *Fair Work Act 2009* (Cth) s 55. Note, some provisions of the NES expressly authorise a modern award or enterprise agreement to deal with certain issues in a way that would, or might, otherwise be contrary to the NES. See, eg, *Fair Work Act 2009* (Cth) ss 93, 101, 107(5).

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

Family violence—a role for the NES?

17.8 As noted by the Australian Chamber of Commerce and Industry (ACCI), tribunals and parliaments in Australia have a ‘long history of creating a limited number of minimum employment standards of general application’.¹⁰ As a result, in the course of this Inquiry, two key questions arise when considering amendment to the NES—first, why include provisions relating to family violence, as opposed to other grounds? Secondly, why in the NES, as opposed to other workplace instruments and policies?

17.9 Given the prevalence of family violence and its on employees, workplaces and productivity, the ALRC considers that the NES, in particular with respect to the right to request flexible work arrangements and family violence-related leave, could play an important role in responding to family violence when it becomes a workplace issue.

17.10 While important, the Australian Domestic and Family Violence Clearinghouse (ADFVC) argues that mechanisms other than statutory entitlements alone are inadequate, as statutory entitlements are ‘fundamental to achieving widespread change to address the impact of family violence in the workplace’.¹¹ This is in part because provision of such entitlements acknowledges that ‘dealing with family violence is a community rather than just an individual responsibility’.¹²

17.11 However, amendment to the NES would involve a significant change to the *Fair Work Act* framework after already extensive consultations surrounding the introduction of the Act. In addition, there is a need to build a foundation for any such changes, in order to balance the needs of employees with the economic and practical realities faced by businesses and employers. As a result, in line with the phased approach to implementation outlined in Chapter 15, the ALRC is of the view that consideration of amendments to the NES should occur in accordance with Recommendations 17–1 and 17–2.

Extending the right to request flexible working arrangements

17.12 Under the NES, an employee who satisfies the eligibility requirements—who is a parent or otherwise has responsibility for a child who is under school age, or who is under 18 and has a disability—may request that his or her employer change the employee’s working arrangements to assist with the care of the child.¹³

17.13 The ALRC recommends that as part of Phase 5 of the whole-of-government strategy for phased implementation of reforms contained in this Report, the Australian Government should consider amending s 65 of the *Fair Work Act* to provide that an

10 ACCI, *Submission CFV 19*.

11 ADFVC, *Submission CFV 26*. Further, for example, the AHRC submitted that amendments to the NES ‘are preferable to this issue being left for parties to negotiate in collective workplace agreements. History has shown that clauses which primarily benefit women are slow to become common bargaining claims and be negotiated into workplace agreements’: Australian Human Rights Commission, *Submission CFV 48*.

12 Redfern Legal Centre, *Submission CFV 15*.

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

employee who is experiencing family violence, or who is providing care or support to another person experiencing family violence, may request the employer for a change in working arrangements to assist the employee to deal with circumstances arising from the family violence.

17.14 The ALRC notes that while the Terms of Reference for this Inquiry require the ALRC to focus on family violence, there are potentially a number of circumstances and categories of people to whom the right to request flexible work arrangements could, and should, be extended.

Family violence and the right to request

17.15 In many workplaces, ‘employers and employees work through and deal with many challenging issues affecting workers in their professional and personal lives’,¹⁴ including the impact of family violence. Under existing arrangements, while employees are able to request flexible working arrangements outside the scope of the NES, they are not entitled to a response or reasons and, as a result, there may be a need for a ‘more secure entitlement to access flexible working arrangements’.¹⁵

17.16 Some stakeholders strongly supported the inclusion of family violence as a ground upon which an employee should be entitled to request flexible working arrangements.¹⁶ Provision of flexible working arrangements is likely to ‘enhance the participation and job security’ of employees experiencing family violence, while allowing employees to deal with issues arising from family violence which may impact on their ability to attend work, or work safely and productively.¹⁷ Arrangements that may assist victims of family violence include: a change in shifts or working hours; changes to work contact details; and changes to work location—all of which are likely to contribute to the safety of the employee.

17.17 While it was acknowledged that ‘many employers already provide important support’ in a range of forms,¹⁸ amendment to the NES would avoid the need for victims of family violence to seek casual employment to achieve flexibility, or to rely solely on the ‘goodwill’ of their particular employer to access flexible working

14 ACCL, *Submission CFV 19*.

15 Australian Human Rights Commission, *Submission CFV 48*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

16 Australian Human Rights Commission, *Submission CFV 48*; ACTU, *Submission CFV 39*; Women’s Legal Services NSW, *Submission CFV 28*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; Queensland Law Society, *Submission CFV 21*; National Network of Working Women’s Centres, *Submission CFV 20*; AASW (Qld), *Submission CFV 17*; Redfern Legal Centre, *Submission CFV 15*; WEAVE, *Submission CFV 14*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*; Northern Rivers Community Legal Centre, *Submission CFV 08*.

17 ACTU, *Submission CFV 39*; National Network of Working Women’s Centres, *Submission CFV 20*.

18 ACCL, *Submission CFV 19*.

arrangements.¹⁹ This is particularly important for people experiencing family violence who are often casual employees with little power to negotiate such changes.²⁰

17.18 By way of comparison, some overseas jurisdictions have enacted legislation that entitles victims of family violence to reduce or reorganise their working hours, change workplaces and make other flexible working arrangements.²¹

17.19 If the right to request provisions were amended, the ALRC suggests that s 65 of the *Fair Work Act* should provide that an employee who is experiencing family violence, or who is providing care or support to another person who is experiencing family violence, may request the employer for a change in working arrangements to assist the employee to deal with circumstances arising from the family violence.

17.20 The provision should be broadly formulated to cover care or support provided to a member of the employee's immediate family or household, including children or dependants who may have been affected by family violence,²² as well as in a range of 'other important relationships such as Indigenous kinship ... neighbours or close friends who may well be more likely to be called upon to care or support a victim of family or domestic violence than a member of the family or household'.²³

17.21 The ALRC considers that the evaluation of the effectiveness of the current provision is necessary and each of the concerns identified by stakeholders outlined above should be considered in the course of any proposed amendment.²⁴ While ACCI indicated that it would not support any changes to the *Fair Work Act* at this stage, it noted that 'this is not to say that ACCI believes that all of the laws currently operate as intended and will not require amendment in the future'.²⁵

Potential limitations with the current provision

17.22 There are two aspects of the current provision that are likely to be particularly restrictive for victims of family violence—eligibility and the employer response period. However, there were also a number of other concerns expressed by many stakeholders in relation to the current structure and operation of s 65 of the *Fair Work Act*, including the procedural nature of the provision, the limited availability of enforcement mechanisms and the grounds for refusal.

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

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

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

22 Several stakeholders emphasised the importance of flexible working arrangements in ensuring employees with children are able to care for their children, particularly where they have been affected by family violence: ACTU, *Submission CFV 39*; National Network of Working Women's Centres, *Submission CFV 20*.

23 ACTU, *Submission CFV 100*.

24 Women's Health Victoria, *Submission CFV 11*.

25 ACCI, *Submission CFV 19*.

Eligibility requirements

17.23 To be eligible to request flexible work arrangements, the employee must have 12 months continuous service or, for a casual employee, be a long-term casual employee with a reasonable expectation of continuing employment on a regular and systemic basis.²⁶ The victims of family violence are predominantly women, and generally have a more disrupted work history,²⁷ which may make it more difficult to satisfy eligibility requirements.²⁸

Response period

17.24 An employer must respond to any request for flexible working arrangements by an employee in writing within 21 days and, if refusing the request, must give reasons for doing so.²⁹ The difficulty is that, due to the unpredictable nature of family violence, employees experiencing family violence may need a response sooner, and that such a response period may mean no change to working arrangements, or even reasons for refusal to allow a change, is available when it is most necessary.³⁰ However, stakeholders emphasised that this must be balanced with the need to ensure employers have sufficient time to examine and determine appropriate alternative working arrangements.³¹

Procedural nature of the provision

17.25 Concern has also been expressed that the provision is procedural rather than substantive. That is, it provides that an employee is entitled to request flexible working arrangements, receive a response and, if that request is refused, be provided with a written statement of reasons.³² The rationale for the inclusion of a procedural provision was that a similar provision in the UK had demonstrated that ‘simply encouraging employers and employees to discuss options for flexible working arrangements has been very successful in promoting arrangements that work for both employers and employees’.³³ However, stakeholders have emphasised that there are ‘limitations with only having a right to request and not an entrenched clear entitlement’.³⁴

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

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

28 ADFVC, *Submission CFV 26*. See also: Women’s Legal Services NSW, *Submission CFV 28*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*.

29 *Fair Work Act 2009* (Cth) s 65(4), (5).

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

31 See, eg, ACCI, *Submission CFV 128*.

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

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

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

Limited enforcement or appeal mechanisms

17.26 There are also limited enforcement or appeal mechanisms available where an employee considers a request has been unreasonably refused.³⁵ Section 44 of the *Fair Work Act* provides that an order cannot be made under the civil remedies provisions in relation to contraventions of s 65(5). As a result, civil remedies for breaches of the flexible working arrangement NES do not apply if an employer refuses a request, other than on reasonable business grounds. In addition, s 739 of the *Fair Work Act* provides that FWA must not deal with a dispute about whether an employer had reasonable business grounds to decline a request for flexible working arrangements unless the clause is replicated in an enterprise agreement.³⁶

17.27 Stakeholders submitted that the ‘same rights of redress’ that apply to the other NES should be extended to this provision.³⁷ The ACTU argued that denial of appeal rights to FWA, except where specifically provided for in an enterprise agreement, raised issues of justice, and stated that ‘it is wholly inappropriate that such a basic right to procedural fairness be left to the vagaries of the bargaining framework’.³⁸

Refusal on ‘reasonable business grounds’

17.28 Section 65(5) of the *Fair Work Act* provides that such a request may only be refused on ‘reasonable business grounds’.³⁹ In light of the lack of legislative clarification of what constitutes reasonable business grounds, some stakeholders suggested that the provision should outline an ‘an employer’s obligations to have properly considered the request and reasonably endeavoured to accommodate the request’.⁴⁰

Recommendation 17–1 As part of Phase Five of the whole-of-government strategy for phased implementation of reforms contained in Part E of this Report, the Australian Government should consider amending s 65 of the *Fair Work Act 2009* (Cth) to provide that an employee:

- (a) who is experiencing family violence, or

35 Concern about this was expressed by a number of stakeholders. See, eg, Australian Human Rights Commission, *Submission CFV 48*; ACTU, *Submission CFV 39*.

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

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

38 ACTU, *Submission CFV 39*.

39 *Fair Work Act 2009* (Cth) s 65(5). The *Fair Work Act 2009* (Cth) does not elaborate on what may, or may not, comprise ‘reasonable business grounds’ and there has been no case law regarding the meaning of the phrase. However, there has been significant commentary: see, eg, J Wells, ‘Flexible Work in 2010: The impact of the Fair Work Act 2009 (Cth) on Employer Control of, and Employee Access to, Flexible Working Hours’ (Paper presented at Our Work, Our Lives National Conference on Women and Industrial Relations, Darwin, 12 August 2010) 5–7. In the *Family Provisions Test Case* (2005) 143 IR 245, decided prior to the introduction of the provision, the AIRC formulated a similar entitlement and suggested that such grounds may include cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service: *Family Provisions Test Case* (2005) 143 IR 245, 333.

40 The ACTU proposed adopting wording from the *Equal Opportunity Act 1995* (Vic): ACTU, *Submission CFV 100*.

- (b) who is providing care or support to another person who is experiencing family violence,
- may request the employer for a change in working arrangements to assist the employee to deal with circumstances arising from the family violence.

Family violence-related leave

17.29 The ALRC recommends that as part of Phase Five of the whole-of-government strategy for phased implementation of reforms contained in this Report, the Australian Government should consider amending the NES with a view to including provision for additional paid family violence leave. The ALRC is of the view that there should be a core of basic requirements with respect to family violence leave, including that it should be paid, flexible and easily accessible where necessary, while containing sufficient safeguards to maintain the confidentiality of personal information and the integrity of the leave system.

Current leave entitlements under the NES

17.30 Under the NES, employees are entitled to access a number of categories of paid and unpaid leave, including: parental leave; annual leave; personal/carer's leave; compassionate leave; community service leave; and long service leave.⁴¹ Section 107 of the *Fair Work Act* includes notice and evidence requirements relating to leave under the NES.⁴² An employee who is experiencing family violence may use a combination of leave entitlements to take time off work for purposes related to family violence.⁴³ However, there are restrictions on the use of particular types of leave;⁴⁴ and where family violence occurs over a prolonged period, people experiencing family violence may quickly exhaust their leave entitlements.

A need for family violence leave under the NES?

17.31 In many cases, employers will grant employees access to forms of existing leave in circumstances where it may be required as a result of family violence. However, stakeholders suggest that frequently those experiencing violence exhaust their existing

41 *Fair Work Act 2009* (Cth) ch 2, pt 2-2, div 5-9. Contravention of the leave-related NES (other than unpaid parental leave) is prohibited under s 44 of the *Fair Work Act*, which is a civil remedy provision. Currently, if an employer breaches the NES, an employee, employee organisation or an inspector may make an application for orders in relation to that contravention and the employer may be liable to pay a civil penalty of a maximum of 60 penalty units for each contravention: *Fair Work Act 2009* (Cth) pt 4-1, div 2.

42 *Fair Work Act 2009* (Cth) s 107.

43 AFEI, *Submission CFV 158*; Ai Group, *Submission CFV 141*; DEEWR, *Submission CFV 130*; ACCI, *Submission CFV 128*.

44 For example, personal/carer's leave can only be used in circumstances of personal illness or injury or caring responsibilities. Strictly interpreted such leave could not be used in circumstances such as attending court: *Fair Work Act 2009* (Cth) ch 2, pt 2-2, div 7.

leave entitlements, particularly where the violence occurs over a prolonged period.⁴⁵ In addition, there is currently a discretionary element associated with the granting of leave in cases of family violence. In light of this, the ALRC considers existing leave provisions provided for in the NES may not adequately provide for the needs of employees experiencing family violence.

17.32 Employer organisations expressed significant concerns about the costs associated with the introduction of additional leave entitlements.⁴⁶ In order to address such concerns it is necessary to ensure there is widespread recognition of the need for additional leave, and to ensure that employers—who are likely to shoulder the burden of the additional cost of leave—are satisfied that a ‘strong case is made out for doing so’.⁴⁷ As a result, the ALRC suggests that research, data collection and economic modelling are important precursors to the recommended review of the NES and determination of any quantum of leave.⁴⁸ Further, in examining leave-related costs, the ALRC emphasises the need to factor in current monetary and non-monetary costs to the Australian economy and businesses associated with family violence.⁴⁹

17.33 In light of such opposition to the inclusion of family violence leave under the NES, the ALRC considers that the phased approach and consideration of this issue as suggested in Chapter 15 is vital. In the course of the phased approach, the ALRC considers that it may be appropriate for the Government to amend the *Fair Work Act* to provide for a minimum statutory entitlement to family violence-related leave that will contribute to a universal approach to, and understanding of, family violence and its impact in the workplace.⁵⁰

17.34 While recognising the important role played by other forms of regulation in this area, such as enterprise agreements, the ALRC considers that a minimum statutory entitlement is ultimately necessary and is likely to serve a number of purposes. First, it would ensure a universal entitlement to leave for employees experiencing family violence. This is consistent with the themes identified in the conceptual framework for this Inquiry and would ensure all national system employees would have access to the leave. The ALRC considers that access to family violence leave through bargaining

45 See, eg, ADFVC, *Submission CFV 26*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

46 AFEI, *Submission CFV 158*; Ai Group, *Submission CFV 141*; ACCI, *Submission CFV 128*; CCIWA, *Submission CFV 123*; Business SA, *Submission CFV 98*; ACCI, *Submission CFV 19*.

47 ACCI, *Submission CFV 19*.

48 See Ch 15.

49 See Ch 1 and 15.

50 Submissions received in relation to this issue were overwhelmingly supportive of the introduction of a minimum statutory entitlement to family violence leave: Kingsford Legal Centre, *Submission CFV 161*; AEU, *Submission CFV 125*; NSW Women’s Refuge Movement Working Party, *Submission CFV 120*; Aboriginal & Torres Strait Islander Women’s Legal & Advocacy Service, *Submission CFV 103*; Australian Human Rights Commission, *Submission CFV 48*; ACTU, *Submission CFV 39*; Women’s Legal Services NSW, *Submission CFV 28*; Confidential, *Submission CFV 27*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; Queensland Law Society, *Submission CFV 21*; National Network of Working Women’s Centres, *Submission CFV 20*; AASW (Qld), *Submission CFV 17*; Redfern Legal Centre, *Submission CFV 15*; WEAVE, *Submission CFV 14*; Women’s Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*; Northern Rivers Community Legal Centre, *Submission CFV 08*.

and enterprise agreements may not be sufficient to protect the safety of employees experiencing family violence.⁵¹ Using paid parental leave as an example, the ADFVC submitted that ‘despite several decades of bargaining, success was incremental at best and ultimately, real change has only eventuated through the recently-adopted federal legislative Paid Parental Leave scheme’.⁵²

17.35 Secondly, the introduction of family violence leave as part of the minimum safety net under the NES is likely to play an educative role.⁵³ It gives express recognition to family violence as a national issue that has a significant impact on the Australian economy. It also recognises that both the government and workplaces have a role in, and responsibility for, responding to family violence.⁵⁴ This would build on the work already undertaken by the government in the *National Plan to Reduce Violence against Women and their Children* and similar initiatives noted in Chapter 1.⁵⁵

17.36 Another benefit of including family violence leave under the NES would be the availability of enforcement mechanisms through the application of civil remedy provisions.

Options for reform

17.37 There are a number of options for reform of the NES to provide access to family violence leave.

17.38 As a preliminary step, the ALRC considers that it may be appropriate to provide that, to the extent they are not already able to do so, employees experiencing family violence should be able to access other forms of existing leave for circumstances arising from family violence. In particular, the ALRC suggests that amending the circumstances in s 97 of the *Fair Work Act*, under which personal/carer’s leave can be taken, to include circumstances arising from family violence, may provide employees experiencing family violence with access to leave where necessary in a wider range of situations than is currently the case. For example, this would provide employees with access to personal leave to attend court proceedings, a purpose which is not currently provided for under personal/carer’s leave as it does not relate to illness or injury.⁵⁶

51 ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*.

52 ADFVC, *Submission CFV 26*.

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

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

55 National Council to Reduce Violence Against Women, *National Plan to Reduce Violence Against Women and Their Children (2010-2022)* (2011), Commonwealth of Australia.

56 ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; Queensland Law Society, *Submission CFV 21*; National Network of Working Women’s Centres, *Submission CFV 20*; Redfern Legal Centre, *Submission CFV 15*. The ACTU advocated for the wholesale expansion and extension of personal/carer’s leave, which would also accommodate the needs of employees who care for or support a person experiencing family violence: ACTU, *Submission CFV 39*.

17.39 In addition, the ALRC considers more substantive change is required to provide access to additional leave. While broadly supporting the introduction of some form of family violence leave, stakeholders expressed differing views with respect to the two key options for reform. These options are to provide either:

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

17.40 A range of stakeholders also suggested a new minimum statutory entitlement to family violence leave, paid for by the government in a similar way to the paid parental leave scheme.⁵⁷

17.41 By way of comparison, a number of overseas jurisdictions have enacted legislation that entitles victims of family violence to take leave from work, including specifically identified family violence leave, or requirements to grant ‘reasonable and necessary leave’ for purposes related to experiencing family violence.⁵⁸

Specific family violence leave

17.42 Stakeholders supporting this option expressed the view that it was necessary to articulate the entitlement as an additional, but separate, category of leave in order to:

- reflect the conceptual differences between leave for family violence and other purposes, and to validate the experiences of people experiencing family violence;
- provide a requirement in relation to which employers must develop specific policies and procedures;
- more clearly identify family violence as a possible work health and safety issue;
- allow for different evidentiary requirements from other forms of leave; and
- provide consistency and clarity in light of the introduction of family violence leave under clauses in enterprise agreements.⁵⁹

Additional leave as a subset of personal/carer’s leave

17.43 Incorporating additional family violence leave into existing entitlements may create a ‘less threatening step’ for employees,⁶⁰ and utilise the existing leave system

⁵⁷ Union Roundtable, *Consultation*, Sydney, 30 September 2011.

⁵⁸ For example, entitlements in some US jurisdictions range from three days to 12 weeks, or ‘reasonable and necessary’ leave: *Victims Economic Security and Safety Act* 820 Illinois Compiled Statutes 180 (US) § 20; *Maine Revised Statutes* 26 § 850 (US); *Revised Code of Washington* 49 § 4976 (US); *Hawaii Revised Statutes* 21 § 378–72 (US).

⁵⁹ ADFVC, *Submission CFV 124*. See also Kingsford Legal Centre, *Submission CFV 161*; Women’s Health Victoria, *Submission CFV 133*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 113*; Australian Human Rights Commission, *Submission CFV 48*.

⁶⁰ AEU, *Submission CFV 125*; ACTU, *Submission CFV 100*.

and administrative processes. However, disclosure of family violence would still be required to access any additional leave included as a subset of personal/carer's leave.

17.44 In order for family violence leave to be included as such a subset, the provision would need to be amended to account for circumstances other than those involving personal illness or injury or caring responsibilities. As the provisions operate, an employee can access carer's leave to provide care or support because of illness or injury or an 'unexpected emergency' affecting the person for whom they are caring. However, an employee can only access personal leave due to illness or injury, not where they are affected by an unexpected emergency, such as in circumstances of family violence.⁶¹

Basic requirements

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

- be introduced in the context of a range of initiatives aimed at addressing family violence in the workplace;⁶²
- be accessible in a range of circumstances arising from family violence, including to: attend appointments with support services; receive medical attention; receive legal advice or attend court; arrange or undertake child care; arrange accommodation or relocate; or attend to other immediate safety issues;⁶³
- be accessible as consecutive or single days, or as a fraction of a day;⁶⁴
- be available to employees who are victims of family violence as well employees who need to access such leave to provide care or support to another person, for example a member of the employee's immediate family or household who is experiencing family violence;⁶⁵
- not be subject to a minimum employment or qualifying period, or to be accrued in advance;⁶⁶

61 *Fair Work Act 2009* (Cth) s 97.

62 Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; AASW (Qld), *Submission CFV 17*; Women's Health Victoria, *Submission CFV 11*.

63 Women's Legal Services NSW, *Submission CFV 28*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; Queensland Law Society, *Submission CFV 21*; Women's Health Victoria, *Submission CFV 11*.

64 ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

65 See eg, ACTU, *Submission CFV 100*; Australian Human Rights Commission, *Submission CFV 48*.

66 ACTU, *Submission CFV 39*; Women's Legal Services NSW, *Submission CFV 28*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*.

- be paid;⁶⁷ and
- be subject to verification of entitlement.⁶⁸

Complementary initiatives

17.46 The ALRC considers that there is a need to introduce a range of initiatives to address family violence as an issue affecting the workplace. Recognising the need for a holistic approach to addressing family violence and its impact on Australian workplaces, the ALRC has made a number of overarching recommendations such as with respect to the need for a national education and awareness campaign, and other initiatives.⁶⁹

Paid leave

17.47 There are strong arguments in favour of the need for paid family violence leave, or a combination of paid and unpaid leave, to avoid provision of a ‘hollow’ entitlement, risk further disadvantaging victims of family violence, or to fail to achieve the objects underlying its introduction.⁷⁰ Stakeholders emphasised that ensuring leave is paid recognises that people experiencing family violence are often in a position of financial hardship and allows them to ‘maintain their income’⁷¹ at a time where maintain economic independence and financial security is vital to ‘maintaining suitable housing, ensur[ing] future safety and on the ability to secure on-going family stability for them and their children’.⁷²

17.48 In light of the focus of this part of the Report on ensuring the economic security and independence of employees experiencing family violence, and stakeholder concerns about the possible compounding effect unpaid family violence leave may have, the ALRC has formed the view that any entitlement to family violence leave should provide for paid leave and, possibly, also additional unpaid leave.

67 ACTU, *Submission CFV 39*; Women’s Legal Services NSW, *Submission CFV 28*; Confidential, *Submission CFV 27*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; National Network of Working Women’s Centres, *Submission CFV 20*; Redfern Legal Centre, *Submission CFV 15*; WEAVE, *Submission CFV 14*; Women’s Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

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

69 See, eg, Rec 15–1.

70 Kingsford Legal Centre, *Submission CFV 161*; ACTU, *Submission CFV 39*; Women’s Legal Services NSW, *Submission CFV 28*; Confidential, *Submission CFV 27*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; National Network of Working Women’s Centres, *Submission CFV 20*; Redfern Legal Centre, *Submission CFV 15*; WEAVE, *Submission CFV 14*; Women’s Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

71 Kingsford Legal Centre, *Submission CFV 161*.

72 ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*. See also ACTU, *Submission CFV 39*.

Accessibility

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

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

Entitlement

17.51 Several stakeholders highlighted the impact that family violence often has, not only on the victims, but also on friends, relatives and other household members, including children.⁷³ The Australian Human Rights Commission suggested that the ALRC consider the extension of family violence leave to those ‘assisting and supporting’ employees affected by family violence.⁷⁴

17.52 The ALRC agrees that an employee who is experiencing family violence, or who is required to provide care or support to another person who is experiencing family violence, should be entitled to family violence leave. The ALRC suggests that any definition of another person should include members of immediate family or household but also recognise the kinship and family relationships of Indigenous people as well as people from CALD communities, the living arrangements and relationships of people with disability,⁷⁵ and those in same-sex relationships.⁷⁶

17.53 Under s 96 of the *Fair Work Act*, personal/carer’s leave under the NES accrues on the basis of 10 days paid personal/carer’s leave per year of service. The entitlement accrues progressively during a year of service according to the employee’s ordinary hours of work, and accumulates from year to year.⁷⁷ However, the nature of family violence itself, and the often interrupted work history of victims of family violence, are such that family violence leave should not be subject to a minimum employment or qualifying period, or need to be accrued in advance. Such limitations may ‘undermine the beneficial nature of this type of leave’ and prevent access by those who most require it.⁷⁸

73 ACTU, *Submission CFV 100*; Australian Human Rights Commission, *Submission CFV 48*; National Network of Working Women’s Centres, *Submission CFV 20*.

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

75 People with Disability, *Consultation*, By telephone, 10 October 2011.

76 ACTU, *Submission CFV 100*; LGBTI Community Roundtable, *Consultation*, Sydney, 28 September 2011.

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

78 ADFVC, *Submission CFV 26*. See also ACTU, *Submission CFV 39*; Women’s Legal Services NSW, *Submission CFV 28*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*.

17.54 As outlined above, the notice requirements under s 107 of the *Fair Work Act* provide that an employee must give his or her employer notice of the taking of leave as soon as practicable (which may be a time after the leave has started) and advise the employer of the expected period of the leave.⁷⁹ While, in some cases, it may be difficult for a victim to notify their employer in advance, s 107 appears to strike a balance between the needs of an employee to take leave, often at short notice, with the need for employers to be informed as soon as practicable in order to make appropriate arrangements. The ALRC considers the notice requirements under s 107 of the *Fair Work Act* relating to personal/carer's leave should be mirrored in any provision relating to family violence leave.

17.55 Another entitlement issue raised in submissions, which will need to be considered in the course of any review, is whether perpetrators of family violence should be entitled to access any family violence leave under the NES. The Queensland Law Society stated that 'an employer should not be required to determine who is a victim and who is a perpetrator of domestic violence' and so suggested that 'to ensure access to justice for all parties, these circumstances should apply to both the applicant and the respondent of any family violence action'.⁸⁰ Conversely, stakeholders such as the Kingsford Legal Centre emphasised that 'perpetrators of family violence should not benefit from their actions' and are not usually the ones who require access to leave.⁸¹ In the ALRC's view, access to leave by people using family violence would be contrary to the objects according to which any such leave should be introduced.

Period of leave

17.56 The ALRC is conscious of the need to balance the needs, rights and responsibilities of employees and employers. The ALRC is required, under the *Australian Law Reform Commission Act 1996* (Cth), to consider the cost implications of any recommendation.⁸² The ALRC suggests that the quantum of leave provided for under the NES should be determined in the course of any review into the NES, following consultation with key stakeholders and appropriate analysis of actual periods of leave taken and the projected cost to business.⁸³

17.57 There are differing views as to the most appropriate period of any family violence leave. Many stakeholders submitted that 20 days of paid leave would be appropriate, in line with existing family violence leave entitlements under enterprise agreements.⁸⁴ However, while this period may be appropriate in the context of an

79 *Fair Work Act 2009* (Cth) s 107.

80 Queensland Law Society, *Submission CFV 21*.

81 Kingsford Legal Centre, *Submission CFV 161*.

82 *Australian Law Reform Commission Act 1996* (Cth) s 24 as amended by the *Financial Framework Legislation Amendment Act 2010* (Cth).

83 AFEI, *Submission CFV 158*; ACCI, *Submission CFV 128*; Australian Human Rights Commission, *Submission CFV 48*; National Network of Working Women's Centres, *Submission CFV 20*; ACCI, *Submission CFV 19*.

84 ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*; Women's Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

enterprise agreement negotiated to take into account the circumstances of an individual employer, it may not be appropriate as a statutory minimum.

17.58 Other stakeholders supported an entitlement of up to two days of leave per occasion.⁸⁵ This approach would be in line with the enterprise agreement negotiated at the University of New South Wales.⁸⁶ However, in circumstances of ongoing family violence, this entitlement might result in an employee being entitled to a potentially unlimited amount of leave. Further, processing these applications may impose a significant administrative burden on employers.

Verification of entitlement

17.59 While many stakeholders strongly supported the introduction of family violence leave, many recognised the need to ensure that employees accessing such leave are able to demonstrate their entitlement or experience of family violence in a way that maintains the integrity of the leave system and does not place an undue administrative burden on employers. Employer organisations in particular expressed concern about the provision of an additional category of family violence leave being open to ‘unscrupulous behaviour and abuse’.⁸⁷ To preserve the integrity of the leave system, employees accessing family violence leave must be subject to the same requirements to demonstrate their entitlement to the leave as other forms of leave.

17.60 The ALRC considers that the existing, generally expressed, evidence requirements provided for under s 107 of the *Fair Work Act* should also apply to any family violence leave. However, the types of verification that a victim of family violence may be able to provide to an employer upon request are varied and a number of forms of documentary verification may be appropriate to demonstrate an entitlement to family violence leave. These include a document issued by:

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

85 Queensland Law Society, *Submission CFV 21*.

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

87 Business SA, *Submission CFV 98*. See also ACCI, *Submission CFV 128*; Queensland Law Society, *Submission CFV 21*.

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

17.61 As noted by the OAIC:

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

17.62 Finally, providing employers information about what might constitute appropriate verification could form part of the national education campaign recommended in this Report.⁹⁰

Recommendation 17–2 As part of Phase Five of the whole-of-government strategy for phased implementation of reforms contained in Part E of this Report, the Australian Government should consider amending the National Employment Standards with a view to including provision for additional paid family violence leave.

89 Office of the Australian Information Commissioner, *Submission CFV 18*.
90 Rec 15-1.

