



AUSTRALIAN CHAMBER OF
COMMERCE AND INDUSTRY

ACCI FURTHER SUBMISSION

Family Violence and Commonwealth Laws

ALRC Discussion Paper 76

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1. ABOUT ACCI

1.1 Who We Are

The Australian Chamber of Commerce and Industry (ACCI) speaks on behalf of Australian business at a national and international level.

Australia's largest and most representative business advocate, ACCI develops and advocates policies that are in the best interests of Australian business, economy and community.

We achieve this through the collaborative action of our national member network which comprises:

- All state and territory chambers of commerce
- 28 national industry associations
- Bilateral and multilateral business organisations

In this way, ACCI provides leadership for more than 350,000 businesses which:

- Operate in all industry sectors
- Includes small, medium and large businesses
- Are located throughout metropolitan and regional Australia

1.2 What We Do

ACCI takes a leading role in advocating the views of Australian business to public policy decision makers and influencers including:

- Federal Government Ministers & Shadow Ministers
- Federal Parliamentarians
- Policy Advisors
- Commonwealth Public Servants
- Regulatory Authorities
- Federal Government Agencies

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally;
- Business representation on a range of statutory and business boards and committees;
- Representing business in national forums including Fair Work Australia, Safe Work Australia and many other bodies associated with economics, taxation, sustainability, small business, superannuation, employment, education and training, migration, trade, workplace relations and occupational health and safety;
- Representing business in international and global forums including the International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, Confederation of Asia-Pacific Chambers of Commerce and Industry and Confederation of Asia-Pacific Employers;
- Research and policy development on issues concerning Australian business;
- The publication of leading business surveys and other information products; and
- Providing forums for collective discussion amongst businesses on matters of law and policy.

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2. INTRODUCTION

1. The Australian Chamber of Commerce and Industry (ACCI) provided an extensive written submission in April 2011 in response to the Australian Law Reform Commission's (ALRC) Issues Paper (IP 36), "*Family Violence and Commonwealth Laws*" (employment and superannuation) addressing a number matters affecting employment and workplace relations matters.
2. This further submission is made without prejudice to ACCI or its members' views.
3. ACCI has welcomed the opportunity to consult directly with officers of the ALRC as part of the inquiry.
4. In ACCI's earlier submission to this inquiry, ACCI indicated that the general business community supports the laudable efforts of governments and the community over the last decade to reduce the incidence of family/domestic violence, particularly against women and children. This is strongly supported by all businesses. To illustrate businesses' commitment and good will, in a parallel process to the ALRC inquiry, ACCI has constructively engaged with initiatives under the National Plan to Reduce Violence against Women and their Children 2010-2022, including our participation with the Domestic Violence Workplace Rights and Entitlements Project which is funded by the Department of Education, Employment and Workplace Relations.
5. It is the overwhelming experience of the majority of workplaces across Australia that employers and employees work through and deal with many challenging issues affecting them in their professional and personal lives. Social issues do impact the workplace, as they do in any other public area. Where issues of domestic violence crosses over into the workplace, this can be particularly challenging for affected employees, employers, co-workers, customers, and clients. It is acknowledged that for many employees their workplace can provide a sense of protection or is somewhat a safe refuge from domestic violence.
6. Considering the ongoing advocacy of issues affecting women and children, it appears that effective public campaigns of recent have provided more awareness of these issues across the community, including workplaces. Clearly the challenge for policy makers is to influence and change attitudes of those who do abuse their partner or

child, which may be developed at a young age and is associated with socio-economic environs.

7. As many individuals in the community who are currently experiencing or have been affected by domestic violence do have some connection to the workplace, it is easy to then make a link to the role and obligations of employers and businesses and what efforts they should be doing to reduce the incidence of domestic or family violence which occurs outside of the workplace.
8. Business is a partner in this goal, alongside other stakeholders such as government, police, community, religious, charity organisations, and dedicated professionals, who all provide support to affected persons in various ways.
9. Many employers already provide important support in the form of employment opportunities and income¹, access to confidential advice and counselling, time off for personal circumstances in line with employment legislation² or on the basis of other mutually agreed arrangements.
10. There are a range of policies and practices at workplaces which address these matters and which are not formalised in agreements.
11. The overwhelming majority of employers are extremely sensitive to situations impacting staff, including cases of past or present domestic violence. Some workplaces must deal with these issues on a more frequent basis, such as schools or health professionals as part of their interface with members of the community.
12. As indicated by ACCI in its earlier submission, some business owners themselves (or their children) can also be subject to domestic/family violence. Arguably, any inquiry should also consider the impact of commonwealth laws on domestic violence vis-à-vis female business owners (including independent contractors). As of 2006, 32% of small business owners were female.³ These business owners must continue to run the business, comply with a multitude of regulations and deal with the normal day to day pressures of running a business. It would be ironic that a business owner is forced to consider allowing flexible work for a worker or provide additional paid leave, when they themselves have no safety-net to access.

¹ Acknowledged at paragraph [13], of the ALRC Issues Paper.

² For example, under personal/carers leave or annual leave under the *Fair Work Act 2009*.

³ ABS Cat 8127.0 - Australian Small Business Operators - Findings from the 2005 and 2006 Characteristics of Small Business Surveys, 2005-06.

13. It is possible that the positive and constructive work that has already been achieved by business with government, employees, and unions will be threatened if the ALRC recommends a number of draft proposals. There is already a great deal of significant work being done, particularly with the Domestic Violence Workplace Rights and Entitlements Project, and ACCI is concerned that the good will that has so far been generated amongst the employer community will be undone.
14. Whilst employers continue to have existing obligations to their employees, the issues to be dealt with in this inquiry should predominantly concern how existing commonwealth laws affect individuals experiencing family violence, as distinct from individuals in their capacity as an employee, experiencing domestic/family violence. The distinction is important, as the IP and DP assume there is some strong correlation between apparent deficient minimum employment standards and the safety of workers. Any link, if it exists, is tenuous and not supported by the literature or evidence. It would also not be seen by the community to be something that should be the responsibility of employers or that employers should do the heavy lifting on behalf of the community.
15. To reiterate, employers are very mindful and sensitive to these issues and will assist individuals in a personal manner and in their capacity as an employer as best they can, given the resources and capacity do so.
16. An employer, particularly a small business owner, is not a substitute for expert and professional counselling and assistance. Nor is it a substitute for the intervention of police or other officials or agencies. Equally, policy makers should not consider business as a de-facto community or government agency, given that those dedicated agencies are staffed with professionals and have power and resources to assist individuals.
17. Workable and simple ideas, such as putting up a poster on a work notice board with details of a dedicated contact hotline or web address, is a powerful and direct way business can play its part.
18. Whilst business will continue to provide assistance to employees in various ways and as best they can, they will not appreciate feeling that they are directly or indirectly part of the problem when the act of violence occurs in the personal and private life of an individual worker away from the workplace. Nor will employers accept being forced to take on additional obligations above and beyond what is currently required by existing laws unless a strong case is made out for doing so.

19. Policy makers must be particularly mindful that many businesses are small to medium sized without dedicated human resource professionals. Many owners work in their own business, work long hours, draw the equivalence of their employee's wages, and make their contribution to the community through paying taxes and providing employment opportunities.
20. Many businesses operate on tight margins, have limited access to finance, have mortgaged their family home and struggle to make a decent return. Other businesses, particularly large firms, clearly have better resources and capacities, which is reflected in the benefits and policies formalised at the workplace. Businesses are not homogenous and any regulatory proposal must be acutely aware of these differences. Many policy makers assume or genuinely believe that if a large business (or government department) can do it or is already doing it, so can everyone else.
21. ACCI has constructively engaged with the proposals and questions raised by the ALRC in its Discussion Paper and wishes to make some specific comments in relation to a number of proposals as it relates to the role of employers and possible new employment obligations under the *Fair Work Act 2009*.

3. RESPONSE TO THE DISCUSSION PAPER

22. The ALRC's introduction to the DP states that "[t]he ALRC was requested to consider what, if any, improvements could be made to the relevant legal frameworks to protect the safety of those experiencing family violence" (at [1.1]). It reiterates that "[t]he 'lens' established in the Terms of Reference is one of safety". (at [1.25]). Whilst it is clear that laws do play an important role in providing additional protections for persons experiencing or affected by family violence, there are obvious limitations and possible costs associated with various proposals to change the law particularly where this would lead to imposing additional employment obligations on business. Many issues are rightly identified as requiring a community wide response.
23. ACCI notes that a number of issues it has raised in terms of the existing framework of employment and workplace relations laws, have been highlighted in the DP. It is also welcome that a number of recommendations made by ACCI have been adopted by the ALRC, particularly in the OH&S context.
24. However, there are a number of proposals which ACCI strongly opposes, particularly as it would add to the overall cost and administrative burden of business and provide only limited and untested benefits to the safety of workers. To reiterate, ACCI has proposed in its earlier submission a number of practical proposals that would assist workers when they experience these unfortunate issues in their lives. These types of non-regulatory measures would be supported by employers, and in some cases, may be achieved by utilising the extensive network of Chambers and Industry Associations who have direct access to employers of all sizes and who operate in industries across all areas of Australia.
25. We are therefore very supportive of measures which will increase awareness amongst employees, employers and the community generally. Posters, pamphlets, e-links to websites and information on where employees can get help are all good ideas that are easy to implement, involve little cost for government and can have a significant positive impact. Moreover, information on how employers can develop protocols or policies to deal with situations which involve threats of violence to an employee or co-workers in the workplace would also be helpful.
26. The ALRC has highlighted that "*employment may afford victims of family violence a measure of financial security, independence*

confidence, and therefore safety” and “employment is a key factor in enabling victims to leave violent relationships, providing longer-term benefits associated with financial security”. ACCI suggests that this only further highlights that employers are already contributing in response to this difficult and complex social and community issue and governments should assist in creating the environment for employers to be confident in providing further employment opportunities. Unfortunately, instead of considering ways in which to encourage employers and government enhance job creation and opportunities, the attention turns to a narrow “rights” based approach in respect to employment matters. For example, instead of considering how unfair dismissal laws may discourage employers from hiring potential workers, the ALRC asks whether the existing discretion for Fair Work Australia to waive the filing fee for lodging an unfair dismissal claim be amended to ensure “issues of family violence affecting the ability to pay are brought to the attention of Fair Work Australia” (at [16.33]). If employment is so crucial to assisting persons who are experiencing family violence, the ALRC has unfortunately missed an opportunity to consider how to increase female workforce participation and create incentives for business to hire staff.

In-principle support for some proposals

27. Therefore, and subject to some caveats, ACCI does not oppose the following proposals:
 - a. Proposal 14-1 (develop privacy policies in conjunction with the Fair Work Ombudsman, employer and employee representatives). Given that the FWO already has education material on privacy issues, this could be achieved through this existing mechanism.
 - b. Proposal 14-2 (a national education and awareness campaign). However, ACCI believes that this has already been initiated by the Government through the Domestic Violence Workplace Rights and Entitlements Project and no further action need be taken which would only duplicate existing efforts.
 - c. Proposals 17-1 (developing a guide to negotiating individual flexibility arrangements). ACCI is disappointed that the ALRC has not gone further in this regard and proposed that the default individual flexibility clause as contained in all modern awards be the actual default for the purposes of making an enterprise agreement. Whilst the ALRC proposes that the FWO should develop the guide in conjunction with the ACTU and employer

organisations, however, the ACTU and affiliates remain vocal critics of the IFAs and have general opposition to allowing employers and employees the full suite of flexibility permitted under modern awards. We are particularly disappointed that the union movement has trampled over an option that was designed for individuals and employers to tailor arrangements to meet their needs. Circumstances of employees experiencing domestic violence appear to be a classic example of the circumstances in which these arrangements should be available to tailor, on a mutually agreed basis, flexible work. It now appears that the Government needs to prescribe an actual default in light of the ACTU and affiliates entrenched attitude towards IFAs in bargaining.

28. ACCI would provide in-principle support to proposal 17-2 in so far as promotion of a range of flexible workplace arrangements. However, ACCI opposes any suggestion that there can be a “model” family violence clause in all enterprise agreements which meet minimum standards or conditions. This ignores that enterprise agreements are “enterprise” based instruments that are not one-size fits all workplace instruments. They are negotiated between employers and employees (with or without a bargaining representative) to reflect the needs of both the business and the employees. By definition, there can be no “model” clause for any employment conditions or benefits.

Proposals that are opposed

29. ACCI at this stage opposes the following proposals:
 - a. Proposal 3-1 and 3-5 (creating a common definition of “family violence”) for the purposes of, inter alia, the *Fair Work Act 2009* (the FW Act).
 - b. Proposal 14-3 (Fair Work Australia research), Proposal 14-4 (2012 and 2014 review of modern awards), Proposal 17-4 (review of modern awards) Proposal 17-5 (model family violence clause). The research which must be undertaken in accordance with s.653 of the FW Act and the review of modern awards is already comprehensive and it would not be appropriate to create an additional and specific consideration of this issue given such issues will already be part of existing minimum conditions.
 - c. Proposal 16 -1 (right to request flexible work). ACCI strongly opposes the extension of the right to request provisions for the reasons identified in its earlier submission. There is no evidence

that extending the existing s.65 provisions will aid in providing enhanced safety to an employee. There is no discussion about the increase to the employer's administrative burden in considering such requests (see further below).

- d. Question 17-1 (possibility of adding "family violence" to s.352 which prohibits employers from dismissing an employee because they are temporarily absent from work due to illness or injury). ACCI strongly opposes the amendment of s.352 which is a reflection of previous longstanding provisions under the *Workplace Relations Act 1996* and which is founded in an ILO Termination of Employment Convention 1982.⁴ ACCI is unsure why a possible amendment to s.352 is raised, when the ALRC says elsewhere that "*whether family violence should be included as a separate ground of discrimination under anti-discrimination laws falls outside the Terms of Reference for this Inquiry*". (at [17.142]) (see further below).

Existing employer obligations are extensive

30. Employers already have a number of existing obligations at the federal and state level in relation to employment, OHS, and discrimination legislation. This is in addition to common law obligations.
31. The *Fair Work Act 2009* was the result of extensive consultations between government, unions, employer representatives and peak groups, as part of the National Workplace Relations Consultative Committee and its various sub-committees, including the Committee on Industrial Legislation (COIL) and the International Affairs Committee (ILAC). This was in addition to an extensive Senate Committee Inquiry into the new laws. As a result of those consultations and inquiries the Act was enacted in its current form.
32. ACCI would not support any changes at this stage which would provide new rights for employees or obligations on employers, particularly given the lack of independent and robust evidence as to why that would be warranted given that the laws only commenced recently.
33. To reiterate what ACCI said in an earlier submission, the Government and Parliament have consulted extensively with all relevant stakeholders, both privately (as part of confidential policy discussions on the draft legislation with the members of the NWRCC, which

⁴ See *Lee v Hills Before & After School Care Pty Ltd* [2007] FMCA 4 (15 January 2007).

includes unions) and publicly (as part of Parliamentary committee inquiry and a dedicated Departmental inquiry into the draft NES) and has decided that the existing framework under the NES, including s.65, is appropriate, balanced and meets the 2007 pre-election commitments of the Government (as outlined in the *Forward with Fairness Policy* documents). The ACTU did not in its extensive written submission to the DEEWR exposure draft NES consultations recommend an extension to the right to request provisions, nor suggest that “family violence” leave be included in the NES.⁵ ACCI notes that there were approximately 154 separate written submissions to the Senate Committee Inquiry into the Fair Work Bill 2008.⁶ The ACTU, affiliate unions, the Australian Human Rights Commission and organisations such as Job Watch, the National Pay Equity Coalition Women’s Electoral Lobby Australia Inc and the Working Women’s Centres (WWC)⁷ did not recommend changes to the NES to deal with domestic or family violence. Instead those submissions generally expressed strong support for the NES provisions as contained in the Fair Work Bill 2008. Considering the issue of domestic violence was as relevant in 2008 as it is in 2011, it is difficult not to conclude that support by organisations for amending the NES or the FW Act has arisen because of the opportunity this ALRC inquiry has presented, rather than any significant defects in the existing laws.

34. Employers, particularly SMEs, do not have the capacity that a large employer (ie. local government or university) may have to provide for, *inter alia*, specialised training, counselling, and paid leave arrangements. Where an employer agrees to such clauses, it is because it meets the specific needs of its staff, which may not be true for other workplaces. This is why Industrial Tribunals and Parliaments have a long history of creating a limited number of minimum employment standards of general application.
35. When Tribunals and Parliaments decide to create rights on the basis of defined attributes, there will inevitably be a long queue of interest groups and individuals that would want their particular attribute or characteristic recognised.

⁵ ACTU submission to the National Employment Standards Exposure Draft Consultation process, (April 2008).

⁶ A list of written submissions can be accessed here:

http://www.aph.gov.au/SEnate/committee/eet_ctte/fair_work/submissions.htm

⁷ The submission of the WWC’s includes the South Australian Working Women’s Centre Inc (WWCSA), the Northern Territory Working Women’s Centre Inc (NTWWC) and the Queensland Working Women’s Service Inc (QWWS).

36. There has been no general industrial entitlement in awards or minimum employment legislation which has recognised that employers must be obliged to provide “family violence” terms or conditions.
37. Australia has obligations under numerous binding ILO and UN conventions, including ILO Convention 156 Workers With Family Responsibilities and the UN Convention on the Elimination of All Forms of Discrimination against Women. These conventions do not have a specific provision regarding family or domestic violence, however, discrimination or adverse action on the basis of sex or family responsibilities is a protected attribute under the *Fair Work Act 2009* and federal/state discrimination legislation. The Australian Government has stated that the Fair Work laws are consistent with Australia's international legal obligations.⁸
38. Both paid and unpaid leave entitlements are governed by the *Fair Work Act 2009*, common law contracts or enterprise agreements. There may also be formal or informal policies which provide contractual obligations on employers to provide certain additional entitlements. Employees who are unfit for work are already able to access paid leave entitlements or access annual leave, which is much more generous than other OECD nations.
39. Many leave entitlements under the NES arise from a long history of test cases before the Australian Industrial Relations Commission (AIRC), with some vigorously fought between unions and employer organisations over a considerable length of time. The resultant test case “standards” which was inserted into federal industrial awards (and sometimes flowed-onto state awards) was the result of these arbitrated outcomes. Many standards have been replicated to a significant degree in the NES. As Parliament is now to decide the content of minimum employment standards for all employees and outworkers in the TCF industry under the NES, and not the Tribunal (except for modern awards), any proposed legislative change will require an extensive debate between employees, employers, their representatives, and state governments (who, apart from WA, have referred their powers over the private sector to the Commonwealth under an Intergovernmental Agreement). It will require extensive policy justification based on the impact on employees and employers.

⁸ See Senate Standing Committee On Education, Employment And Workplace Relations Inquiry Into The Fair Work Bill 2008, Department of Employment, Education and Workplace Relations answer on notice: http://www.aph.gov.au/Senate/committee/eet_ctte/fair_work/qon/qon25.pdf

40. It is likely that efforts to achieve community awareness of family violence and how the entire community can assist in playing a role to minimise family violence against women and children would achieve far more positive outcomes than creating new rights for employees and obligations for employers (which generally carries the threat of civil penalty). In one sense, business may feel that this would be an easy way out for government, rather than focusing on trying to change ingrained attitudes that may tolerate, foster or perpetuate family violence against women and children. Other inquiries which have considered policy responses to family violence issues in the community have not been persuaded to recommend new workplace rights or entitlements, such as paid leave.

No data on the cost or impact to business

41. As indicated by ACCI in its earlier submission, there is always a risk that well intentioned regulatory changes will have unintentional consequences. This includes adding to the regulatory burden which already exists without delivering the benefits that is believed would be achieved by new laws. Best practice policy making requires evidence of the extent of public problems and how best to address those problems with a range of policy responses and tools. Regulatory reform is but one tool out of a suite of possible responses. ACCI is concerned that a number of proposals would impose a significant cost on employers and this has not been quantified by the ALRC. For example, there is absent from the DP any approximate cost to employers should they be required to provide an additional 10 days of extra paid leave each year to employees (it is assumed this is also cumulative and would accrue each year resulting in employees having a new and significantly large bank of paid leave entitlements).
42. The ALRC has indicated that any cost impact analysis can be completed *after* implementation of its proposals and during Post Implementation Review process (2 years after regulations commence), stating:

16.165 Two submissions expressed the view that the best approach may be to undertake further analysis of actual periods of leave taken and the projected cost to business before determining an appropriate quantum. The introduction of any additional leave will undoubtedly result in increased costs to business, particularly small business. Amongst other factors, the ALRC is required, under the Australian Law Reform Commission Act 1996 (Cth), to consider the cost implications of any proposal. The ALRC has formed the view that analysis of actual periods of leave taken would provide a useful pool

of data upon which future policy decisions could be made. However, the ALRC considers any such analysis could usefully be conducted following the introduction of the provision, or form part of the PIR.

43. ACCI strongly recommends that the ALRC consider the Productivity Commission's (PC) recent discussion draft on "*Identifying and Evaluation Regulation Reforms*" (September 2011) which is apposite to the question of best practice regulation making. ACCI strongly recommends that before it issues its final report, it conducts an extensive cost-benefit analysis of its proposals, particularly on the SME sector.
44. To try to understand the possible labour cost impact of a potential new paid leave entitlement, ACCI has modelled the 10 day quantum on a range of business sizes as follows:

TABLE: ESTIMATED COST OF 10 DAYS "FAMILY VIOLENCE" LEAVE

| |
|--|
| ACCI estimates that the introduction of a new entitlement to 10 days paid "family violence" leave, using a conservative assumption that only 10% of the workforce will seek to access the new leave entitlement in any one year, will cost approximately (per annum): ⁹ |
| - \$13, 054 for an small business with 50 employees |
| - \$26, 108 for a medium sized firm with 100 employees |
| - \$130, 540 for a large sized firm with 500 employees |
| - \$522, 000 for a very large firm with 2000 employees |

45. ACCI also notes that the ALRC states that (at [16.60]) additional leave may cost employers, but it also may enhance productivity:

Whilst some of the ALRC's proposals may impose some additional costs on employers, in addressing family violence, they may also go some way to enhancing productivity in workplaces

46. There is no evidence cited by the ALRC as to how any of these proposals would enhance "productivity in workplaces". Used in this context, it is unclear why the term "productivity" is used. Research does show that increased training and learning opportunities plays an

⁹ Based on ABS Cat. 6302 Average Weekly Earnings Australia, May 2011 full time weekly adult private/public sector ordinary time earnings, trend estimate (\$1 305.40).

important role in the development of human capital and improves workers' productivity.¹⁰ It is also relevant to note that research from the HILDA survey shows *“that around 60 per cent of mature aged women are satisfied with the flexibility offered by their workplaces to balance work and non-work commitments, with less than 10 per cent expressing some dissatisfaction.”*¹¹

47. The PC in a recent review on government service provision in indigenous communities, has also highlighted that unemployment can contribute to domestic violence, finding:¹²

Employment

Having a job that pays adequately and provides opportunities for self development is important to most people. Employment contributes to individual living standards, self-esteem and overall wellbeing. It is also important to the family. Children who have a parent who is employed are more likely to attend school and stay on past the compulsory school age. They are also more likely to enter into post secondary education and gain employment. Where people are employed, benefits also flow on to the wider community. On the other hand, unemployment can contribute to poor health, domestic violence, homelessness and substance misuse.

48. Furthermore, the PC also reminds policy makers that *“family and community violence problems are complex”* and include, *inter alia*, *“social, economic, environmental, alcohol and substance misuse”*.¹³
49. With respect to measuring the impact of proposals to create new employment rights, the ALRC has failed to consider how its proposals will impact particular cohorts of employers. For example, it has failed to identify or acknowledge how its proposal for a new leave entitlement / right to request may disproportionately impact employers in indigenous communities, which unfortunately experiences a higher than average incidence of family and domestic violence. If a new leave entitlement led to employers in those communities feeling reluctant to offer employment opportunities, this will be an unfortunate unintended consequence. It would also create distortions in the labour market, as

¹⁰ Productivity Commission Staff Working Paper, “Labour Force Participation of Women Over 45” (December 2010), at p.xxv.

¹¹ Productivity Commission Staff Working Paper. “Labour Force Participation of Women Over 45” (December 2010), at p.xxiv.

¹² Productivity Commission, Steering Committee for the Review of Government Service Provision “Overcoming Indigenous Disadvantage 2009, at p.20.

¹³ Productivity Commission, Steering Committee for the Review of Government Service Provision “Overcoming Indigenous Disadvantage 2009, at p.26.

some employers will have a higher labour cost base than others depending on where their business operations are located.

50. ACCI notes that the PC's consideration on family and community violence amongst indigenous Australians did not recommend new employment rights or entitlements.

Proposed statutory definition of “family violence”

51. The definition of family violence as outlined in Proposal 3-1 and Proposal 3-5 is extremely problematic in the context of defining minimum employment rights. In ACCI's view, it is far too wide as a workable definition for the purposes of determining minimum conditions of employment under the FW Act.

52. The ALRC has proposed that family violence for the purposes of a range of commonwealth legislation, including the FW Act is:

[V]iolent or threatening behaviour, or any other form of behaviour, that coerces and controls a family member, or causes that family member to be fearful. Such behaviour may include, but is not limited to:

- a. Physical violence;
- b. Sexual assault and other sexually abusive behaviour;
- c. Economic abuse;
- d. Emotional or psychological abuse;
- e. Stalking;
- f. Kidnapping or deprivation of liberty;
- g. Damage to property, irrespective of whether the victim owns the property;
- h. Causing injury or death to an animal irrespective of whether the victim owns the animal; and
- i. Behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a) – (h) above.

53. Having regard to the proposals to amend the FW Act and providing (a) new paid leave entitlements, (b) rights to request flexible work and (c) creating a new protection under the General Protection provisions, it would cover a diverse range of circumstances and allow an employee to access paid leave for multiple purposes. This is

inconsistent with how minimum employment standards have been developed by the industrial tribunals, which created national safety net standards, through testing of the claims with robust evidence and careful consideration of the impact on employers. National standards take considerable time to be introduced for this reason.

Policy and practical problems with new leave / right to request proposals

54. The existing standards under the NES have distinct and objective purposes. An employee who wishes to be absent from work for recreational purposes can access paid annual leave. An employee who is unfit for work due to personal injury or illness is able to access paid personal leave. An employee who is required to care for a member of the household who is injured or for unexpected emergencies affecting the household member is able to access personal/carer's leave or, if that leave is exhausted, take unpaid carer's leave. An employee who is expecting the birth of a child is able to access unpaid parental leave. An employee who is required to spend time with the member of the employee's immediate family who has a serious illness or injury, is able to access paid compassionate leave. The ALRC are proposing a new paid leave entitlement for a multiple purposes and reasons, all under the umbrella of "family violence".
55. The policy rationale for this proposal appears to be contained at paragraphs [16.146] to [16.148] of the DP as follows:

ALRC's views

16.146 As is the case with flexible working arrangements, the ALRC recognises that, in many cases, employers will grant employees access to forms of existing leave in circumstances where it may be required as a result of family violence. However, evidence suggests that, in many cases of family violence, victims exhaust their existing leave entitlements. In addition, there is currently a discretionary element associated with the granting of leave in cases of family violence, particularly in such circumstances.

16.147 In light of this, the ALRC considers existing leave provisions provided for in the NES may not be adequate to provide for the needs of employees experiencing family violence. As a result, the ALRC has formed the preliminary view that amending the NES to provide for some form of family violence leave is a necessary change to provide employees with a minimum statutory entitlement to such leave.

16.148 In proposing this amendment, the ALRC reiterates its comments made earlier in this chapter in relation to the role of governments and business in responding to family violence as well as in relation to issues surrounding the need for minimum statutory entitlements.

56. In response to the above paragraphs, ACCI notes that:
- a. There was no “evidence” in the traditional sense which ACCI can identify within the DP. Whilst there may have been submissions made, with anecdotal or personal stories about various experiences in a workplace, this does not equate to robust evidence of the kind that would sustain granting a claim for a new national standard by an industrial tribunal.
 - b. It is unclear why creating a new national standard of paid leave is necessary to ensure the safety or well fare of a worker (or member of their family household) experiencing domestic violence. ACCI has undertaken a scan of the literature on gender-based violence in the workplace and has not discovered any research of a comparable country which has determined that paid “family violence” leave or rights to request flexible work, is necessary or warranted to address domestic based violence. The International Labour Office has not, to ACCI's knowledge, published technical assistance materials to ILO member states, which recommends consideration of additional paid “family violence” leave. References by the ALRC to the United States is not a fair comparison to the Australian context, as the United States does not have a dual safety net of minimum standards such as the NES and modern awards, whereby employees are already able to access paid and unpaid leave arrangements. The ILO's focus is on preventing sexual harassment and gender based violence at work and not at home (unless the work is carried out at home, in the areas of home/domestic workers, sex workers, and textile and clothing workers etc). Notably, the International Labour Conference in 2009 noted the importance of increasing female workforce participating as assisting in improving gender equality, indicating that *“fostering small and medium enterprises and women's entrepreneurship is a key means of generating employment”*.¹⁴

¹⁴ ILO Provisional Record 13, Sixth item on the agenda: gender equality at the heart of decent work (General Discussion), Report of the Committee on Gender Equality, page 13/65, paragraph 20.

57. There are practical compliance difficulties for business, as the concept of “family violence” leave or requests for flexible work is dependent on a new statutory definition of “family violence”. Mistakes for business in getting it wrong are costly and includes fines of up to \$33,000 and possible legal action by employees alleging “adverse action”.
58. For example:
- a. A possible request for flexible work under s.65 of the FW Act for “family violence” grounds, would require the employer to consider whether the request satisfies the definition of family violence (as defined), assess the reasons for changes as outlined by the employee and provide a written response stating whether the employer grants or refuses the request. The employer must include details of the reasons for a refusal and can only refuse on reasonable business grounds. Currently, an employee needs to demonstrate that they are a parent or have responsibility for the care of a child is under school age or is under 18 and has a disability. The ALRC proposes that s.65 “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” to request a change in working arrangements. Unlike the existing right, there is no defined “caring” purpose. Rather, it is proposed that the new right be available “to assist the employee deal with circumstances arising from the family violence”. There could be so many permutations with this concept, which may be understandable from the point of view of the ALRC, but from the point of view of creating employment rights, it is far too wide and amorphous. Other proposals to water down the time frame for an employer to consider the request from 21 days to 7 days appears to gloss over the complexity which the ALRC is asking employees and employers to deal with in this context. The watering down of the existing service requirements also does not recognise that the existing right is not unconditional and eligibility based on service recognises this quid pro quo. Whilst recognising the underlying intent of the leave to assist workers, ACCI believes that the ALRC proposal is too wide, unspecific, and will be unworkable for both employees and employers.
 - b. A possible request for up to 10 days paid leave (which could be claimed prior to or after taking leave) “for the 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” also raises similar problems as above. The alternative proposal is for 10 days additional personal/carer's leave when an employee is not fit for work because of a circumstance arising from the employee's experience of family violence or provide care or support to a member of the employee's immediate family, or a member of the employee's household. Given the proposed broad definition of violence is to include emotional, economic, physical or injury or death to an animal, it would allow for a broad range of entitlements under the heading of “family violence”. It would also be difficult for an employer to request evidence to justify why the leave was taken. For example, what sort of proof could an employer ask for if it was claimed that the leave was associated with (a) “death to an animal” (b) inability to access a bank account due to a partner's actions (c) emotional abuse (d) damage to someone's property? In reality, an employer would not be confident they could ask for substantiation as a matter of course. If this materialised as a common HR practice, the proposed paid leave entitlement could potentially lead to abuse by workers who may exploit this for illegitimate purposes, unrelated to requiring time off for family violence related matters.

59. ACCI also notes that the proposed definition is much wider than the Victorian Government's *Family Violence Protection Act 2008*, which defines “family violence” as:

(a) behaviour by a person towards a family member of that person if that behaviour

- is physically or sexually abusive; or
- is emotionally or psychologically abusive; or
- is economically abusive; or
- is threatening; or
- is coercive; or
- in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person;

or

- (b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).
60. Definitions of entitlements are important, as the possible number of employees who are affected by physical and sexual violence is not insubstantial. The ABS Personal Safety Survey found that:¹⁵
- a. 808,300 (or 10.8% of all males) experienced violence, with 4.4% (21,200) of men were physically assaulted by a current and/or previous partner;
 - b. 443,800 (or 5.8% of all females) experienced violence, with 31% (73,800) were physically assaulted by a current and/or previous partner.
61. It is unknown how many possible workers could possibly claim that they were subject to non-physical violence (ie. those that could be classed as “emotional” or “financial” violence) because of data limitations. Other studies suggest that indigenous women are significantly more likely to be victims of violence.¹⁶
62. Any new employment obligation based on a widely defined definition of family violence is likely to have a significant impact on employers because of the significant number of possible employees who may be eligible to access the leave, and the considerable difficulty in terms of understanding eligibility.

Proposals to amend Part 3-1 (General Protections)

63. Any new entitlement under the FW Act, would also create a “workplace right” and would enable litigation to be commenced if an employee believed that an employer’s actions constituted “adverse action” under s.341(2). The general protection provisions under Part 3-1 of the Act, which carry a reverse onus of proof, uncapped damages and ability to obtain injunctions, are increasingly being used by employees to challenge a range of employer actions.
64. ACCI is concerned that the ALRC has not considered the impact of making changes to the FW Act and its consequence of allowing greater capacity for an employer to be sued for taking or threatening to take “adverse action”.

¹⁵ ABS Cat. 4906.

¹⁶ Mouzos & Makkai 2004; National Crime Prevention 2001, cited by the Victorian Government Department of Human Services, <<http://www.dhs.vic.gov.au/for-individuals/children-families-and-young-people/family-violence/what-is-family-violence/family-violence-the-facts>>.

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