



Australian  
Human Rights  
Commission

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# Family Violence and Commonwealth Laws: Employment and Superannuation

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Australian Human Rights Commission Submission  
to the Australian Law Reform Commission

21 April 2011

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## 1 Introduction

1. The Australian Human Rights Commission makes this submission to the Australian Law Reform Commission in its *Inquiry into Family Violence and Commonwealth Laws: Issues Paper - Employment and Superannuation*.
2. In this submission, the Commission will offer some brief comments on proposed amendments to the *Fair Work Act 2009* (Cth) which may assist employees affected by domestic and family violence. In this submission, the Commission uses the term 'domestic' violence to refer to both domestic and family violence in accordance with the broad definitions recommended in section 4.
3. The Commission notes that the question of whether domestic violence should be included as a separate ground of discrimination under anti-discrimination laws falls outside of the terms of reference of the ALRC's inquiry, and therefore does not comment on this issue. However, in this submission, the Commission considers the adverse action and termination provisions in FWA, as these may, with amendments, offer an avenue of redress for employees who consider they may have been discriminated against on the ground of domestic or family violence.

## 2 Summary

4. Violence against women is a breach of women's human rights. This has been recognised by the UN Committee on the Elimination of All Forms of Discrimination Against Women<sup>1</sup> as well as the Commission on the Status of Women<sup>2</sup>. These bodies recognise that domestic violence is an obstacle to women's full participation in employment.
5. Almost two-thirds of women affected by domestic violence in Australia are in paid employment<sup>3</sup>, so the impact of domestic violence on employees and workplaces may be considerable. The impact of domestic violence on organisational productivity and the national economy is also extensive, costing an estimated \$13.6b in 2009<sup>4</sup>. For these reasons, it is important that appropriate legal and industrial mechanisms are in place to assist employees affected by domestic violence and to enable employers to assist their employees.
6. There is capacity for current industrial instruments – the National Employment Standards (NES) in enterprise agreements, awards and individual flexibility

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<sup>1</sup> UN Committee on the Elimination of Discrimination Against Women, General Recommendations 12 and 19 – Violence Against Women, 11<sup>th</sup> Session, <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

<sup>2</sup> Commission on the Status of Women (2011) <http://www.un.org/womenwatch/daw/csw/55sess.htm#agreed>, 14 March 2011.

<sup>3</sup> Australian Bureau of Statistics (2006) *Personal Safety, Australia, 2005* (Reissue), Cat. No. 4906.0, 35, at [www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4906.0Main+Features12005%20\(Reissue\)?OpenDocument](http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4906.0Main+Features12005%20(Reissue)?OpenDocument).

<sup>4</sup> National Council to Reduce Violence Against Women and their Children (2009) *The Cost of Violence Against Women and their Children*, Canberra, Commonwealth of Australia, 4.

arrangements - to more effectively assist employees affected by domestic violence.

7. As the Issues Paper notes, the question of 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. The Commission therefore does not comment on this issue.

### **3 Recommendations**

8. The Commission makes the following recommendations to the ALRC:
  - **Recommendation 1:** That the definitions set out in Section 4 of this submission be taken into account when amendments are made to Commonwealth employment and superannuation law.
  - **Recommendation 2:** That s. 65 of the FWA be amended to provide employees affected by domestic violence with a right to request flexible working arrangements.
  - **Recommendation 3:** That information be produced to raise awareness about negotiating for domestic leave provisions, including awareness about how individual flexibility arrangements can be used to assist employees affected by domestic violence.
  - **Recommendation 4:** That a guide to negotiating domestic violence leave clauses, which could include existing and model clauses, be published. The drafting of this guide could be undertaken by Fair Work Australia, in consultation with the Australian Council of Trade Unions, peak employer bodies and experts in the field of domestic violence.
  - **Recommendation 5:** That resources to assist employers and employees understand that domestic violence is a workplace issue, and which outline measures which can be taken to assist employees, be developed. The development of these resources could be undertaken by peak industrial relations organisations, domestic violence experts and other independent bodies.
  - **Recommendation 6:** That s. 139(1) of the FWA be amended to expressly include the facilitation of flexible working arrangements for employees affected by domestic violence.
  - **Recommendation 7:** That the ALRC give consideration to whether it may be desirable to include protection from discrimination on the ground of domestic or family violence under the FWA.

### **4 Definitions and Scope**

9. **Recommendation 1:** The Commission recommends that the ALRC consider the following definitions and scope when considering the treatment of domestic and

family violence in Commonwealth employment, occupational health and safety and superannuation law:

- That violence against women – including domestic and family violence – is a breach of women’s human rights. The UN Committee on the Elimination of All Forms of Discrimination Against Women<sup>5</sup> and the UN Commission on the Status of Women<sup>6</sup> both recognise that gender-based violence is a form of discrimination against women.
- A broad definition of domestic violence be used when considering any employment law reform, in line with the definition included in the National Plan to Reduce Violence Against Women and their Children. The Plan states that domestic violence can include physical, sexual, emotional and psychological abuse<sup>7</sup>.
- Any definition of domestic and family violence not be restricted to current or former intimate partners, but include a wide range of domestic relationships. The Plan states that domestic violence relates to violence between people who have, or have had, an intimate relationship. Family violence refers to violence between family members as well as between intimate partners<sup>8</sup>.

## **5 Violence against women is a human rights issue**

10. Violence against women is a breach of women’s human rights. The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) has adopted recommendations which recognise that gender-based violence is a form of discrimination against women. CEDAW also specifically recognises that violence against women can nullify their human rights in the workplace<sup>9</sup>.

11. The 55<sup>th</sup> session on the Commission on the Status of Women, held in March this year, specifically expressed concerns about the continuing levels of violence against women, noting that violence is an obstacle to women and girls’ full participation in employment<sup>10</sup>.

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<sup>5</sup> UN Committee on the Elimination of Discrimination Against Women, General Recommendations 12 and 19 – Violence Against Women, 11<sup>th</sup> Session, <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

<sup>6</sup> Commission on the Status of Women (2011) <http://www.un.org/womenwatch/daw/csw/55sess.htm#agreed>, 14 March 2011.

<sup>7</sup> Council of Australian Governments (2011) *National Plan to Reduce Violence Against Women and their Children*, <http://www.fahcsia.gov.au/sa/women/progserv/violence/nationalplan/Pages/default.aspx>.

<sup>8</sup> Council of Australian Governments (2011) *National Plan to Reduce Violence Against Women and their Children*, <http://www.fahcsia.gov.au/sa/women/progserv/violence/nationalplan/Pages/default.aspx>, 3.

<sup>9</sup> Committee on the Elimination of Discrimination Against Women, General Recommendations 12 and 19 – Violence Against Women, 11<sup>th</sup> Session, <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

<sup>10</sup> Commission on the Status of Women (2011) <http://www.un.org/womenwatch/daw/csw/55sess.htm#agreed>, 14 March 2011.

12. Domestically, the Australian Government has recognised the importance of reducing violence against women, and in March 2011, released the *National Plan to Reduce Violence Against Women and their Children* (the Plan). The Plan specifically includes a strategy to assist women in the workforce who experience domestic and family violence. The Plan commits federal, State and Territory governments to work together to ‘develop workplace measures to support women experiencing and escaping from domestic violence’<sup>11</sup>.
13. The Australian Human Rights Commission is committed to reducing violence against women. In 2010, the Sex Discrimination Commissioner, Elizabeth Broderick, released the Australian Human Rights Commission’s *Gender Equality Blueprint*, which recommended the implementation and then monitoring of the Plan. Since its release, Commissioner Broderick has been informing employers about the impact of domestic violence in their workplace and encouraging employers to adopt policies to assist employees who are affected by domestic violence. Maintaining employment is critical to ensuring that women affected by domestic violence have a secure financial basis for themselves and their children. A secure financial situation also removes a significant impediment in the way of women who wish to leave violent relationships<sup>12</sup>.
14. Almost two-thirds of women affected by domestic violence are in paid employment<sup>13</sup>, so the impact of domestic violence on employees may be considerable. Domestic violence may result in lower performance and productivity at work. It may result in frequent or prolonged absenteeism or job loss because of trauma or the need to preserve and prioritise their safety<sup>14</sup>. Women who experience domestic violence are more likely to have a disrupted work history, to have to change jobs and work in casual and part time work, than women with no experience of violence<sup>15</sup>.
15. As well as affecting individual employees, domestic violence has a negative impact on organisations and the wider economy. It was estimated that in 2009, domestic violence cost an estimated \$13.6b a year<sup>16</sup>. Without appropriate action

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<sup>11</sup> Council of Australian Governments (2011) *National Plan to Reduce Violence Against Women and their Children*,

<http://www.fahcsia.gov.au/sa/women/progserv/violence/nationalplan/Pages/default.aspx>, 16.

<sup>12</sup> Braaf, R and Barrett Meyering, I (2011) *Seeking Security: Promoting women’s economic wellbeing following domestic violence*, Sydney, Australian Domestic and Family Violence Clearinghouse, 85; McFerran, L (2009) ‘Domestic Violence is a Workplace Issue’, Australian Domestic & Family Violence Clearinghouse speech to the PSA conference, *Balance Brings Everything to Life*, 10 – 11 September 2009, Sydney.

<sup>13</sup> Australian Bureau of Statistics (2006) *Personal Safety, Australia, 2005* (Reissue), Cat. No. 4906.0, 35, at [www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4906.0Main+Features12005%20\(Reissue\)?OpenDocument](http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4906.0Main+Features12005%20(Reissue)?OpenDocument).

<sup>14</sup> Moe, A & Bell, M (2004) ‘Abject economics: the effects of battering and violence on women’s work and employability,’ *Violence Against Women*, 10:1, 30.

<sup>15</sup> Franzway, S, Zufferey, C and Chung, D (2010) ‘Domestic Violence and Multidimensional Factors: Investigating the impact of domestic violence on women’s employment, health and housing’, *Our Work Our Lives National Conference*, Darwin, 12-13 August 2010.

<sup>16</sup> National Council to Reduce Violence Against Women and their Children, *The Cost of Violence Against Women and their Children*, Commonwealth of Australia, 2009, 4.

being taken, by 2021-22, it has been estimated that employers will bear \$235m of the costs associated with domestic violence<sup>17</sup>.

16. For these reasons, it is necessary that appropriate legal and industrial mechanisms to address domestic violence are put in place, including appropriate statutory provisions, collective workplace agreements, industrial awards and human resources policies. While the National Employment Standards (NES) outline minimum employment terms and conditions, they also form a baseline for negotiations between employee representatives and employers. Above-minimum conditions can then be tailored to organisational and employees' needs. Organisational policies complement statutory provisions and negotiated instruments, providing an avenue for employers to further supplement the minimum.

**6 Question 8: Should the Australian Government amend s 65 of the *Fair Work Act 2009 (Cth)* to include experiencing family violence as a basis upon which an employee may request flexible working arrangements?**

17. As the Issues Paper notes, employees affected by domestic violence are able to use various forms of leave to enable them to attend to matters arising from experiencing domestic violence. However, current leave available to employees, including personal/carer's leave and annual leave, may be inadequate to enable employees to attend court, medical, legal or other appointments necessary for those affected by domestic violence. Employees may not have leave accrued or not accrue leave if they are employed casually. Employees affected by violence may also be financially vulnerable, and not be in a position to take leave if this would result in losing wages.
18. Flexible working arrangements may therefore be a useful additional entitlement for employees affected by domestic violence. However, the existing right to request flexible working arrangements in the NES is inadequate to effectively assist employees affected by domestic violence.
19. Research based on interviews with women affected by domestic violence has highlighted the need for women to be able to access flexible working arrangements. Some of the female participants in the research preferred to be employed casually as this form of employment offered flexibility; others relied on the goodwill of their managers to access flexible working arrangements<sup>18</sup>. Incorporating domestic violence into the right to request provisions would provide women with a more secure entitlement to access flexible working arrangements, as well as obviate the need to work as a casual employee.
20. As noted in the Issues Paper, individuals who are embarrassed that they are experiencing, or have experienced, domestic or family violence may be reluctant

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<sup>17</sup> National Council to Reduce Violence Against Women and their Children, *The Cost of Violence Against Women and their Children*, Commonwealth of Australia, 2009, 45.

<sup>18</sup> Braaf, R and Barrett Meyering, I (2011) *Seeking Security: Promoting women's economic wellbeing following domestic violence*, Sydney, Australian Domestic and Family Violence Clearinghouse, 90.



to disclose this information to access flexible working arrangements. An individual employee may also be required to support any disclosure with evidence. The Commission notes, however, that the existence of legislation has a normative effect on the community, which could strengthen employees' confidence to use the legislative provisions.

21. **Recommendation 2:** That s. 65 of the FWA be amended to provide employees affected by domestic violence with a right to request flexible working arrangements.
22. Employees are currently required to fulfil an eligibility criterion of 12 months service before they are eligible to request flexible working arrangements, or for long-term casual employees, be a long-term casual and have a reasonable expectation of continuing employment. Women constitute the majority of those experiencing domestic violence and many have broken labour market participation or work casually<sup>19</sup>. Employees may also need to use leave in an emergency or for unforeseen circumstances. It may therefore be unrealistic to expect an employee in danger to fulfil the eligibility criteria before being formally able to request flexible working arrangements.
23. The ALRC may therefore wish to consider whether eligibility requirements which restrict the categories of employees who can make a request for flexible working arrangements should be removed. The Commission has previously made this recommendation to the Senate Education, Employment and Workplace Relations Committee and suggests that this issue once again be considered<sup>20</sup>.
24. As the Issues Paper notes, an employee can request flexible working arrangements and an employer can only refuse on reasonable business grounds<sup>21</sup>. The right to request flexible working arrangements, however, does not contain an enforcement mechanism and there is no grievance procedure or process to provide redress when an employee considers a request has been unreasonably refused. The FWA states that Fair Work Australia 'must not' deal with a dispute about whether an employer had reasonable business grounds to decline a request for flexible working arrangements unless the clause is replicated in an enterprise agreement<sup>22</sup>. The Commission has previously recommended that the same rights of redress applicable to the other nine NES be extended to the unreasonable refusal of a request for flexible work arrangements<sup>23</sup> and suggests that the ALRC consider this issue.

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<sup>19</sup> s. 65 *Fair Work Act 2009*

<sup>20</sup> Australian Human Rights Commission (2009) *Inquiry into the Fair Work Bill 2008: Australian Human Rights Commission Submission to the Senate Education, Employment and Workplace Relations Committee*, [http://humanrights.gov.au/legal/submissions/2009/20090123\\_Fair\\_Work.doc](http://humanrights.gov.au/legal/submissions/2009/20090123_Fair_Work.doc).

<sup>21</sup> s. 65(5) *Fair Work Act 2009*

<sup>22</sup> s. 739 *Fair Work Act 2009*

<sup>23</sup> Australian Human Rights Commission (2009) *Inquiry into the Fair Work Bill 2008: Australian Human Rights Commission Submission to the Senate Education, Employment and Workplace Relations Committee*, [http://humanrights.gov.au/legal/submissions/2009/20090123\\_Fair\\_Work.doc](http://humanrights.gov.au/legal/submissions/2009/20090123_Fair_Work.doc), 7.

**7 Question 9: Should the Australian Government amend the National Employment Standards under the *Fair Work Act 2009 (Cth)* to provide for a minimum statutory entitlement to family violence leave?**

25. Existing leave provisions in the FWA may not be adequate for employees affected by domestic violence, as there are no provisions which specifically aim to assist such employees. As stated earlier, employees affected by domestic violence may require leave to undertake a range of activities associated with their situation, such as attending medical, legal and other appointments. While a right to request flexible working arrangements would assist employees affected by violence, employees may also benefit from an express provision for statutory paid leave. The need for paid leave has been recognised by some unions and employers, who have introduced domestic violence leave through enterprise bargaining, and organisational policy, as discussed below.

**8 Question 10: If the National Employment Standards under the *Fair Work Act 2009 (Cth)* should be amended to provide for a minimum statutory entitlement to family violence leave: (a) under what circumstances should employees be entitled to take such leave; (b) how many days should employees be entitled to take; and (c) should such leave be paid or unpaid?**

**8.1 *Need for specific domestic violence leave***

26. The Commission notes the inadequacy of the leave provisions contained in the FWA and supports further consideration of the FWA being amended to specifically provide paid domestic/family violence leave. Some trade unions have negotiated domestic violence leave clauses into enterprise agreements. Others, such as the Heritage Building Society, have recently introduced domestic violence leave through organisational policy<sup>24</sup>. The paid leave contained in these industrial instruments and policies ranges from five to twenty days.

**8.2 *Scope and quantum of such leave***

27. The ALRC may wish to consider commissioning modelling on the possible use of domestic violence leave clauses and the resultant costs to business before determining an appropriate quantum.

28. The ALRC could also consider the interaction between domestic violence leave and personal/carer's leave. The Commission notes that some collective workplace agreements require employees to use their existing personal/carer's leave before accessing domestic violence leave. This may be disadvantageous

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<sup>24</sup> Anonymous (2010) 'Heritage Leads Violence Battle', *The Chronicle*, 25 November, [www.thechronicle.com.au](http://www.thechronicle.com.au).

to female employees with caring responsibilities, who may not have reserves of personal/carer's leave due to their caring commitments. Female employees who are affected by domestic violence would therefore benefit from additional, specific domestic violence leave. The ALRC may wish to consider the need for any statutory entitlement to domestic violence leave to be an additional and separate entitlement to carer's leave in the NES.

29. The ALRC may wish to consider the scope of any proposed domestic violence leave to be included in the FWA. Friends, relatives, household members and others who are able to assist employees affected by domestic violence may also benefit from flexible working arrangements and leave to enable them to provide this support. The ALRC may wish to consider whether domestic violence provisions not be limited only to those directly experiencing the violence and its aftermath, but also be available to those who are assisting and supporting employees who are affected by domestic violence.

### **8.3 Disclosure of domestic violence to employers**

30. The Commission notes the difficulties for employees disclosing domestic violence to their employers. Current workplace agreements which include provisions for employees affected by domestic violence require that employees provide proof from police, a court, a domestic violence support worker<sup>25</sup>, a doctor, nurse, or lawyer<sup>26</sup>. The Commission supports such evidentiary requirements.
31. However, the Commission notes the provisions in the Australian Services Union model enterprise agreement clause which include that information concerning domestic violence will be kept confidential, and that 'no information will be kept on an employee's personnel file without their express written permission'<sup>27</sup>. The Commission supports the inclusion of this, or similar wording, in the FWA.

## **9 Question 11: What steps could be taken to ensure that employees who are experiencing family violence are better able to access individual flexibility arrangements made under s 202 of the *Fair Work Act 2009* (Cth)?**

32. Employees affected by domestic violence may be able to use individual flexibility arrangements (IFAs)<sup>28</sup> to negotiate additional flexibilities. However, research has shown that generally women are less likely than male employees to engage in

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<sup>25</sup> *Crown Employees (Public Service Conditions Of Employment) Award 2009*, accessed at [http://www.austdvclearinghouse.unsw.edu.au/dv\\_workplace\\_rights\\_entitlements\\_project.htm](http://www.austdvclearinghouse.unsw.edu.au/dv_workplace_rights_entitlements_project.htm)

<sup>26</sup> ASU Family Violence clause accessed at [http://www.austdvclearinghouse.unsw.edu.au/dv\\_workplace\\_rights\\_entitlements\\_project.htm](http://www.austdvclearinghouse.unsw.edu.au/dv_workplace_rights_entitlements_project.htm)

<sup>27</sup> ASU Family Violence clause accessed at [http://www.austdvclearinghouse.unsw.edu.au/dv\\_workplace\\_rights\\_entitlements\\_project.htm](http://www.austdvclearinghouse.unsw.edu.au/dv_workplace_rights_entitlements_project.htm)

<sup>28</sup> An individual flexibility arrangement is a term that enables an employee and his or her employer to agree on an arrangement.

individual negotiations with an employer<sup>29</sup>. Low paid, low skilled employees, and those employed part-time or casually – all characteristics of women’s employment – have been found to have less bargaining power compared to full-time, higher paid, higher skilled employees<sup>30</sup>.

33. IFAs may therefore be useful for employees who are able to negotiate for themselves and who recognise the value of negotiating domestic violence provisions to vary their terms and conditions of employment. IFAs can complement the NES and organisational policy, however, more education around their use may be necessary.

34. **Recommendation 3:** That information be produced to raise awareness about negotiating for domestic leave provisions, including awareness about how individual flexibility arrangements can be used to assist employees affected by domestic violence.

## 10 Question 12: Should the inclusion of family violence clauses in enterprise agreements be encouraged? If so, what provisions should such clauses contain?

35. The inclusion of domestic violence clauses in enterprise agreements should be encouraged as another avenue by which employees can access flexible working arrangements or domestic violence leave. Were the NES not amended as the Commission has so far recommended, then the ALRC may wish to consider how industrial parties can be actively encouraged to negotiate domestic violence leave and flexible working arrangements. There may be a need for a widespread community education campaign.

36. The Commission considers that FWA amendments to include domestic violence leave as an NES are preferable to this issue being left for parties to negotiate in collective workplace agreements. History has shown that clauses which primarily benefit women are slow to become common bargaining claims and be negotiated into workplace agreements. This is illustrated by the history of the provision of paid parental leave. As far back as 1992, the ACTU was urging unions to negotiate with employers for paid parental leave<sup>31</sup>. By 2007-09, paid parental leave was only included in 12.6 per cent of collective workplace agreements<sup>32</sup>, although approximately half of all employees were eligible for paid parental leave through an industrial instrument<sup>33</sup>. The low incidence of paid parental leave in collective agreements shows that these provisions were either

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<sup>29</sup> Van Wanrooy et al (2009) *Who Bargains?* Sydney, NSW Office of Industrial Relations and Workplace Research Centre, 46.

<sup>30</sup> Van Wanrooy et al (2009) *Who Bargains?* Sydney, NSW Office of Industrial Relations and Workplace Research Centre.

<sup>31</sup> Australian Council of Trade Unions (1992) *Work and Family Issues: Guidelines for enterprise bargaining*, Melbourne, ACTU.

<sup>32</sup> Department of Employment, Education and Workplace Relations (2010), *Report on Agreement-Making*, Canberra, Commonwealth of Australia, 97.

<sup>33</sup> Productivity Commission (2008) *Paid Parental Leave: Support for Parents with Newborn Children*, Canberra, Commonwealth of Australia.

a low bargaining priority for unions and were not being negotiated, or were being negotiated and refused by employers.

37. Competing needs of different workplace constituencies can result in bargaining items which specifically benefit women being excluded from bargaining agendas, or if they are included, being traded off for wages or conditions which benefit both male and female employees. Academics have examined bargaining outcomes and concluded that the interests of the majority, based on a male, full-time breadwinner ideal, are often negotiated instead of entitlements which meet women's industrial needs<sup>34</sup>.
38. Leaving the provision of domestic violence leave to enterprise bargaining runs the risk that this issue will be slow to be negotiated, and where it is, that only higher paid workforces which have more bargaining power will be able to negotiate this provision.
39. **Recommendation 4:** That a guide to negotiating domestic violence leave clauses, which could include existing and model clauses, be published. The drafting of this guide could be undertaken by Fair Work Australia, in consultation with the Australian Council of Trade Unions, peak employer bodies and experts in the field of domestic violence.

## **11 Question 13: What other measures could be introduced to ensure employers are responsive to the needs of employees who are experiencing family violence?**

40. While some material has been produced about domestic violence being a workplace issue, generally there is a lack of accessible information available to employers and employees. Commissioner Broderick has been consulting with employers about domestic violence in the workplace, and generally, awareness of this issue is low. There is a need for a wide-ranging community education campaign on this issue.
41. Educational material could include information on the various types of actions employers, employees and unions can take to assist employees experiencing domestic violence. Researchers have outlined three models of workplace intervention – employer-led, brokerage partnerships and union-based models. Employer-led models focus on incorporating 'an awareness of domestic violence into existing human resource structures or organisational processes'<sup>35</sup>. This avenue relies on increasing awareness amongst staff and managers and implementing a prevention strategy, which can include offering flexible working arrangements and referral to specialist services.

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<sup>34</sup> Swinton, K. (1996) 'Accommodating Equality in the Unionized Workplace', *Osgoode Hall Law Journal*, 704-747; Blackett, A. & Sheppard, C. (2003) 'Collective Bargaining and Equality: Making connections', *International Labour Review*, 142:4, 419-457.

<sup>35</sup> Murray, S and Powell, A (2008) 'Working it Out: Domestic violence issues and the workplace', *Issues Paper 16*, Australian Domestic Violence Clearinghouse, University of Sydney, 9.

42. Brokerage models focus on domestic violence prevention which is undertaken as part of a commitment to corporate social responsibility. Australia's CEO Challenge is an example of a brokerage model. Australia's CEO Challenge 'works with corporate Australia and the violence prevention sector to create and sustain a world free from family violence'<sup>36</sup>. Under this model an organisation will work to foster a mutually beneficial partnership between business and the domestic violence sector, by, for example, financially contributing to a women's refuge, and in return receiving training around domestic violence issues<sup>37</sup>.
43. The third model is based on union activity, and can involve unions negotiating with employers for the adoption of domestic violence policies. Reiterating earlier concerns about the difficulties of negotiating for gender equality, researchers who have identified these models acknowledge the difficulties that flow from including violence issues in bargaining agendas<sup>38</sup>. Information on these three models, as well as a range of clauses and policies, could form the basis of an information kit to be provided to workplaces.
44. **Recommendation 5:** That resources to assist employers and employees understand that domestic violence is a workplace issue, and to outline measures which can be taken to assist employees be developed. The development of these resources could be undertaken by peak industrial relations organisations, domestic violence experts and other independent bodies.

**12 Question 14: In practice, are existing terms in modern awards sufficient to respond to the needs of employees experiencing family violence?**  
**Question 15: Should s 139(1) of the *Fair Work Act 2009* (Cth) be amended to allow the inclusion of a matter related to family violence in the allowable matters in modern awards?**

45. The Commission does not believe that the current terms in modern awards are sufficient to respond to the needs of employees experiencing domestic violence. Modern awards may not provide the flexibility needed by employees affected by domestic violence, such as being able to relocate within the organisation. This flexibility is currently included in some agreements<sup>39</sup>. Amending s. 139(1) of the FWA to enable modern awards to expressly include the facilitation of flexible working arrangements for employees affected by domestic violence would provide these vulnerable employees with an important and useful condition. The Commission notes that types of leave can already be included in modern awards.

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<sup>36</sup> Australia's CEO Challenge, <http://ceochallengeaustralia.org/>.

<sup>37</sup> Murray, S and Powell, A (2008) 'Working it Out: Domestic violence issues and the workplace', *Issues Paper 16*, Australian Domestic Violence Clearinghouse, 12.

<sup>38</sup> Murray, S and Powell, A (2008) 'Working it Out: Domestic violence issues and the workplace', *Issues Paper 16*, Australian Domestic Violence Clearinghouse, University of Sydney, 12.

<sup>39</sup> See for example: ASU Family Violence clause accessed at [http://www.austdvclearinghouse.unsw.edu.au/dv\\_workplace\\_rights\\_entitlements\\_project.htm](http://www.austdvclearinghouse.unsw.edu.au/dv_workplace_rights_entitlements_project.htm)

46. **Recommendation 6:** That s. 139(1) of the FWA be amended to expressly include the facilitation of flexible working arrangements for employees affected by domestic violence.

**13 Question 19: Should family violence be inserted into ss 351(1) and 772(1)(f) of the *Fair Work Act 2009* (Cth) as a separate ground of discrimination?**

47. The Commission is aware that people experiencing domestic violence are subject to direct and indirect adverse treatment in the work place, as a result of their experience of domestic violence. Most commonly the adverse treatment manifests as being denied access to leave, flexible work arrangements or their employment being terminated.
48. The Commission recommends consideration of the insertion of family violence into sections 351(1) and 772(1)(f) of the FWA as a separate ground of discrimination.
49. For the reasons discussed below, sections 351(1) and 772(1)(f) provide limited protection for employees where the true basis for discrimination is that the employee is experiencing domestic or family violence.

**13.1 Causation**

50. The Issues Paper states that a person experiencing family violence may be able to pursue a claim of discrimination under s. 351(1) or 772(1)(f) of the FWA on the basis of disability, sex or family responsibilities.
51. However, to succeed in a claim of adverse action or unlawful termination of employment under the FWA, an employee must prove the necessary causal connection between the adverse action or termination of employment and the protected attribute. The FWA provides that an employer must not take adverse action against a person who is an employee, or prospective employee, of the employer *because* of a protected attribute<sup>40</sup> (emphasis added). An employer must not terminate an employee's employment for *one or more of the following reasons* including discrimination on a prohibited ground<sup>41</sup> (emphasis added).
52. Because domestic or family violence is not a ground of discrimination that is currently protected under the FWA, a claimant would have to prove a causal nexus between the discrimination and an attribute that is currently covered by the FWA such as sex, disability or family responsibilities.
53. It may not always be possible for an employee to link adverse action or a dismissal which is in truth based on domestic violence to a ground of discrimination covered by FWA. For example, an individual who is discriminated against because she or he requires time off work to attend court or to relocate to

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<sup>40</sup> s. 351(1) *Fair Work Act 2009*

<sup>41</sup> s. 772(1)(f) *Fair Work Act 2009*

escape violence may be unable to make a claim under any ground covered by the FWA.

### **13.2 Family violence as a ground of discrimination**

54. The Commission notes that the ALRC is of the view that, as a result of s. 351(1) of the FWA, in order for family violence to be included as a separate ground under s. 351(1), it would also need to be incorporated under federal, state or territory discrimination laws.
55. The Commission is aware that different views have been expressed on this question. One view that has been expressed is that s. 351(2)(a) covers action which is covered by federal, state or territory anti-discrimination law but is not unlawful because an exemption or defence applies under that law. On this view, the prohibition on adverse action contained in the FWA will not apply where an action that would otherwise be unlawful under an anti-discrimination law falls within an existing exemption or defence, making it 'not unlawful'.
56. **Recommendation 7:** The Commission recommends consideration of the insertion of family violence into sections 351(1) and 772(1)(f) of the FWA as a separate ground of discrimination.

## **14 Conclusion**

The Commission considers that there is scope to improve the operation of Commonwealth employment law to provide increased industrial entitlements for people who are affected by domestic or family violence, including by increasing their access to flexible working arrangements. This could be supplemented with a wide-ranging information campaign to encourage enterprise and individual bargaining for domestic violence clauses, the development of targeted policies, as well as material to increase awareness amongst employees and employers that family and domestic violence is a workplace issue. Additionally, amended adverse action and unlawful termination provisions in the FWA may also offer an avenue of redress for employees who consider they may have been discriminated against on the ground of domestic or family violence.