



Australian Domestic & Family Violence Clearinghouse

Ms Sabina Wynn
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By email: sabina.wynn@alrc.gov.au

30 September 2011

Dear Ms Wynn

**ALRC Discussion Paper No 76 - Family Violence and Commonwealth Laws:
Part E - Employment**

The Australian Domestic and Family Violence Clearinghouse (the Clearinghouse) submits this response to Part E of the ALRC Discussion Paper on *Family Violence and Commonwealth Laws*.

The Clearinghouse's ongoing Domestic Violence Workplace Rights and Entitlements Project ('Safe at Home, Safe at Work') with unions and employers around promotion of domestic violence provisions in industrial instruments has significantly informed this submission.

We have used the term 'domestic/family violence' rather than 'family violence' throughout this submission for consistency with existing Project materials.

Please do not hesitate to contact us regarding the content of this submission or if you have further questions.

Yours sincerely

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Australian Domestic and Family Violence Clearinghouse

Submission in Response to the ALRC Discussion Paper on Family Violence and Commonwealth Laws – Part E (Employment)

Prepared by Tashina Orchiston

30 September 2011



Executive Summary

The Clearinghouse supports the following proposals:

- **Proposal 14–1:** The Office of the Australian Information Commissioner and Fair Work Ombudsman should develop a model privacy policy and guidance for employers in relation to privacy obligations with respect of employee disclosure of domestic/family violence.
- **Proposal 14–2** The Australian Government should initiate a national education and awareness campaign about domestic/family violence in the employment context.
- **Proposal 14–3** Section 653 of the *Fair Work Act 2009* (Cth) should be amended to provide that Fair Work Australia must, in its review and research, consider family violence-related developments and the effect of family violence on the employment of those experiencing it.
- **Proposal 14–4** Fair Work Australia should consider issues relating to data collection in the course of its 2012 and 2014 reviews of modern awards.
- **Proposal 16–2** The National Employment Standards should be amended 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.
- **Proposal 17–2** The Australian Government should encourage the inclusion of family violence clauses in enterprise agreements.
- **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.
- **Proposal 17–4** In 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 its first four-yearly review of modern awards, beginning in 2014, Fair Work Australia should consider the inclusion of a model family violence clause.
- **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).
- **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.
- **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 the Australian Domestic and Family Violence Clearinghouse.

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

14. Employment Law—Overarching Issues and a National Approach

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?

1. The Clearinghouse strongly supports the removal of the employee records exemption in the *Privacy Act 1988* (Cth) and the development of a model privacy policy to assist employers in implementing confidentiality measures to protect disclosure of domestic/family violence. Such a policy would assist employees in disclosing domestic/family violence, providing better assurance that their personal information will be dealt with securely.
2. Disclosure in the context of accessing workplace rights and entitlements should be governed by the national privacy principles (private sector) or information privacy principles (public sector). However, for organisations under \$3 million annually that do not fall within an organisational category that is covered by the ambit of the existing *Privacy Act 1988* (Cth) protections, a model privacy policy is necessary to protect the personal information of employees who disclose domestic/family violence for the purposes of accessing workplace rights or entitlements.
3. According to ACCI, ‘employers...treat these matters with the utmost confidentiality and would not seek to break that trust and confidence with their valued staff’.¹ This indicates that the removal of the employee records exemption would accord with ordinary business practice in the private sector and would therefore not add an additional compliance burden.
4. Additionally, we recommend that the Office of the Australian Information Commissioner be given the power to conciliate complaints for employees who believe that their privacy has been breached. This is necessary to improve adherence to the recommended model privacy policy set out below at Proposal 14-1(a).

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.

5. We support the proposal to develop a model privacy policy to assist employers in keeping personal information disclosed about domestic/family violence confidential, subject to the employer duties of care owed under OHS and tort. This should be complemented by guidance material for employers directed specifically at disclosure of domestic/family violence.

¹ ACCI, *Submission CFV 19* (8 April 2011) [33].

6. The Clearinghouse recommends that disclosure of domestic/family violence should be treated as sensitive information, requiring it be handled with the consent of the employee and the model policy should include an obligation on the employer to notify the employee where and how information disclosed will be used. At a minimum, no personal information should be kept on an employee's file regarding disclosure of domestic/family violence without the employee's consent.
7. The model privacy policy should consider the employer duties of care owed under OHS and tort which may compel an employer to contact the police or communicate information about domestic/family violence where there is a risk to workplace safety. This is already reflected in the NPPs at 2.1(e) which states that disclosure of personal information is permitted where:

the organisation reasonably believes that the use or disclosure is necessary to lessen or prevent:

(i) a serious and imminent threat to an individual's life, health or safety; or

(ii) a serious threat to public health or public safety.

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

8. The Clearinghouse supports this proposal if the campaign is accompanied by, rather than in lieu of, workplace rights and entitlements for victims of domestic violence. Entitlements include changes to the *Fair Work Act 2009* (Cth), as set out in Proposals 16-1 and 16-2, or domestic violence clauses in industrial instruments. Any campaign to raise awareness should also correspond with free and accessible employment advice services for workers, so that workers experiencing domestic/family where it impacts on their work can get assistance if necessary.²
9. The national education and awareness campaign should be:
 - *Targeted at all workers*

Recent research from the United States has indicated the importance of targeting middle and high-income women workers in domestic violence prevention measures. In their survey of 1,079 women workers in the state of New Hampshire, Potter and Banyard (2011) found that higher numbers of women in managerial positions experienced intimate partner violence than women in lower positions.³ The study suggested that women in higher-status positions may be more vulnerable to intimate-partner abuse 'because their high status and higher income positions may create gender role conflict within their relationships'.⁴

² See further at para [14].

³ Sharyn Potter and Victoria Banyard, 'The Victimization Experiences of Women in the Workforce: Moving Beyond Single Categories of Work or Violence' (2011) 26(4) *Violence and Victims* 513.

⁴ *Ibid* at 515.

Additionally, the campaign should acknowledge that domestic violence occurs between people in same sex relationships, and people of diverse sex, sexuality and gender.⁵

- *Built around enforceable, non-discretionary entitlements;*
- *Focused solely on domestic/family violence (as opposed to workplace violence, bullying or sexual harassment);*
- *Designed to address the systemic barriers faced by victims of domestic/family violence from disclosing domestic/family violence where it is impacting on them at work or impacting on their workplace*

This includes changing organisational culture to overcome the perception that domestic/family violence is a personal, private issue (even where it impacts on the workplace).

- *Directed at the needs of both SMEs and larger enterprises.*

10. The Clearinghouse strongly supports the campaign being based on a coordinated approach involving all of the key stakeholders. It is particularly important that the campaign bring together the domestic violence and industrial sectors. Given that this is a developing area, and there is a need for existing domestic/family violence support services to be equipped with understanding on how best to support working people experiencing domestic violence. There is currently a lack of understanding around this issue in the domestic/family violence sector.
11. In our experience, employers are seeking assistance to understand the impact of domestic violence and applying protections in the workplace, and assistance with referring to appropriate domestic violence support services. This demonstrates the need for separate awareness campaigns for employees and employers.
12. In light of the above considerations, the campaign could include the following resources:
 - A series of posters designed to raise employee, employer and union awareness around the issue;
 - Online factsheets to provide guidance for workers, employers and unions on domestic/family violence related workplace issues;
 - Online training ('e-learning') module designed to assist workplaces in implementing new domestic/family violence workplace rights and entitlements, using interactive scenarios;

⁵ Research indicates that domestic violence is as common in same-sex relationships as it is in heterosexual relationships. See, eg Marian Pitts, Anthony Smith, Anne Mitchell and Sunil Patel, *Private Lives: A Report on the Health and Wellbeing of LGBTI Australians*, Australian Research Centre in Sex, Health and Society, La Trobe University, (March 2006) which found that 33% of 5,476 LGBTIQ respondents surveyed experienced some form of intimate partner violence during the course of their lifetime, with trans respondents most likely to report having experienced intimate partner violence.

- Onsite training, conducted by persons skilled in both domestic/family violence and industrial/employment issues;
- Training framework designed to assist workplaces in implementing the entitlements effectively.

This training should comprise of two aspects: first, targeted sessions for the ‘go to’ people within the organisation such as human resources, safety and security personnel and frontline managers and union delegates. Second, ‘lunch and learn’ sessions for general staff.

13. We also recommend that organisations are encouraged to implement confidential internal surveys about domestic/family violence in the workplace. This is critical to raising the issue on an enterprise level and allows workplaces to gain insight into how domestic/family violence is affecting their workforce. Survey questions might include the following:

- Have you had any personal experience of domestic/family violence?
- Do you know someone (e.g. family member, friend of co-worker) who has experienced domestic/family violence?
- If you have experienced domestic/family violence, has it affected you at work? If so, how?

14. Although, beyond the terms of reference for this Inquiry, the Clearinghouse strongly recommends that a community-based employment advisory service be established in the Australian states and territories which currently lack one (New South Wales, Tasmania, A.C.T). An awareness campaign needs to be linked with an independent, free service where workers can get advice and assistance about workplace matters involving domestic/family violence. Without such a service, any campaign is unlikely to achieve its objective of supporting the implementation of domestic/family violence entitlements.⁶

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.

15. The Clearinghouse welcomes this proposal. However, review and research by FWA under an amended section 653 does not replace the need for independent research, monitoring and evaluation of the incidence of domestic/family violence in the workplace context on a national basis: FWA lacks the jurisdiction to conduct comprehensive national research into the uptake and

⁶ Australian State, Territory and New Zealand Workplace Relations Ministers Council, *Communique of 85th Meeting* (Sydney, 10 August 2011) 2.

implementation of domestic violence entitlements, given that not all workplaces come under the national system.

16. We recommend that holistic monitoring and evaluation take place on a national basis, in partnership with the Australian Domestic and Family Violence Clearinghouse, or independently, by the Australian Domestic and Family Violence Clearinghouse. This is necessary in order to review the impact of existing domestic violence workplace entitlements in state industrial awards which fall outside the national workplace relations system.⁷
17. The Clearinghouse has recently conducted a survey of the effect of domestic/family violence on the employment of persons experiencing it.⁸ This survey confirms previous international findings that domestic/family violence affects the safety and productivity of a significant number of workers. This survey could provide a useful context for further research into the impact of enterprise agreement conditions, IFAs and changes to the NES.

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?

18. As noted by the ALRC at para [14.92] of the Discussion Paper, the Australian Domestic and Family Violence Clearinghouse and Social Policy Research Centre at the University of New South Wales have developed a Framework to Monitor and Evaluate the Outcomes of the Introduction of Domestic Violence Clauses in industrial instruments.
19. The Framework has several components to assess the inclusion of domestic violence clauses in industrial instruments, including:
 - Incorporation of domestic violence clauses into industrial instruments;
 - Introduction of training and other significant workplace initiatives related to implementing the clauses;
 - Uptake of entitlements and related safety policies and procedures in workplaces where these are available by employees experiencing domestic violence;
 - A reported reduction in the rates and types of domestic violence experienced by workers, impacting on their work performance, and manifesting in the workplace (e.g. abusive phone calls and e-mails; performance issues);
 - Reduction in adverse action experienced by women at work (loss of job, performance management, disciplinary action) as a result of domestic violence;
 - The effectiveness of safety plans and measures such as telephone and e-mail screening;

⁷ So far 19 state public sector awards have been amended to include a right to paid leave for employees experiencing domestic violence.

⁸ Final survey report forthcoming in December 2011.

- Increased activity by the workplace on community related domestic violence prevention; and
- Development of workplace cultures which are supportive of employees experiencing domestic violence.⁹

20. This framework provides a sound mechanism for capturing information about the inclusion of domestic/family violence clauses in enterprise agreements (and industrial awards). Subject to continued Commonwealth funding, the Clearinghouse intends to conduct an implementation and monitoring study of domestic violence clauses, using this framework in 2012, which will be made publicly available and publicised via the Domestic Violence Workplace Rights and Entitlements Project website.¹⁰ The study could also be publicised via the FWA and/or FWO websites.

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?

21. Given the large volume of applications and that most unfair dismissal and general protections matters are resolved at or prior to conciliation, it may be too onerous for FWA to collect data on the incidence and frequency of domestic/family violence in this context. It would be preferable to first conduct research into the barriers for victims of domestic violence to bring unfair dismissal or general protections claims.¹¹
22. To improve data collection by FWA with respect to the incidence and frequency of domestic/family violence in relation to unfair dismissal matters, an education campaign, combined with the entitlement to a right to request flexible work and paid leave for employees experiencing domestic violence would provide a basis for enhanced future data collection in this area by raising employee consciousness of domestic violence in the workplace context.
23. In order to improve data collection in this area in relation to general protections disputes, we strongly support the inclusion of ‘domestic/family violence’ as a protected attribute under section 351 of the *Fair Work Act*, so that a general protections claim can be brought on this ground if victims are treated adversely on the basis of domestic/family violence victim status. This would dramatically enhance FWA’s ability to collect data on this issue.¹²

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.

24. The Clearinghouse strongly supports this proposal.

⁹ Appendix 1, Figure 2.1: A program logic for evaluating the implementation and impact of Domestic Violence clauses into industrial agreements, Table 2.2: Possible measures and data sources: short, medium and long-term outcomes.

¹⁰ Currently located at: http://www.adfvc.unsw.edu.au/dv_workplace_rights_entitlements_project.htm.

¹¹ This research could form the basis of the education/awareness campaign proposed above (Proposal 14-2).

¹² Given that the s 351 protections are currently underpinned by federal or state and territory anti-discrimination law this would need to be coupled with the inclusion of this ground in the new federal equality law which is currently being consolidated.

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

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

25. FWA has a discretion, where it would be desirable due to the 'confidential nature of any evidence' or for 'any other reason', to issue suppression and non-publication orders, order that all or part of the hearing be held in private, or restrict or prohibit the publication of evidence or documents relied on at the hearing. This discretion should be better publicised to applicants, particularly to would-be applicants who have experienced domestic/family violence-related workplace issues.¹³
26. We also recommend that Fair Work InfoLine staff receive training on domestic/family violence and its impact on the workplace, including sensitivity in dealing with clients experiencing domestic/family violence. For example, the ADFVC has developed a suitable training module on domestic/family violence and its interaction with the workplace which could be accessed by FWA staff.¹⁴

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?

27. Discussions with stakeholders indicate that a filing fee may be a further deterrent to would-be applicants experiencing domestic/family violence who are likely to already be financially disadvantaged. One of the manifestations of domestic/family violence is financial control. This control, exerted through psychological and/or physical means, may not be evident from the victim's 'on paper' financial position as set out in the application fee waiver form, which requires applicants provide detailed information about their finances.
28. In order to address the hardship faced by victims of domestic/family violence in establishing financial hardship, the application fee waiver policy and form should expressly refer to circumstances of domestic/family violence so that it is clear to potential applicants that this factor will be taken into account in assessing fee waiver eligibility.

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?

29. Fair Work Australia's 'Application – waiver of application fee' form could include a reference to circumstances of domestic or family violence under Question 14 'other comments', as follows:

Other comments: (Please include any other information/comments you believe FWA should consider when deciding whether to waive your fee).

For example, domestic or family violence affecting your current financial situation.

¹³ *Fair Work Act 2009* (Cth) ss 593-94.

¹⁴ This training is expected to be available via our website from early December 2011.

30. A change to the form would need to be accompanied by training for operators of the Fair Work InfoLine and other services (e.g. community-based worker advisory services) to ensure would-be applicants are made aware that domestic/family violence impacting on financial hardship would be considered by FWA as grounds for a waiver of the applicable application fee.

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?

31. The Clearinghouse recommends that the FWO, in consultation with the Clearinghouse, develop a Best Practice Guide for employers to managing domestic violence issues where domestic violence is impacting on the workplace (e.g. Best Practice Guide to Managing Domestic Violence When it Impacts on the Workplace). It is important that the Guide specifically refer only to domestic/family violence where it impacts on work performance, productivity or safety and is therefore a workplace issue: it is unnecessary and undesirable for employers to attempt to manage or address domestic violence where there is no requisite connection to the workplace.
32. The Guide should be aimed at fostering sensitive and supportive workplaces where victims feel safe to disclose. As discussed below at Proposals 16-2 to 16-4, disclosure is integral to employers and other safety duty holders being able to adequately identify and respond to workplace safety risks. Further, disclosure provides an opportunity for the workplace to offer information to the victim about relevant domestic violence support services.
33. Additionally, the FWO, in its role as a key workplace relations information provider could link to or reproduce existing resources for employees experiencing domestic/family violence on its website. The Clearinghouse has created two resources for employees of this kind:

- One page introductory factsheet

This factsheet is contained in our resource manual ‘Domestic Violence and the Workplace’.¹⁵ It provides an overview of domestic violence protection orders, what they do and how to get one, and where to get help if experiencing domestic/family violence impacting on the workplace.

- ‘Working? Experiencing Domestic/Family Violence? What You Need to Know’ web content

This comprehensive resource is designed to address the needs of workers experiencing domestic/family violence where it is impacting on them at work. Content includes guidance on identifying when domestic/family violence is impacting on you at work, when domestic/family violence needs to be disclosed to your employer, staying safe from domestic/family violence in the workplace, including dealing with abusive calls, texts and emails, frequently asked questions: what to do if you’re prevented from getting to work, disciplinary processes, dismissal, confidentiality and where to go to get assistance (referrals to both domestic violence and industrial/employment advice services).

¹⁵ Available at: http://www.adfvc.unsw.edu.au/PDF/files/Domestic_Violence_Workplace_resource.pdf.

34. We also recommend that the FWO promote the use of safety plans to be used where a worker or workers are at risk of domestic violence related harm whilst at work. These plans could be included as a section in the Best Practice Guide referred to above, or made available separately. The Clearinghouse has developed a model safety plan designed to address domestic violence related work safety risks. This model safety plan is designed to be adapted for different organisations depending on individual needs. Different plans could be developed for small, medium and large enterprises.

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.

35. The Clearinghouse strongly supports this proposal.

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.

36. The Clearinghouse welcomes a proposal to provide access to a separate category of paid leave for victims of domestic violence. A market-based approach towards domestic violence is insufficient to address the detrimental economic impact of domestic/family violence on both the individual, and more broadly, on productivity.
37. We strongly recommend adopting Proposal 16-2, providing a distinct category of paid leave for victims of domestic/family violence. Articulating the entitlement as a specific category of leave, as opposed to an extension of personal/carer's leave in circumstances of domestic violence is preferable for the following reasons:
- Reflects the conceptual differences between domestic/family violence and having an illness or caring responsibilities: conflating leave for the purposes arising out of domestic violence with personal/carer's leave send the wrong message to victims and employers: for the past 40 years, domestic/family violence has been recognised as a crime that should be reported and dealt with openly, without fear or shame.¹⁶ As such, it should not be considered a subset of personal/carer's leave. Instead, it should be validated as a distinct and important category of leave.
 - Provides employers with a requirement to develop supportive policies and practice in relation to workers experiencing domestic violence.
 - Provides employers with a clear opportunity to give the employee seeking to access leave an information sheet or referral to a domestic violence service. This could be potentially lifesaving
 - Makes it clearer for employers to identify a potential workplace safety risk to the employee or co-workers arising out of domestic violence, triggering consideration of safety planning and other measures to ensure that the employee (and colleagues) are safe at work.
 - Different evidential requirements for accessing personal/carer's leave: currently to access this leave. Having a separate category of paid leave for domestic violence allows for different evidentiary requirements to be included in the Fair Work Regulations, desirable for drafting reasons.
 - By the end of 2011 a significant number of Australian employees will be covered by a specific domestic violence clause in their industrial instrument (state award or enterprise agreement) as a result of the success of the Domestic Violence Workplace Rights and Entitlements Project. In the interests of consistency and clarity, we strongly recommend that the ALRC recommend a specific domestic violence leave entitlement.
38. We also recommend that an entitlement to paid leave be coupled with privacy protections for workers who disclose domestic/family violence for the purposes of accessing paid leave. As discussed above at responses to Proposal 14-1, the employee records exemption to the *Privacy Act 1988* (Cth) should be removed. Businesses under \$3 million annual turnover should also be required to comply with the NPP or a model privacy policy as best practice.

¹⁶ See eg, the 'Violence Against Women: Australia Says "No"' campaign.

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

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.

39. We do not support this proposal. As set out in our previous submission on the Employment and Superannuation Issues Paper, we do not consider the promotion of IFAs to be appropriate in this context. However, if the ALRC makes this recommendation, the Clearinghouse should also be consulted in the drafting of the IFA Guide.

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.

40. We strongly support this proposal. Over the past fifteen months the Clearinghouse has been funded to assist employers and unions to introduce domestic violence clauses into industrial instruments. Our experience over this period demonstrates that both employers and unions need substantial support when implementing these entitlements. This support takes many forms, including providing advice on an interim or urgent basis, through to briefing and training managers and human resources staff. Employers introducing these entitlements are aware that this is new territory and are eager to get it 'right'. As a result we recommend that a dedicated unit or centre to assist employers and unions is established in conjunction with encouraging the inclusion of domestic/family violence clauses.

41. Agreements should, at a minimum, ensure the confidentiality of personal information disclosed. This would be facilitated by amendments to existing privacy laws – removing the existing employee records exemption, providing a conciliation-based complaints system through the OAIC and the creation of a model privacy policy (as discussed above at Proposal 14-1). Agreement should make reference to the applicable privacy principles: IPP, NPP or model privacy policy.

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.

42. The Clearinghouse has promoted a set of resources developed by the ASU for unions seeking to negotiate domestic violence clauses in industrial instruments, and for employers looking to adopt domestic violence clauses. These resources include model domestic violence clauses, a guide for unions seeking to negotiate the clauses in the bargaining process and an information package for
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employers on the incentives for adopting the clauses, such as productivity and safety benefits. These resources could be expanded in consultation with FWO (or FWA).

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.

43. The Clearinghouse supports this proposal. One of the modern awards objectives is to enhance social inclusion.¹⁷ Domestic/family violence is recognised as a factor in social exclusion, namely, a factor in women's economic exclusion which is a component of social exclusion in a broader sense. Consequently, the modern award objectives allow FWA to consider award provisions designed to address domestic/family violence where it arises in the workplace context.

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.

44. The Clearinghouse supports this proposal. However, if the NES is amended to include an entitlement to domestic violence leave, it may not be necessary to consider including this entitlement in modern awards as the NES entitlements underpin the modern award system and cannot be contracted out of. Ideally, an entitlement to domestic violence leave and right to request flexible working arrangements for victims of domestic violence would be contained in the NES rather than award provisions. Additionally, not all Australian employees are covered by the modern awards system.¹⁸

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.

45. The Clearinghouse supports this proposal. We also recommend that this training is accompanied by a new Fair Work Australia resource for employees who have been unfairly dismissed for reasons arising out of domestic/family violence and a national education campaign to raise awareness around this issue, as set out above at Proposal 14-2.

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

46. If Proposal 16-2 is adopted, it may be unnecessary to amend the temporary absence provisions. Currently, the temporary absence provisions are broad enough to protect employees experiencing an illness or injury arising as a consequence of domestic/family violence.

¹⁷ Discussion Paper 17.81; *Fair Work Act 2009* (Cth) s 134.

¹⁸ Although the Miscellaneous Workers Award 2010 is intended to capture workers who are otherwise not covered by one of the other 121 awards, it excludes workers who have not historically been included in award coverage.

18. Occupational Health and Safety Law

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.

47. The Clearinghouse strongly supports this proposal. It is vital that Safe Work Australia recognise domestic violence related workplace health and safety risks in its guidance material for safety duty holders.
48. A prospective code of practice on workplace violence is the ideal location for guidance information about domestic/family violence related workplace safety risks because within a specific code of this kind, it is possible to include detailed case studies which highlight some of the dangers associated with domestic violence coming into the workplace. It also provides the opportunity to link domestic violence with analogous case studies on customer or client violence.
49. Given that risk assessment for domestic violence related workplace health and safety risks is similar to that involving client or customer violence, it is desirable that this issue be incorporated into a future code of practice on workplace violence or code in relation to psychosocial risks, rather than creating a further code of practice specifically on domestic/family violence related risks, which would add to the already substantial range of guidance material which duty holders must have reference to in discharging safety obligations.
50. In relation to Safe Work Australia’s Code of Practice: *How to Manage Work Health and Safety Risks*, Page 8, Section 2 – *How to identify hazards*, Table 1 entry: *Psychosocial hazards*, lists the following potential harms: effects of work-related stress, bullying, violence and work-related fatigue.
- An express reference could be made to domestic/family violence which comes into the workplace as one the above potential harms.
51. Safe Work Australia’s Code of Practice: *How to Manage Work Health and Safety Risks*, Page 9, Section 2.1 – *How to find hazards*, refers to hazards which ‘are not always obvious’.
- Domestic/family violence could be specifically mentioned in this paragraph as a type of hidden hazard which can affect workplace health and safety.
52. In relation to Safe Work Australia’s Code of Practice: *Managing the Work Environment and Facilities*, Section 4 – *Guidance for Specific Types of Work* includes a series of risk minimisation measures relevant to ensuring the safety of workers in remote or isolated locations.

- A brief reference could be made to workers being more vulnerable to domestic/family violence related risks in isolated locations where the worker is working alone.

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.

53. The Clearinghouse supports this proposal. The Clearinghouse has already developed a set of model safety plans that can be used by workplaces in responding to domestic/family violence related workplace health and safety risks.¹⁹
54. Existing safety plans could be revised in consultation with other stakeholders to and linked with existing Safe Work Australia guidance material, such as the Model Codes of Practice (e.g. Code of Practice: *Managing the Work Environment and Facilities – Section 5 – Emergency Plans*) and Model Work Health and Safety Regulations (e.g. reg 3.1.3 - remote or isolated work) Linking the plan with existing WHS obligations and guidance material makes it easier for duty holders to implement.
55. It may be desirable that model safety plans consider the needs of small, medium and larger organisations, which have different resources available, for example, larger enterprises are more likely to have dedicated security staff.

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.

56. The Clearinghouse supports this proposal. Safe Work Australia’s functions include developing and promoting awareness of occupational health and safety nationally.²⁰ As an emerging issue in contemporary occupational health and safety and workplace liability, there is a clear need for Safe Work Australia to lead on this issue and promote training for duty holders on this potential area of workplace risk. We strongly recommend any training initiatives be developed in consultation with the Australian Domestic and Family Violence Clearinghouse.
57. Through the Domestic Violence Workplace Rights and Entitlements Project we are already in the process of developing training packages for workplaces. We have piloted and delivered face-to-face training for workplaces specifically related to the introduction of domestic/family violence entitlements. The Project trainers have the combination of in-depth knowledge and experience in the field of domestic/family violence and workplace relations and are ideally suited to deliver the training. Our experience indicates that both of these skill sets are essential in delivering this type of training.

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

¹⁹ These safety plans can be located at www.adfvc.unsw.edu.au/PDF/files/Domestic_Violence_Workplace_resource.pdf.

²⁰ *Safe Work Australia Act 2008* (Cth) s 6 (functions).

(b) consider ways to extend and improve data coverage, collection and analysis in relation to family violence as a work health and safety issue.

58. The Clearinghouse supports this proposal. Given that Safe Work Australia's National Work Health and Safety Strategy is developed based on research and data collection, there is a demonstrable need for improved data collection and analysis in relation to domestic/family violence as a workplace health and safety issue. To our knowledge, this type of research has never been conducted in Australia, although it has in overseas jurisdictions.
59. Ideally, research into domestic/family violence risks would be conducted in consultation or partnership with existing researchers who have experience in creating research methodology for data collection on domestic/family violence workplace health and safety.

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?

60. We recommend that domestic/family violence is included expressly in the National Work Health and Safety Strategy. Statistically, we know that domestic/family violence can enter the workplace and compromise workplace safety. Domestic/family violence entitlements have already been introduced into many workplaces, thus raising the awareness of the issue and giving workers corresponding rights and protections. It follows that domestic/family violence should be included in the National Strategy.