



Australian Unions



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ACTU submission in response to the ALRC Discussion paper on Family Violence and Commonwealth (Employment and Superannuation) Laws

30 September 2011

1. Introduction and executive summary

1.1 Introduction

The ACTU is the peak body representing almost 2 million working Australians- approximately half of whom are women.

A significant number of the 3 million women (350,000 each year), who experience domestic violence, would be members of a union or be employed in a unionised workplace.¹ The right of victims of family and domestic violence to maintain paid employment is one which the ACTU and its affiliated unions regards as an important workplace issue and we have been working towards achieving provisions in workplace agreements which aim to facilitate this right.

Having made a submission to the ALRC *Inquiry into Family Violence and Commonwealth (Employment and Superannuation) Laws*, we now welcome this opportunity to make additional comments in response to the *Discussion Paper, Family Violence and Commonwealth Laws*. As with our original submission, and in line with the specific areas of knowledge to which we can contribute informed commentary, we will comment on the recommendations relating to Employment, Occupational Health and Safety and Superannuation legislation.

1.2 The importance of workforce attachment for victims of family and domestic violence

Maintaining paid employment and financial independence is critical to women and their children successfully breaking the cycle of family and domestic violence.²

The ACTU supports the principle that family and domestic violence is a workplace issue in which unions may play a role to assist victims maintain paid employment, support them through the process of escaping violence and promote safe and secure workplaces.

The ACTU recognises that family and domestic violence is not simply a private issue, but a systemic issue arising from wider social, economic and cultural factors, and thus, must also be addressed in the public sphere.

We are of the view that it is important that unions, as part of the community, advocate for women's rights to a safe home, community and workplace and take a stand to say no to violence against women.

The ACTU supports amendments to commonwealth employment, occupational health and safety and superannuation legislation which are designed to protect victims and to assist in eradicating family and domestic violence.

¹ Two thirds of women who suffer domestic violence are working in the paid labour force. Almost half domestic violence victims suffered violence at the hands of their current or former partner, and sadly, in the majority of cases, the violence was witnessed by children. ABS, Personal Safety, Australia, Cat. 4906.0 (2006) p.35

² Refer S Franzway, Framing Domestic Violence: Its Impact on Women's Employment' (paper presented at Re-Imaging Sociology Conference, Melbourne 2008) and S Potton, Pathways: How Women Leave Violent Men (2003), 71

1.3 The need for a dual approach of bargaining and minimum legislative protections within a holistic framework

The ACTU has consistently advocated that effective operation of legislation relating to the protection of victims of family and domestic violence and children requires reforms which are integrated and co-coordinated in a holistic framework. To this end, we support amendments to employment legislation which will operate in an integrated manner with the broader legal family and domestic violence framework.

We are also keen to point out that it is critical that any reform to employment related legislation, without effective reforms to the key family and domestic violence legislation will render the overall framework ineffective. In fact, encouraging workplaces to support victims of family and domestic violence by ensuring safe workplaces and ongoing access to paid employment, without making the necessary improvements to basic protective and complementary legislation would potentially undermine the good will of the employment sector and put at risk the capacity of the family and domestic violence -related legal framework to adequately protect women and children from family and domestic violence.

1.4 The ACTU broadly supports the recommendations proposed by the ALRC Discussion paper, and in particular:

1. The ACTU advocates for the pursuit of domestic violence clauses through workplace bargaining, both in terms of delivering improvements to workers experiencing domestic violence as well as acting as a pace setter and cultural change agent in lifting minimum safety net conditions for those workers who do not have access to workplace bargaining. The first workplace agreement FDV clause was implemented by the Australian Services Union and Surf Coast Shire and Greater Geelong Council in 2010. It is considered world's best practice and has since been replicated in a number of other workplace agreements in local government councils. A number of workplace agreements also now include FDV provisions across a range of both public and private sectors.
2. However, we recognise that workplace bargaining does not deliver equitable standards to all workers. In particular, the very groups of employees least likely to have access to bargaining include women, low-paid workers in casual and part-time work who are more likely to experience domestic violence than any other group of workers.
3. Consequently, the ACTU strongly advocates that a dual approach is required through workplace bargaining coupled with strengthening the minimum safety net including the National Employment Standards (NES) and modern awards to assist employees experiencing domestic violence.
4. Specifically, the current NES right to request a change in working arrangements should be extended to employees who are experiencing family and domestic violence or on whom a person experiencing family and domestic violence reasonably relies for care.
5. The NES right to request a change in work arrangements should also be expanded accommodate a wider range of circumstances, including those arising in connection with domestic violence such as the need to make alternative accommodation arrangements, attend court hearings and so on.

6. We reiterate our position that the NES personal/carers leave minimum statutory entitlement should be extended to employees on whom a person reasonably relies for care and to accommodate a wider range of caring circumstances, including those arising in connection with domestic violence.
 7. In both workplace bargaining and in minimum legislative provisions, it is critical that processes, roles and obligations of all parties are clearly outlined in order to protect both employees experiencing domestic violence and those to whom family and domestic violence is disclosed to.
 8. The ACTU also recommends that the general protection provisions of the *Fair Work Act 2009* (FWA) and relevant state and federal anti-discrimination legislation be amended to include domestic violence as a ground of discrimination to ensure that those who do disclose family and domestic violence are not discriminated against.
 9. Finally, the ACTU emphasises the importance of a holistic legal and social framework to effectively deal with family and domestic violence. Workplace and employment law reform will not be effective if there are inadequate training and support policies and resources available to unions, employers and employees.
 10. Similarly, addressing the broader cultural and educational issues will be ineffective without supporting victims of domestic violence with positive, enforceable rights through proactive legislation.
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1.5 Comments on the Proposals and Questions posed by the ALRC Discussion Paper

ALRC Discussion Paper Sections 14-17: Employment Law

Question 14–1 In addition to removal of the employee records exemption in the Privacy Act 1988 (Cth), what reforms, if any, are needed to protect the personal information of employees who disclose family violence for the purposes of accessing new entitlements such as those proposed in Chapters 16 and 17?

The ACTU agrees that it is critically important to protect the personal information of employees disclosing family and domestic violence, and to ensure confidentiality of employees' personal records relating to family violence.

However, the Fair Work Act 2009 (FWA) currently governs an employee's (and their union's) access to their own records in an affordable, efficient and timely manner, for the purposes of pursuing, for example, a suspected breach of a right or entitlement in need of prompt remedy.

Whilst the ACTU would support legislative amendments to better protect employees' personal information relating to family violence, this support would be conditional upon ensuring that the rights of employees and their union to access employee records as currently provided for in the FWA not be diminished.

Proposal 14–1 There is a need to safeguard the personal information of employees who have disclosed family violence in the employment context. The Office of the Australian Information Commissioner and the Fair Work Ombudsman should, in consultation with unions and employer organisations:

(a) develop a model privacy policy which incorporates consideration of family violence-related personal information; and

(b) develop or revise guidance for employers in relation to their privacy obligations where an employee discloses, or they are aware of, family violence.

The ACTU supports the proposal to develop a model privacy policy and would be prepared to assist in the development of appropriate guidelines.

It is important to remember that employees' disclosure of family and domestic violence is not limited to employers, and will include for example, colleagues and union representatives, both in the workplace and outside of the workplace).

The ACTU is keen to ensure the model privacy policy and/or guidelines would include clear and definitive terms regarding the appropriate:

1. Privacy obligations on workplace contacts/union delegates/union officials/work colleagues/employers to whom an employee has disclosed family and domestic violence information;
2. The role and responsibilities of the person to whom an employee has disclosed family and domestic violence;
3. Processes and procedures to ensure confidentiality for employees disclosing family and domestic violence, including employee records;
4. Potential effects of any applicable mandatory reporting and Privacy Act 1988 (Cth) requirements;
5. Provision of anti-discrimination and/or appeal mechanisms to protect breaches of confidentiality protections for employees disclosing family and domestic violence; and
6. Training and support for all employees, in particular those who are likely to have an employee disclose information related to family and domestic violence to them.

In addition, the adverse action protections included in the FWA (s.351(1)) should be amended to include discrimination against an "employee experiencing family and domestic violence" as a prohibited action under the Act.

A model clause for record keeping and confidentiality requirements in relation to family violence provisions included in workplace agreements should also be developed. For example, the provision in the Surf Coast Shire workplace agreement (clause 4.3.3.3), states that "*No adverse action will be taken against an employee if their attendance or performance at work suffers as a result of experiencing domestic violence.*"

Proposal 14–2 The Australian Government should initiate a national education and awareness campaign about family violence in the employment context.

The ACTU supports Proposal 14-2. The ACTU recommends that such an initiative be developed in consultation with organisations dealing with family violence in the employment context such as unions, employers and the Family and Domestic Violence Clearing House (FDVCH).

The development of education and awareness raising programs to compliment legislative or workplace entitlements should complement, rather than substitute, implementation of enforceable workplace rights and entitlements.

Effort should be focused on changing attitudes to violence against women and children which see family violence as a private issue. Employers, unions and employees should be encouraged to recognise the role that workplaces can play in supporting and assisting victims of violence. Their support and understanding of the issues will be critical to the successful implementation of any legislative reform or enforceable entitlements in workplaces.

Training and support of employers, union staff, delegates and employees in general of legislative reforms, their rights and responsibilities and the provision of resource and referral information will be critical to the effectiveness of any legislative reform in workplaces.

Proposal 14–3 Section 653 of the Fair Work Act 2009 (Cth) should be amended to provide that Fair Work Australia must, in conducting the review and research required under that section, consider family violence-related developments and the effect of family violence on the employment of those experiencing it, in relation to:

- (a) enterprise agreements;***
- (b) individual flexibility arrangements; and***
- (c) the National Employment Standards.***

The ACTU supports Proposal 14-3, noting though that the FWA does not require employers or employees to systematically lodge information regarding the provisions listed in s. 653 and therefore the research conducted under that section does not provide a totally comprehensive picture of the operation of family and domestic violence provisions in workplace or their effect.

Question 14–2 In addition to review and research by Fair Work Australia, what is the most appropriate mechanism to capture and make publicly available information about the inclusion of family violence clauses in enterprise agreements?

The most statistically valid way to collect data on the inclusion of family violence clauses in enterprise agreements is to systematically record their existence in registered workplace agreements.

Currently DEEWR collects some data on provisions in agreements relating to requests for changes to work arrangements and extensions to unpaid parental leave as stipulated under s. 653 (such as for example, expanded eligibility criteria and right to appeal refusals). DEEWR coding could be expanded to also include whether provision for paid family and domestic violence leave exists and whether there is a right to request a change in working hours to accommodate family and domestic violence issues.

Reference could also be made to the joint Australian Family and Domestic Violence Clearing House (AFDVCH) and Social Policy Research Centre (UNSW) Framework to Monitor and Evaluate the Outcomes of the Introduction of Domestic Violence in consideration of capturing and publishing data relevant to the uptake and impact of family violence provisions in workplace agreements.

Question 14–3 How should Fair Work Australia collect data in relation to the incidence and frequency with which family violence is raised in unfair dismissal and general protections matters?

Whilst this would be useful information to collect, it is unclear as to how the proposal would work, given (a) the majority (almost 99%) of unfair dismissal cases are settled on confidential terms; and (b) the initial details provided on the application form may be inadequate to rely on.

Including family violence as a protected attribute with respect to the general protections in s. 351 of the FWA (see para 1.4) would assist in quantifying the extent to which employees experiencing family or domestic violence are adversely affected in the workplace.

Proposal 14–4 In the course of its 2012 and 2014 reviews of modern awards, Fair Work Australia should consider issues relating to data collection.

We are unsure of what data collection is proposed to be conducted under the modern award reviews relating to family and domestic violence. We would require more information on this proposal to make comment.

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

It is appropriate for Fair Work Australia to exercise its discretion under sections 592, 593 and 594 with respect to the conduct of conferences, hearings and confidential evidence. Fair Work Australia’s capacity to issue orders regarding privacy and restricted presence at hearings and conferences as well as suppression of publication of personal details, evidence and documents may assist in encouraging and supporting victims of family violence to pursue matters via the tribunal.

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

Financial hardship and/or lack of access to money are often connected to family and domestic violence as economic control is a critical component of the abuse. It is possible that Fair Work Australia’s filing fee could act as a deterrent for some victims of domestic violence.

Communication materials regarding the ability to waive the filing fee could be promoted in all family and domestic violence materials and also examples of ‘serious hardship’ on materials relating to the waiver could include, inter alia, family and domestic violence.

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

The form currently provides for an applicant to provide any other information or comments they believe FWA should consider when deciding whether to waive the application fee. Providing information to employees on the availability of the option of the waiver for victims of family and domestic violence in general material on family and domestic violence would assist in raising awareness.

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

The Office of the Fair Work Ombudsman regularly develops and publishes best practice guides for employers, employees and their representative organisations. It would be appropriate for the FWO to produce a best practice guide on family and domestic violence for workplaces. As with existing practice, the family and domestic violence for workplaces guide should be prepared in consultation with key stakeholders.

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

This additional ground should:

(a) remove the requirement that an employee be employed for 12 months, or be a long-term casual and have a reasonable expectation of continuing employment on a regular and systemic basis, prior to making a request for flexible working arrangements; and

(b) provide that the employer must give the employee a written response to the request within seven days, stating whether the employer grants or refuses the request.

The ACTU supports the addition of a new right to request flexible work arrangements which would assist employees to deal with other matters arising from family and domestic violence not currently covered by the NES ‘caring responsibilities’; for example, to attend court appearances and related appointments, seek legal advice, and make re-location arrangements. Such provisions would need to encompass an appropriate definition of ‘family or domestic violence’ and refer to confidentiality obligations.

The ACTU queries the draft wording which limits the provision to “provide care or support to a member of the employee’s immediate family or household who is experiencing family violence.” The ACTU supports a model which refers to “employees who care for or support (or are expected to care for or support) a person who reasonably relies on the employee for care or support.”³ This wording covers other important relationships such as indigenous kinship and also neighbours or close friends who may well be more likely to be called upon to care or support a victim of

³ This definition is taken from the Dependent Care Leave provisions of the Work and Families Act 2006, UK.

family or domestic violence than a member of the family or household. Appropriate evidence would need to be produced to verify that the victim ‘reasonably relies on the employee for care or support.’

In addition, it should be noted that currently the FWA [s.739 (2)] restricts employees from appealing an employer’s unreasonable refusal of a request unless they are able to negotiate this right with their employer in a workplace agreement. It is mostly women with caring responsibilities or who suffer family and domestic violence and who need the right to request change to working hours affects. Unfortunately, they tend to have far less bargaining power than their male counterparts. Consequently the very group of employees this provision purports to benefit are the least likely to be able to access it. The ACTU continues to agitate for procedural fairness for all employees to have the right to appeal an unreasonable decision in relation to an NES right.

Of course, preventative measures should be taken to avoid employers making unreasonable refusal of requests for flexible working arrangements. In order to ensure this, the right to request provision in the Act must clearly set out an employer’s obligations to (1) have properly considered the request and (2) reasonably endeavored to accommodate the request.

The ACTU proposes adopting the following wording taken from the amended *Victorian Equal Opportunity Act (1995)*:

An employer must demonstrate that they have considered all relevant circumstances, including—

- (a) *the employee's circumstances, including the nature of his or her responsibilities as a parent or carer; and*
- (b) *the nature of the employee's role; and*
- (c) *the nature of the arrangements required to accommodate those responsibilities (including any flexible working arrangements available under this Agreement); and*
- (d) *the financial circumstances of the employer; and*
- (e) *the size and nature of the workplace and the employer's business; and*
- (f) *the effect on the workplace and the employer's business of accommodating those responsibilities, including:*
 - (i) *the financial impact of doing so;*
 - (ii) *the number of persons who would benefit from or be disadvantaged by doing so;*
 - (iii) *the impact on efficiency and productivity and, if applicable, on customer service of doing so; and*
- (g) *the consequences for the employer of making such accommodation; and*
- (h) *the consequences for the employee of not making such accommodation.*⁴

⁴From the *Victorian Equal Opportunity Act (1995)* s.14A. The Family Provisions Test Case decision provided that reasonable business grounds for refusal of a request “might include cost, lack of adequate replacement staff, loss of efficiency and the impact of customer service.” Alternatively, the Sex Discrimination Act (Cth) 1984 (s.7A) provides that the matters to be taken into account in deciding whether an employer’s condition, requirement or practice is reasonable in the circumstances include: (a) the nature and extent of the disadvantage to the employee; (b) the feasibility of overcoming or mitigating the employee’s disadvantage; and (c) whether the employee’s disadvantage is proportionate to the benefits of the employer’s condition, requirement or practice.

Another example of a similar approach is contained in the Surf Coast Shire Workplace Agreement (clause 4.3.5) which states that “In order to provide support to an employee experiencing family violence and to provide a safe work environment to all employees, Surf Coast Shire will approve any reasonable request from an employee experiencing family violence for :

- Changes to their span of hours or pattern of hours and / or shift patterns;
- Job redesign or changes to duties;
- Relocation to suitable employment within the council / shire;
- A change to their telephone number or email address to avoid harassing contact;
- Any other appropriate measure including those available under existing provisions for family friendly and flexible work arrangements.”

The next proposals are presented as alternate options: Proposal 16–2 OR Proposals 16–3 and 16–4

OPTION ONE: Proposal 16–2

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

OPTION TWO: Proposals 16–3 and 16–4

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

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

(a) because the employee is not fit for work because of a circumstance arising from the employee’s experience of family violence; or

(b) to provide care or support to a member of the employee’s immediate family, or a member of the employee’s household, who requires care or support as a result of their experience of family violence.

The ACTU supports the provision of paid leave for the purposes of dealing with an experience of family and domestic violence or to care for a person who is experiencing family and domestic violence.

We recognise the pros and cons of proposals 16-2 and 16-3/4. Proposal 16-3 acknowledges employees’ family and domestic violence issues up-front. It also enables the triggering of related

specific family and domestic violence provisions such as protection of confidentiality, personal safety and so on.

Proposal 16-3 and 4 on the other hand perhaps creates a less threatening step for employees wishing to avail family and domestic violence entitlements by simply creating the right as a subset of 'personal/carers leave'.

We note that, although option 16-2 is upfront about the leave being for family and domestic violence, and that option 16-3 and 16-4 have the leave as a subset of personal/carers' leave, both options require an employee's disclosure of family and domestic violence.

The wording in proposal 16-4(a) limits the provision to instances where the employee is 'not fit for work', thereby unnecessarily curtailing the usefulness of the leave for other purposes relating to family and domestic violence such as arranging alternative safe accommodation, attending court hearings and so on.

Also, the wording in proposals 16-2, 16-3 and 16-4 (b) unnecessarily limits the provision to "provide care or support to a member of the employee's immediate family or household who is experiencing family violence". The ACTU supports a model which refers to "employees who care for or support (or are expected to care for or support a person who reasonably relies on the employee for care or support" for the reasons discussed regarding proposal 16-1.

An example includes the ASU Surf Coast Shire workplace agreement clause which provides that *"An employee who supports a person experiencing family violence may take carer's leave to accompany them to court, to hospital, or to mind children."*

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

The ACTU does not regard Individual Flexibility Agreements (IFAs) as an appropriate mechanism to achieve employee initiated requests for a change to work arrangements to deal with domestic and family violence circumstances for the following main reasons:

- (a) IFAs are open ended in that an employer can require a range of 'trade-offs' from a person seeking the change to work arrangements;
- (b) Employees seeking flexible arrangements for domestic and family violence are likely to be in a very weak bargaining position; and
- (c) IFAs provide limited certainty as an employer or employee can unilaterally terminate an IFA with 28 days' notice.

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

In addition, the ACTU maintains its concerns that without third party scrutiny of IFAs, there is no way of ensuring employees are not disadvantaged as a result of agreeing to an IFA. This is

particularly applicable to employees suffering family and domestic violence who may be in particularly vulnerable and weak bargaining positions.

For these reasons there are other more appropriate provisions, including workplace agreement clauses and the right to request change to work arrangements which have boundaries around the flexibility and protections for employees in weak or vulnerable circumstances.

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

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

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

(c) establish lines of communication for employees;

(d) set out relevant roles and responsibilities;

(e) provide for flexible working arrangements; and

(f) provide access to paid leave.

The ACTU supports proposal 17-2.

The ACTU supports and promotes union bargaining for family and domestic violence clauses which assist victims of family and domestic violence to remain in paid employment support them through the process of escaping violence and to promote safe and secure workplaces.

As mentioned above, the Australian Services Union (ASU) and CPSU (PSA NSW) have recently negotiated Domestic Violence clauses with the Surf Coast Shire Council and the University of NSW respectively.

For example, the Australian Services Union (ASU) Surf Coast Shire workplace agreement family violence clause:

- recognises that proof of family violence may be required;
- establishes the confidentiality of any personal information disclosed;
- ensures no adverse action can be taken if any employee's attendance or performance suffers as a result of experiencing family violence;
- establishes lines of communication for employees;
- states that a human resources contact will recommend to an employee's supervisor possible forms of support for the employee;
- entitles employees to 20 days per year of paid special leave for absences related to family violence; and
- states that the employer will allow employees' other reasonable requests, such as flexible working arrangements or relocation.

Unions are continuing to pursue family and domestic violence related entitlements through negotiations with employers across a number of jurisdictions.

Proposal 17–3 The Fair Work Ombudsman should develop a guide to negotiating family violence clauses in enterprise agreements, in conjunction with the Australian Domestic and Family Violence Clearinghouse, the Australian Council of Trade Unions and employer organisations.

ACTU would support proposal 17-3 and would be prepared to assist.

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

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

ACTU would support proposals 17-4 and 17-5 that FWA consider including a model clause in awards as part of the modern award review processes.

The ACTU recognises the importance that bargaining has in setting a pace for cultural change and establishing good employment practices in workplaces where bargaining occurs. Such bargaining outcomes play a significant role in paving the way for legislative change to minimum conditions for all workers including those who do not benefit from workplace bargaining.

However, the system of enterprise bargaining is predicated on the capacity to tailor arrangements to the individual needs of a workplace, over an appropriate minimum safety net. The considerable differences in bargaining power of groups of employees limits the capacity to deliver entitlements equally to workers through workplace bargaining alone. Women generally, and in particular, those employed in low paid sectors and those employed on a part-time or casual basis have the lowest bargaining power.⁵ It is for this reason that the Government has legislated a paid parental scheme.⁶

Victims of family violence are likely to have a history of disrupted work patterns, be on lower incomes and more often employed in casual and part-time employment and therefore least likely to have access to domestic violence related provisions delivered through the bargaining process.⁷

As with the NES, entitlements to request flexible work arrangements and the personal/carer's leave provisions in modern awards are not broad enough in coverage of employees eligible to apply or scope of the provision to accommodate a broader range of activities to adequately address the needs of employees experiencing family or domestic violence.

Modern awards can provide additional detail to the terms of the NES, and together with the NES, regulate the bulk of terms of employment for the portion of workers not covered by workplace agreements.

⁵ In 2006, 44% of casuals and 33% of part time employees' wages and conditions were determined solely by awards. Unsurprisingly, employees in these sectors are also the lowest paid: ABS 6306.0 May 2006

⁶ In 2009, after almost 30 years of bargaining, two thirds of Australian mothers (mostly in low paid jobs) still had no access to paid maternity leave: ABS Pregnancy and Employment Transitions, Australia, November 2005, cat.no.4913.0

⁷ M Costello, D Chung & E Carson, 'Exploring Pathways out of Poverty: Making Connections Between Domestic Violence and Employment Practices' (2005) Australian Journal of Social Issues 253, 256;
S Franzway, C Zufferey & D Chung, 'Domestic Violence and Women's Employment' (Paper presented at Our Work , Our Lives National Conference on Women and Industrial Relations, Adelaide, 2007

Section 139(1) of the *Fair Work Act 2009* includes provisions for, inter alia:

- (b) ... the facilitation of flexible working arrangements, particularly for employees with family responsibilities;
- (c) ... variations to working hours; and
- (h) leave, leave loadings and arrangements for taking leave.

As such, s.139 (1) should not impede the capacity of modern awards to include terms for flexible work and leave arrangements for family or domestic violence purposes.

In 2011, the then NSW labour government began the process of inserting a new clause into the Crown Employees (Public Service Conditions of Employment) Award 2009 and a number of similar state based awards. The clause provides employees 5 days special leave and access to other forms of leave to deal with family and domestic violence matters.

Specific referral to family or domestic violence in s.139(1) would further clarify the rights of employees experiencing family or domestic violence.

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

ACTU supports proposal 17-6.

Question 17–7 Section 352 of the Fair Work Act 2009 (Cth) prohibits employers from dismissing an employee because they are temporarily absent from work due to illness or injury. Regulation 3.01 of the Fair Work Regulations 2009 (Cth) prescribes kinds of illness or injury and outlines a range of other requirements. In what ways, if any, could the temporary absence provisions be amended to protect employees experiencing family violence?

We note that if proposal 16-2 (new NES provision of 10 days paid family violence leave) were adopted, employees accessing the leave would be afforded protection against dismissal due to temporary absences. However, where employees have not requested or accessed paid family violence leave and nonetheless are absent from work temporarily due to family violence they may not be protected. We would recommend the addition of “family violence” to the circumstances in which employees are protected from dismissal under Regulation 3.01.

ALRC Discussion Paper Section 18: Occupational Health and Safety Law

Family and domestic violence is one example where conditions or circumstances outside the workplace can follow a member of the community into the workplace. When this occurs it also becomes a workplace matter and therefore within the scope of workplace health and safety law, including placing particular obligations on duty holders, including the person conducting the business or undertaking.

The ACTU supports the intent of Proposals 18-1 to 18- 4, albeit with some minor adjustment to most of them. However, the ACTU would be concerned if:

- (a) These proposals alone were implemented by Safe Work Australia (SWA) and others without first looking at the breadth of issues that may affect women in particular in the work environment. Family and domestic violence is one of a range of issues which disproportionately affects women; and
- (b) These proposals were implemented without also identifying the role and responsibilities of workplace health and safety regulators in each of the jurisdictions (e.g. Victoria, Queensland, Comcare).

Proposal 18–1 Safe Work Australia should include information on family violence as a 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’; and***
- (c) any other code that Safe Work Australia may develop in relation to other topics, such as bullying and harassment or family violence.***

SWA should include information on family violence as a work health and safety issue in relevant Model Codes of Practice, including for example:

‘How to manage work health and safety risks’, ‘managing the work environment and facilities’, ‘bullying’ and any other relevant Code the SWA may develop, including Codes on violence and psychosocial hazards.

It is noted that implementation of this recommendation would require amendment of the first 2 Codes mentioned which are, at time of writing, scheduled for approval by the Workplace Relations Ministerial Council (WRMC) in the near future. It is also noted that a Code on bullying is currently under development and due for endorsement by Ministers endorsement May – June 2012.

Proposal 18–2 Safe Work Australia should develop model safety plans which include measures to minimise the risk posed by family violence in the work context for use by all Australian employers, in consultation with unions, employer organisations, and bodies such as the Australian Domestic and Family Violence Clearinghouse.

SWA should oversight development of model safety plans, including measures to eliminate risks posed by family violence in the work context. Whilst development should occur utilising existing tripartite structures, SWA should also identify other relevant bodies, such as the Australian Domestic and Family Violence Clearing House to participate in this development.

Proposal 18–3 Safe Work Australia should develop and provide education and training in relation to family violence as a work health and safety issue in consultation with unions, employer organisations and state and territory OHS regulators.

Similarly, SWA should oversee development of appropriate training in relation to family violence as a work health and safety issue. Noting that SWA does not itself deliver training, SWA should also identify where this training might be delivered, exploring for example training provided to

assist in enabling 'due diligence' to be achieved, and Health and Safety Representative training. What bodies might deliver this training should also be explored.

Proposal 18–4 Safe Work Australia should, in developing its Research and Data Strategy:
(a) identify family violence and work health and safety as a research priority; and
(b) consider ways to extend and improve data coverage, collection and analysis in relation to family violence as a work health and safety issue.

SWA should, developing its Research and Data Strategy, identify family violence and work health and safety as a priority and consider how to extend and improve research, data collection, coverage and analysis.

Question 18–1 What reforms, if any, are needed to occupational health and safety law to provide better protection for those experiencing family violence? For example, should family violence be included in the National Work Health and Safety Strategy?

The ACTU supports proposal 18-1 to include family and domestic violence in the National Work Health and Safety Strategy.

ALRC Discussion Paper Section 19: Superannuation Law

Family and domestic violence affects the financial control and security of victims. The ACTU in principle supports reforms aimed at protecting family and domestic violence victims' retirement savings and consideration of early access to superannuation where appropriate.

APRA should work with the Australian Institute of Superannuation Trustees, the Association of Superannuation Funds of Australia and other relevant bodies (including the ACTU) to develop guidance for trustees in relation to early release of superannuation on the basis of 'severe financial hardship'.

To the extent that the additional ground is subject to the same eligibility criteria as the existing compassionate grounds covered by the Act, the ACTU supports the inclusion of domestic violence as a new ground employees may rely on to seek early release of superannuation benefits.

Having said that, the ACTU notes that women, in particular, are already significantly disadvantaged in the accumulation of adequate retirement savings already by virtue of the gender pay gap, broken and casual employment history. The ACTU commends the government to take action to remedy this disparity through other legislative reform including removal of the \$450 superannuation guarantee threshold, more progressive tax treatment of superannuation savings, payment of superannuation on periods of parental leave and initiatives to encourage low paid workers to co-contribute to superannuation.