AFEI RESPONSE TO FAMILY VIOLENCE AND COMMONWEALTH LAWS
ALRC DISCUSSION PAPER 76

AFEI
Australian Federation of Employers & Industries

ALRC Discussion Paper 76 Family Violence—Commonwealth Laws

AFEI Response to questions and proposals

1. The Australian Federation of Employers and Industries (AFEI), formed in 1904, is one of the oldest and most respected independent business advisory organisations in Australia. AFEI has been a peak council for employers in NSW and has consistently represented employers in matters of industrial regulation since its inception.

2. With over 3,500 members and over 60 affiliated industry associations, our main role is to represent, advise, and assist employers in all areas of workplace and industrial relations and human resources. Our membership extends across employers of all sizes and a wide diversity of industries.

3. AFEI provides advice and information on employment law and workplace regulation, human resources management, occupational health and safety and workers compensation. We have been the lead employer party in running almost every major test case in the New South Wales jurisdiction and have been a major employer representative in the award modernisation process under the Fair Work Act.

4. AFEI is a key participant in developing employer policy at national and state (NSW) levels and is actively involved in all major workplace relations issues affecting Australian businesses.

5. In this response, AFEI will address the key proposals in ALRC Discussion Paper 76 (“the discussion paper”) which affect employers.

Proposed Statutory definition of family violence

AFEI is opposed to the inclusion of a definition of family violence in the Fair Work Act and the definition proposed by the ALRC in particular.

The definition proposed by ALRC for use in proposals 3.1, 3.5 and 3.6 is unacceptably broad and should not be adopted. For the purposes of the Fair Work Act, it would be an impractical definition on which to base an entitlement for leave or any other condition of employment. Its open ended character exposes employers to both risk of non compliance and the extension of matters which could give rise to adverse action claims.

The National Employment Standards confer specific obligations on employers to provide defined entitlements in specified circumstances. A definition should provide clarity so that what compliance entails should be readily understood.

It is unworkable to have a definition which is not confined to "violent or threatening behaviour" but includes "any other form of behaviour" which is itself open ended and not limited to the array of behaviour itemised in 3.10 (a) to (i).

Response to questions and proposals Discussion Paper Part E Employment

Question 14–1 *In addition to removal of the employee records exemption in the* Privacy Act 1988 *(Cth), what reforms, if any, are needed to protect the personal information of employees who disclose family violence for the purposes of accessing new entitlements such as those proposed in Chapters 16 and 17?*

Proposal 14–1 *There is a need to safeguard the personal information of employees who have disclosed family violence in the employment context. The Office of the Australian Information Commissioner and the Fair Work Ombudsman should, in consultation with unions and employer organisations:*

(a) develop a model privacy policy which incorporates consideration of family violence-related personal information; and

(b) develop or revise guidance for employers in relation to their privacy obligations where an employee discloses, or they are aware of, family violence.

Response

This appears to be a solution in search of a problem. Where is the evidence that employers characteristically misuse, or do not adequately take care of employee personal information, whatever its nature or character?

The ALRC already has a clear position on the removal of the employee exemption provisions from the Privacy Act 1988 (Cth).[1]

The ALRC now seeks removal of the exemption on narrower grounds — the disclosure of family violence in order to access proposed new workplace entitlements. It presupposes that this employee information will be routinely mismanaged or that its provision will be a barrier to employees accessing entitlements.

AFEI does not support the introduction of new entitlements and does not consider the *Privacy Act 1988 (Cth)* should be amended on these grounds.

Any information disclosed by an employee to an employer concerning domestic violence should not subject employers to greater levels of regulation and exposure to liability. This is not information which employers seek nor wish to retain. It is being foisted upon them in a multi faceted strategy by government and interest groups to solve a social ill which is not of their making. Nor is it rectifiable by employers.

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

Response

AFEI does not consider generating awareness about family violence in the 'employment context' to be in employers' interests. Individuals, not employees are subject to family violence. There is not and should not be a connection between workplace obligations and violence within the home.

The workplace is a convenient target for regulators to purport to address any range of social ills, as seen with other strategies to address issues such as drug and alcohol addiction, fitness, obesity, fatigue etc. Regulators and interest groups regard the workplace primarily as *'organisational contexts through which social norms are shaped and can be changed.*[2] However, employing workplaces in the private sector can only exist so long as they have the capacity to employ and can afford to do so within the regulatory environment in which they operate.

For employers there is a clear risk that an education and awareness campaign will be used to create a causal factor link between work and family violence. Further, there will be adverse effects on business operations resulting from the perception sought to be generated that the workplace is there for rehabilitation, not work.

---

[1] For Your Information: Australian Privacy Law and Practice (ALRC Report 108) paragraphs 40. 121 –122.

[2] ALRC Issues Paper 36 -Family Violence Employment and Superannuation Law page 4
http://www.alrc.gov.au/sites/default/files/pdfs/publications/IP%2036%20Whole%20Pdf_0.pdf

With the elevation of domestic violence as a significant public issue, under the banner of shared responsibility employers are being required to accept responsibility for family violence and the employment costs of family violence on those experiencing it.[3] Unions are already campaigning to advance family violence prevention in the workplace with views such as

> "*the workplace cannot be seen as a safe haven for people experiencing family violence as sadly this is not the case".*[4]

The effect of such campaigns which purport to provide the means of a solution to family violence will be (unfairly) to present work and the workplace as part of the problem.

The consequence is a cost shifting exercise intended to move a productivity cost from the employee to the employer. Cost to employers will not be confined to the immediate direct costs of increased leave and other entitlements. Characterisation of family violence as a workplace issue heightens employers' exposure to liability on a number of fronts including work health and safety, obligations under the Fair Work Act (FWA) (including adverse action) common law actions, and breach of contract.

Significantly, once family violence *which does not take place at work* becomes a workplace obligation for which an employer must take responsibility, there will be increased employer exposure to workers compensation claims and occupational health and safety risks.

Proposal 14–3 *Section 653 of the* Fair Work Act 2009 *(Cth) should be amended to provide that Fair Work Australia must, in conducting the review and research required under that section, consider family violence-related developments and the effect of family violence on the employment of those experiencing it, in relation to:*

(a) enterprise agreements;

(b) individual flexibility arrangements; and

(c) the National Employment Standards.

Response

AFEI opposes this proposal. In our view family violence should not be treated as an industrial matter. Further section 653 of the FWA is already sufficiently comprensive to encompass any range of actual workplace

[3] Working it out: domestic violence issues and the workplace Suellen Murray Anastasia Powell Australian Domestic and Family Violence Clearinghouse. http://www.adfvc.unsw.edu.au/PDF%20files/Issues%20Paper_16.pdf

[4] ASU organiser Julie Kun Domestic Violence and Workplace Rights Entitlement Project UNSW Workplace Bulletin Winter 2011 Hhttp://www.adfvc.unsw.edu.au/PDF%20files/Workplace_Bulletin_winter_2011.pdf

issues. Amendments for narrowly based matters to be specifically considered will subsequently give rise to further demands for particular matters to be considered and itemised.

Question 14–2 *In addition to review and research by Fair Work Australia, what is the most appropriate mechanism to capture and make publicly available information about the inclusion of family violence clauses in enterprise agreements?*

Response

If enterprise agreements are to be genuinely enterprise based and meet the objective of s 171 of the FWA to enable enterprise agreements "that deliver productivity benefits", enterprises should be left to identify for themselves what can be usefully included in their agreements.

Agreements should be about work, not the ever widening range of social ills issues sought to be made the responsibility of employers.

AFEI sees no merit in Fair Work Australia or other bodies drawing up template agreement provisions or "shopping lists" of items to be put up for negotiation. On the contrary many sectors of the economy are already struggling to compete in global markets, to keep costs down and to improve productivity.

Question 14–3 *How should Fair Work Australia collect data in relation to the incidence and frequency with which family violence is raised in unfair dismissal and general protections matters?*

Response

This is a matter for Fair Work Australia and its resource allocation. Claims by employees suffering a detriment because of family violence giving rise to unfair dismissal or general protections are accomodated under the current legislation. Given the powers and processes available to Fair Work Australia the actual circumstances giving rise to the claim can be and are fully explored. Again, family violence should not be treated as an industrial matter.

Proposal 14–4 *In the course of its 2012 and 2014 reviews of modern awards, Fair Work Australia should consider issues relating to data collection.*

Response

Family violence considerations should not be part of the modern award review process. We do not consider family violence entitlements should form part of the minimum safety net standards and their insertion would constitute a departure from the formulation of these minimum standards.

Proposal 16–1 *Section 65 of the* Fair Work Act 2009 *(Cth) should be amended to provide that an employee who is experiencing family violence, or who is providing care or support to a member of the employee's immediate family or household who is experiencing family violence, may request the employer for a change in working arrangements to assist the employee to deal with circumstances arising from the family violence.*

This additional ground should:

(a) remove the requirement that an employee be employed for 12 months, or be a long-term casual and have a reasonable expectation of continuing employment on a regular and systemic basis, prior to making a request for flexible working arrangements; and

(b) provide that the employer must give the employee a written response to the request within seven days, stating whether the employer grants or refuses the request.

Response:

AFEI opposes the extension of the right to request provisions. This will require employers to devote resources to management of an additional right to request grounds and expose employers to adverse action claims when they conclude it is not possible to provide the requested arrangements.

Under current provisions employees must demonstrate that they have caring responsibilities for a child. The ARLC proposal is broad and non specific —"*to deal with circumstances"*. This is open ended and given the issues raised by the ARLC in relation to disclosure and privacy considerations, will be difficult to verify.

The introduction of additional specific grounds, such as domestic violence will inevitably give rise to other grounds for additional leave deemed equally worthy by other interest groups or those promoting particular needs. This has the potential to make the provisions less, rather than more flexible and introduce additional layers of obligation and regulation for employers.

The requirement that an employee be employed for a period of 12 months or be a long term casual was made because it is impractical to have recent start employees employed on an agreed hours basis seeking to change that agreement within a short time frame. Removing this provision will further reduce certainty for employers that new employees will actually work on the basis agreed at the time of recruitment. That said, the ALRC proposal is not acceptable even with a 12 month threshold.

Seven days is an inadequate period of time for an employer to consider a formal request for flexible working arrangements and decide if and how adjustments could be made. The current 21 days provides an opportunity for the employer to consider options and if the request is feasible. Again,

this provision has only recently been established and was the subject of debate and Fair Work Australia consideration.

We observe that a heavy handed, rights based regulatory approach which presupposes that no accommodation for an employee's personal needs is likely to be initiated by employers will not engender a supportive, case by case approach. Detailed regulation is proposed without any evidence that it is needed and without any evidence that employers have a low level of concern for their employees' welfare. It is also proposed without regard for cost implications. It is unacceptable to assert that any cost implications will be offset by lower labour turnover and increased employee productivity, or that such measures are necessary to increase women's participation in paid work.

The next proposals are presented as alternate options: Proposal 16–2 OR Proposals 16–3 and 16–4

OPTION ONE: Proposal 16–2

Proposal 16–2 *The Australian Government should amend the National Employment Standards under the Fair Work Act 2009 (Cth) to provide for a new minimum statutory entitlement to 10 days paid family violence leave. An employee should be entitled to access such leave for purposes arising from the employee's experience of family violence, or to provide care or support to a member of the employee's immediate family or household who is experiencing family violence.*

OPTION TWO: Proposals 16–3 and 16–4

Proposal 16–3 *The Australian Government should amend the National Employment Standards under the Fair Work Act 2009 (Cth) to provide for a minimum statutory entitlement to an additional 10 days paid personal/carer's leave. An employee should be entitled to access the additional leave solely for purposes arising from the employee's experience of family violence, or to provide care or support to a member of the employee's immediate family or household who is experiencing family violence.*

Proposal 16–4 *The Australian Government should amend the National Employment Standards under the Fair Work Act 2009 (Cth) to provide that an employee may access the additional personal/carer's leave referred to in Proposal 16–3:*

(a) because the employee is not fit for work because of a circumstance arising from the employee's experience of family violence; or

(b) to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support as a result of their experience of family violence.

Response

AFEI does not support the options presented in proposals 16-2 to 16- 4.

The introduction of an additional 10 days leave will significantly increase labour and administrative costs for employers. We note that Access Economics has described the costs to the employer, even as seen from their heavily qualified analytical perspective:

> *From the victim's employer's perspective, depending on the degree of the violence, work loss or absenteeism will lead to costs such as higher wages (i.e. accessing skilled replacement short-term labour) or alternatively lost production, idle assets and other non-wage costs. In severe cases, employers might also face costs such as rehiring, retraining and worker's compensation.*[5]

These costs are by no means complete and will not be reduced or ameliorated by the introduction of an additional 10 days leave for family violence purposes. They will simply be additional costs which will not be universally offset by savings in employee retention or increases in productivity, as is argued by proponents of increased leave.[6]

Employers already are required to provide significant amounts of paid leave to employees. It is AFEI's view that the various forms of leave provided by the National Employment Standards already have provisions which recognise the need for employees to take leave for family reasons. The table below sets out the current minimum legislated leave requirements:

[5] The Cost of Domestic Violence to the Australian Economy: Part I | 2. Threshold Issues page 6

[6] For example Why Domestic Violence Entitlements Makes Economic Sense: The Economic Costs of Domestic Violence on the Workplace A project of the Australian Domestic and Family Violence Clearinghouse (ADFVC), funded by the Commonwealth Department of Education, Employment and Workplace Relations http://www.adfvc.unsw.edu.au/RTF%20Files/Why%20Domestic%20Violence%20Entitlements%20Makes%20Economic%20Sense.rtf

Statutory leave entitlements - does not include community service, long service, army reserve leave, jury duty or enterprise specific arrangements.

LEAVE TYPE	WHEN / HOW LEAVE IS TAKEN	LEAVE ENTITLEMENT (DAYS)
Public Holidays	Christmas Day	1
	Boxing Day	1
	New Year's Day	1
	Australia Day	1
	Good Friday	1
	Easter Saturday	1
	Easter Monday	1
	Anzac Day	1
	Queen's Birthday	1
	Labour Day	1
	Additional Day - picnic day, race day, show days etc	1
Personal / Carer's Leave (NES) **Unpaid Personal / Carer's Leave (NES)**	When the individual suffers an illness / injury that prevents them from attending work Or When a member of the individual's immediate family or household suffers an illness / injury that requires care or support When a member of the individual's immediate family or household suffers an illness / injury that requires care or support	10 days paid 2 days unpaid leave on each occasion
Annual Leave	For the purpose of the employee having an annual holiday	20 days paid

LEAVE TYPE	WHEN / HOW LEAVE IS TAKEN	LEAVE ENTITLEMENT (DAYS)
Compassionate Leave	On the death of a member of the individual's immediate family or household Or when a member of the individual's immediate family or household suffers an illness or injury which poses a serious threat to life	2 days paid (taken as a single unbroken period, 2 periods of 1 day or any separate periods that are agreed to) 2 days paid x as many incidents as warrant compassionate leave

Example

A full-time employee receives every public holiday per year plus an additional day under their award (Clerical) (11 days).

The employee has carer's responsibilities and uses their accumulated paid personal/carer's leave entitlement (15 days).

A member of the employee's household required family violence support on three separate occasions so the employee took two days leave on each occasion. (6 days).

The employee's sister experiences family violence and suffers a serious injury so the employee takes 2 days compassionate leave (2 days). A week later the employee's sister again requires her support for the injury. The employee again accesses 2 days compassionate leave (2 days).

Over the Christmas period the employee takes their annual leave entitlement (20 days).

The total leave taken by this employee in a 12 month period is 50 paid days and 6 unpaid days. There are 261 working days per annum of which the employee has worked 205 days.

Whether the employee is absent on personal carers leave, compassionate leave or on some other form of leave, the outcome is absence which has to be accommodated in some way by the employer. This usually involves using other employees on overtime to cover for the absence, hiring temporary workers, or deferring work until the employee returns. It involves both monetary and non monetary costs. The argument that these costs will be offset by an improvement in employee productivity and reduced turnover is not merely theoretical but also fanciful; the impact of employee absence will differ depending on the circumstances of each workplace.

Increased leave entitlements cannot be said to be universally beneficial for all employers in terms of reduced turnover costs or productivity improvement.[7]

Nor is it acceptable to justify introduction of increased leave to stem the alleged flow of victims of family violence from their jobs. The actual level of labour turnover caused by family violence is not known and it is by no means clear as to actual impacts on the labour market. Access Economics, acknowledges "*that a considerable margin of uncertainty surround our estimates*".[8] Its report notes that:

> *The literature provides mixed messages about the likely impact of DV on victims' long term earnings and labour market participation. Farmer and Tiefenthaler (2004) argue that victims who suffer abuse are likely to earn lower wages or participate less in the labour market. This may reflect the inability to go to work or poorer productivity at work. However, Lloyd (1997) argued that some victims may increase their labour market participation to decrease their economic dependency or avoid the perpetrator. There is also the possibility of reverse causation; victims with a lower capacity for economic self-sufficiency may tolerate abuse for longer periods.*
>
> *Statistical analysis of the unit record file of the WSS failed to reveal any long term impact of DV on labour force participation, employment or personal income, once account was taken of other influences such as the presence of children in the household. Preliminary analysis of the unit record file of the ALSWH indicated that experience of DV had no impact on the probability of employment or expected earnings in the younger age cohort, but possibly a small impact in the middle aged cohort.*[9]

---

[7] Why Domestic Violence Entitlements Makes Economic Sense: The Economic Costs of Domestic Violence on the Workplace op cit http://www.adfvc.unsw.edu.au/RTF%20Files/Why%20Domestic%20Violence%20Entitlements%20Makes%20Economic%20Sense.rtf

[8] This caveat was also applied by KPMG to its 2009 revision of the Access study to estimate costs in 2021-2022:
The caveats placed by Access Economics on the 2002-03 estimates still apply in that the overall findings must be considered indicative (and in some cases speculative) and are conditional on numerous assumptions made during the course of the analysis. A considerable margin of uncertainty surrounds the original estimate (and is retained in this update and forecasting of the estimates to 2021-22). Estimates are based on limited data and on parameters that reflect a large element of judgement.
KPMG The cost of violence against women and children 2009 National Council to Reduce Violence against Women and their Children page 14
http://www.fahcsia.gov.au/sa/women/pubs/violence/np_time_for_action/economic_costs/Documents/VAWC_Economic_Report.PDF

[9] Access Economics The Cost of Domestic Violence to the Australian Economy: Part I pages 42-43

We further note that Access Economics regarded any employer costs as merely transitory, with consumers (and the community) bearing the actual costs:

> *While it may be convenient to think of these costs as being purely borne by the employer, in reality this cost will eventually be passed on to end consumers in the form of higher prices for goods and services*.[10]

Employers do not take comfort from theoretical statistical approaches which treat their increased labour costs as transitory and of no consequence or impact for their operations. For employers these costs are real, immediate and have to be managed. In circumstances of no growth or negligible growth conditions increased costs have clear potential to increase unemployment.

The ALRC should have regard for the practical consequences of increasing employer liability and costs and where the burden of increased regulation will fall.

Data on the incidence and cost of family violence is either heavily qualified or estimated, with considerations about factors such as unwillingness to report leading to a reliance on a range of assumptions and the exercise of judgement. However analysis of *reported instances* of domestic assault to NSW police does give a clear picture as to the geographic areas in NSW where reported levels are highest:

> *LGAs with the highest per capita rates of domestic assault were predominantly located in remote and regional areas of NSW. The top five LGAs were all remote (Bourke, Walgett, Moree Plains, Coonamble and Wentworth). Sydney metropolitan LGAs with the highest rates of domestic assault were Campbelltown, Blacktown, Penrith, Wyong and Holroyd. Each of these LGAs also featured in the top 10 Sydney metropolitan LGAs for domestic assault in 2004 (People, 2005).*[11]

These regions correspond with the area of highest unemployment in NSW:

> *In 2009–10, across NSW, the highest rate of unemployment was recorded in the Canterbury-Bankstown Statistical Region (9.0%) and the lowest was recorded in the Central Northern Sydney Statistical Region (3.9%). Small area labour market statistics from the Department of Education, Employment and Workplace Relations for June 2010 revealed that the Local Government Area (LGA) with the highest estimated rate of unemployment in NSW was Central Darling (13.4%) followed by Bourke (12.6%), while the lowest*

---

[10] ibid

[11] Trends and patterns in domestic violence assaults: 2001 to 2010 K Grech and M Burgess NSW Bureau Crime Statistics and Research Issue Paper no. 61 May 2011 page 10.

estimated unemployment rates were found in Singleton (2.1%) and Woollahra (2.2%) LGAs.[12]

The unemployment rates for the areas with the highest per capita rates of domestic violence are set out below. These higher levels or unemployment in areas where employers are most likely to be impacted by family violence regulation suggest that the focus should be on encouraging job creation, not increases in labour costs which will act as a deterrent to employment.

Location	% Unemployed June Qtr 2011
Bourke	12.0
Walgett	12.o
Moree Plains	7.8
Coonamble	6.5
Wentworth	8.8
Campbelltown	6.0
Blacktown south east	6.7
Blacktown south west	12.2
Penrith east	6.5
Penrith west	4.7
Wyong	6.9
Holdroyd	6.6
Source: DEEWR Small Area Labour Markets – June Quarter 2011	

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

Response

There is no need to amend section 352 of the FWA. The general protections provisions provide wide protection for employees with the onus on the employer to prove they took adverse action. The increasing use of the adverse action provisions by employees in a wide variety of circumstances demonstrates there is little impediment to making a complaint under the current regime.

Proposal 17–1 *The Fair Work Ombudsman should develop a guide to negotiating individual flexibility arrangements to respond to the needs of employees experiencing family violence, in consultation with the Australian Council of Trade Unions and employer organisations.*

[12] 1338.1 - NSW State and Regional Indicators, Dec 2010 http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/1338.1Main+Features4Dec+2010

Response

AFEI raises the question — why a guide restricted to individual flexibility arrangements and family violence? The use of individual flexibility arrangements (IFAs) has been so constrained that any attempt to widen their use for this purpose alone appears to be somewhat unbalanced.

IFAs cannot be described as working to enhance workplace flexibility and productivity. Unions view IFAs as a vehicle to undermine minimum conditions including penalty rates, public holiday pay, and annual leave and have worked to prevent their widespread or meaningful use.[13]

IFAs within modern awards can only provide for variations in working hours arrangements, overtime rates, penalty rates, allowances and leave loading.

In the case of enterprise agreements, the terms of an IFA must be decided when the enterprise agreement is being negotiated. Consequently unions have been able to restrict the scope and application of IFAs.

Employers are unlikely to support the expanded use of IFAs for family violence purposes when their use to achieve other flexibilities has been so limited and unsupported by the union movement.

Proposal 17–2 *The Australian Government should encourage the inclusion of family violence clauses in enterprise agreements. Agreements should, at a minimum:*

(a) recognise that verification of family violence may be required;

(b) ensure the confidentiality of any personal information disclosed;

(c) establish lines of communication for employees;

(d) set out relevant roles and responsibilities;

(e) provide for flexible working arrangements; and

(f) provide access to paid leave.

Proposal 17–3 *The Fair Work Ombudsman should develop a guide to negotiating family violence clauses in enterprise agreements, in conjunction with the Australian Domestic and Family Violence Clearinghouse, the Australian Council of Trade Unions and employer organisations.*

[13] ACTU Factsheet August 2010;ACTU The Fair Work Act Two Years On July 2011

Response

AFEI rejects these proposals. The Australian Domestic and Family Violence Clearing House operates primarily a resource centre for unions. It has provided template enterprise agreement provisions which are completely unsuited for the majority of Australian businesses, which are small and underesourced.[14] It is unrealistic to propose that these employers can provide, in addition to managing an employee's family violence needs, time off, new work arrangements, counselling, training for staff and so on.

In any case, enterprise agreement provisions should be specifically tailored to the needs of each business and its employees. They should not be forced into utilising so called guidance material which is defacto a form of pattern bargaining.

The use of domestic violence provisions to date is very limited, confined to the public sector and those few private sector organisations who have judged it in their interests to do so.

Employers routinely make adjustments to cope with employees facing circumstances in which they need help. The likely employer reaction to standardisation of arrangements for employees in need of assistance will be to limit whatever is provided voluntarily.

Proposal 17–4 *In the course of its 2012 review of modern awards, Fair Work Australia should consider the ways in which family violence may be incorporated into awards in keeping with the modern award objectives.*

Proposal 17–5 *In the course of its first four-yearly review of modern awards, beginning in 2014, Fair Work Australia should consider the inclusion of a model family violence clause.*

Response

Specific family violence provisions should not form part of minimum employment standards. Modern awards and the national employment standards have been established to set minimums which apply to all employers and employees regardless of their circumstances. Award provisions have been subject to debate and examination by industrial tribunals throughout the evolution of our award and wage fixing system. Family violence clauses in awards will introduce new minimum entitlements which must be complied with, despite having broad definitional issues which will present considerable substantiation and

[14] Most employing businesses, 731,055 (89.1%) employ less than 20 employees. This comprised 497,098 (68.0%) businesses with 1-4 employees and 233,957 (32.0%) businesses with 5-19 employees. There were also 83,399 (10.2%) businesses with 20-199 employees and 6,349 (<1%) businesses with 200 or more employees.
ABS 8165.0 - Counts of Australian Businesses, including Entries and Exits, Jun 2007 to Jun 2009

implementation difficulties. Further issues arise with the potential inclusion of matters such as counselling, training.

The push to load further employment obligations on employers to achieve goals of social reform and inclusion should be tempered with consideration of what will actually be affordable.

We note that "social inclusion" is not defined in the FWA but s284 (1)(b) includes "promoting social inclusion through increased workforce participation" as part of the minimum wage objective. The use of the term "social inclusion" in the context of any FWA wage setting function must include consideration of maintaining and creating employment opportunity. It carries with it the obligation not to set award provisions that are unaffordable or unsustainable.

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

Response

AFEI opposes amendment to section 352 of the FWA and its regulations to specifically provide for family violence, particularly given the breadth of the ARLC proposed definition. The unfair dismissal and general protections provisions of the FWA adequately encompass these circumstances.

Proposal 18–1 *Safe Work Australia should include information on family violence as a work health and safety issue in relevant Model Codes of Practice, for example:*

(a) 'How to Manage Work Health and Safety Risks';

(b) 'Managing the Work Environment and Facilities'; and

(c) any other code that Safe Work Australia may develop in relation to other topics, such as bullying and harassment or family violence.

Proposal 18–2 *Safe Work Australia should develop model safety plans which include measures to minimise the risk posed by family violence in the work context for use by all Australian employers, in consultation with unions, employer organisations, and bodies such as the Australian Domestic and Family Violence Clearinghouse.*

Proposal 18–3 *Safe Work Australia should develop and provide education and training in relation to family violence as a work health and safety issue in consultation with unions, employer organisations and state and territory OHS regulators.*

Proposal 18–4 *Safe Work Australia should, in developing its Research and Data Strategy:*

(a) identify family violence and work health and safety as a research priority; and

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

Question 18–1 *What reforms, if any, are needed to occupational health and safety law to provide better protection for those experiencing family violence? For example, should family violence be included in the National Work Health and Safety Strategy?*

Response

AFEI is opposed to any further widening of work health safety obligations. Employers are currently dealing with the substantial adjustments they must make as a consequence of OHS national "harmonisation".

The model Work Health and Safety Act which has either been adopted or is currently under consideration by the jurisdictions has created very significant changes in duties and obligations and an expansion of duty holders. There are attendant significant changes in regulations and codes, all of which amounts to a considerable increase in compliance effort, despite the optimistic stance adopted in the Regulatory Impact Statement. In short duty holders do not need a new category of risk.

Violence ***at work*** – in any form - is already included in the person in control of a business or undertaking's obligations to workers and the duty to protect all persons from risks to their health and safety arising from the work carried out as part of the conduct of the business or undertaking. Proposals 18-1 to 18–4 serve to further extend the primary duty of care to non work circumstances.