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### **Submission to the Inquiry into the Fair Work Amendment (Better Work/Life Balance) Bill 2012**

The Australian Law Reform Commission (ALRC) welcomes the opportunity to make this submission to the House of Representatives Standing Committee on Education and Employment Inquiry into the Fair Work Amendment (Better Work/Life Balance) Bill 2012 (the Bill). This submission draws heavily on the experience and findings in the ALRC's Inquiry into family violence and Commonwealth laws. That inquiry (the 'Commonwealth Family Violence Inquiry') culminated in the production of the report, *Family Violence and Commonwealth Laws—Improving Legal Frameworks* (ALRC Report 117, 2011), including 102 recommendations for reform.

A copy of *Family Violence and Commonwealth Laws—Improving Legal Frameworks* (the Report) was tabled in Parliament on 7 February 2012. An electronic version of the Report, the preceding Issues Paper, Discussion Paper, and associated materials including the Summary Report and public submissions are available on the ALRC website at [www.alrc.gov.au](http://www.alrc.gov.au).

The ALRC's Terms of Reference required consideration of the treatment of family violence in Commonwealth laws—including employment laws—and the identification of improvements that could be made to those legal frameworks to protect the safety of those experiencing family violence. Safety in this context refers to both actual safety from harm and also financial security and independence which may be derived through paid employment.

The ALRC refers the Committee to the Report insofar as it deals with the National Employment Standards (NES) under the *Fair Work Act 2009* (Cth) and Fair Work Australia (FWA) research, in particular chapters 15 and 17. Key recommendations of relevance to the Committee are Recommendations 17–1 and 15–3, as discussed below.

#### **1. Family Violence in an Employment Context—Background Information and Evidence**

1.1 Two thirds of Australian women who report violence by a current partner are in paid employment.<sup>1</sup> The results of the National Domestic Violence and the Workplace Survey conducted in 2011, on behalf of the Australian Domestic and Family Violence Clearinghouse (ADFVC), emphasise the extent of the impact of family violence in an employment context. The survey found that, of those who reported experiencing family violence:

- nearly half the respondents reported that the violence affected their capacity to get to work—the major reason being physical injury or restraint; and
- in the last 12 months of the survey period, 19% reported that family violence continued in the workplace, with 12% indicating it occurred in the form of abusive phone calls and emails, and 11% stating that it occurred by way of the violent person attending the workplace.<sup>2</sup>

1.2 Many people experiencing family violence face ongoing difficulties in gaining and retaining paid employment and in disclosing family violence where it may adversely affect their employment. For example,

<sup>1</sup> Australian Bureau of Statistics, *Personal Safety Survey*, Catalogue No 4906.0 (2005), 11, 34.

<sup>2</sup> ADFVC, *ADFVC National Domestic Violence and the Workplace Survey* (2011). The survey sample was 3,611 respondents of which 81% were women and 90% were either a member of the National Tertiary Education Union or the NSW Nurses Association.

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women who have experienced family violence generally have a more disrupted work history, receive lower incomes, and are often in casual and part-time employment.<sup>3</sup> In addition to the negative effects of family violence on employees and the positive effects of employment, family violence also generates an enormous economic and social cost, with broader implications for employers and the economy.

1.3 Family violence is projected to cost the Australian economy an estimated \$15.6 billion in 2021–22.<sup>4</sup> In 2004, it reportedly cost the corporate and business sectors over \$1.5 billion through direct costs.<sup>5</sup> Where family violence affects employees in the workplace, or leads to their leaving employment, individual employers face costs associated with:

- absenteeism—including administration costs;
- decreased productivity;
- recruitment following staff turnover—estimated as 150% of an employee’s salary annually;<sup>6</sup> and
- training for new employees and loss of corporate knowledge.<sup>7</sup>

1.4 The employment law system in Australia is premised on the need to provide a balanced framework that promotes labour market engagement, economic productivity and social inclusion. Ensuring the employment law system appropriately identifies, responds to and addresses family violence, is central to achieving these aims—particularly in light of the enormous social and economic costs of family violence, and the high proportion of employees experiencing it.

## 2. General Recommendations for Reform

2.1 In its examination of family violence and Commonwealth employment law, the ALRC recommended a range of reforms to legislative, regulatory and administrative frameworks. This included recommendations for reform of the *Fair Work Act*, its institutions, and agreements and instruments made under the Act, to address the needs—and ultimately the safety—of employees experiencing family violence.

2.2 While implementation is ultimately a matter for government, in the employment context the ALRC suggested that it would be most appropriate to implement the recommended reforms by way of a whole-of-government five-phase approach. The ALRC emphasised that none of the phases are mutually exclusive, nor must they necessarily be sequential. The ALRC suggested implementation should incorporate the following phases:

- Phase One—coordinated whole-of-government national education and awareness campaign; research and data collection; and implementation of government-focused recommendations.
- Phase Two—continued negotiation of family violence clauses in enterprise agreements and development of associated guidance material.
- Phase Three—consideration of family violence in the course of modern award reviews.
- Phase Four—consideration of family violence in the course of the Post-Implementation Review of the *Fair Work Act*.
- Phase Five—review of the NES with a view to making family violence-related amendments to the right to request flexible working arrangements and the inclusion of an entitlement to additional paid family violence leave.

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<sup>3</sup> M Costello, D Chung and E Carson, ‘Exploring Pathways Out of Poverty: Making Connections Between Domestic Violence and Employment Practices’ (2005) 40 *Australian Journal of Social Issues* 253, 256; S Franzway, C Zufferey and D Chung, ‘Domestic Violence and Women’s Employment’ (Paper presented at Our Work, Our Lives National Conference on Women and Industrial Relations, Adelaide, 21 September 2007).

<sup>4</sup> KPMG, *The Cost of Violence against Women and their Children* (2009), prepared for the National Council to Reduce Violence Against Women and their Children, 4, 7. While the focus of this study was women and children victims it is useful to indicate the enormous economic impact of family violence more broadly.

<sup>5</sup> See, eg, Victorian Community Council Against Violence, *Family Violence is a Workplace Issue: Workplace Models to Prevent Family Violence* (2004), 7, 11.

<sup>6</sup> ADFVC, *Why Domestic Violence Entitlements Makes Economic Sense: The Economic Costs of Domestic Violence on the Workplace*, referring to Australian Human Resources Institute, ‘Love ’Em don’t Lose ’Em: Identifying Retention Strategies that Work’ (2008) 2(1) *HR Pulse* 1.

<sup>7</sup> ADFVC, *Why Domestic Violence Entitlements Makes Economic Sense: The Economic Costs of Domestic Violence on the Workplace*.

### 3. National Employment Standards

#### (i) Family violence and the right to request

3.1 In the Report, the ALRC expressed the view that minimum statutory entitlements, such as those provided for under the NES, are important to ensuring fairness and consistency in access to the entitlements and, ideally, to consistent decision making and employer responses. Given the prevalence of family violence and its effect on employees, workplaces and productivity, the ALRC considers that the NES could play an important role in responding to family violence when it becomes a workplace issue—in particular with respect to the right to request flexible work arrangements.

3.2 Under existing arrangements, while employees are able to request flexible working arrangements outside the scope of the NES, they are not entitled to a response or reasons and, as a result, there may be a need for a ‘more secure entitlement to access flexible working arrangements’.<sup>8</sup> Provision of flexible working arrangements on family violence grounds is likely to ‘enhance the participation and job security’ of employees experiencing family violence, while allowing employees to deal with issues arising from family violence which may affect their ability to attend work, or to work safely and productively.<sup>9</sup> Arrangements that may assist victims of family violence include: a change in shifts or working hours; changes to work contact details; and changes to work location—all of which are likely to contribute to the safety of the employee.

3.3 Amendment to the NES would release people experiencing family violence from the need to seek casual employment to achieve flexibility, or to rely solely on the ‘goodwill’ of their particular employer to access flexible working arrangements.<sup>10</sup> This is particularly important for people experiencing family violence who are often casual employees with little power to negotiate such changes.<sup>11</sup> Some overseas jurisdictions have enacted legislation that entitles victims of family violence to reduce or reorganise their working hours, change workplaces and make other flexible working arrangements.<sup>12</sup>

3.4 However, amendment to the NES would involve a significant change to the *Fair Work Act* framework after already extensive consultations surrounding the introduction of the Act. In addition, there is a need to build a foundation for any such changes, in order to balance the needs of employees with the economic and practical realities faced by businesses and employers.

3.5 As a result, in line with the phased approach to implementation outlined in Chapter 15 of the Report, the ALRC expressed the view that the Australian Government should consider amending the NES—in particular, whether family violence should be included as a circumstance in which an employee should have a right to request flexible working arrangements. Accordingly, Recommendation 17–1 provided that:

As part of Phase Five of the whole-of-government strategy for phased implementation of reforms contained in Part E of this Report, the Australian Government should consider amending s 65 of the *Fair Work Act 2009* (Cth) to provide that an employee:

- a) who is experiencing family violence, or
- b) who is providing care or support to another person 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.

3.6 There potentially are a number of other circumstances and categories of people to whom the right to request flexible work arrangements could, and should, be extended. As family violence was the focus of the ALRC’s Inquiry, the ALRC did not consider this issue more broadly and consequently does not comment on it in this submission.

3.7 If the right to request provisions were amended, the ALRC suggested that s 65 of the *Fair Work Act* should provide that an employee who is experiencing family violence, or who is providing care or support to another person 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.

<sup>8</sup> Australian Human Rights Commission, *Submission CFV 48*; ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 10*.

<sup>9</sup> ACTU, *Submission CFV 39*; National Network of Working Women’s Centres, *Submission CFV 20*.

<sup>10</sup> Australian Human Rights Commission, *Submission CFV 48*. See also R Braaf and I Meyering, *Seeking Security: Promoting Women’s Economic Wellbeing Following Domestic Violence* (2011), 90.

<sup>11</sup> National Network of Working Women’s Centres, *Submission CFV 20*.

<sup>12</sup> See, eg, *Employment Rights Act 1996* (UK) pt 8A; *Employment Relations Act 2000* (NZ) pt 6AA; *Organic Act on Integrated Protection Measures Against Gender Violence 2004* (Spain) art 21.

3.8 The provision should be broadly formulated to cover care or support provided to a member of the employee's immediate family or household, including children or dependants who may have been affected by family violence,<sup>13</sup> as well as in a range of 'other important relationships such as Indigenous kinship ... neighbours or close friends who may well be more likely to be called upon to care or support a victim of family or domestic violence than a member of the family or household'.<sup>14</sup>

3.9 Of particular note to the Standing Committee, the ALRC suggested that evaluation of the effectiveness of the current provision is necessary and each of the concerns identified by stakeholders outlined above should be considered in the course of any proposed amendment.

**(ii) Potential limitations with the current provision**

3.10 There are two aspects of the current provision that are likely to be particularly restrictive for people experiencing family violence—eligibility and the employer response period. There were a number of other concerns expressed by many stakeholders in relation to the current structure and operation of s 65 of the *Fair Work Act*, including the procedural nature of the provision, the limited availability of enforcement mechanisms and the grounds for refusal.

3.11 In its current form the Bill does not appear to address these concerns, other than with respect to enforcement.

*Eligibility requirements*

3.12 To be eligible to request flexible work arrangements, the employee must have 12 months continuous service or, for a casual employee, be a long-term casual employee with a reasonable expectation of continuing employment on a regular and systemic basis.<sup>15</sup> Victims of family violence are predominantly women, and generally have a more disrupted work history,<sup>16</sup> which may make it more difficult to satisfy eligibility requirements.<sup>17</sup>

*Employer response period*

3.13 An employer must respond to any request for flexible working arrangements by an employee in writing within 21 days and, if refusing the request, must give reasons for doing so.<sup>18</sup> As noted by one stakeholder, the difficulty of this requirement is that, due to the unpredictable nature of family violence, employees experiencing family violence may need a response sooner, and that such a response period may mean no change to working arrangements, or even reasons for refusal to allow a change, is available when it is most necessary.<sup>19</sup> However, stakeholders emphasised that this must be balanced with the need to ensure employers have sufficient time to examine and determine appropriate alternative working arrangements.<sup>20</sup>

*Procedural nature of the provision*

3.14 The provision is procedural rather than substantive—that is, it provides that an employee is entitled to request flexible working arrangements, receive a response and, if that request is refused, be provided with a written statement of reasons.<sup>21</sup> The rationale for the inclusion of a procedural provision was that a similar provision in the UK had demonstrated that 'simply encouraging employers and employees to discuss options for flexible working arrangements has been very successful in promoting arrangements that work for both employers

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<sup>13</sup> Several stakeholders emphasised the importance of flexible working arrangements in ensuring employees with children are able to care for their children, particularly where they have been affected by family violence: ACTU, *Submission CFV 39*; National Network of Working Women's Centres, *Submission CFV 20*.

<sup>14</sup> ACTU, *Submission CFV 100*.

<sup>15</sup> *Fair Work Act 2009* (Cth) s 65.

<sup>16</sup> S Franzway, C Zufferey and D Chung, 'Domestic Violence and Women's Employment' (Paper presented at Our Work, Our Lives National Conference on Women and Industrial Relations, Adelaide, 21 September 2007); M Costello, D Chung and E Carson, 'Exploring Pathways Out of Poverty: Making Connections Between Domestic Violence and Employment Practices' (2005) 40 *Australian Journal of Social Issues* 253, 256.

<sup>17</sup> ADFVC, *Submission CFV 26*. See also: Women's Legal Services NSW, *Submission CFV 28*; Joint submission from Domestic Violence Victoria and others, *Submission CFV 22*.

<sup>18</sup> *Fair Work Act 2009* (Cth) s 65(4), (5).

<sup>19</sup> National Network of Working Women's Centres, *Submission CFV 20*.

<sup>20</sup> See, eg, ACCI, *Submission CFV 128*.

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

and employees'.<sup>22</sup> However, stakeholders have emphasised that there are 'limitations with only having a right to request and not an entrenched clear entitlement'.<sup>23</sup>

#### *Limited enforcement or appeal mechanisms*

3.15 There are also limited enforcement or appeal mechanisms available where an employee considers a request has been unreasonably refused.<sup>24</sup> Section 44 of the *Fair Work Act* provides that an order cannot be made under the civil remedies provisions in relation to contraventions of s 65(5). As a result, civil remedies for breaches of the flexible working arrangement under the NES do not apply if an employer refuses a request, other than on reasonable business grounds. In addition, s 739 of the *Fair Work Act* provides that FWA 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>25</sup>

3.16 The ALRC notes that the Bill provides FWA with the power to make flexible working arrangement orders it considers appropriate to ensure compliance with the expanded right to request provisions. Fair Work Australia may only make such orders on application from an employee or employee organisation whose request has been refused, or the Age/Disability/Sex Discrimination Commissioner. The Bill also makes breach of a term of a flexible working arrangements order subject to civil remedy provisions.

3.17 While the ALRC is not in a position to comment on the operation of flexible working arrangement orders, the ALRC draws the Committee's attention to the significant concerns expressed in some submissions about the lack of enforcement available in relation to the current provision. The Australian Human Rights Commission submitted that the 'same rights of redress' that apply to the other NES provisions should be extended to this provision.<sup>26</sup> The Australian Council of Trade Unions (ACTU) argued that denial of appeal rights to FWA, except where specifically provided for in an enterprise agreement, raised issues of justice, and stated that 'it is wholly inappropriate that such a basic right to procedural fairness be left to the vagaries of the bargaining framework'.<sup>27</sup>

#### *Refusal on 'reasonable business grounds'*

3.18 Section 65(5) of the *Fair Work Act* provides that such a request may only be refused on 'reasonable business grounds'.<sup>28</sup> In light of the lack of legislative clarification of what constitutes reasonable business grounds, some stakeholders suggested that the provision should outline an 'an employer's obligations to have properly considered the request and reasonably endeavoured to accommodate the request'.<sup>29</sup>

## **4. Research by Fair Work Australia**

4.1 The Bill inserts two new paragraphs into the *Fair Work Act 2009* which require the General Manager of Fair Work Australia to conduct research into the operation of the new Part 2–7A in relation to requests for changed working arrangements.

4.2 In *Family Violence and Commonwealth Laws—Improving Legal Framework*, the ALRC examined whether amendment to s 653 of the *Fair Work Act* was required in order to facilitate the conduct of reviews and research into family violence as an emerging development in the making of enterprise agreements, and its effect more broadly in the employment law system. The ALRC provides its discussion of this issue for the Committee's consideration.

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<sup>22</sup> Department of Education, Employment and Workplace Relations, *National Employment Standards Exposure Draft: Discussion Paper* (2008), 61.

<sup>23</sup> National Network of Working Women's Centres, *Submission CFV 20*.

<sup>24</sup> Concern about this was expressed by a number of stakeholders. See, eg, Australian Human Rights Commission, *Submission CFV 48*; ACTU, *Submission CFV 39*.

<sup>25</sup> *Fair Work Act 2009* (Cth) s 739.

<sup>26</sup> Australian Human Rights Commission, *Submission CFV 48*.

<sup>27</sup> ACTU, *Submission CFV 39*.

<sup>28</sup> *Fair Work Act 2009* (Cth) s 65(5). The *Fair Work Act 2009* (Cth) does not elaborate on what may, or may not, comprise 'reasonable business grounds' and there has been no case law regarding the meaning of the phrase. However, there has been significant commentary: see, eg, J Wells, 'Flexible Work in 2010: The impact of the Fair Work Act 2009 (Cth) on Employer Control of, and Employee Access to, Flexible Working Hours' (Paper presented at Our Work, Our Lives National Conference on Women and Industrial Relations, Darwin, 12 August 2010) 5–7. In the *Family Provisions Test Case* (2005) 143 IR 245, decided prior to the introduction of the provision, the Australian Industrial Relations Commission formulated a similar entitlement and suggested that such grounds may include cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service: *Family Provisions Test Case* (2005) 143 IR 245, 333.

<sup>29</sup> The ACTU proposed adopting wording from the *Equal Opportunity Act 1995* (Vic): ACTU, *Submission CFV 100*.

4.3 Under s 653, the General Manager of FWA is required to review developments in making enterprise agreements and to conduct research about, among other things, individual flexibility arrangements and requests for flexible working arrangements under the NES. In doing so, the General Manager must consider the effect of these on certain groups including, for example, women and part-time employees. Section 653 also requires the General Manager of FWA to give the Minister a written report of the review and research as soon as practicable, and in any event, within six months after the end of the period to which it relates.<sup>30</sup>

4.4 Some stakeholders expressed the view that, as there are no associated reporting requirements, FWA may have limited information available to it in order to inform such research.<sup>31</sup> FWA noted the resource implications of expanding current research under s 653.<sup>32</sup>

4.6 The ALRC considered that s 653 is a broad provision and that, in order to ensure that the General Manager has continued discretion to conduct research and review of a wide range of employment developments, rather than being limited by being overly prescriptive, 'it would not be appropriate to create or add specific consideration of this issue'.<sup>33</sup> As a result, the ALRC expressed the view that amendment to the *Fair Work Act* was unnecessary. Instead, the ALRC recommended that the General Manager of FWA, in conducting the review and research required under s 653 in relation to enterprise agreements and individual flexibility arrangements, should consider family violence-related developments and the effect on the employment of those experiencing family violence. Recommendation 15–3 accordingly provides:

The General Manager of Fair Work Australia, in conducting the review and research required under s 653 of the *Fair Work Act 2009* (Cth), should consider family violence-related developments and the effect of family violence on the employment of those experiencing it, in relation to:

- (a) enterprise agreements; and
- (b) individual flexibility arrangements.

## 5. Further Contact

We hope this has been of assistance to you.

Yours sincerely,

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<sup>30</sup> The Minister must table a copy of the report in Parliament within 15 sitting days: *Ibid* s 653(3), (4).

<sup>31</sup> See, eg, ASU (Victorian and Tasmanian Authorities and Services Branch), *Submission CFV 113*; ACTU, *Submission CFV 100*.

<sup>32</sup> Fair Work Australia, *Consultation*, By telephone, 30 September 2011.

<sup>33</sup> ACCI, *Submission CFV 128*.