

## 18. Occupational Health and Safety Law

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### Contents

Summary	431
Broader concepts	432
Overview of the OHS system	433
Legislative and strategic framework	433
Review and harmonisation of OHS law	434
Purposes of the OHS system	436
Family violence—a work health and safety issue?	437
The legislative duty of care	437
Research and data collection	442
A focus on education and awareness	444
Codes of Practice and other guidance	446
What form should guidance take?	447
Substance of guidance	450

### Summary

18.1 This chapter examines ways in which the Commonwealth occupational health and safety (OHS) system, in the context of moves to harmonise OHS law across Australia, protects employees experiencing family violence and, where it does not do so, how that might be addressed. In particular, the chapter examines: legislative duties of care; the nature and role of regulatory guidance; the importance of further consideration of family violence as a possible work health and safety issue, including research and data collection; as well as the importance of increased awareness, education and training around family violence and its impact as a possible work health and safety issue.

18.2 This chapter contains two main approaches to the issue of family violence as a possible work health and safety issue. First, under the Commonwealth OHS system, legislative and regulatory duties appear to be sufficiently broad to capture some circumstances in which family violence may affect an employee in the workplace. In these instances, in terms of employer obligations, the risk posed by family violence is analogous to the risk posed by other forms of workplace violence. As a result, lack of knowledge, rather than legislative inadequacies, represent the greatest challenge in such instances and so improving awareness and understanding of family violence as a possible OHS issue is the focus of reforms. The ALRC makes a range of recommendations focused on: increasing awareness of family violence and its impact as a possible work health and safety issue; the incorporation of systems and policies into normal business practice to develop the capacity of employers and employees to

effectively manage family violence as an OHS risk; and data collection mechanisms to establish an evidence base upon which to plan future policy directions in this area.

18.3 Secondly, in instances in which it is more difficult to establish that family violence would engage an employer's duty of care or be covered by existing OHS law, for example where it is more analogous to psychosocial hazards, the ALRC recommends that additional research be undertaken in this area. In particular, the ALRC recommends that Safe Work Australia should identify family violence as a research priority, examine the effect of the harmonised OHS regime on duties and obligations owed in relation to family violence as a possible OHS risk, and consider ways to extent and improve data coverage, collection and analysis in this area.

18.4 The central premise underlying this chapter is that, where family violence is a possible OHS issue, employees should be given the highest level of protection reasonably practicable, and employers should introduce measures to respond to family violence and create and sustain safe work environments in such circumstances.

### **Broader concepts**

18.5 The Model Work Health and Safety Act (Model Act) developed by Safe Work Australia, and the Work Health and Safety Bill 2011 (Cth), move away from the use of 'employer' to a more inclusive view of the primary duty holder, using the term 'person conducting a business or undertaking' (PCBU).<sup>1</sup> However, the term PCBU is not yet used in Commonwealth legislation. Due to the implications of such an expanded definition, and to make the traditional distinction between employers and employees clear, unless referring to the duties under the Model Act, the terms 'employer', and occasionally 'duty holder' when referring specifically to a duty of care, are used in this chapter.

18.6 Similarly, the terms 'employee' and 'worker' are used interchangeably throughout the chapter. Employee is generally used when discussing the distinction between employees and employers as classes of people, and 'worker' for the purposes of the Model Act, recognising that it adopts a broad definition of 'worker' instead of 'employee', due in part to the changing nature of work relationships.<sup>2</sup>

18.7 This chapter uses the term 'workplace' when referring to the place where work is carried out. Under the Model Act and Work Health and Safety Bill, the duty of care is tied to work activities and there is no place of work restriction. Workplace is defined broadly to include any place where work is carried out or where a worker goes, or is likely to be, while at work.<sup>3</sup>

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1 The principal duty holder under the Model Act is a person conducting a business or undertaking, defined in s 5: Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011.

2 Safe Work Australia, *Explanatory Memorandum—Model Work Health and Safety Act* (2010), [38]. 'Worker' is defined as a person who carries out work in any capacity for an employer, including in any of the capacities listed, such as employee, contractor or subcontractor, outworker, apprentice, student or volunteer: Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 s 7.

3 Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 s 8. Note also there is no requirement for an immediate temporal connection between the place or premises and the work to be performed: Safe Work Australia, *Explanatory Memorandum—Model Work Health and Safety Act* (2010), [48]–[50].

## Overview of the OHS system

### Legislative and strategic framework

18.8 Any duties employers may have to address OHS risks that arise as a result of family violence, like other OHS duties, are governed by common law duties and Commonwealth, state and territory legislation and regulations.

18.9 The key elements of the existing Commonwealth framework governing OHS are:

- *Occupational Health and Safety Act 1991* (Cth) (*OHS Act*);
- *Safe Work Australia Act 2008* (Cth) (*SWA Act*);
- *Occupational Health and Safety (Safety Arrangements) Regulations 1991* (Cth) (*OHS Regulations 1991*) and *Occupational Health and Safety (Safety Standards) Regulations 1994* (Cth) (*OHS Regulations 1994*); and
- *Occupational Health and Safety Code of Practice 2008* (Cth) (*OHS Code*).

18.10 The *OHS Regulations* outline processes and outcomes that duty holders must follow or achieve to meet their duties under the *OHS Act*. Unlike the *OHS Act* and *OHS Regulations*, the *OHS Code* does not stipulate mandatory obligations but rather provides practical guidance on safe work practices and risk assessment. The *OHS Code* may be used in court as evidence of the standards of health and safety that employers should achieve.<sup>4</sup>

18.11 The *Safety, Rehabilitation and Compensation Act 1988* (Cth) outlines a workers' compensation scheme and establishes two bodies responsible for its implementation and maintenance—Comcare and the Safety, Rehabilitation and Compensation Commission (the SRCC).<sup>5</sup> The *OHS Act* charges these bodies with ensuring compliance with OHS standards, advising employers and employees on health and safety matters, and formulating policies related to OHS.<sup>6</sup> Comcare and the SRCC also publish supplementary guidance material.

18.12 In addition, in 2002, all Australian governments, the Australian Chamber of Commerce and Industry (ACCI) and the Australian Council of Trade Unions (ACTU) agreed to the *National OHS Strategy 2002–2012* (National Strategy).<sup>7</sup> The National Strategy was reviewed by the Workplace Relations Ministers Council (WRMC) in 2004–2005. One of the functions of Safe Work Australia is to revise and further

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4 *Occupational Health and Safety Code of Practice 2008* (Cth), 18. DHS, *Additional Submission to the Senate Community Affairs Committee Inquiry of the Human Services Legislation Amendment Bill 2010* (2011).

5 *Safety, Rehabilitation and Compensation Act 1988* (Cth) pt VII. The ALRC is not examining workers' compensation in this Inquiry. However, compensation is available for injuries sustained while the employee is at the employee's place of work, suggesting that employees injured by family violence at work may be eligible for compensation: *Safety, Rehabilitation and Compensation Act 1988* (Cth) ss 5A, 6, 14.

6 *Occupational Health and Safety Act 1991* (Cth) ss 12, 12A, 38A, 41, 75A, 77.

7 Safe Work Australia, *National OHS Strategy 2002–2012*.

develop the National Strategy.<sup>8</sup> One area of attention in 2011–2012 is developing a National Work Health and Safety Strategy to replace the current National Strategy.<sup>9</sup>

## **Review and harmonisation of OHS law**

### ***Towards national uniformity***

18.13 Since 2008, OHS law in Australia has been the focus of significant legislative and policy developments. The Work Health and Safety Bill 2011 (Cth) was introduced in July 2011 as part of a harmonisation process to introduce model OHS legislation across Australia.<sup>10</sup> Mirror legislation has also been introduced in a number of other Australian jurisdictions.<sup>11</sup> These reforms ‘represent the most significant reform’ to OHS laws in Australia in the last 30 years.<sup>12</sup>

18.14 By way of background, national uniformity in OHS laws arose as an issue on the Council of Australian Governments’ (COAG) reform agenda and, in 2008, the WRMC ‘agreed that the use of model legislation is the most effective way to achieve harmonisation of OHS laws’.<sup>13</sup> Subsequently, the Commonwealth, States and Territories signed the Intergovernmental Agreement for Regulatory and Operational Reform in OHS (IGA). Under the IGA, the Commonwealth, along with states and territories, committed to establishing a national independent body (which became Safe Work Australia) and the adoption and implementation of model legislation in each jurisdiction.<sup>14</sup>

18.15 The National Review into Model Occupational Health and Safety Laws (National OHS Review) was completed in January 2009.<sup>15</sup> It made a range of recommendations with respect to the development of model legislation aimed at improving safety outcomes, reducing compliance costs and improving regulatory efficiency.<sup>16</sup>

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8 *Safe Work Australia Act 2008* (Cth) s 6.

9 Safe Work Australia, *Agency Budget Statement 2011–2012* (2011), 372.

10 The Bill was introduced on 6 July 2011 and subsequently passed both the House of Representatives and the Senate. The harmonisation process has Council of Australian Governments support: Council of Australian Governments, *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (2008) ss 5.2.5, 5.3.3, 5.4.4.

11 *Work Health and Safety Act 2011* (NSW); *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2011* (ACT); *Work Health and Safety Bill 2011* (Cth); *Work Health and Safety Bill 2011* (SA); *Work Health and Safety Bill 2011* (Tas); *Work Health and Safety Bill 2011* (NT). See also G Rich-Phillips (Assistant Treasurer Victoria), ‘Victoria Calls for Delay to National Occupational Health and Safety Harmonisation’ (Press Release, 28 September 2011); Government of Western Australia Department of Commerce, *WorkSafe Western Australia Commissioner Statement* <[www.commerce.wa.gov.au/worksafe/content/About\\_Us/Legislation/National\\_model\\_act\\_FAQs.html](http://www.commerce.wa.gov.au/worksafe/content/About_Us/Legislation/National_model_act_FAQs.html)> at 21 November 2011.

12 B Sherriff and M Tooma, *Understanding the Model Work and Health Safety Act* (2010), ix.

13 Explanatory Memorandum, *Work Health and Safety Bill 2011* (Cth), 1.

14 Council of Australian Governments, *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (2008) ss 5.2.5, 5.3.3, 5.4.4.

15 The Panel produced two reports, one in October 2008 and another in January 2009.

16 Safe Work Australia, *Explanatory Memorandum—Model Work Health and Safety Act* (2010), 1.

18.16 The model legislation, regulations and codes of practice were released by Safe Work Australia following a detailed process and extensive stakeholder consultation and include:

- the Model Act;<sup>17</sup>
- Model Work Health and Safety Regulations (Model Regulations);<sup>18</sup> and
- Model Codes of Practice, relevantly including ‘How to Manage Work Health and Safety Risks’, ‘How to Consult on Work Health and Safety’; ‘Managing the Work Environment and Facilities’;<sup>19</sup> and ‘Preventing and Responding to Workplace Bullying’.<sup>20</sup>

18.17 However, the Model Act does not contain all detailed provisions required to give effect to legislation of this kind, leaving some matters to the relevant jurisdiction in order to recognise the differing needs of jurisdictions according to their ‘commercial or industrial environment’.<sup>21</sup>

18.18 The Terms of Reference require the ALRC to review current Commonwealth law.<sup>22</sup> However, as the Model Act, Model Regulations and Model Codes of Practice form the basis for the legislation that has been or will be enacted in each jurisdiction, have Commonwealth, state and territory support,<sup>23</sup> and are due to form part of the harmonised OHS regime from 1 January 2012, the discussion below focuses on the content of the model provisions.

### ***Safe Work Australia***

18.19 Safe Work Australia was established in 2009 as a statutory agency to ‘improve occupational health and safety outcomes and workers’ compensation arrangements in Australia’.<sup>24</sup> It is an ‘inclusive, tripartite body comprising 15 members’ including a Chair; the CEO; representatives from the Commonwealth, States and Territories; as well as employee and employer representatives.<sup>25</sup>

18.20 Safe Work Australia’s functions include coordinating and developing national policy relating to OHS and workers’ compensation; developing model OHS legislation and codes of practice; undertaking research, and collecting, analysing and publishing

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17 Endorsed by WRMC on 11 December 2009 and last revised on 23 June 2011.

18 Released by SWA for public comment between 7 December 2010–4 April 2011.

19 Ibid.

20 Released by SWA for public comment between 26 September 2011–16 December 2011.

21 B Sherriff and M Tooma, *Understanding the Model Work and Health Safety Act* (2010), 3.

22 The Terms of Reference are set out at the front of this Report and are available on the ALRC website: <[www.alrc.gov.au](http://www.alrc.gov.au)>.

23 Council of Australian Governments, *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (2008) ss 5.2.5, 5.3.3, 5.4.4.

24 *Safe Work Australia Act 2008* (Cth) s 3.

25 Safe Work Australia <<http://safeworkaustralia.gov.au/AboutSafeWorkAustralia/Corporateinformation/OurMembers/Pages/OurMembers.aspx>> at 18 November 2011.

data. It also plays a role in the development and promotion of strategies to raise awareness of OHS and workers' compensation.<sup>26</sup>

### **Purposes of the OHS system**

18.21 The main object of the Model Act is to 'provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces' by, among other things:

- 1(a) protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work [or from specified types of substances or plant]; and
  - ...
  - (c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment; and
  - (d) promoting the provision of advice, information, education and training in relation to work health and safety; and
  - ...
  - (g) providing a framework for continuous improvement and progressively higher standards of work health and safety; and
  - (h) maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in this jurisdiction.
- 2 In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work [or from specified types of substances or plant] as is reasonably practicable.<sup>27</sup>

18.22 Commentators have noted that 'these changes put safety at the forefront of corporate decision making'.<sup>28</sup> Implicit in the objects of the Model Act is the preventative focus of the OHS system.

18.23 Significantly, the purposes of the OHS system in protecting workers and other persons against harm to their health, safety and welfare, mirror the focus of the ALRC's Terms of Reference to reform legal frameworks to protect the safety of victims of family violence. Accordingly, to the extent that the OHS system is achieving its purposes, this should be synonymous with the protection of workers experiencing family violence where it poses a risk to their health, safety or welfare in a work context. Further, the ALRC considers that the reforms proposed in this chapter align

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26 *Safe Work Australia Act 2008* (Cth) s 6.

27 Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 s 3. Section 3 of the *Occupational Health and Safety Act 1991* (Cth) contains the objects of that Act.

28 B Sherriff and M Tooma, *Understanding the Model Work and Health Safety Act* (2010), ix.

with the objective of the Model Act to provide a framework for continuous improvement and progressively higher standards of work health and safety.

### **Family violence—a work health and safety issue?**

18.24 Throughout this Inquiry it has become apparent that more needs to be done to ensure that employees and employers understand the magnitude of the possible risk family violence and its impact pose as a work health and safety issue.

18.25 A key question underlying this area relates to the point at which family violence may become an OHS issue in the workplace, as opposed to a ‘private’ issue, or one which is more appropriately dealt with by other laws, for example where the conduct may be an offence under criminal laws. According to the National Network of Working Women’s Centres (NNWWC):

Unfortunately, instances where family violence has intruded into the workplace in our experience are not dealt with well, are seen as ‘private matters’ and too often result in serious injury or death, often witnessed by workmates.<sup>29</sup>

18.26 By way of illustration, Ontario’s Health and Safety Guidelines provide an example of how family violence may be identified as a potential source of workplace violence. These guidelines include ‘domestic violence’ as a ‘key concept’, recognising:

A person who has a personal relationship with a worker—such as a spouse or former spouse, current or former intimate partner or a family member—may physically harm, or attempt or threaten to physically harm, that worker at work. In these situations, domestic violence is considered workplace violence.<sup>30</sup>

18.27 Ultimately, the ALRC has formed the view that family violence may, in some cases, pose a risk to the physical and psychological health and safety, not only of employees who are victims of the violence, but also of co-workers and other third parties.

### **The legislative duty of care**

18.28 There are a range of duties owed by both employers and employees under the Model Act.<sup>31</sup> Of particular relevance is the duty of care owed by employers, employees and third parties.<sup>32</sup> Importantly, the Model Act ‘establishes a regime of responsibilities

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

30 Occupational Health and Safety Branch, Ontario Ministry of Labour, *Workplace Violence and Harassment: Understanding the Law* (2010), [1.3].

31 The ALRC does not discuss the duty of care owed by officers of companies and other organisations despite that being one of the significant reforms under the Model Act. Under the Model Act officers must exercise due diligence to ensure corporate compliance and fulfil corporate governance responsibilities: see, eg, B Sherriff and M Tooma, *Understanding the Model Work and Health Safety Act* (2010), ch 3. In addition, employers owe employees a duty of care both at common law and under legislation. The primary focus of this chapter is the legislative duty of care.

32 Aside from the duty of care, the other key duty is the duty to report—OHS laws across Australian jurisdictions currently require reporting of all workplace deaths as well as certain workplace incidents to the relevant authority, such as Comcare or the SRCC. This issue is discussed in detail in the Discussion Paper, in which the ALRC indicated it did not intend to make any proposals for reform: Australian Law Reform Commission, *Family Violence and Commonwealth Laws*, Discussion Paper 76 (2011) ch 18.

and obligations owed by duty holders which is commensurate with their ability to influence safety outcomes’.<sup>33</sup>

***What is an employer’s duty of care with respect to family violence?***

18.29 The Model Act provides a primary duty of care under which a PCBU must ensure, so far as is reasonably practicable:

- the health and safety of workers engaged, or caused to be engaged by the person and whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking;
- the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking;
- the provision and maintenance of a work environment without risks to health and safety; and
- a range of other requirements, including to provide information and training to protect all persons from risks to their health and safety; monitoring of the health of workers for the purposes of preventing illness or injury arising from the conduct of the business or undertaking<sup>34</sup> and a duty to consult.<sup>35</sup>

18.30 As outlined above, the Model Act provides that the primary duty holder is a PCBU and expands the class of persons to whom a duty is owed to ‘workers’, including among others, employees, subcontractors, outworkers, apprentices, students and volunteers.<sup>36</sup> Under this general duty, primary duty holders must take ‘reasonable precautions to prevent workplace related harm to workers and the public, including the possibility of harm to employees from nonemployees’,<sup>37</sup> which the ALRC suggests includes partners, ex partners and other family members who may use family violence against an employee.

18.31 Moreover, the primary duty of care is not limited to the workplace. Rather, the laws apply to work activities wherever they occur and so apply ‘as much to the home as they do to the workplace’.<sup>38</sup>

18.32 With respect to the qualifier of ‘reasonably practicable’, the Explanatory Memorandum to the Model Act explains that ‘the standard of reasonably practicable

33 B Sherriff and M Tooma, *Understanding the Model Work and Health Safety Act* (2010), 49.

34 Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 s 19(1)–(3). Employees also have a duty to care for their own safety and comply and cooperate with reasonable policies and instructions from the employer: Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 s 28.

35 Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011, s 47. Under the *OHS Act*, ‘[a]n employer must take all reasonably practicable steps to protect the health and safety at work of the employer’s employees’: *Occupational Health and Safety Act 1991* (Cth) s 16.

36 Both definitions expand existing definitions of ‘employer’ and ‘employee’: Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 s 7.

37 ACCL, *Submission CFV 19*.

38 They may also apply in the following locations: house, road, airport lounge, hotel room, or shopping centre: B Sherriff and M Tooma, *Understanding the Model Work and Health Safety Act* (2010), ix.



has been generally accepted for many decades as an appropriate qualifier of the duties of care in most Australian jurisdictions'.<sup>39</sup> It requires an employer to do what can reasonably be done in the circumstances, considering:

- the likelihood of the hazard or risk occurring;
- the degree of harm that might result;
- what the person knew, or ought to have known, about the hazard or risk and ways of eliminating or minimising it;
- the availability and suitability of ways to eliminate or minimise the hazard or risk; and
- the associated costs.<sup>40</sup>

***Circumstances in which a duty arises***

18.33 Throughout this Inquiry, stakeholders have expressed a divergence of views about the circumstances in which family violence may give rise to a duty of care under the Model Act, if at all.

18.34 At the outset it is important to note that, in instances of criminal acts, such acts are the responsibility of law enforcement authorities and reporting and responses should be tailored accordingly.

18.35 Safe Work Australia emphasised that, while recognising family violence may 'impact on the workplace, it is not a risk that arises from the conduct of a business or undertaking or work itself' and is therefore 'beyond the scope' of the model work health and safety laws.<sup>41</sup> It also expressed the view that duties in relation to workplace violence generally are limited to reasonably foreseeable risks which arise 'due to the nature of the work, like as in the services sector, banking and cash handling, policing'.<sup>42</sup>

18.36 However, numerous stakeholders have expressed the view that, in some circumstances, family violence may be an OHS issue.<sup>43</sup> The ALRC considers that in some circumstances, where family violence-related incidents occur in the workplace and affect the health and safety of workers in that workplace, that PCBU's may well owe a primary duty of care.

18.37 The analogy with other forms of workplace violence is a useful one. A PCBU owes a duty to ensure, so far as is reasonably practicable, the health and safety of workers and provision of a safe working environment, which encompasses the

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39 Safe Work Australia, *Explanatory Memorandum—Model Work Health and Safety Act* (2010), [70].

40 Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011, s 18. Safe Work Australia has developed Interpretative Guidelines providing guidance on interpretation and application of the term 'reasonably practicable': Safe Work Australia, *Interpretative Guideline: Model Work Health and Safety Act- The Meaning of 'Reasonably Practicable'* (2011).

41 Safe Work Australia, *Submission CFV 115*.

42 Ibid.

43 See, eg, ADFVC, *Submission CFV 124*; ACCL, *Submission CFV 19*.

potential risk posed by internal, external or client-initiated violence. The existence of a worker's intimate relationship does not alter that duty. In addition, in light of evidence which suggests that two thirds of Australian women who report violence by a current partner are in paid employment,<sup>44</sup> it may be considered reasonably foreseeable that family violence will have an impact on the workplace, and that some such impact may involve concerns for safety, particularly if that violence comes into the workplace.

18.38 As a result, the ALRC considers that circumstances in which family violence may pose a clear OHS issue or risk include:

- physical or verbal abuse between partners employed at the same workplace;
- threats to a partner or the partner's co-workers at the workplace;
- harassment or attacks on a partner or a partner's co-workers at their workplace, either in person or through phone calls and emails;
- stalking a partner at the partner's workplace—for example, 29% of victims who were stalked by their previous partner reported that the person using family violence loitered outside their workplace;<sup>45</sup> and
- in the most extreme cases, family violence-related homicide at the workplace.<sup>46</sup>

18.39 While the ALRC considers that the above circumstances are ones in which a PCBU owes a primary duty of care, throughout this Inquiry the ALRC has heard that in many cases, employers are not aware of the breadth of their duty of care, nor do they consider the risks associated with family violence to be a work issue, or if they do they are unsure what steps they are reasonably required to take to fulfill their primary duty of care. This is likely to be compounded from 1 January 2012 as a result of the expanded definitions and concepts of PCBU, worker and workplace under the Model Act. Accordingly, the ALRC makes a range of recommendations in relation to the need for guidance, education, training and appropriate employer responses in relation to these circumstances later in this chapter.

#### ***Circumstances where it is unclear whether a duty exists***

18.40 However, there are some instances involving family violence where no duty is owed, or where it is unclear whether a PCBU owes a duty of care. For example, the definition of 'workplace' under the Model Act as any place where work is carried out or where a worker goes, or is likely to be, while at work, significantly expands OHS duties.<sup>47</sup> In the context of family violence, it does so in a way possibly not envisaged, raising difficult and previously unconsidered questions with respect to the extent of duties where family violence exists. For example, if a worker who is experiencing family violence is working from home and in the course of undertaking that work is

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

45 Australian Bureau of Statistics, *Women's Safety Survey*, Catalogue No 4128.0. (1996).

46 See, eg, Women's Health Victoria, *Submission CFV 11*.

47 Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 s 8.

threatened or physically or verbally abused, does this come within the duty of care owed by a PCBU?

18.41 Some stakeholders submitted that family violence may also pose an OHS risk, analogous to the risk posed by other psychosocial hazards.<sup>48</sup> As one commentator has noted, ‘the broad formulation of the general duty provisions clearly covers hazards hitherto unregulated, such as ergonomic and psychosocial hazards’.<sup>49</sup> It is unclear whether, by extension, where family violence causes employees to be distracted or inattentive, leading to reduced ability to operate equipment safely or concentrate on tasks and increasing the risk of accidents, it is likely to engage an employer’s duty of care. There are a range of issues yet to be included under the OHS ‘umbrella’ and this particular iteration of family violence may be one such issue which is not yet the subject of legislation, Codes of Practice or guidelines,<sup>50</sup> and therefore warrants further consideration.

18.42 Accordingly, in relation to these types of circumstances, the ALRC recommends that Safe Work Australia, among others, should examine the effect of the harmonised OHS regime on duties and obligations owed in relation to family violence as a possible work health and safety issue.

18.43 Finally, while the ALRC does not recommend the inclusion of a specific duty of care with respect to family violence in this Report, some stakeholders supported such a move, suggesting that it would ensure that duty holders were required to take appropriate action in all cases where they ‘become aware (or ought to be reasonably aware) of family violence that could be a risk to a worker in the workplace’.<sup>51</sup> It may be instructive for Safe Work Australia in the course of its examination of the duties of care to consider, by way of comparison, a family violence provision introduced in Ontario.<sup>52</sup> The *Occupational Health and Safety Act 1990* RSO c 01 (Ontario) provides:

Domestic violence

32.0.4 If an employer becomes aware, or ought reasonably to be aware, that domestic violence that would likely expose a worker to physical injury may occur in the workplace, the employer shall take every precaution reasonable in the circumstances for the protection of the worker ...

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48 Psychosocial hazards can include bullying, harassment and stress. See, eg, R Johnstone, M Quinlan and M McNamara, *OHS Inspectors and Psychosocial Risk Factors: Evidence from Australia* (2008), prepared for the National Research Centre for OHS Regulation.

49 Ibid, 7.

50 This sentiment was expressed particularly in relation to occupation stress and other similar psychosocial hazards.

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

52 The provision was introduced in Ontario after a series of family violence-related deaths in workplaces and arose in part from recommendations made by a Coroner’s Jury following an inquest into the death of Lori Dupont and subsequent lobbying for changes to OHS legislation: see, eg, Centre for Research and Education on Violence against Women and Children and University of Western Ontario, *Report of Workplace Violence Think Tank* (2008).

## Duties re violence

32.0.5 (1) For greater certainty, the employer duties set out in section 25, the supervisor duties set out in section 27, and the worker duties set out in section 28 apply, as appropriate, with respect to workplace violence ...<sup>53</sup>

***What is an employee's duty of care?***

18.44 Workers also have a primary duty to take reasonable care for their own safety at work and that their own acts or omissions do not adversely affect the health and safety of other persons.<sup>54</sup> The inclusion of this duty under the Model Act acknowledges the changing way work is performed, as many employees have greater independence and control over the condition of their work, and recognises the role employees play in risk identification and creating a safe work environment. These duties to take reasonable care also apply to a person at a workplace.<sup>55</sup>

18.45 In consultations, Safe Work Australia emphasised that it would be difficult for an employer to take steps where a worker has not disclosed the existence of, or the risk posed by, family violence.<sup>56</sup> While workers may have legitimate reasons for not wishing to disclose family violence, they also need to be aware of their duties to take reasonable care for their own health and safety and to ensure that family violence does not adversely impact on others. Accordingly, the ALRC makes a range of recommendations in relation to the need for guidance, education and training that are likely to assist employees experiencing family violence to fulfil their duties under the Model Act. The ALRC suggests that Safe Work Australia should give further consideration to the circumstances in which an employee experiencing family violence has a duty to disclose that violence to their employer for the purposes of fulfilling their own duty of care, and if they do not, firstly, whether that constitutes a breach of their duty and secondly, how it affects the employer's duty.

**Research and data collection**

18.46 The National OHS Strategy refers to the need to improve data collection and analysis of OHS issues.<sup>57</sup> Despite this, there is a lack of publicly available data about the incidence of family violence-related OHS hazards or incidents.

18.47 As outlined above, there are some instances in which family violence may pose a clear OHS issue or risk—in such instances, the ALRC considers the most appropriate approach is to conduct research into duties arising in such instances and to ensure reliable data is collected in order to provide a basis for any future policy development. There are also instances in which it is unclear whether a primary duty exists—in such instances the need for research and data collection differs and as a result, the ALRC

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53 *Occupational Health and Safety Act 1990* RSO c O1 (Ontario) ss 32.0.4, 32.0.5.

54 Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 s 28. Note, officers also have a range of duties: Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 ss 27, 28, 29.

55 Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 s 29.

56 Safe Work Australia, *Consultation*, by telephone, 17 January 2011.

57 Safe Work Australia, *National OHS Strategy 2002–2012*.

considers it is appropriate to identify family violence as an OHS risk as a research priority.

18.48 Stakeholders like the Australian Domestic and Family Violence Clearinghouse (ADFVC) have emphasised the importance of research and data collection in this area to ‘assist in enhancing recognition of family violence as a workplace issue’.<sup>58</sup> Throughout the course of this Inquiry, stakeholders have suggested that data may usefully be collected through the notifiable incident system or through changes with respect to data surrounding work-related fatalities and the use of workers’ compensation data.<sup>59</sup> The ALRC recommends that Safe Work Australia consider ways to extend and improve data coverage, collection and analysis in relation to family violence as a work health and safety issue.

18.49 In its submission, Safe Work Australia stated that its ‘limited resources need to be focused on collecting data and carrying out research to prevent work-related injury and illness as a priority’.<sup>60</sup> The ALRC and numerous stakeholders are of the view that research and data collection around family violence-related illness and injury in the workplace is a priority, as such research and data ‘assists decision makers when developing or evaluating policies in relation to work health and safety and workers’ compensation by building on knowledge of existing issues, identifying trends and emerging issues’.<sup>61</sup>

18.50 The ALRC therefore considers that Safe Work Australia is the most appropriate body to conduct research and collect information about family violence as a possible OHS issue. The functions of Safe Work Australia include to ‘collect, analyse and publish data or other information’ and to ‘conduct and publish research’ relating to OHS ‘in order to inform the development or evaluation of policies’.<sup>62</sup> As a result, it already has sections undertaking research and evaluation, and data analysis.<sup>63</sup> However, the ALRC suggests that State and Territory OHS regulators, Comcare and similar bodies could also play a role in any such research or data collection. The ADFVC suggested that such research could be ‘conducted in consultation or partnership with existing researchers who have experience in creating research methodology for data collection’ in this area.<sup>64</sup>

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58 ADFVC, *Submission CFV 26*.

59 For example, some stakeholders expressed support for amending the reporting mechanisms and recording of workplace fatality statistics to outline more clearly the cause of the injury or death, in particular where it involves family violence: *Ibid*. In some cases it may be difficult to determine where family violence has played a role in an accident caused by an employee’s lack of concentration or fatigue, which may stem from family violence. In instances where there are verbal or physical threats or abuse in the workplace, it may be less difficult.

60 Safe Work Australia, *Submission CFV 115*.

61 *Ibid*

<<http://safeworkaustralia.gov.au/AboutSafeWorkAustralia/WhatWeDo/Research/Pages/Research.aspx>> at 18 November 2011.

62 *Safe Work Australia Act 2008* (Cth) s 6.

63 The main role and function Safe Work Australia’s Research and Evaluation Section is to conduct and make publicly available research in relation to work health and safety and workers’ compensation.

64 ADFVC, *Submission CFV 124*.

18.51 The ALRC recommends that in the course of conducting research and collecting data in this area, Safe Work Australia should focus on examining the effect of the harmonised legislative and regulatory OHS scheme on duties and obligations owed in relation to family violence as a work health and safety issue—in particular the duty of:

- PCBUs in circumstances where family violence enters the workplace; and
- workers to disclose family violence; whether non-disclosure constitutes a breach of their primary duty and the effect it may have on the duty owed by a PCBU.

18.52 One of the focuses for Safe Work Australia in 2011–12 will be the development of a comprehensive Research and Data strategy,<sup>65</sup> another is finalising development of the National Work Health and Safety Strategy 2012–2022 to replace the current National Strategy.<sup>66</sup> In addition, the ALRC understands that Safe Work Australia's work is 'guided by its strategic and operational plans'.<sup>67</sup> The ALRC considers the development of these strategies, or any review of other strategies or plans, provide the most appropriate opportunity to consider this issue.

**Recommendation 18–1** Safe Work Australia should, in developing or reviewing its Research and Data Strategy or other relevant strategies:

- (a) identify family violence and work health and safety as a research priority;
- (b) examine the effect of the harmonised legislative and regulatory OHS scheme on duties and obligations owed in relation to family violence as a possible work health and safety issue; and
- (c) consider ways to extend and improve data coverage, collection and analysis in relation to family violence and its impact as a work health and safety issue.

## A focus on education and awareness

18.53 One of the key recommendations in this Report is Recommendation 15–1, in which the ALRC recommends that the Australian Government should initiate a national education and awareness campaign around family violence and its impact as a work issue. The ALRC suggests that one important component of the national campaign should focus on family violence as a possible OHS issue and the national education campaign will provide an important basis for education, training and awareness raising in relation to family violence as a possible OHS issue.

18.54 One of the objects of the Model Act involves the promotion of the provision of advice, information, education and training in relation to OHS.<sup>68</sup> In light of the

65 Safe Work Australia, *Agency Budget Statement 2011–2012* (2011), Overview and Resources, 372.

66 Safe Work Australia, *Submission CFV 115*.

67 Ibid.

68 Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 s 3(1)(d).

ALRC's recommendations, and in line with this object, the ALRC considers there is a specific need for education, training and increased awareness about family violence as an OHS issue, which builds on the obligations contained in OHS legislation and regulations, and guidance provided in Codes of Practice and other guidance material. It is important that such education and training goes 'hand in hand'<sup>69</sup> with the other recommendations made in this chapter.

18.55 Such education and training will 'equip duty holders with the tools they need to identify potential risks and respond appropriately by developing measures to eliminate risk'.<sup>70</sup> The ALRC reinforces the views expressed in *Family Violence—A National Legal Response*, that education and training on the nature and dynamics of family violence—in this case for employers, employees and related organisations—will assist in protecting the safety of victims of family violence.<sup>71</sup> The ALRC considers that if a definition of family violence is included in Codes of Practice and other Safe Work Australia material, which is consistent across legal frameworks, this will provide for a common understanding of family violence on which education, training and information dissemination can be based.<sup>72</sup>

18.56 Stakeholders supported a national approach in this area, as well as recognising the particular role to be played by bodies such as Safe Work Australia, the Fair Work Ombudsman (FWO) and State and Territory OHS regulatory bodies as well as unions and employer organisations.<sup>73</sup>

18.57 While Safe Work Australia submitted that 'it is not appropriate that Safe Work Australia be the lead agency to develop this type of material',<sup>74</sup> the ALRC is of the view that Safe Work Australia and State and Territory OHS regulators should play a lead role in this area.<sup>75</sup> While not necessarily possessing expertise in family violence, they are clearly the bodies with responsibility for 'developing and promoting national strategies to raise awareness' and improve OHS.<sup>76</sup> As a result, as submitted by ACCI, educative 'materials should be provided by the OHS regulator(s) at first instance'.<sup>77</sup> However, bodies such as FWO could also be involved in the provision of educational material, including on 'reasonable precautions or protocols that workplaces could implement where there is a possibility that an employee or co-worker may be harmed by a spouse at a workplace'.<sup>78</sup>

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69 AASW (Qld), *Submission CFV 17*.

70 ADFVC, *Submission CFV 26*.

71 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), Rec 31–1.

72 See Rec 3–1.

73 ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*; Queensland Law Society, *Submission CFV 21*; National Network of Working Women's Centres, *Submission CFV 20*; ACCI, *Submission CFV 19*; AASW (Qld), *Submission CFV 17*; Women's Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

74 Safe Work Australia, *Submission CFV 115*.

75 See, eg. ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

76 *Safe Work Australia Act 2008* (Cth) s 6.

77 ACCI, *Submission CFV 19*.

78 *Ibid.*

18.58 Further, stakeholders recognised the need to involve bodies and organisations with expertise in family violence,<sup>79</sup> such as the ADFVC, as well as ‘the important role that employer organisations play in educating members on OHS issues in some industry sectors’, and considered that ‘ideally, any education initiatives should also be driven by the private sector’.<sup>80</sup>

18.59 As a result, the ALRC recommends that Safe Work Australia should work with the ADFVC, unions, employer organisations, State and Territory OHS regulators and other relevant bodies to raise awareness about family violence and its impact as a work health and safety issue, and develop and provide associated education and training. The ALRC considers that such information should be provided through a range of forms, and be tailored to suit specific industries and workplace types and sizes, and provided in an accessible and culturally-appropriate manner.

18.60 The ALRC also considers that provision of education should be complemented by appropriate training of employees, employers, Health and Safety Representatives and committees, as well as OHS regulators, for example, through incorporation into training modules which focus on workplace violence.<sup>81</sup>

**Recommendation 18–2** As part of the national education and awareness campaign in Recommendation 15–1, Safe Work Australia should work with the Australian Domestic and Family Violence Clearinghouse, unions, employer organisations, State and Territory OHS regulators and other relevant bodies to:

- (a) raise awareness about family violence and its impact as a possible work health and safety issue; and
- (b) develop and provide education and training in relation to family violence as a possible work health and safety issue.

## Codes of Practice and other guidance

18.61 Throughout this Inquiry it has become clear that there is a need for increased recognition and understanding that family violence may constitute a work health and safety issue. However, there is a need to make out a duty before guidance is relevant, therefore in this Report the ALRC suggests that such guidance is only relevant in relation to those instances of family violence where there is a clear duty of care.<sup>82</sup>

18.62 Discussion of family violence in a Code of Practice or guidance would not necessarily change employers’ legal obligations. However, explicit recognition that family violence can affect the workplace could raise both employers’ and employees’

79 Safe Work Australia, *Submission CFV 115*; ADFVC, *Submission CFV 26*.

80 ADFVC, *Submission CFV 26*.

81 ACTU, *Submission CFV 39*; ADFVC, *Submission CFV 26*; National Network of Working Women’s Centres, *Submission CFV 20*. Similar strategies were supported by WEAVE who also submitted that there is a need for employer safety audits: WEAVE, *Submission CFV 14*.

82 Instances where the ALRC considers a clear duty of care exists are outlined at paragraph 18.38.



awareness of family violence as a potential work health and safety issue and provide useful guidance to employers on how to respond appropriately.

18.63 There are a range of mechanisms through which greater recognition and understanding could be achieved. The development of guidance, whether in the form of a Code of Practice, or other forms, builds upon general education, training and measures aimed at increasing the visibility and understanding of family violence as an OHS issue discussed later in the chapter. In this section of the chapter the ALRC considers:

- the appropriate type of guidance about family violence as an OHS issue, with a particular focus on Codes of Practice; and
- the substance of such guidance, including defining family violence as an OHS issue and identifying and responding to family violence in this context.

### **What form should guidance take?**

18.64 In addition to OHS legislation, there is a range of guidance provided to employers and employees about OHS matters in the form of regulations, Codes of Practice and other material produced by Safe Work Australia, Comcare and similar bodies. While stakeholders supported the provision of some form of additional guidance with respect to family violence as an OHS issue, they were divided as to where this additional guidance should be provided in: OHS legislation, Codes of Practice, or in other forms.<sup>83</sup> The ALRC has formed the view that the inclusion of information on family violence as a possible work health and safety issue should, at a minimum, be included in Codes of Practice and that other guidance may also play a role.

#### ***Codes of Practice***

18.65 Codes of Practice provide practical guidance on safe work practices and risk management. While Codes of Practice do not impose mandatory legal obligations, they are admissible in evidence before a court as proof of the standards of health and safety that should be achieved by a duty holder to comply with the relevant legislation and regulations. More importantly, the *OHS Code*, for example, if relied on as evidence in legal proceedings, reverses the burden of proof to the duty holder. Accordingly, where the Code of Practice has not been followed, the duty holder would be required to prove that they complied with their duties by other means (equivalent to or better than the Code of Practice).<sup>84</sup>

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83 ACTU, *Submission CFV 39*; Women's Legal Services NSW, *Submission CFV 28*; ADFVC, *Submission CFV 26*; Queensland Law Society, *Submission CFV 21*; National Network of Working Women's Centres, *Submission CFV 20*; ACCI, *Submission CFV 19*; WEAVE, *Submission CFV 14*; Women's Health Victoria, *Submission CFV 11*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*; R Johnstone and L Bluff, *Consultation*, by telephone, 5 May 2011.

84 *Occupational Health and Safety Code of Practice 2008* (Cth), 18.

18.66 Guidance provided by way of a Code of Practice appears to strike the balance between ensuring employers are aware of the health and safety standards expected of them, while still allowing individual employers sufficient flexibility to tailor their responses according to the nature of the business or enterprise. Most stakeholders who considered this issue suggested that Codes of Practice were the most appropriate place to include consideration of family violence as an OHS issue,<sup>85</sup> as they provide an ‘important touchstone for duty holders’.<sup>86</sup>

18.67 However, neither the OHS Code nor any of the Model Codes of Practice developed by Safe Work Australia identify or consider responses to family violence as a potential OHS risk. In its submission to this Inquiry, Safe Work Australia stated that ‘as family violence is not a risk that arises from work, it ... cannot be included as a specific work health and safety issue in the model codes’.<sup>87</sup> The Safe Work Australia Agency Budget Statement indicates that one of the focuses of Safe Work Australia in 2011–2012 will be on the continued development of model Codes of Practice and national guidance material.<sup>88</sup> The ALRC understands that several of the Codes of Practice are considered complete, however notes that Safe Work Australia’s responsibility with respect to such Codes includes to ‘if necessary, revise them’.<sup>89</sup>

18.68 Consequently, the ALRC considers that the inclusion of information on family violence as a possible work health and safety issue should, at a minimum, be included in Codes of Practice. While some stakeholders suggested that bodies such as Safe Work Australia and the ADFVC could collaborate to create a specific Code of Practice for family violence-related workplace safety risks, others emphasised that information should be included in general Codes, such as those in relation to risk assessment, workplace violence or psychosocial hazards, ‘rather than creating a further Code of Practice specifically on domestic/family violence related risks’.<sup>90</sup> In particular, the ALRC is of the view that the most appropriate Codes in which to include such information are: ‘How to Manage Work Health and Safety Risks’; ‘How to Consult on Work Health and Safety’; ‘Managing the Work Environment and Facilities’; and ‘Preventing and Responding to Workplace Bullying’.<sup>91</sup>

### **Regulations**

18.69 The *OHS Regulations 1991* and *OHS Regulations 1994* do not address any type of violence as a health and safety risk, although the *OHS Regulations 1994* address the

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85 See, eg Aboriginal & Torres Strait Islander Women’s Legal Service North Queensland, *Submission CFV 99*; Women’s Legal Services NSW, *Submission CFV 28*; ADFVC, *Submission CFV 26*; National Network of Working Women’s Centres, *Submission CFV 20*.

86 ADFVC, *Submission CFV 26*.

87 Safe Work Australia, *Submission CFV 115*.

88 Safe Work Australia, *Agency Budget Statement 2011–2012* (2011), Overview and Resources, 372.

89 *Safe Work Australia Act 2008* (Cth) s 6.

90 ADFVC, *Submission CFV 124*. In its submission, the ADFVC suggested specific parts of current Codes of Practice which could be amended.

91 Safe Work Australia, *Draft Code of Practice: Preventing and Responding to Workplace Bullying* (2011); Safe Work Australia, *Draft Code of Practice: How to Manage Work Health and Safety Risks* (2010); Safe Work Australia, *Draft Code of Practice: How to Consult on Work Health and Safety* (2010); Safe Work Australia, *Draft Code of Practice: Managing the Work Environment and Facilities* (2010).

general topic of hazard identification and risk assessment. Similarly, the Model Regulations do not address violence. The role of these regulations is to set out mandatory obligations on specific matters and provide processes or outcomes that duty holders must follow or achieve to meet their general duties under legislation.

18.70 Stakeholders such as the ACTU suggested that family violence should be within the scope of matters addressed by regulation, and that Codes of Practice and guidance material should provide detail with respect to the duties that arise.<sup>92</sup> However in light of contrasting stakeholder views, and to the extent that the *OHS Regulations* set out mandatory obligations and provide detail with respect to meeting general legislative duties, the ALRC does not consider it is necessary to amend the *OHS Regulations* to protect the safety of victims of family violence.

### ***Other guidance***

18.71 Throughout this Inquiry stakeholders have outlined a range of other possible responses to family violence in an OHS context, many of which involve inclusion of information in guidance or the development of parallel policies and procedures.<sup>93</sup>

18.72 Several stakeholders supported the development of an overarching workplace family violence policy which encompassed OHS.<sup>94</sup> In addition to this, however, stakeholders including the Australian Services Union supported the development of stand-alone guidance material that ‘specifically deals with the implications of family violence in the workplace and an employer’s obligations in relation to protecting their employees from manifestations of family violence at the workplace’.<sup>95</sup>

18.73 However, the ALRC considers that incorporating consideration of family violence into existing policies, risk assessment frameworks and documents as well as safety plans<sup>96</sup> is the preferable approach. As a result, the ALRC suggests that ‘auditing existing policies, examining values and mission statements, and considering the effects of organisational culture,’<sup>97</sup> as well as developing new policies and procedures, as required, may also go some way to increasing the safety of employees experiencing family violence as well as their co-workers and the workplace more generally.

18.74 In addition, Safe Work Australia has developed Interpretative Guidelines to assist in the interpretation and application of the Model Act.<sup>98</sup> As a result, the ALRC suggests that, in the course of examining duties and obligations, and what constitutes ‘reasonably practicable’ in the context of family violence as a possible work health and safety issue arising under the harmonised legislative and regulatory OHS scheme, Safe

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92 ACTU, *Submission CFV 39*. The Joint submission from Domestic Violence Victoria and others, *Submission CFV 22* and Women’s Health Victoria, *Submission CFV 11* expressed a similar view, stating that family violence should be included in OHS legislation or regulations.

93 ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 113*; Redfern Legal Centre, *Submission CFV 15*; Women’s Health Victoria, *Submission CFV 11*.

94 This issue is discussed in the context of national initiatives in Ch 15.

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

96 *Ibid.*

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

98 See, eg. Safe Work Australia, *Interpretative Guideline: Model Work Health and Safety Act- The Meaning of ‘Reasonably Practicable’* (2011).

Work Australia should consider inclusion of guidance on the matter in Interpretive Guidelines.

18.75 Finally, the ALRC recognises the important role played by other forms of guidance material and suggests that bodies such as Safe Work Australia, Comcare, and others involved in the national education and awareness campaign in Recommendation 15–1 could be involved in the provision of additional guidance.

### **Substance of guidance**

18.76 There are a range of issues that Codes of Practice or other guidance material could cover in attempting to explain, and raise awareness about, family violence and its impact as a work health and safety issue. In addition to general information about the nature, features and dynamics of family violence, such guidance should ultimately assist employers and employees to identify, and respond to, family violence where it presents in the work context. The ALRC considers that Codes of Practice should include:

- a definition of family violence—in line with that suggested in Chapter 3;
- information about the nature, features and dynamics of family violence;
- possible ways to identify family violence in a work context;
- responsibilities and obligations of employers and employees;
- examples of how family violence may constitute a work health and safety risk; and
- possible employer and workplace responses to the risk posed by family violence.

### ***Identifying family violence***

18.77 Employers should not be required to conduct potentially intrusive examinations into their employees' private lives, nor should they be allowed to ignore their responsibilities for the health and safety of their employees. Such a balance may already be implicit in relevant legislation, but more explicit discussion in the context of workplace risks posed by family violence may be helpful.

18.78 As outlined above, in fulfilling their duty of care, employers must consider what is 'reasonably practicable'.<sup>99</sup> This involves considering a range of matters including the likelihood of the hazard/risk; the degree of harm; and knowledge, availability and suitability of ways to eliminate or minimise the hazard or risk.<sup>100</sup> The ALRC considers that guidance could be included in material such as the Interpretative Guidelines, in order to assist employer to put in place measures to ensure they are able to identify family violence in the workplace.<sup>101</sup> Models from state codes of practice and other

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99 Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 s 47.

100 Safe Work Australia, *Explanatory Memorandum—Model Work Health and Safety Act* (2010), [71].

101 Safe Work Australia, *Interpretative Guideline: Model Work Health and Safety Act- The Meaning of 'Reasonably Practicable'* (2011).

jurisdictions—in particular, recent legislation and accompanying guidelines from Ontario, Canada—provide examples of what subjects such guidance could discuss. The inclusion of such guidance is likely to be particularly important under the Model Act, given the expanded range of potential ‘workplaces’. However, guidance should make clear the distinction between work-related and personal responsibilities.

18.79 The approach in the Ontario *Occupational Health and Safety Act* does not require employers to assess the risk of family violence occurring in the workplace, instead it requires that an employer take precautions only if an employer ‘becomes aware, or ought reasonably to be aware that domestic violence that would likely expose a worker to physical injury may occur in the workplace’.<sup>102</sup> The ALRC suggests that this formulation may strike a useful balance in an area where it is difficult to distinguish clearly between workplace and personal responsibilities.

18.80 In identifying family violence in the workplace, the ALRC also considers that suggestions from existing Codes of Practice discussing bullying, psychosocial hazards, and general violence may be of assistance, outlining approaches including:

- reviewing absenteeism records;
- checking injury records;
- conducting confidential surveys to identify possible sources of violence; and
- encouraging workers to communicate about workplace violence.<sup>103</sup>

18.81 In light of the expanded concept of workplace under the Model Act, with no place of work restriction, employers may require specific guidance on identifying family violence in non-traditional workplace settings where work is conducted.

### ***Responding to family violence***

18.82 In order to ensure effective reporting and responses to family violence in an OHS context, both employers and employees have an important role to play. However, at the outset, it is important to note that ‘whilst businesses can play a role in ensuring its workforce isn’t exposed to internal or external sources of harm’,<sup>104</sup> in instances of criminal acts such acts are the responsibility of law enforcement authorities and reporting and responses should be tailored accordingly.

18.83 The ALRC acknowledges the need for workplace responses that are tailored to meet the individual needs of businesses, and of employees within those businesses. In order for employers to be prepared to address the risks associated with family violence in the work context, they must be aware that an employee is experiencing family

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102 *Occupational Health and Safety Act 1990* RSO c O1 (Ontario) s 32.0.4. See also Occupational Health and Safety Branch, Ontario Ministry of Labour, *Workplace Violence and Harassment: Understanding the Law* (2010), [2.7].

103 See, eg, *Violence, Aggression and Bullying at Work: A Code of Practice for Prevention and Management 2006* (Vic) s 3.3.1; *Code of Practice: Violence, Aggression and Bullying at Work 2010* (WA) s 3.3.1; ACT Public Service, *Reducing Occupational Violence* (1993) [4.1]; Safe Work Australia, *Draft Code of Practice: How to Manage Work Health and Safety Risks* (2010), [2.1].

104 ACCL, *Submission CFV 19*.

violence that is likely to result in an OHS hazard or incident.<sup>105</sup> As a result, a precondition for responding appropriately is to ensure adequate structures are in place for disclosure and reporting of family violence.<sup>106</sup> Such structures also assist in establishing and encouraging a reporting and safety culture.<sup>107</sup> Women’s Health Victoria highlighted the importance of leadership in this respect, commenting that ‘organisational leaders can set the tone for a workplace culture that is safe, respectful and supportive—one that sends an unambiguous message that family violence is not tolerated’.<sup>108</sup>

18.84 However, in instances where family violence clearly engages a primary duty of care and is an OHS issue, workplace responses can build on existing measures associated with risk management and safety plans such as those ‘adopted in relation to customer service staff (who often deal with abusive customers) or other workers at risk of harm or violence’.<sup>109</sup>

18.85 In responding to family violence, a model employer response should include several components, including legal compliance, policies and procedures, victim safety and support, and education and training and the overarching need to ‘recognise, respond and refer’.<sup>110</sup>

18.86 Guidance may usefully provide information about how employers should respond to and minimise risks associated with family violence and its affect on the workplace. This is in line with the objects of OHS legislation to assist observance with obligations and ultimately to protect the safety of workers to the highest level reasonably practicable.

18.87 In some cases, employers will already have mechanisms and processes in place that can be utilised to minimise the risk posed by family violence in the work context. Employer and workplace approaches and responses can be multifaceted and there is no ‘one size fits all’. However, risk assessment frameworks and safety plans have emerged as the key way in which employers can respond to the risk posed by family violence as a possible OHS issue. This section of the chapter considers general responses as well as providing some discussion of the ways in which safety plans can be used by employers, and outlines what such plans could include.

18.88 The ALRC considers that the risk assessment components currently contained in the Model Codes of Practice could be amended to account for the risk posed by family violence. This may assist workplaces to integrate good risk management practices in relation to family violence into day-to-day business operations. In doing so, the Model

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105 In consultations SWA expressed the view that workplace responses can realistically only be focused on the risks arising from the business or undertaking and what is reasonably practicable for the employer to do in the circumstances: Safe Work Australia, *Consultation*, by telephone, 17 January 2011.

106 See, eg. ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

107 Note, the Model Act prohibits discriminatory conduct, including against employees who raise safety concerns: Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 pt 6.

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

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

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

Act requires employers to consult workers in relation to the identification of hazards and assessment of risks as well as decisions made to eliminate such risks.<sup>111</sup>

### **Safety plans**

18.89 A key element of effective risk management emphasised by stakeholders is the development and implementation of general and individual safety plans tailored to the individual business and needs of employees experiencing family violence.<sup>112</sup> The ALRC considers that Safe Work Australia should work with the ADFVC, unions and employer organisations to develop safety plans to be incorporated into guidance material which includes measures to minimise the risk of family violence in the workplace.<sup>113</sup> It is necessary to recognise the need for flexible safety plans to suit businesses of varying sizes across a range of industries.<sup>114</sup>

18.90 The ALRC considers that the involvement of unions and employer organisations is important and in line with the object of the framework created by the Model Act to encourage unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices and assisting employers and employees to achieve healthier and safer working environments.

18.91 As part of the Domestic Violence Workplace Rights and Entitlements Project, the ADFVC has developed resources designed to assist employers in assessing and responding to risks in the workplace, associated with family violence. These resources include a draft workplace guide to developing an effective safety plan. The guide allows employers to tailor the safety plan to the specific working environment and business needs and includes a range of tips in developing a safety plan. Such plans could be developed to work with, or be incorporated into, existing safety plans. The guide also emphasises that workers should be involved in the development of the plan. The guide includes a number of steps which should be taken to assess the workplace and develop the safety plan as well as suggested actions to support safety in relation to each step, including:

#### **Step 1: Assess the nature of the workplace**

Every workplace is different. Safety plans need to reflect the general safety measures that can be introduced as well as the specific plans tailored to the needs of individual staff who disclose, according to the nature of the workplace and the work patterns of individuals. Is work office based, retail, service industry, or manufacturing? Do rosters expose staff to potentially hazardous times, such as late at night, early in the morning or at very quiet times of day? Do staff work alone, off site, or beyond mobile range?

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111 Safe Work Australia, *Model Work Health and Safety Act*, Revised Draft, 23 June 2011 ss 47–49.

112 ADFVC, *Submission CFV 26*. Similar strategies were supported by WEAVE who also submitted that there is a need for employer safety audits: WEAVE, *Submission CFV 14*.

113 ADFVC, *Submission CFV 124*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 113*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*.

114 ADFVC, *Submission CFV 124*.

**Step 2: Assess the workplace for security**

Is public access to the workplace restricted? Are security guards on site? Are employees working in remote or isolated locations within the building? Is car parking safe?

**Step 3: When an employee discloses**

A tailored plan to protect the employee needs to be developed with [his or] her and with [his or] her consent. The plan needs to reflect her work patterns. Does the employee work at times of greater vulnerability to harassment or attack? Does [he or] she work alone? Is she required to work outside the workplace? Is [he or] she within mobile range? How does [he or] she get to and from work? Note that high risk times for exposure to acts of domestic violence are during pregnancy and post-separation. Increase vigilance and support during these times.

**Step 4: Assess with the vulnerable staff member, the use of appropriate screening measures**

The most common form of domestic violence that employees report experiencing at work is abusive phone calls. How can you prevent the abuser gaining access to the vulnerable staff member? How can this be done without affecting the work performance of the employee? Can you collect evidence of stalking and harassment so that police can follow up concerns? Is there a domestic violence court protection order in place so that you can report breaches? Are you aware of escalating risk?

**Step 5: Assess the capacity of the workplace to respond to emergencies**

Are you prepared for a crisis situation?

**Step 6: Assess the need for a safe area**

This is a place where someone under threat can retreat to escape the violence. It may be a room, an enclosed outdoor area or an adjoining business.<sup>115</sup>

18.92 In addition, Women’s Health Victoria suggested other issues to consider when drafting a safety plan include considering changes to work schedule, location or telephone number; developing a return to work place if absence is agreed to; provision of emergency contact details; obtaining an apprehended violence order that includes the workplace; and reviewing workplace safety arrangements.<sup>116</sup>

**Recommendation 18–3** Safe Work Australia should consider including information on family violence as a possible work health and safety issue in relevant Model Codes of Practice, for example:

- (a) ‘How to Manage Work Health and Safety Risks’;
- (b) ‘Managing the Work Environment and Facilities’;
- (c) ‘How to Consult on Work Health and Safety’;

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115 ADFVC, *Workplace Guide: Domestic Violence Safety Plan*.

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



- (d) 'Preventing and Responding to Workplace Bullying'; and
- (e) any other code that Safe Work Australia may develop in relation to other relevant topics, such as workplace violence and psychosocial hazards.

