



Knowledge Influence Support

CHAMBER OF COMMERCE
AND INDUSTRY
WESTERN AUSTRALIA

Australian Law Reform Commission Family Violence - Commonwealth Laws Discussion Paper

Submission

CCI Advocacy – 2011

Making it easier to do business

Introduction

1. The Chamber of Commerce and Industry of Western Australia (CCIWA) is the leading business association in Western Australia (WA).
2. It is one of the largest organisations of its kind in Australia, with a membership of over 6,500 organisations in all sectors, including:
 - manufacturing;
 - resources;
 - agriculture;
 - transport;
 - communications;
 - retailing;
 - hospitality;
 - building and construction;
 - community services; and
 - finance.
3. Most of CCIWA's members are private businesses, although CCIWA also has members in the not-for-profit sector and the government sector.
4. CCIWA members employ a significant number of employees:
 - (a) nearly 73 per cent, or over 4100 members employ up to 19 employees;
 - (b) 21 per cent or nearly 1200 members employ between 20 and 99 employees; and
 - (c) six per cent, or over 340 members employ over 100 employees.
5. CCIWA members are located in all geographical regions of WA.
6. CCIWA is also the direct employer of about 800 apprentices across WA as part of a Group Training Scheme operated by Apprenticeships Western Australia Pty Ltd, a wholly owned subsidiary of CCIWA.

Background

7. In 2009, the Standing Committee of the Attorneys- General appointed the Australian Law Reform Commission (ALRC) to conduct an inquiry into the legal framework surrounding issues of family violence. The ALRC was asked to report on what, if any, improvements could be made to the relevant laws to protect the safety of women and their children. The ALRC sought input and feedback from stakeholders.
8. The ALRC launched the report after identifying a goal “*to reduce all violence in our communities*”, recognising that “*Whatever form the violence takes, it has serious and often devastating consequences for victims, their extended families and the community*”.¹
9. The launch of the Inquiry is underpinned by an objective to protect the safety of those experiencing family violence.²
10. CCI acknowledges and applauds the Government for its efforts in recognising and attempting to reduce the incidence of family violence in the Australian community. This is a move that is strongly supported by CCI.
11. CCI recognises that family violence is one of many challenging social issues that can have a devastating affect on an employee’s personal and professional life.
12. CCI submits that while family violence may have an impact at the workplace, it is a social issue, not an employment issue. The solution to family violence lies with increased community awareness of the problem rather than increased employment regulation.
13. Employers currently provide support and assistance to employees facing serious social problems through general human resources management, supported by the employment law framework.³

¹ Australian Law Reform Commission, *Family Violence-Commonwealth Laws Discussion Paper 76 Summary*, August 2011, page 3.

² Ibid.

³ For example, *Fair Work Act 2009 (Cth)* ss 97, 202.

14. CCI submits that any examination of existing laws surrounding family violence should be considered in the context of *individuals* that experience family violence rather than *employees* that experience family violence. There is no plausible link between any deficiency in the current legal framework, and the obligations of employers to their employees.
15. Hence, there is no need to alter the existing employment laws.

Business impact and attitude

16. Businesses are sensitive to the personal and social problems experienced by their staff. Where an employee is experiencing personal problems, their performance and general attitude towards work can be adversely affected.⁴ An employer would typically be supportive of an employee in this situation, not only out of concern for the employee's personal welfare, but also because it is in the best interests of the business that staff are engaged in their work. CCI argues against further regulating the employment relationship and recommends maintaining a system where employers and employees can deal with the issues that affect them on a case-by-case basis.
17. Employers will not look favourably upon further regulation in the employment context. Businesses are already heavily regulated and have to deal with extensive administrative burdens which are not only time consuming, but costly. Labour costs are already a major concern for many businesses.⁵ For example, the CCI '*Cost of Doing Business*' survey reported that wage costs were the most highly rated cost impact for businesses with 88 per cent of respondents selecting wage costs as a key cost driver.⁶
18. While there are a number of larger businesses equipped to handle increased regulation, a large number of small businesses that operate on limited finance and tight margins are not. Many small to medium sized businesses do not have dedicated human resources staff and in turn, do not have capacity to deal with the additional obligations being proposed by the ALRC. It is important for the ALRC to take these differences into account.

⁴ Domestic Violence Workplace Rights and Entitlements Project, '*Domestic Violence and the Workplace: Employee, Employer and Union Resources*', page 8.

⁵ National Australia Bank, '*Monthly Business Survey*', August 2011; Chamber of Commerce and Industry WA, '*Outlook*', March Quarter 2011, pages 17-18.

⁶ Chamber of Commerce and Industry WA, '*Cost of Doing Business*', August 2011, page 12.

19. Enforcing new regulations on employers will only instil a feeling of direct or indirect responsibility for something that has occurred away from the workplace. It is not appropriate to force an employer to deal with a problem that is otherwise private and personal to an employee. CCI adopts paragraph 81 of the Australian Chamber of Commerce and Industry (ACCI) Submission to ALRC Issues Paper 36 where it is stated that the *“ALRC must recognise that employers cannot be morally or legally responsible for all of the activities of its staff outside of the workplace, particularly when this relates to what happens in the privacy of a person’s home. Any recommendations to create legal obligations on employers to prevent harm in this regard would not be supported”*.⁷

Current employer obligations

20. CCI submits that the current employment law framework provides adequate support for employees experiencing family violence. This is recognised in the ALRC discussion paper where it is stated that the *“objects of the Fair Work Act 2009, the inclusion of the right to request flexible working arrangements, and the entitlement to various forms of leave under the NES, all provide explicit recognition of the need for employees to balance their work with their personal lives and commitments, and the role of employers in allowing them to do so”*.⁸

Personal/Carer’s Leave

21. The *National Employment Standards* (NES) set out under the *Fair Work Act 2009* (the Act), gives employees an entitlement to 10 days paid personal/carers’ leave. Section 97 of the Act provides:

97. *Taking paid personal/carers’ leave*

An employee may take paid personal/carers’ leave if the leave is taken:

⁷ Australian Chamber of Commerce and Industry, *‘ACCI Submission: Family Violence and Commonwealth Laws’*, ALRC Issues Paper 36 (Employment and Superannuation), April 2011, paragraph 81 at page 20.

⁸ ALRC, *‘Family Violence- Commonwealth Laws’* Discussion Paper 76, August 2011, Paragraph 16.59 at page 517.

- (a) *because the employee is not fit for work because of personal illness, or personal injury affecting the employee; 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 because of:*
 - (i) *a personal illness, or personal injury, affecting the member; or*
 - (ii) *an unexpected emergency affecting the member.*⁹

22. CCI submits that the current entitlement to personal/carer's leave is broad enough to encompass situations where the employee or a member of their family or household is experiencing family violence.

Individual Flexibility Arrangements

23. The Act also provides the ability for employees and employers to enter into individual flexibility arrangements (IFA's). Section 202 provides:

202. Enterprise agreements to include flexibility term etc.

Flexibility term must be included in an enterprise agreement

202(1). An enterprise agreement must include a term (a flexibility term) that:

- (a) *enables an employee and his or her employer to agree to an arrangement (an individual flexibility arrangement) varying the effect of the agreement in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer; and*
- (b) *complies with section 203.*

Effect of an individual flexibility arrangement

⁹ *Fair Work Act 2009 (Cth), s97.*

202(2). *If an employee and employer agree to an individual flexibility arrangement under a flexibility term in an enterprise agreement:*

(a) *the agreement has effect in relation to the employee and the employer as if it were varied by the arrangement; and*

(b) *the arrangement is taken to be a term of the agreement.*

202(3). *To avoid doubt, the individual flexibility arrangement:*

(a) *does not change the effect the agreement has in relation to the employer and any other employee; and*

(b) *does not have any effect other than as a term of the agreement.*

Model flexibility term

202(4). *If an enterprise agreement does not include a flexibility term, the model flexibility term is taken to be a term of the agreement.*

202(5). *The regulations must prescribe the model flexibility term for enterprise agreements.*¹⁰

The model flexibility term for agreements can be found in Schedule 2.2 of the *Fair Work Regulations 2009*.

24. Notwithstanding the difficulties faced by some employees and employers when negotiating IFA's due to union influence and insistence on collective bargaining¹¹, CCI submits that IFA's are another means by which the current industrial relations legislation can assist employees who are experiencing family violence.

25. The model flexibility clause provides that an employer and employee may make an agreement about when work is performed. This allows those

¹⁰ Ibid, ss202(1)-(5).

¹¹ ACCI submission April 2011, paragraphs 64-65 at page 15.

experiencing family violence the flexibility to adjust their working hours by agreement with their employer to take care of a range of personal business issues including, for example, attending counselling sessions or court hearings related to the family violence, seeking advice on their personal situation or collecting a child from school.

Other support mechanisms

26. CCI submits that employer's have a vested interest in the health and well-being of their employees. Employer's can, and do, provide assistance to employees experiencing family violence in many ways that do not require regulation. For example, Australia Post has implemented a Domestic and Family Violence Policy as part of its Employee Health and Well-being strategy. The policy aims to raise awareness of the issue and provides a guideline for employees who experience family violence. The Body Shop has also implemented a number of policies and procedures to support staff who may be experiencing violence in the home.¹²
27. Although an employer may provide support to an employee who is experiencing family violence, that assistance is not a substitute for proper counselling and advice. To overcome this issue, employers are able to offer support to their employees through Employee Assistance Programs which are designed to help people cope with personal issues including family violence.¹³
28. As recognised by ACCI, businesses provide income and employment opportunities and are able to provide assistance to those experiencing family violence in this manner, albeit indirectly.¹⁴
29. Employers are able to utilise common areas such as kitchens and lunch rooms to display informative posters about family violence in the workplace.¹⁵ This option is simple for an employer to implement but is powerful and shows support for employees who may be subjected to family violence outside of work.

¹² Australian Domestic and Family Violence Clearinghouse, 'Working it out: domestic violence issues in the workplace', Issues Paper 16, April 2008, page 10.

¹³ For example, CRS Australia is recommended by the Australian Government Department of Human Services and is able to help employees deal with personal problems that may be related to work, health, family, financial or emotional concerns:

<http://www.crsaustralia.gov.au/employee_assistance_programmes.htm> accessed at 21 September 2011.

¹⁴ ACCI submission April 2011, paragraph 14 at page 3.

¹⁵ Domestic Violence Workplace Rights and Entitlements Project, 'Domestic Violence and the Workplace: Employee, Employer and Union Resources', page 19.

30. Workplace policies and procedures deal with these matters already even if they are not formalised in agreements.¹⁶ CCI submits there is no need to interfere with these arrangements and introduce further regulation to the employment relationship.

Response to proposals set out in the discussion paper

31. For the reasons cited above, CCI opposes the following proposals:

Proposal 16-1

32. Proposal 16-1 provides that:

Section 65 of the Fair Work Act 2009 (Cth) should be amended to provide that an employee who is experiencing family violence, or 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 the circumstances arising from 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 systematic 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.*

33. For the reasons provided in paragraphs 23, 24 and 25 of this submission, CCI believes that proposal 16-1 would be an unnecessary amendment to the Act. The pre-existing rights for employees to request flexible working arrangements are broad enough to encompass requests from employees who are experiencing family violence or need to provide assistance to a member of their immediate family or household who is experiencing family violence.

¹⁶ Ibid, page 10.

34. CCI submits that an amendment to section 65 of the Act is not the most effective mechanism through which an employee could be protected from family violence. A submission from Women's Health Victoria, which notably has a more specific interest in the protection of employees experiencing family violence, suggested that section 65 '*may not be the best place to promote flexible leave arrangements for victims of family violence*'. This is because an amendment to the section would require a complete shift in the focus of the provision. Section 65 is a relatively new provision and it is essential to evaluate the current effectiveness of the provision before any amendments are made.¹⁷ This position is further supported by the ALRC itself.

"Overall, the ALRC considers that while IFA's may act as one mechanism through which the Fair Work Act could account for the needs of employees experiencing family violence, they may not necessarily be the most appropriate in the family violence context. In any event, the ALRC does not consider that any changes could usefully be made to the legislation with respect to IFA's to protect the safety of employees experiencing family violence."¹⁸

35. In response to subsection (a) of proposal 16-1, CCI opposes the removal of the requirement that an employee must be employed for more than 12 months prior to making a request for flexible working arrangements. The removal of this condition only reduces the requirements employees must satisfy before accessing workplace entitlements to the detriment of employers.
36. The introduction of an additional entitlement to leave for those experiencing family violence may leave other employees feeling aggrieved. Employees experience a number of different personal problems for which they receive no additional leave entitlements. Employees not suffering from domestic violence may see the introduction of family violence leave as unfair and CCI submits no distinction should be made between employees who experience family violence and those who are victims of crime generally, or suffer from any other personal issue which may affect their ability to attend work.

¹⁷ Women's Health Victoria, '*Submission to ALRC Family Violence and Commonwealth Laws Issues Paper: Employment and Superannuation*', April 2011, page 5.

¹⁸ ALRC, '*Family Violence- Commonwealth Laws*, Discussion Paper 76, August 2011, paragraph 17.37 at page 38.

37. The circumstances in which an employee may request leave for family violence have not been defined and it would be very difficult for an employee to provide evidence of their entitlement to family violence leave in many cases. Hence, it may be open to abuse.

Proposals 16-2, 16-3 and 16-4

38. Proposal 16-2 states that:

“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 and support to a member of the employee’s immediate family or household who is experiencing family violence.”

OR Proposals 16-3 and 16-4.

Proposal 16-3 states that:

“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 and support to a member of the employee’s immediate family or household who is experiencing family violence.”

Proposal 16-4 states that:

“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 circumstances arising from the employee’s experience of family violence; or*

b) *to provide care and 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."*

39. CCI strongly opposes proposals 16-2 to 16-4 for the reasons cited in paragraph 20, 21 and 22 of this submission. An employee experiencing family violence may not be *'fit for work'* and if not, they will have access to the pre-existing personal/carer's leave entitlement. There is no need to introduce a further 10 days paid leave, which will only result in a significant increase in employment costs and administrative burdens for businesses.
40. CCI opposes the position of many stakeholders¹⁹ who have argued that the introduction of a statutory entitlement to paid family violence leave would *'send a clear message to employers and the Australian community that family violence has significant impact on the Australian economy, and that preventing and responding to it is a whole of community responsibility.'*²⁰ This approach requires employers to meet the cost and shoulder the burden of community education over which they have no control. The introduction of family violence leave is not the only way to engage the community and promote social awareness of the issue. Education campaigns should be the first avenue through which awareness is raised before considering additional regulation and compliance on business.
41. CCI supports the position of ACCI that it is not appropriate to amend the NES to provide for family violence leave, noting that *"employers often provide paid and unpaid leave where employees need to take time off work for a variety of personal reasons. The reason to take leave doesn't necessarily involve issues such as domestic violence, but often can... These issues are dealt with every day across hundreds of thousands of workplaces in Australia and in the absence of a dedicated law or regulation."*²¹
42. Further, CCI supports ACCI's submission that employers are unlikely to *"accept being forced to take on additional obligations above and beyond what*

¹⁹ Australian Domestic and Family Violence Clearinghouse; Domestic Violence Victoria; National Network of Working Women's Centres.

²⁰ Joint submission of Domestic Violence Victoria and others, *'Submission to ALRC Family Violence and Commonwealth Laws Issues Paper: Employment and Superannuation'*, April 2011.

²¹ ACCI submission, paragraph 57 at page 11.

is currently required by existing laws unless a strong case is made out for doing so".²²

Proposal 17-6

43. Proposal 17-6 states:

"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 section 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."

44. CCI opposes this proposal on the grounds that it is unnecessary. Section 394(3) of the Act sets out the factors to be considered by Fair Work Australia (FWA) when considering whether to grant an extension of time. These factors were originally established in the case of *Brodie-Hanns v MTV Publishing Pty Ltd* (1995) 67 IR 298. Section 394(3) states:

"FWA may allow a further period for the application to be made by a person under subsection (1) if FWA is satisfied that there are exceptional circumstances, taking into account:

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

The factors outlined in s394(3) demonstrate that FWA will give adequate consideration to any reasons for delay in applying for an unfair dismissal

²² Ibid, paragraph 26 at page 5.

remedy. This provision allows a person who is late in making an application by reason of family violence the opportunity to explain their circumstances to FWA.

45. CCI submits the term '*exceptional circumstances*' is broad enough to include situations of family violence and the capacity for FWA members to take family violence into account, like any other exceptional circumstance, does not need to be explicit or part of an exhaustive list of considerations. FWA members should retain their discretion in this regard.

Response to questions set out in the discussion paper

Question 14-1

46. Question 14-1 asks:

"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?"

47. CCI submits that no reforms are necessary in response to this question. It assumes the current privacy legislation creates barriers to the disclosure of family violence by private sector employees due to the employee records exemption under the *Privacy Act 1988 (Cth)*. CCI supports the position of ACCI in this regard. The employee records exemption should be retained as *"there is no evidence that employers have abused, mishandled or treated confidential personal information from employees other than on a proper and legitimate basis. Employee concerns that such information may be mishandled does not count. And where isolated events do occur, they should not provide a policy reason for the removal of a perfectly working and appropriate exemption."*²³

Question 17-1

45. Question 17-1 asks:

"Section 352 of the Fair Work Act 2009 (Cth) prohibits employers from dismissing an employee because they are temporarily absent from work due

²³ Ibid, paragraph 35 at page 6.

to illness or injury. Regulation 3.01 of the Fair Work Regulations 2009 (Cth) prescribes kinds of illness and 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?"

46. CCI adopts the position of ACCI in response to this question and submits that there is no need to amend section 352 of the Act. As indicated by ACCI in its submission, the current general protections provisions provide appropriate protections for employees as it is now easier for an aggrieved person to make a complaint, with the onus on the employer to prove they did not take adverse action against the employee.²⁴

Question 18-1.

47. Question 18-1 asks:

"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?"

51. CCI submits it is not necessary to introduce any further reforms to occupational health and safety law.
52. CCI supports the position of ACCI that *"Employers already have existing obligations in respect of all workers. This includes where threats of violence are sufficiently connected to the workplace and the people to whom the employer owes a duty of care (both at common law and in legislation). Employers must take reasonable precautions to prevent workplace related harm to workers and the public, including the possibility of harm to employees from non-employees. There should not be any specific law dealing with specific situations, such as family violence, given that the existing legal framework already covers this situation as part of the general duties."*²⁵
53. CCI submits that an employer's responsibility to its employees in situations related to family violence should not be separated from their general occupational health and safety obligations.

²⁴ Ibid, paragraph 72 at page 18.

²⁵ Ibid, paragraph 79 at page 19.

Conclusion

54. CCI submits that while family violence may have an impact at the workplace, it is a social issue rather than an employment issue.
55. CCI believes that employers should not be held morally or legally responsible for the activities of employees outside the workplace, especially when it relates to personal issues that develop in the privacy of a person's own home or in their private lives.
56. Many businesses are already struggling with labour cost increases and will not look favourably upon additional paid leave entitlements, as well as the increased administrative burden that many of the ALRC proposals would create.
57. The current provisions of the Act and the NES relating to IFA's and personal/carer's leave are broad enough to encompass situations of family violence and as such, there is no need to make any amendments to the legislation.
58. Beyond legal obligations, there are many ways in which employers can, and do, assist employees experiencing family violence that are simple and cost effective.
59. For the reasons outlined in this submission, CCI does not support the introduction of any further regulation to the current employment legal framework.

Bibliography

Australian Chamber of Commerce and Industry, '*ACCI Submission: Family Violence and Commonwealth Laws*', ALRC Issues Paper 36 (Employment and Superannuation), April 2011.

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