

IN THE FAIR WORK COMMISSION

Matter No.: AM2015/1

Fair Work Act 2009

Section 156 – 4 yearly review of modern awards

Family and Domestic Violence Leave

OUTLINE OF SUBMISSIONS OF THE AUSTRALIAN COUNCIL OF TRADE UNIONS

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Lodged by:	ACTU
Address for service:	Level 6, 365 Queen Street Melbourne VIC 3000
Tel:	03 9664 7333
Fax:	03 9600 0050
Contact:	Gabrielle Starr
Email:	gstarr@actu.org.au
Internal Reference:	D No. 65/2016

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1. OVERVIEW

A. Introduction

- 1.1. The Australian Council of Trade Unions (ACTU) is the peak body representing about 1.8 million working Australians.
- 1.2. The ACTU makes these submissions in support of its application for paid family and domestic violence leave.
- 1.3. Victims seeking to leave violent relationships primarily need protection and safety. Their ability to realise this is determined by their capacity to access legal and economic resources.
- 1.4. An industrial law framework that provides job and financial security for victims is a critical part of the whole of community response, and necessary if Australia is serious about dealing with the issue of family violence.
- 1.5. The modern award safety net has evolved on the basis of whether particular conditions of employment are a necessary or desirable minimum for workers and whether such conditions are achievable given the impact on employers and the economy more generally. The ACTU believe that victims shoulder too great a proportion of the burden and cost of family violence, a cost that is shared by government, the community and employers. A minimum safety net of family and domestic violence leave is necessary to balance the share of the burden.
- 1.6. Family violence is a relevant matter for the Commission and the 4 yearly review of modern awards because the exercise of the Commission's power to create legally enforceable minimum safety net entitlements will benefit workers who have experienced family violence.
- 1.7. The variation of modern awards is necessary to permit employees to deal with the afflictions of family violence with dignity and without jeopardising their employment and financial stability, and by recognising and acknowledging at a broader level the pervasiveness of the problem in Australian society.
- 1.8. The purpose of these submissions is to provide the Commission with an overview of the prevalence, incidence and impact of family violence, both within and outside the workplace. With this background in mind, in particular the impact of family violence on work, it is clear that employers play an important role, together with other government policy responses, to minimise the harm that family violence has on its victims.

B. The Evidence Relied on by the ACTU

- 1.9. The ACTU rely on the expert reports of:
 - (a) Professor Cathy Humphreys (**Humphreys Report**);

- (b) Dr Peta Cox (**Cox Report**);
- (c) Dr Natasha Cortis (**Cortis Report**);
- (d) Dr Michael Flood (**Flood Report**); and
- (e) Ms Ludo McFerran (**McFerran Report 1** and **McFerran Report 2**).

1.10. The ACTU rely on the witnesses from the following organisations:

- (a) Jocelyn Bignold, McAuley Community Services;
- (b) Bernadette Pasco, Financial and Consumer Rights Council;
- (c) Julie Kun, Women’s Information and Referral Exchange (WIRE);
- (d) Jessica Stott, Women’s Information and Referral Exchange (WIRE);
- (e) Marilyn Beaumont, Australian Women’s Health Network;
- (f) Emma Smallwood, Women’s Legal Services Victoria;
- (g) Fiona McCormack, Domestic Violence Victoria;
- (h) Sandra Dann, Women’s Working Centre SA;
- (i) Karen Willis OAM, Rape and Domestic Violence Services Australia; and
- (j) Samantha Parker, Western Sydney Women’s Domestic Violence Court Advocacy.

1.11. The ACTU rely on the following evidence from union officials and staff:

- (a) Michele O’Neil, National Secretary of Textile Clothing & Footwear Union of Australia;
- (b) Mick Doleman, Executive Officer of the Maritime International Federation;
- (c) Brad Gandy, Assistant Branch Secretary for the Australian Workers Union, Western Australian Branch;
- (d) Michelle Jackson, Branch Co-ordinator of the Victorian and Tasmanian Authorities and Services Branch of the Australian Services Union; and
- (e) Sunil Kempfi, Senior Industrial Officer at the Community and Public Sector Union.

1.12. Finally, the ACTU rely on evidence from a number of women who have experienced domestic violence.¹

1.13. Collectively, the evidence relied on by the ACTU provides a comprehensive insight into the nature of domestic and family violence, and the sorts of support services that victims of domestic violence need to access. These services form part of the ‘whole of community’

¹ By orders of the Commission dated 31 May 2016, these statements are confidential.

response to support victims, and more broadly to achieve a society free from violence. The workplace is essential to that whole of community response.

- 1.14. The ACTU also intends to rely on an extensive range of research and literature on family violence, which we reference throughout our submissions. Most of that work is publicly available. Where available, we have included hyperlinks to the material referred to in these submissions. A separate list of the key material relied on by the ACTU is at Annexure A of these submissions.

2. THE ACTU APPLICATION

A. The proposed Family and Domestic Violence Clause

- 2.1. The ACTU makes this application in accordance with section 156 of the *Fair Work Act 2009* (Cth) (**FW Act**) as part of the 4 yearly review of modern awards.
- 2.2. On 28 October 2014, the ACTU set out in broad terms an outline of the application seeking paid family and domestic violence leave (**family violence leave**) in all modern awards (**ACTU Application**).²
- 2.3. On 1 December 2014, Ross J determined that the ACTU Application would be dealt with as a common issue, and any preliminary or jurisdictional issues would be dealt with prior to the merits of the Application.³ The employer parties and the ACTU agreed draft directions for the future conduct of the matter.
- 2.4. On 13 February 2015, in accordance with those directions, the ACTU filed a proposed draft clause entitled “Support for employees experiencing family and domestic violence”.⁴ In addition to 10 days per year of paid leave, this proposed clause included provision for a family and domestic violence contact person in the workplace, safety obligations, and an extension of the right in s 65(1A) of the FW Act for persons experiencing family violence from a family member to request flexible working arrangements.
- 2.5. The employer parties raised a jurisdictional objection to the ACTU’s Application, and that objection was listed for hearing in August 2015.
- 2.6. On 15 June 2015, the ACTU narrowed the scope of the ACTU Application with the effect that it focussed solely on paid family violence leave. The supporting entitlements outlined in paragraph 2.4 above were removed.⁵
- 2.7. The jurisdictional objection was heard by a Full Bench on 13 August 2015 and a decision was handed down on 22 October 2015 (**Jurisdictional Decision**).⁶ The Jurisdictional Decision pertains to a discrete aspect of the application, specifically proposed clause X.3.3 that requires an employer to ensure that the employee’s disclosure of family violence is maintained as confidential (the **Confidentiality Obligation**). This issue is discussed in more detail at paragraph 2.26 below.

² [ACTU Application, 28 October 2014.](#)

³ [\[2014\] FWC 8583.](#)

⁴ [ACTU Draft Clause, 13 February 2015.](#)

⁵ [ACTU Revised Application, 15 June 2015.](#)

⁶ [\[2015\] FWCFB 5585.](#)

- 2.8. The ACTU application seeks the inclusion of the proposed clause in all modern awards.⁷
- 2.9. The revised ACTU Application (**proposed clause**) is set out below.

X. FAMILY AND DOMESTIC VIOLENCE LEAVE

X.1 Definition

For the purpose of this clause, family and domestic violence is defined as any violent, threatening or other abusive behaviour by a person against a member of the person's family or household (current or former).

X.2 Family and Domestic Violence Leave

X.2.1 An employee, including a casual employee, experiencing family and domestic violence is entitled to 10 days per year of paid family and domestic violence leave for the purpose of:

- (a) attending legal proceedings, counselling, appointments with a medical or legal practitioner;
- (b) relocation or making other safety arrangements; or
- (c) other activities associated with the experience of family and domestic violence.

X.2.2 Upon exhaustion of the leave entitlements in clauses X.2.1, employees will be entitled to up to 2 days unpaid family and domestic violence leave on each occasion.

X.3 Notice and Evidentiary Requirements

X.3.1 The employee shall give his or her employer notice as soon as reasonably practicable of their request to take leave under this clause.

X.3.2 If required by the employer, the employee must provide evidence that would satisfy a reasonable person that the leave is for the purpose as set out in clause X.2.1. Such evidence may include a document issued by the police service, a court, a doctor (including a medical certificate), district nurse, maternal and child health care nurse, a family violence support service, a lawyer or a statutory declaration.

X.3.3 The employer must take all reasonable measures to ensure that any personal information provided by the employee to the employer concerning an employee's experience of family and domestic violence is kept confidential.

⁷ The ACTU Application with respect to domestic violence leave originally included a right to request flexible working arrangements for employees who are victims of domestic violence. [The United Firefighters' Union filed correspondence with the Commission](#) stating that it supports the ACTU's claim for paid domestic violence leave only insofar as the arrangements do not result in any operational firefighter working part-time. Since the date of that correspondence, the ACTU has amended its proposed clause and removed the right to request flexible working arrangements.

B. How the proposed clause is intended to operate

2.10. The proposed clause is intended to operate in the manner set out below.

Definition – Clause X.1

2.11. In accordance with the proposed clause, any employee who is experiencing family violence is entitled to non-discretionary leave. This means that provided the relevant notice and evidentiary requirements are met, an employer cannot refuse an employee’s application for leave.

2.12. The definition of ‘family and domestic violence’ is a simplified version derived from s 4AB of the *Family Law Act 1975* (Cth).⁸ It is intended to capture the broad way in which family violence can manifest. However, the definition of family and domestic violence in the proposed clause, unlike in the *Family Law Act*, refers to a *victim* of family violence.

2.13. Whilst the ACTU recognises the importance of work and services to support behavioural change for perpetrators, we do not propose that perpetrators of family violence be entitled to access the family violence leave sought in the ACTU’s Application. Providing perpetrators with access to a workplace entitlement where that person may have engaged in criminal conduct would, in our submission, create unforeseeable complications for employees and employers alike, and is opposed more broadly on policy grounds by the ACTU. For those reasons, we intend that eligibility be restricted to persons who have been, or are, victims of family violence.

2.14. We understand that the term ‘survivor’ may be preferred to the term ‘victim’; other laws use the expression ‘affected family member’.⁹ The ACTU Application adopts the term ‘victim’ so that the Application is clear about the category of employees who are eligible to apply for family violence leave according to the proposed clause. In doing so, we recognise the limitations of this term but reject the connotation of ‘victim’ that suggests persons who are effected by family violence are in anyway helpless, incapable or incompetent of making decisions in their best interests. Such characterisations are certainly not consistent with the women’s stories that have been shared with the ACTU, all of which demonstrate overwhelming courage and resilience in the face of adversity.

Eligibility – Clause X.2

2.15. The draft clause proposes that family violence leave can be taken in a broad range of circumstances. Clause X.2.1 sets out a non-exhaustive list of activities that would be considered acceptable circumstances in order to be eligible for family violence leave. These

⁸ [Family Law Act 1975 \(Cth\) s 4AB.](#)

⁹ For example, in the case of police made applications for family violence intervention orders.

circumstances include accessing support services provided by medical practitioners, social workers, police, court or other legal workers, nurses and other providers of domestic violence support services.

- 2.16. However, because it is not possible to foresee all of the potential needs of victims, the clause provides for ‘other activities associated with the experience of family and domestic violence’. This could include attending appointments with children who have been affected by domestic violence, or attending a child’s school or other sporting or extracurricular activities to notify those responsible for the child’s care of relevant information. In such circumstances, the clause provides that the employee would be required to establish that the ‘activity’ is sufficiently connected to their family violence experience in order to access the leave entitlement. Leave for this reason would be treated consistently with leave for the purpose of the activities in clause X.2.1(a) and (b) for the purpose of the notice and evidentiary requirements in clause X.3.
- 2.17. Because family violence can affect any worker, we consider there is no sound policy reason to restrict the proposed leave to permanent employees. Rather, there are very good reasons to ensure that casual employees are entitled to take family violence leave. As such, both the paid and unpaid leave entitlements would be available to casual employees.

Leave Entitlement – Clause X.2

- 2.18. Any employee who is experiencing family violence would be entitled to take a minimum of 10 days paid leave per year. Once the paid leave is exhausted, the employee is entitled to take up to two days unpaid leave per permissible occasion.
- 2.19. The application is intended to create dedicated leave so that employees who experience family violence are not disadvantaged or indirectly discriminated against as a result of being forced to use annual or personal leave for family violence purposes and as such, effectively diluting the pool of existing paid leave entitlements for these workers.
- 2.20. Family violence leave would not be an accruable leave entitlement and would operate such that on each respective anniversary date when the employee commenced with the employer, the employee would have a bank of 10 days paid leave available throughout the year.
- 2.21. Employees would be entitled to be paid at the employee’s ordinary rate of pay, that is, the rate of pay they would have received had they worked the period.
- 2.22. We note that nothing in this provision would exclude an employee’s right to take any other form of leave in accordance with the NES or any collective agreement.
- 2.23. Both the paid and unpaid leave entitlement would operate similar to that of compassionate leave, in that it is proposed that the leave can be taken:

- (a) as a continuous period, or
- (b) on a single period of one day; or
- (c) any separate periods of less than one day to which the employer and employee agree.

Notice and Evidentiary Requirements – Clause X.3

- 2.24. The notice and evidentiary requirements are modelled on the notice requirements in s 107 of the FW Act with respect to the personal, carer's, and compassionate leave entitlements in the NES. Given the nature of the leave, some necessary modifications have been included.
- 2.25. Clause X.3.2 provides a number of examples of third party service providers who may provide satisfactory evidence as to the basis of the employee's taking leave, including medical practitioners, lawyers, or support services. In our submission, evidence provided by any of these service providers that the employee is experiencing family violence should be sufficient to satisfy the employer that the employee's application is genuine. In addition, and consistent with the NES, the employee may also sign a statutory declaration to the effect that they are eligible to access family violence leave.

Confidentiality Obligation – Clause X.3.3

- 2.26. Clause X.3.3. provides that *"The employer must take all reasonable measures to ensure that any personal information provided by the employee to the employer concerning an employee's experience of family and domestic violence is kept confidential"*.
- 2.27. The ACTU submit that this provision is necessary to ensure that employees who are experiencing family violence can feel safe and reassured that their disclosure will be treated confidentially. This would assist to remove any barrier or reluctance that the employee might otherwise have to access the leave.
- 2.28. In practice, the Confidentiality Obligation would attach to any documentation that is provided by the employee to the employer to substantiate their application for leave.
- 2.29. Depending on the size of the employer, this person could be a supervisor, manager, HR manager or payroll administrator. Any of those persons who are required to review the documentation would be subject to the Confidentiality Obligation. We accept that there might be more than one person to whom the Confidentiality Obligation would apply. Those persons would be prohibited from disclosing the contents of the documents, to any other person, except insofar as necessary to approve the leave application.

Jurisdiction of the 'Confidentiality Obligation'

- 2.30. The jurisdictional objection raised by the employer parties and referred to at paragraph 2.5 above related to a narrow question as to whether the Confidentiality Obligation contained in

proposed clause X.3.3, was inconsistent with ss 139 and 142 of the FW Act, and was therefore not a term that could be included in a modern award.

- 2.31. During the hearing of the jurisdictional objection, Hatcher VP raised with counsel for the ACTU how the Confidentiality Obligation was intended to operate.¹⁰ During that exchange, the Vice President noted that if it was intended that the subclause was to apply more broadly than to information provided for the purpose of satisfying the notice and evidentiary requirements, then the subclause might go beyond ‘arrangements for taking leave’.¹¹ The corollary of the Vice President’s comment is that if the Confidentiality Obligation was confined to that information, then the subclause may not stray beyond the jurisdiction of the Commission.
- 2.32. This approach was confirmed in the Jurisdictional Decision, where the Full Bench (Hatcher VP, Acton SDP and Spencer C) stated that “*if was evidence demonstrating the confidentiality requirement was necessary in order for the proposed leave entitlement to operate effectively*” then “*would reasonably arguable that X.3.3 is authorised by s 139(1)(h) as a term about ‘leave’ or ‘arrangements for taking leave’ and/or by s 142(1) as ‘incidental to a term that is permitted... to be in the modern award’ and ‘essential for the purpose of making a particular term operate in a practical way’*”.¹²
- 2.33. The Confidentiality Obligation does not extend beyond an obligation to keep confidential documents (and their content) provided to the employer to satisfy the notice and evidentiary requirements. This is consistent with the confined operation of the provision as contemplated by the Vice President. As to the necessity of the confidentiality requirement in order for the proposed leave entitlement to operate effectively, the ACTU rely on the evidence of a number of witnesses¹³ in support of the argument that unless there is a Confidentiality Obligation, the entitlement would be unable to operate in a practical way
- 2.34. On the basis of these matters, it is difficult to see how an argument can be sustained that the Confidentiality Obligation is jurisdictionally barred.
- 2.35. However, for completeness and out of an abundance of caution, we set out below our argument to support the proposition that the Confidentiality Obligation is a permitted term of a modern award.
- 2.36. The proposed Confidentiality Obligation is a permitted term according to s 136(1)(a) of the FW Act which deals with terms that may be included in modern awards.

¹⁰ [Transcript dated 13 August 2015](#).

¹¹ Refer PN346 of the [Transcript dated 13 August 2015](#).

¹² [2015] FWCFB 5585, [21].

¹³ See for example, Fiona McCormack, Marilyn Beaumont, ACTU Confidential Witness 3 and 4.

- 2.37. The Confidentiality Obligation is permitted because it may be included in the modern award according to s 139(1)(h) as a term that is “*about leave and the arrangements for taking leave*”.
- 2.38. The notice and evidentiary requirements at clause X.3 are terms that may be included in the modern award according to s 142 of the FW Act, in particular, because they are:
- (a) incidental to the leave entitlement at clause X.2; and
 - (b) essential for the purpose of making the leave entitlement operate in a practical way, specifically:
 - (i) The notice requirement is framed to balance the operational needs of the employer to know how much of her or his workforce is able to attend work at any given time, with the needs of the employee who on occasion – although not always – may need to access the leave entitlement in urgent circumstances. In this respect, the notice requirement is intended to operate in the same or similar way as for sick leave.
 - (ii) The requirement to provide evidentiary information in support allows the employer to be satisfied, if required, that the leave has been taken for a proper purpose.
 - (iii) The Confidentiality Obligation allows employees to be assured that matters personal to their lives is kept confidential and only disclosed to those persons necessary. Aside from assuaging any privacy concerns held by the employee in question, the Confidentiality Obligation also increases the safety of the employee in circumstances where a perpetrator might seek out personal information about the victim, through deception.
- 2.39. The necessity of the Confidentiality Obligation is discussed further below from paragraph 4.84.

3. STATUTORY FRAMEWORK – RELEVANT CONSIDERATIONS AND APPROACH

- 3.1. In conducting the 4 yearly review of modern awards, the task of the Full Bench is governed by statute. Section 156 of the FW Act sets out the requirement to conduct the review. The Commission has broad discretion as to the conduct of the review, but the Commission must ensure that the modern awards, together with the National Employment Standards (NES), provide a fair and relevant minimum safety net of terms and conditions, taking into account the modern award objective set out in s 134(1) of the FW Act.
- 3.2. The FW Act provides that the Commission must conduct a four yearly review of modern awards: s 156(1). Section 156(2) deals with what has to be done in a review:
- (2) In a four yearly review of modern awards, the FWC:
 - (a) must review all modern awards; and
 - (b) may make:
 - (i) one or more determinations varying modern awards; and
 - (ii) one or more modern awards; and
 - (iii) one or more determinations revoking modern awards.
- 3.3. Subsection 156(5) provides that in a review each modern award is reviewed ‘in its own right’. However, this does not prevent the Commission from reviewing two or more modern awards at the same time.¹⁴ The Commission has determined that this matter (along with several other matters) can be determined as common issues affecting all awards, “*as distinct from having the issue determined on an award by award basis during the award stage of the review*”.¹⁵
- 3.4. In conducting a review the Commission will also have regard to the historical context applicable to each modern award,¹⁶ and previous decisions relevant to any contested issue. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.¹⁷ However, the issue of leave for domestic violence has not been the subject of award hearings before the Commission or its predecessors, and so there is no precedent from which to depart, or to follow.
- 3.5. In *Re Four Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (*Jurisdictional Issues Decision*), the Full Bench identified that, in addition to s 156, a range of other provisions in the Act are relevant to the review.¹⁸ Those provisions included the objects of the Act (s 3), the interaction with the NES (s 55) and those provisions providing for the performance of functions and exercise of powers by the Commission (ss 577

¹⁴ *Re Four Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788, [8].

¹⁵ [\[2014\] FWC 1790](#), [6] (Ross J).

¹⁶ *Ibid*, [24].

¹⁷ *Ibid*, [27].

¹⁸ *Ibid*, [10].

and 578). The following essential features characterise the legislative regime established by the FW Act.

- 3.6. The starting point is that modern awards, together with the NES and national minimum wage orders, comprise the “*guaranteed safety net of fair, relevant and enforceable minimum terms and conditions*”.¹⁹ In the 4 yearly review of modern awards, the Full Bench “*must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions*”.²⁰
- 3.7. A term should be included in a modern award “*only to the extent necessary to achieve the modern awards objective*”.²¹
- 3.8. The modern awards objective is set out in s 134(1) of the Act and provides:
- (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
 - (a) relative living standards and the needs of the low paid; and
 - (b) the need to encourage collective bargaining; and
 - (c) the need to promote social inclusion through increased workforce participation; and
 - (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
 - (da) the need to provide additional remuneration for:
 - (i) employees working overtime; or
 - (ii) employees working unsocial, irregular or unpredictable hours; or
 - (iii) employees working on weekends or public holidays; or
 - (iv) employees working shifts; and
 - (e) the principle of equal remuneration for work of equal or comparable value; and
 - (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
 - (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
 - (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the *modern awards objective*.

¹⁹ FW Act, s 3(b).

²⁰ FW Act, s 134(1).

²¹ FW Act, s 138.

- 3.9. The s 134(1)(a) to (h) factors in the modern awards objective are “*broad considerations which the Commission must take into account in considering whether a modern award meets the objective set by s 134(1)*”.²²
- 3.10. The criteria “*do not set any standard against which a modern award could be evaluated*”, and many of them are properly described as “*broad social objectives*.”²³ No particular weight should be attached to any one consideration over another; and not all of the matters identified in s 134(1) will necessarily be relevant to a particular proposal to vary a modern award.²⁴ To the extent there is any tension between some of the considerations in section 134(1), “*the Commission’s task is to balance the various considerations and ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions*.”²⁵
- 3.11. The requirement in s 138 of the FW Act that a term be ‘necessary’ to achieve the modern awards objective requires the Full Bench to form “*a value judgment*” based on the considerations delineated in s 134(1) of the FW Act.²⁶
- 3.12. The Full Bench does not form its value judgment in a vacuum.
- 3.13. Consistent with the Explanatory Memorandum to the Fair Work Bill 2008, it is expected that when considering whether and how to vary the content of a modern award in the four yearly review process, the Commission will be “*guided by criteria which take into account public, social interest and economic aspects*”.²⁷
- 3.14. Section 578 of the FW Act provides that in performing functions or exercising powers, in relation to a matter (including a review), the Commission must take into account the objects of the Act; equity, good conscience and the merits of the matter; and the need to respect and value the diversity of the workforce by helping to prevent and eliminate, inter alia, discrimination on the basis of sex and family or carer’s responsibilities.
- 3.15. Further, in performing functions or exercising powers, the Commission must take into account the objects of the FW Act including, relevantly, “*ensuring a guaranteed safety net of*

²² *National Retailers Association v Fair Work Commission* (2014) 225 FCR 154, [109] (Collier, Bromberg, Katzman JJ).

²³ *Ibid.*

²⁴ *Four Yearly Review of Modern Awards – Annual Leave* [2015] FWCFC 3406, [19], [20] (***Annual Leave Decision***).

²⁵ *Annual Leave Decision*, [20].

²⁶ *Jurisdictional Issues Decision*, [36].

²⁷ Explanatory Memorandum, Fair Work Bill 2008, r 105 (emphasis added).

fair, relevant and enforceable minimum terms and conditions” including through modern awards.²⁸

- 3.16. In respect of the modern awards objective, the Commission’s obligation is to take into account the need to ensure that modern awards provide a fair and relevant minimum safety net: s 134(1). Those considerations of the modern awards objective that are particularly relevant to this application include the need to promote social inclusion through increased workforce participation: s 134(1)(c), the likely impact on business including productivity and employment costs: s 134(1)(f). The modern awards objective is addressed by reference to the evidence outlined in these submissions from Part 10 below.
- 3.17. At a general level the ACTU Application raises matters that are directly relevant matters of public and social interest; equity and good conscience; the need to eliminate discrimination; and the requirement that Australia act consistently with its international obligations.

²⁸ FW Act, s 578(a), and s 3(d).

4. FAMILY AND DOMESTIC VIOLENCE IS A WORKPLACE ISSUE

A. The Impact of Family and Domestic Violence at the Workplace

- 4.1. Domestic violence and the workplace are connected in two keys ways:
- (a) The experience of domestic violence has direct and indirect adverse consequences for victim's working and professional lives, and therefore on the organisation; and
 - (b) Working can provide support and other benefits and have a positive impact on the lives of people who are experiencing or recovering from violence.

Adverse consequences

- 4.2. Around 62 per cent of women who experienced domestic violence in the last 12 months were in paid work.²⁹
- 4.3. Studies have shown that women who are experiencing or have experienced domestic violence have a more disrupted work history, are on lower personal incomes, have had to change jobs frequently and are more likely to be employed in casual and part time work than women with no experience of violence.³⁰ Violence can have a mix of effects on women's workforce participation, including those mentioned above, without affecting macro-level indicators such as workforce participation rates. It is not clear whether domestic violence *causes* women to have less stable or consistent work history, or if women in these forms of work are more likely to experience domestic violence. However, although the casual relationship is uncertain, the correlation between domestic violence and work is clear.
- 4.4. In a literature review undertaken in 2015 and referred to in the Cortis Report, Cortis & Bullen describe the three theoretical approaches for understanding how family violence impacts on workforce participation. These are:

The 'exposure and exchange' model emphasises how employment gives women opportunities outside the home which can lower their exposure to domestic violence, and can increase women's independence, bargaining power, and social supports, helping to curb or escape abuse.

²⁹ Cortis Report at 21. taken from PSS 2012, ABS Table A17 'Women's experience of violence by intimate partner during last 12 months'.

³⁰ McFerran, L (2011) 'Safe at Home, Safe at Work', National Domestic Violence and the Workplace Survey, Australian Domestic and Family Violence Clearinghouse, A Project of the Centre for Gender-Related Violence Studies and Micromex Research, University of New South Wales (**National Domestic Violence Workplace Survey 2011**), page 2.

'Backlash' models emphasise how the increased bargaining power and independence that can come from paid work may cause perpetrators to escalate their abuse, and to use tactics of employment sabotage.

A third approach avoids framing the relationship between violence and work as either empowerment or backlash, and instead emphasises how violence has varied impacts on work, and women respond to these in diverse ways, and with diverse sets of resources.³¹

Interference at work

- 4.5. Domestic violence can act as a barrier to accessing and sustaining work for a number of reasons, including where the perpetrator interferes and sabotages employment through tactics of stalking, abusive phone calls and harassment. This can result in reduced productivity, absenteeism and illness, and job losses.³²
- 4.6. The PSS has found that about one in four (145,700) employed women took time off work as a result of their most recent incident of physical assault by a male cohabitating partner. For employed women who had been sexually assaulted by a male cohabitating partner, about one in five (29,000) took time off work as a result of their most recent incident.³³
- 4.7. In 2007, Swanberg et al conducted an in-depth analysis of literature looking at the impact of partner violence on work in the United States, and concluded that the evidence demonstrates that violence creates significant costs for individual victims and organisations. They categorise interference with women's work in three primary forms; work disruption, on-the-job harassment and performance problems. The short-term consequences of experiencing these forms of interference include increased absenteeism, reduced concentration and reduced productivity³⁴.
- 4.8. A study in the US in 2009 funded by the US Department of Justice studied the effects of intimate partner violence (IPV) on the workplace by surveying 2,400 working men and women.³⁵ The results of the study suggested negative effects of intimate partner violence on current victims levels of depression, self-esteem, economic self-sufficiency and family-work conflict.

³¹ Cortis Report at 23. (citations omitted).

³² Franzway S, Zufferey C, Chung D, 2007 'Domestic Violence and Women's Employment' report by the South Australian Government as part of the Women's Safety Strategy, Office for Women (**Franzway et al**).

³³ Cox P (2015) Violence Against women: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012 (**Cox ANROWS Report 2015**) at 4.3, page 116.

³⁴ Swanberg J, Macke C, Logan TK (2007) 'Working Women Making It Work – Intimate Partner Violence, Employment and Workplace Support' 22(3) *Journal of Interpersonal Violence*, 292-311 (**Swanberg et al**).

³⁵ Reeves C, O'Leary-Kelly A, 'Study of the Effects of Intimate Partner Violence on the Workplace', A report for the United States Department of Justice, June 2009.

- 4.9. In particular the authors found that for lifetime victims (persons who had experienced IPV but are no longer in an abusive relationship) there were negative effects of depression, self-esteem and job insecurity. Lifetime victims were more likely to be absent from work than were non-victims. In relation to current victims, the authors found that current victims did not demonstrate any increased tendency towards absenteeism. They did, however, report higher levels of work distraction compared to non-victims.³⁶ This is unsurprising given the trauma of family violence. The authors summarised their findings as follows:

Simply put, it appears that current victims get to work, but have more difficulty working than non-victims, and this pattern was especially strong for female victims. On the other hand, lifetime victims appear to have challenges around work attendance, but once at work, they are as fully engaged as other employees. Taken together, these findings suggest that victimisation has short and long term detrimental effects on work-related outcomes, but also that IPV victims can recover, particularly in terms of their work productivity.³⁷

- 4.10. It may appear counter-intuitive that employees who are currently experiencing IPV were no more likely to be absent than were non-victims, given the known negative impacts of IPV on victims mental health. However, this could be explained by attendance at work acting as a coping mechanism, or perhaps reflecting the strong need of victims to keep their jobs and maintain their economic power as a way out of the abusive situation.³⁸
- 4.11. The Australian Domestic and Family Violence Clearinghouse National Domestic Violence and the Workplace Survey (**NDV Workplace Survey**), conducted in 2011, surveyed 3,611 workers and found that nearly half of those surveyed (48 per cent), who had experienced domestic violence reported that the violence affected their capacity to get to work (due to injury or restraint).³⁹ This was the most common way in which domestic violence interferes with work.
- 4.12. The NDV Workplace Survey also found that 19 per cent of those surveyed who had experienced domestic violence reported that the abuse continued in the workplace, predominantly through phone calls, emails, texts and unwanted visits to the workplace.⁴⁰

³⁶ Reeves C, O’Leary-Kelly A, ‘Study of the Effects of Intimate Partner Violence on the Workplace’, A report for the United States Department of Justice, June 2009, page 5 (**Reeves and O’Leary Kelly DoJ Report**).

³⁷ Reeves and O’Leary Kelly DoJ Report page 6.

³⁸ Reeves C, O’Leary-Kelly A, (2007) ‘The Effects and Costs of Intimate Partner Violence for Work Organisations’ 22(3) *Journal of Interpersonal Violence*, 339 (**Reeves and O’Leary-Kelly**).

³⁹ National Domestic Violence Workplace Survey 2011, page 8, table 6.

⁴⁰ National Domestic Violence Workplace Survey 2011, page 10, table 8.

- 4.13. The NDV Workplace Survey recorded that 59 per cent of those surveyed who had experienced domestic violence reported a negative impact on their work performance due to distraction, anxiety and feeling unwell. These negative impacts were the result of tactics such as physical injury or restraint, inhibiting transport (hiding keys, withholding transport money), refusal to care for children and sleep deprivation. This led to absenteeism (10 per cent of those who reported an impact on work), tardiness (7 per cent), and performance issues (15 per cent).⁴¹
- 4.14. Interference with work is a form of abuse typically described as sabotage, and is a tactic of economic abuse, although it may utilise other forms of abuse such as physical abuse.
- 4.15. The findings in the NDV Workplace Survey have been demonstrated internationally. Dr Cortis refers to an American study conducted in 2012 found that 78 per cent of survivors of DFV had experienced some form of employment sabotage.⁴²

Employment Stability

- 4.16. The long-term consequences of work interference include inconsistent work histories, underemployment, unemployment, or reduced or actual potential earnings.
- 4.17. Women with a history of domestic violence have a more disrupted work history and are consequently on lower personal incomes, have had to change jobs more often and are employed at higher levels in casual and part-time work.⁴³ Franzway et al note that “Women escaping and experiencing domestic violence are often the most disadvantaged and vulnerable in the labour market.”⁴⁴ Moreover, leaving a good job for safety reasons or encountering difficulties securing and retaining meaningful work further complicates the economic hardship women encounter when leaving an abusive relationship.⁴⁵
- 4.18. Not all victims will feel comfortable to disclose their experience of domestic violence to their employers, and this in turn may affect employment stability. Julie Kun, Deputy CEO of WIRE suggests that the women she sees as part of her work:

*...didn't disclose their violence they were experiencing because of fear that they would lose professional face, lose credibility and miss out on promotional opportunities.*⁴⁶

⁴¹ National Domestic Violence Workplace Survey 2011, page 10, table 9.

⁴² Cortis Report, [25].

⁴³ Franzway et al at page 5.

⁴⁴ Franzway et al at page 5.

⁴⁵ Swanberg et al at page 293.

⁴⁶ Julie Kun Witness Statement at 51.

- 4.19. These fears can result in some workers feeling as though they have no choice but to leave their employment. As Jocelyn Bignold, CEO of McAuley Community Services, states:

*For ... clients who were able to work, some were unable to stay in their jobs because of their experience of family violence. It was common for clients to tell us that they did not feel confident to tell their employer and so resigned from their employment. For other clients, they felt they were forced out of their jobs because of performance issues.*⁴⁷

- 4.20. A 2011 study on the concurrent and long-term impact of intimate partner violence on employment stability in the US found that domestic violence has an impact on employment stability, which could be long lasting but that it does not last indefinitely.⁴⁸ The results of the study showed that domestic violence had short-term and long term effects on employment stability. In particular, the authors found evidence of an impact on employment stability almost six years later.⁴⁹ The study notes that in building on the work of several other studies, they too were able to conclude that domestic violence contributes to poorer employment outcomes. Specifically, women experiencing two or more incidents of physical assault in the preceding 12 months had more than twice the odds of low or moderate employment stability in the same timeframe in multivariate models.⁵⁰
- 4.21. The evidence of Jocelyn Bignold of McAuley Community Services for Women supports this finding.
- 4.22. McAuley Community Services for Women provides accommodation, support and advocacy for women and their children who are homeless, primarily as a result of family violence and mental illness. They currently support about 650 women and children each year. Among other support services, they provide 24-hour crisis accommodation for women and children escaping family violence.
- 4.23. The McAuley Works program was initiated in response to the evident need from their clients to secure meaningful employment as a means of escaping and recovering from violence. Most of their clients wanted to work, despite the barriers in doing so, but were excluded from the workforce. The McAuley Works program is designed to break down those barriers by providing training and support to assist women to re-enter the workforce.
- 4.24. As at the end of the 2013/14 financial year, 201 women had been referred to McAuley Works. Of those, 134 women successfully found work (mostly in casual positions) and as at July

⁴⁷ Jocelyn Bignold Witness Statement at 32.

⁴⁸ Crowne S, Juon HS, Ensminger M, Burrell L, McFarlane E, Duggan A, (2011) 'Concurrent and Long-Term Impact of Intimate Partner Violence on Employment Stability' 26(2) *Journal of Interpersonal Violence*, 1282–1304 (Crowne et al).

⁴⁹ Crowne et al at page 1293.

⁵⁰ Crowne et al at pages 1293-1295.

2015, 90 of those women were still in work.⁵¹ The ability to stay in work was typically impacted by the women's work history, the needs of their children (and how women coped with child care responsibilities whilst working) and other risk factors associated with their experience of family violence.

- 4.25. In addition to providing women with training and work experience, the success of the McAuley Works program was the noticeable positive impact that work had on women's self-esteem and confidence. Bignold notes that as women's confidence grew, they would return to the program to secure their next step which might be a more highly skilled role or additional hours.⁵²

Benefits of Work

- 4.26. In the words of Julie Kun, Deputy CEO of Women's Information Referral Exchange:

*Overall the feedback that we have received at WIRE is that women want their lives to be normal, safe, secure and routine, and part of that routine in employment.*⁵³

- 4.27. Overwhelmingly, research establishes that employment is a key pathway to escaping violent relationships. Sustained periods of employment can provide financial security, independence, social networks and increased self-esteem.⁵⁴
- 4.28. An American study (2007) found that the availability of social support at work may act as a protective factor in women's lives, decreasing social isolation and improving health, especially among single mothers and women who work in low-wage jobs,⁵⁵ While this effect may depend on job demands and personal characteristics,⁵⁶ support from supervisors, as well as co-workers, helped women to focus on their jobs and maintain employment, although eventually many of them experienced job turnover due to consequences of the abuse they were experiencing.⁵⁷
- 4.29. Similarly, Reeves and O'Leary-Kelly found that organisations have significant power to influence the degree of harm that employees experience as a result of family violence.

⁵¹ Jocelyn Bignold Witness Statement at 42 and 56.

⁵² Jocelyn Bignold Witness Statement at 53.

⁵³ Julie Kun Witness Statement at 57.

⁵⁴ See for example Cortis Report, McFerran Report 2 and Jocelyn Bignold at 36. Also see S Patton, *Pathways: How Women Leave Violent Men*, Government of Tasmania, Hobart, 2003, p xviii; R Braaf and I Barrett Meyering, *Seeking Security: Women's Economic Wellbeing During and Following Domestic Violence*, Australian Domestic and Family Violence Clearinghouse, Sydney, 2011.

⁵⁵ Staggs, Long, Mason, Krishnan, Riger (2007) 'Intimate Partner Violence, Social Support and Employment in the Post-Welfare Reform Era', 22(3) *Journal of Interpersonal Violence*, 347.

⁵⁶ Ibid.

⁵⁷ Ibid at page 348.

Specifically, however they conclude that it is more important for the victim to have the support of the employer, than a co-worker.⁵⁸

- 4.30. A number of ACTU witnesses point to the benefits of working and the support that they had from their co-workers, supervisors and in some instances organisations more generally. For example, Jocelyn Bignold observes that in her work at McAuley Works, “*we saw from direct experience the potential of employers to be able to make a significant difference to women’s experiences of family violence and to less the follow-on consequences.*”⁵⁹
- 4.31. This point is reinforced by the experiences of the ACTU confidential witnesses, who each speak in their own words about the different kinds of support they received from their employers at various times.
- 4.32. Support from employers is particularly critical when considering that employment related issues may not be the initial priority for employees who are dealing with family violence related matters. As Jennifer Stott, Women’s Support Worker at WIRE states “*the woman was not aware of her industrial rights, and nor was fighting for her industrial rights a priority. The sole focus was on escaping her husband’s violence.*”⁶⁰
- 4.33. It is for this reason that workplace strategies to assist employees who are experiencing domestic violence are necessary, and that those strategies need to be accessible, easy to understand, uniform and enforceable.

B. Workplace/Industrial Responses to Family and Domestic Violence

- 4.34. There are a number of protections built into the current workplace relations framework to assist victims of domestic violence. However, in our submission, they are inadequate to meet the needs of family violence victims. Paid leave is a critical entitlement that is missing from the framework.

Existing Leave Entitlements

- 4.35. Currently, an employee could, in some circumstances, access entitlements to personal/carer’s leave, compassionate leave, or annual leave for the purposes of dealing with family and domestic violence matters. In order to do so, they would have to comply with the eligibility, notice and evidence requirements of those entitlements, which may present difficulties.
- 4.36. For example, personal/carers leave can only be used where the employee is not fit for work, or they are caring for a sick member of their family. The need for domestic violence leave

⁵⁸ Reeves C and O’Leary-Kelly A (2007) ‘The Effects and Costs of Intimate Partner Violence for Work Organizations’, 22(3) *Journal of Interpersonal Violence*, 327.

⁵⁹ Jocelyn Bignold Witness Statement at 61.

⁶⁰ Jessica Stott Witness Statement at 18.

does not necessarily meet these eligibility requirements because the employee is fit to work, but is unable to work because of their need to attend court, seek specialist services or relocate. Of course, where the employee has suffered an injury (physical or mental) they would be eligible to take personal/carers leave.

- 4.37. In her second report, McFerran describes the impetus for the campaign for dedicated paid family violence leave as follows:

*... other existing leave provisions are designed to meet other equally pressing needs such as illness or injury. Dedicated and additional domestic or family violence leave was perceived, therefore, as not encroaching on the needs for which other existing leave entitlements had been created.*⁶¹

- 4.38. With respect to annual leave, it is ordinarily taken for planned absences, where the employee has given the employer as much notice as is required or otherwise by agreement. This will not always be workable for victims of family violence, where they may need to take urgent action. Long service leave falls into a similar category. Further, using leave in this manner is inconsistent with the purpose of annual leave and long service, which is for rest and recreation.

- 4.39. Where victims of domestic violence are required to use their existing entitlements for the purpose of dealing with family violence, they may be experiencing discrimination. The evidence of many victims demonstrates that they had to exhaust their existing entitlements to prepare and conduct family violence related court proceedings or relocate homes and schools. See for example, the evidence of the ACTU Confidential Witnesses. These workers are entitled to take their leave in the way that it was intended, that is for rest and recreation.

- 4.40. Notwithstanding the inadequacy of using other leave entitlements, the evidence of the ACTU Confidential Witnesses suggests that victims will often exhaust all their leave requirements in any event and therefore be placed in a vulnerable position where they need to request discretionary and unpaid forms of leave.

Flexible working arrangements

- 4.41. As noted by Orchiston and Smith, “ordinary and apparently innocuous workplace rules can operate harshly for employees experiencing violence, thereby exacerbating the harm they already suffer”.⁶²

⁶¹ McFerran Report 2 at 12.5

⁶² Orchiston T and Smith B (2012), ‘Empowering victims of family violence: Could anti-discrimination laws play a role?’ (March) *Australian Review of Public Rights*, The University of Sydney, at http://www.australianreview.net/digest/2012/03/orchiston_smith.html

- 4.42. Work policies dealing with hours of work, rosters, performance and access to existing leave entitlements can be difficult for workers who are experiencing family violence to comply with. As such, workers will often seek flexibility, understanding and other reasonable adjustments to their working arrangements. This includes minor adjustments such as requiring an alternative employee to answer the phone to more substantive adjustments including relocation or changes to working hours/rosters.
- 4.43. Employees, including long-term casuals, are entitled to request a change in working arrangements (for example changes in hours of work, rosters or location of work). Eligible employees who can make such a request includes an employee who is experiencing violence from a member of the employee's family, per s 65(1A)(e) of the FW Act. However, the request can be rejected on reasonable business grounds: s 65(5) of the FW Act.
- 4.44. The ACTU submit that the right to request does not adequately address the needs of employees, who need defined and enforceable entitlements to flexible working arrangements.

Discrimination and equal opportunity

- 4.45. There are inadequate protections under discrimination law for workers experiencing family violence. We support the views of the Australian Human Rights Commission that there is a growing body of evidence that shows victims often experience workplace discrimination as a result of their family violence experience.⁶³
- 4.46. In particular, victims often face difficulties seeking legal redress under the existing grounds in ss 351 and 772 of the FW Act. As such, proponents including the AHRC have supported amendments to the FW Act to include an express prohibition against adverse action and unfair dismissal for victims of domestic violence.⁶⁴ Further, there have been a small, but increasing number of unfair dismissal applications heard by the Fair Work Commission that point to the discrimination that can result from disclosure about family violence.⁶⁵
- 4.47. Without strong anti-discrimination laws, victims will continue to be reluctant to disclose their experience of family violence. It is not just the threat of dismissal that is of concern. Some employees feel that disclosure will jeopardise their careers and that they will be stigmatised.

⁶³ See for example Australian Human Rights Commission, *Submission to the Attorney-General's Department on Consolidation of Commonwealth Discrimination Law - domestic and family violence* (2012) at: http://www.humanrights.gov.au/legal/submissions/2012/20120123_consolidation.html#fn1 (7 October 2014) and AHRC Submission to Australian Law Reform Commission (21 April 2011) <http://www.alrc.gov.au/sites/default/files/pdfs/CFV%2048%20Australian%20Human%20Rights%20Commission.pdf>

⁶⁴ See above.

⁶⁵ See for example *Eliana Construction and Developing Group Pty Ltd v Leyla Moghimi* [2015] FWCFB 7476 and *King v D.C Lee & L.J Lyons* [2016] FWC 1664.

4.48. The ACTU have strongly advocated for amendments to equal opportunity laws, to ensure that ‘victim of family violence’ is a standalone attribute, so that victims do not have to try and fit their experience into other broader categories of discrimination.⁶⁶ These legal reforms, whilst complementary to the ACTU’s application, are hypothetical at this stage, and do not adequately address the victim’s need to access paid leave.

Work health and safety

4.49. Employers have an obligation under work health safety laws to ensure the safety of their employees.

4.50. Family violence can pose a threat to the safety of employees where both victim and perpetrator are employed at the same workplace; the perpetrator threatens the victim, or a co-worker in the workplace (in person or via the phone or email); as well as more direct and egregious conduct including stalking and even homicide.

4.51. There are a number of government policy reform initiatives that are in the consultation phase of development, with respect to the health and safety of workers who are experiencing family violence. The ACTU is encouraged by any work that is designed to improve worker safety, regardless of the cause of the risk or danger.

4.52. WHS laws have a role to play in assisting victims, and their co-workers, however the objectives of these laws are very different to those of the ACTU application. WHS laws cannot provide certainty or access to family violence leave.

C. Collective Bargaining

Prevalence of family violence entitlements in registered Enterprise Agreements

4.53. The first McFerran report provides an analysis of the number of collective agreements that currently contain a family violence leave entitlement, as well as the nature of the entitlement.

4.54. McFerran analysed the Workplace Agreement Database (**WAD**) collated by the Commonwealth Department of Employment for current collective agreements to September 2015. According to WAD, there were 776 current enterprise agreements that included a family violence clause, covering an estimated 654,419 employees.⁶⁷

⁶⁶ Refer to ACTU Submission to Australian Law Reform Commission (30 September 2011) http://www.alrc.gov.au/sites/default/files/pdfs/cfv_100_actu_submission_in_response_to_the_alrc_dv_1_eg_discussion_paper.pdf

⁶⁷ Refer McFerran Report 1 at 4.5.

- 4.55. Of those analysed (600), McFerran found that:
- (a) **168 agreements** provided dedicated, paid family violence leave across 14 industries. The number of days leave varied from 2 to 20 days; 36% with 20 days leave, 20% with 10 days leave, and 30% with 5 days leave⁶⁸.
 - (b) **167 agreements** provided access to existing entitlements, most commonly personal/carers leave.⁶⁹
 - (c) **47 agreements** provided access to paid or unpaid leave once other leave entitlements were exhausted.⁷⁰
 - (d) **78 agreements** provided leave at the discretion of the employer.⁷¹
 - (e) **25 agreements** referred to unspecified amounts of leave that was available under the employer's policies.⁷²
 - (f) **194 agreements** provided no specific access to paid or unpaid domestic violence leave, however in most instances replicated the right to request flexible working arrangements obligations found in s 65 of the FW Act.⁷³
- 4.56. McFerran notes that the agreements might fall into more than one category and as such, a particular agreement might be represented in multiple figures stated above.⁷⁴
- 4.57. The breakdown of the number of employees covered by the above categories of entitlements was summarised as follows:
- (a) 169,373 employees have access to dedicated paid family violence leave;
 - (b) 229,734 employees have access to existing leave entitlements; and
 - (c) 46,019 employees have no access to paid or unpaid family violence leave.⁷⁵
- 4.58. McFerran's analysis demonstrates that there is high degree of variability with respect to bargaining outcomes, regardless of union involvement, industry demographics or location.
- 4.59. We submit that the analysis supports our submission that this matter cannot simply be left to bargaining to resolve. Collective bargaining is useful, but in the absence of an minimum

⁶⁸ McFerran Report 1 at 5.1.

⁶⁹ McFerran Report 1 at 5.4.

⁷⁰ McFerran Report 1 at 5.6.

⁷¹ McFerran Report 1 at 5.8.

⁷² McFerran Report 1 at 5.11.

⁷³ McFerran Report 1 at 5.13.

⁷⁴ McFerran Report 1 at 4.10.

⁷⁵ McFerran Report 1 at 5.16.

safety net, it is unlikely that any consistent and uniform entitlement to family violence leave will eventuate.

Bargaining negotiations

- 4.60. The ACTU rely on the evidence provided by a number of union organisers who discuss some of the barriers and challenges they face when bargaining with employers for family violence related entitlements.
- 4.61. The evidence suggests that the majority of employers do not agree with the inclusion of family violence entitlements in their collective agreements, and the inclusion of such clauses is no guarantee of their ongoing presence as a workplace right. The witness statement of Sunil Kempfi describes the numerous and difficult challenges the CPSU has faced in bargaining with the Commonwealth, where there is effectively a ban on the inclusion of such clauses as part of the renegotiation of their current agreements.
- 4.62. Even where there is a group of workers committed to their claim for paid domestic violence leave, this does not mean that it will be achievable. The evidence of Brad Gandy, Assistant Secretary of the AWU in Western Australian describes his pursuit of family violence leave and the challenges he has faced in successfully negotiating for leave, even with the support of workers.
- 4.63. In other, male dominated industries, it can be difficult to engage the workforce with the necessity for family violence leave, in light of other pressing industrial priorities that arise as part of bargaining, including wage increases. The evidence of Michelle Jackson, Branch Co-ordinator at the ASU Vic/Tas Branch provides a relevant example of these circumstances.⁷⁶
- 4.64. However, difficulties arise in female dominated industries as well. The evidence of Michele O’Neil, National Secretary of the TCFUA, shows that whilst they have succeeded with supportive employers, such as Blundstone Australia, on the whole the TCFUA’s claim for family violence leave has been rejected by a large amount of employers.⁷⁷
- 4.65. Importantly, all of the above examples are circumstances where there is union representation during the bargaining process. The same dynamic would apply, if not be greatly exacerbated, for employees bargaining in the absence of a bargaining representative.
- 4.66. ‘Equality bargaining’ draws attention to the need for the bargaining agenda to reflect the interests of women. One of the key factors is the gender, age, previous work experience and educational background of the trade union which may determine whether an individual trade union (and its officials) prioritise women’s issues.

⁷⁶ Michelle Jackson Witness Statement at 15–17.

⁷⁷ Michele O’Neil Witness Statement at 28–31.

- 4.67. The analysis of collective agreements as conducted by McFerran is consistent with the theory that equality bargaining will lead to greater outcomes for women, particularly in consideration of the distribution of agreement by industry (refer to the table at 5.17 of McFerran Report 1). The table clearly shows the highest proportion of collective agreements with family violence leave entitlements are concentrated in female dominated industries.
- 4.68. Baird et al have critically analysed the negotiations of the first paid family violence leave entitlement in a collective agreement through the lens of equality bargaining, between a union and a particular local council employer.⁷⁸ In that case study, the ability of the union to successfully negotiate for family violence leave was not assisted by the lack of legislative collective bargaining framework on which to build the case for family violence leave. However, the bargaining relationship between the parties (longstanding and traditional), the security of the well-established enterprise agreements, and to some extent the gender of the negotiators (both women) were able to overcome these limitations.⁷⁹
- 4.69. The research of Baird et al shows that while some employees will be able to negotiate at a workplace level for the inclusion of equality measures, like family violence leave, many will not. As such, collective bargaining is never going to achieve uniform, progressive and gender inclusive outcomes for all workers. However, a modern award safety net will provide the framework and machinery for workers, whether represented by unions or not, a better opportunity to achieve family violence leave.
- 4.70. It is clear that collective bargaining will not provide uniform, enforceable benefits except in circumstances where the employer is supportive of this approach. In other words, it is unlikely, or virtually impossible, for there to be any industrial power at a workplace level that could counter a reluctant employer's position to include family violence entitlements in a collective agreement.
- 4.71. Over many years and in consultation with affiliates, the ACTU has developed a model clause for family and domestic violence leave. This clause includes a raft of supportive entitlements, in addition to 20 days paid leave such as contact officer training and access to flexible working arrangements. The purpose of the model clause is to assist with bargaining. By contrast, the proposed modern award clause, while drafted with the model clause in mind, has been prepared conscious of the need to act as a part of a safety net of *minimum* terms and conditions of employment. It is anticipated that the proposed clause will encourage positive bargaining outcomes including but not limited to an additional quantum of leave.

⁷⁸ Baird M, McFerran L and Wright I, (2014) 'An equality bargaining breakthrough: Paid domestic violence leave,' 56(2) *The Journal of Australian Labour and Employment Relations Association* at pages 190-207 (**Baird et al**).

⁷⁹ Baird et al at page 204.

- 4.72. The ACTU submit that family violence leave should be an entitlement for all Australian workers, and that this application is a first step in the right direction to achieving this objective.

Prevalence of workplace policies with family violence entitlements

- 4.73. The Workplace Gender Equality Agency reported in 2014/15 that about one-third (34.9 per cent) of major private sector employers have a family and domestic violence policy in operation. However this represented an increase of only 2.7 per cent from the previous reporting year (32.2 per cent of employers in 2013/14).⁸⁰ Whilst this shows a positive trend, progress remains slow.
- 4.74. There is also no analysis about the quality of the entitlements that are offered by these employers in accordance with their policies. We therefore have no way of being able to determine the effectiveness of these policies.
- 4.75. What we do know about these policies points to a conclusion that they do not adequately provide dedicated leave, the sort of which this application seeks to achieve. About 76.1 per cent of these employers offer measures that may not be specific to domestic violence but can be accessed by employees experiencing domestic violence, such as employee assistance programs and access to leave. We also note that these arrangements will, in most instances, be unenforceable legal rights.
- 4.76. The Workplace Gender Equality Agency rightly concludes that notwithstanding this positive step, there is still a long way to go.⁸¹

D. Achieving Gender Equality

*Australia has a choice. We can change the story that currently sees a woman murdered every week by a current or former partner. We can choose a future where women and their children live free from violence. Violence against women and their children is not an inevitable or intractable social problem. Rather, it is the product of complex yet modifiable social and environmental factors.*⁸²

- 4.77. ‘Change the Story’ is a collaborative work by Our Watch, ANROWS and VicHealth that sets out a framework to eliminate violence against women in our society. The report notes that “addressing a complex social problem of the scale of violence against women requires a

⁸⁰ <https://www.wgea.gov.au/media-releases/employers-act-domestic-violence-pace-slow>.

⁸¹ Refer to the comments of WGEA Director, Libby Lyons, at <https://www.wgea.gov.au/media-releases/employers-act-domestic-violence-pace-slow>

⁸² Our Watch, Australia’s National Research Organisation for Women’s Safety (ANROWS) and VicHealth (2015) *Change the story: A shared framework for the primary prevention of violence against women and their children in Australia*, Our Watch, Melbourne, Australia, Foreword.

*large-scale effort, engaging the largest possible number of people and organisations with sustained and meaningful interventions that encourage shifts in the way people think and behave in relation to gender inequality and violence.*⁸³

- 4.78. Part of the primary prevention response needs to be focussed in Australian workplaces as *“these are the places where social and cultural values are produced and reproduced”* and *“because they present opportunities for significant influence over the social norms, organisational practices and institutional structures that can drive change.”*⁸⁴
- 4.79. The ACTU acknowledge that workplaces share in the responsibility to take action to eliminate all forms of violence against women, and this ambitious agenda requires more than simply access to industrial entitlements. Supporting employees is not just about *“giving her a day off to attend court”*.⁸⁵
- 4.80. However, we view industrial entitlements as important recognition of the relationship between work and DFV and the impetus for a more comprehensive breadth of initiatives that might also be employer-led. As Jocelyn Bignold states about the McAuley Works program, *“in many ways the program is about consciousness raising about family violence. This means that every conversation with employers is an education opportunity”*.⁸⁶
- 4.81. The workplace is a critical setting to provide education and awareness about family violence and more broadly, gender inequality. For some victims of family violence, the workplace will be the first contact point and employers need to be able to confidently respond to employee’s disclosure of family violence. In most instances this will be by way of referral to specialist family violence services, or their Employee Assistance Program where they have one.
- 4.82. Jocelyn Bignold observes that *“we realised that there would be much greater opportunities for women to remain employed, if only their employer was aware of the circumstances the woman was experiencing.”*⁸⁷ This realisation led to the McAuley Works development of their employer education program, ‘Engage to Change’ designed to educate employers and staff about family violence, its impact on business, and what can be done to support women experiencing violence.
- 4.83. In addition, workplaces also have the ability to reach out to members of the community who would otherwise not necessarily come into contact with mainstream services. Vulnerable and isolated groups, such as newly arrived immigrants and refugees, might find that their only

⁸³ Change the Story, page 38.

⁸⁴ Ibid.

⁸⁵ Jocelyn Bignold Witness Statement at 60.

⁸⁶ Ibid at 61.

⁸⁷ Ibid at 58.

point of contact with support services is through the workplace. The evidence of Michele O'Neil, National Secretary of the Textile, Clothing and Footwear Union Australia provides perspective on this issue.

E. Barriers to Disclosure

- 4.84. It is still overwhelmingly believed that family violence is seriously under-reported.⁸⁸ As such, a key policy reform objective has been to firstly better enable the identification of family violence that a person might be experiencing and secondly to encourage those persons to disclose and in doing so, seek necessary support and advice.
- 4.85. Evidence and research confirms that most victims will typically be reluctant to disclose their experience of family violence to employers or colleagues, even where they may desperately need flexibility to deal with family violence related matters such as attending court, or where their safety is at risk at home and/or in the workplace.
- 4.86. There are a range of complex factors that intersect to create barriers for disclosure. Most commonly it is the victim's sense of fear, shame and embarrassment that prevent them from disclosing their abuse. Almost as common are feelings that victims will not be believed. Other factors include the stress and anxiety caused by the daunting anticipation of inevitable legal proceedings and also cultural or religious pressures. In some instances, and in spite of the severity of the abuse, individuals may not recognise themselves as victims of abuse. Feelings of shame, embarrassment or the fear of being negatively treated by a colleague or manager are powerful barriers to disclosure.
- 4.87. Victims often do not disclose their abuse to their employer because they are worried about being disbelieved or subjected to negative stereotypes such as that they are likely to underperform or that they bring their personal issues, danger and disruption to the workplace.⁸⁹
- 4.88. In particular, a US study found that women who are employed in 'high wage, high status' positions are particularly unlikely to use the resources to which they have greater access because of perceptions of competence they are trying to maintain when in professional, managerial or executive positions.⁹⁰

⁸⁸ See paragraph 5.34 et seq.

⁸⁹ Orchiston and Smith, op cit, at http://www.australianreview.net/digest/2012/03/orchiston_smith.html

⁹⁰ Kwesiga E, Bell M, Pattie M and Moe A (2007) 'Exploring the Literature on Relationships Between Gender Roles, Intimate Partner Violence, Occupational Status, and Organizational Benefits', 22(3) *Journal of Interpersonal Violence*, 316.

- 4.89. Stigma against victims of family violence is rife within the community. The VicHealth 2009 survey and report ‘National Survey on Community Attitudes to Violence Against Women’ found very low levels of understanding about the nature of DFV, in particular that:
- (a) 80 per cent of respondents agreed with the statements: ‘it’s hard to understand why women stay in violent relationships’; and
 - (b) Almost 50 per cent of respondents believed that ‘a woman can leave a violent relationship if she wants to’.⁹¹
- 4.90. These findings are broadly consistent with the findings of the 2013 National Community Attitudes Survey on Violence against women, where Humphreys notes⁹² the subtle endorsement and excusing of abuse. In particular the most recent survey shows that:
- (c) About 75 per cent of Australians find it hard to understand why women stay in relationships; and
 - (d) About 50 per cent of all Australian’s believe that women could leave if they really wanted to;
 - (e) There is little understanding about the escalation of abuse after separation and the difficulties of separation, especially where children are present.⁹³
- 4.91. Community stigma and the general lack of education about the nature of family violence actively discourage disclosure. As such, a key focus of workplace education and policy reform has been to empower victims to seek support. Disclosure is critical to early response and intervention and the benefits of it are well documented, and uncontroversial. A key way to encourage disclosure is to ensure that a victim’s disclosure is maintained, to the greatest extent possible, confidential.
- 4.92. In order for family violence leave to be accessible, it is necessary to ensure that workers feel confident to disclose their circumstances to the employer. Of course, this requires courage on the part of those workers as it can take victims many years to even confide to close family and friends about their experience.
- 4.93. Disclosure can be supported enormously by the employer having a clear and consistent procedure in place, with effective privacy safeguards so that the employee understands what the process will be once they make any disclosure. The ACTU Application, specifically the

⁹¹ Victorian Health Promotion Foundation, ‘*National Survey on Community Attitudes to Violence Against Women 2009: Changing Cultures, Changing Attitudes – Preventing Violence Against Women.*

⁹² Humphreys Report at 1.10-11.2.

⁹³ <https://www.vichealth.vic.gov.au/media-and-resources/publications/2013-national-community-attitudes-towards-violence-against-women-survey>

Confidentiality Obligations, expressly sets out these procedures so that employers and employees are fully aware of their rights and obligations pertaining to their application.

- 4.94. Confidentiality is essential to the utilisation of domestic violence leave, as noted in UNSW's Domestic and Family Violence Clauses in your Workplace: Implementation and Good Practice Monitoring Study:

Indeed, concerns about confidentiality appear key barriers to using the clause [domestic violence clause], even though the policies and clauses say the matter will be dealt with confidentially. In the group discussions and meetings with managers and union representatives, there was much uncertainty about how to ensure a confidential and appropriate response, and to balance confidentiality with the need for some colleagues to know. Indeed, in the consultative groups and surveys, employees expressed much anxiety about having immediate supervisors know the details, or about others in the organisation knowing about, and keeping records of their use of domestic violence leave. As one person who had experienced domestic violence explained:

My only concern with this leave type is that it will be recorded on your history as this leave type and therefore anyone in HR or Payroll will be able to view it. When I suffered as a result of domestic violence, I only told my supervisor and in no way did I want anyone else to know about it ever. HR and Payroll employees tend to gossip a lot and I would be afraid of it getting around. (Organisation 2 survey respondent).⁹⁴

- 4.95. The ACTU are equally aware, having discussed the ACTU Application with a number of women who have experienced family violence that ultimately, whether or not they would access family violence leave, will be significantly influenced by the Confidentiality Obligation expressed as part of the ACTU's application.
- 4.96. It is critical that employers encourage disclosure through all means necessary. The American study conducted by Swanberg et al found that *"the current study suggests that disclosure is associated with current employment, it can be inferred that increasing disclosure rates within a company will result in lower turnover rates, and subsequent economic benefit for the employer and the victimised employee"*.⁹⁵
- 4.97. The evidence of Marilyn Beaumont, Chairperson of the Australian Women's Health Network, provides useful insight into the experience of practitioners in the health sector with respect to

⁹⁴ McFerran L, Cortis N and Trijbetz T, Safe at Home, Safe at Work, *Domestic and Family Violence Clauses in your Workplace: Implementation and Good Practice*, Social Policy Research Centre & Centre for Gender Related Violence Studies University of NSW, June 2013, 14.

⁹⁵ Swanberg et al, at page 306.

disclosure. Beaumont states that *“An important part of creating a safe environment is building trust with the woman, and giving her confidence so that she feels free to speak about her experiences. In my view, trust cannot be achieved unless the woman can be absolutely confident that her story will be kept confidential.”*⁹⁶ To achieve this, specific training has been conducted in the health sector to build the capacity of health practitioners.

- 4.98. Beaumont also points to the key reason that confidentiality is so important in this context: that confidentiality is not just about the woman’s comfort, but is also about the woman’s safety.⁹⁷ The fear of victims is that their partner, or former partner might come to learn about their disclosure and that this information will be used against them, or put them at risk of further danger. The Confidentiality Obligation is not just about protecting sensitive and personal information (like the disclosure of another illness or injury) it is necessary to protect the victim’s safety.

⁹⁶ Marilyn Beaumont Witness Statement at 59 and 60.

⁹⁷ Marilyn Beaumont Witness Statement at 65.

5. DOMESTIC AND FAMILY VIOLENCE

A. Background and Context

- 5.1. In recent times, there has been an increased focus on the prevalence of family violence in Australia, and the need for regulatory and policy reform aimed at preventing family violence.
- 5.2. A critical element of any improved policy and regulatory response is to ensure that the response is that of the ‘whole community’. We each need to play a role in tackling the scourge of family violence. As part of this community response, employers play a very important role.
- 5.3. This role can be summarised under three broad categories:
 - (a) Their role as a primary setting for the prevention of family violence;
 - (b) Their capacity for early intervention response initiatives to support victims; and
 - (c) Their role as a primary driver of cultural change to reduce gender inequity, the root cause of family violence.
- 5.4. There is an undeniable connection between the personal lives of workers who experience family violence, and their working lives. The lay witnesses relied on by the ACTU illustrate just how deep that connection is and how beneficial support from the workplace was to their recovery.
- 5.5. Family violence is a relevant matter for the Fair Work Commission, because the exercise of the Commission’s power to create legally enforceable minimum safety net entitlements that will benefit workers who have experienced family violence.

B. Definition and Terminology

- 5.6. Family violence refers to acts of violence that occur between people who have, or have had, an ongoing intimate relationship. Whilst there is no single definition, in most cases, the behaviour is part of a range of tactics to exercise power and control, typically through fear, over the victim.
- 5.7. Dr Michael Flood describes intimate partner violence or domestic violence, which can involve criminal and non-criminal behaviour, as:

...involving a systematic pattern of power and control exerted by one person against another, involving a variety of physical and non-physical tactics of abuse and coercion, in the context of a current or former intimate relationship. While the presence of any aggressive behaviour between partners or former partners in a sense can be described as

*domestic violence, this pattern of power and control is domestic violence is the 'strong' or 'proper' sense.*⁹⁸

- 5.8. The *Family Law Act 1975* (Cth) defines 'family violence' at s 4AB as "*violent, threatening or other behaviour by a person that coerces or controls a member of the person's family, or causes the family to be fearful.*"
- 5.9. The legislation in each state and territory defines the term 'domestic violence' for the purpose of various laws such as intervention orders. In recent times there has been a move towards more consistent terminology. For example, the legislation in NSW, Victoria, Queensland, Western Australia, South Australia, the ACT and the NT now define domestic violence as occurring between intimate partners, relatives, family members, carers and children and in most cases an 'intimate relationship' can exist between two people who do not live together. The exception is Tasmania where family violence is only considered in the context of spouse of partner relationship. The kinds of behaviour (physical, sexual, emotional, psychological or economic abuse) that are considered to be family violence are also broadly consistent between the states and territories.
- 5.10. Notwithstanding this, a range of terms are interchangeably used across the jurisdictions in lieu of 'domestic violence' for example 'family violence', 'domestic and family violence' and 'domestic abuse'. Another term 'intimate partner violence' is also often used to highlight the predominant manifestation of the violence, which is in the context of intimate partner relationships.
- 5.11. The ACTU application defines family and domestic violence as:
- ...any violent, threatening or other abusive behaviour by a person against a member of the person's family or household (current or former).*
- 5.12. It is intended that this definition will be interpreted broadly so as to encompass the many ways in which family violence manifests.
- 5.13. In support of the necessity of a broad definition of 'family violence' in this application, the ACTU relies on the report of Professor Cathy Humphreys. Professor Humphreys draws attention to three important considerations that must be acknowledged in order to better understand the nature, and primary drivers of domestic violence.
- (a) Children who witness, or experience violence are also victims of family violence.
 - (b) Family violence can be between family members, rather than just intimate partners.
As such, we use the broader term of 'family violence' to encapsulate a broad

⁹⁸ Flood Report at 2.7

definition of family arrangements. Most typically, this terminology is used to identify the experiences of Indigenous relationships in that it encompasses both marital and kinship relationships.

- (c) Recognition that people with disabilities face additional challenges, and so the definition of ‘domestic violence’ needs to include women and men who are abused within an institutional setting (which is their home) and by carers who may be intimate in terms of their access to personal space.⁹⁹

5.14. Throughout these submissions, the ACTU adopts the term ‘family violence’ to recognise and acknowledge all such relationships within which violence might occur. Having said that, the terminology used throughout this submission may vary on occasion as a result of picking up on the specific references used by the various authors of the relevant literature and research. This is not intended to narrow the eligibility of any person to access family violence leave.

C. Forms of Abuse

5.15. At the core of family violence is the perpetrator’s need to maintain control and dominance over their victim. In almost every case, the perpetrator believes that they are entitled to control the victim and that violence is a legitimate means to achieve this. The UK Home Office describe this as “*a purposeful pattern of behaviour which takes place over time in order for one individual to exert power, control or coercion over another*”.¹⁰⁰

5.16. In short, the perpetrator dictates what the victim does, whom they talk to and see, where they go and what they think. In particular, perpetrators often seek to reinforce isolation and, as family and friends become more distant, the violence escalates and the victim’s identity and self-worth are eroded by the perpetrator.

5.17. It is important that we consider the impacts of family violence because in doing so, it becomes clear just how important the role of the workplace is in supporting victims. The next section explains the various forms of family violence.

Physical and sexual violence

5.18. Physical and sexual violence is a feature of many stories of family violence, and includes not just the physical act, but also the threat of violence that can have an impact on the victim.

⁹⁹ Humphreys Report at 1.7.

¹⁰⁰ As referred to in the RC Report, Vol I, page 18.

- 5.19. Cox notes that of women who have lived with their violent partner, most had experienced more than one incident of violence:

*For instance, 73% of women who had experienced violence by a former cohabitating partner reported that the violence occurred more than once: this is close to a million women (925,100).*¹⁰¹

- 5.20. Research suggests that there is a particularly pronounced under-reporting of sexual violence because of the ‘additional layer of shame’ attributed to this form of violence.¹⁰²

Emotional and psychological abuse

- 5.21. The Cox Report indicates that one in four women (2.1 million) and one in seven men (1.2 million) have experienced emotional abuse from a former or current cohabitating partner.¹⁰³

- 5.22. Emotional abuse often forms part of the pattern of controlling behaviours that torment, intimidate, harass or are offensive to the other person.

- 5.23. Gilmore, who is quoted in the Victorian Royal Commission Report, states that:

*Emotional abuse is almost always an aspect of intimate terrorism, but it is rarely part of uncontrolled violence. And it is most definitely not the same as hurting someone’s feelings... [Emotional abuse] is a very specific and deliberate form of emotional damage, designed to destroy any feeling of independence or self-worth, and thereby make someone easy to control and manipulate.*¹⁰⁴

- 5.24. The damage inflicted by emotional abuse can be very serious. This is often exacerbated by a victim’s inability to recognise the behaviour as abusive or feeling that they are less deserving of help. Often victims describe their experience as ‘less serious’ and perpetrators can deflect the seriousness of their behaviour because they are not physically hitting their partner. The result of this is that police and other methods of early intervention can be delayed.¹⁰⁵

Economic or financial abuse

- 5.25. Economic or financial abuse is a more recently recognised form of abuse, although it is still perhaps the least well-known and understood form of family violence.

- 5.26. Cox’s analysis of the PSS found that women may struggle to leave violent relationships, for reasons including that they have nowhere to go or because they believed they were unable to

¹⁰¹ Cox Report at para 7.3

¹⁰² RC Report, Vol I, page 26.

¹⁰³ Cox Report at para 7.24

¹⁰⁴ RC Report, Vol I, page 23, quoting Jane Gilmore, *What Do We Really Know About Family Violence in Australia?* (7 December 2015) Women’s Agenda.

¹⁰⁵ RC Report, Vol I, pages 23-25.

provide for themselves and their children.¹⁰⁶ Financial or economic abuse is distinct from the economic harm caused by domestic violence. Economic harm can occur whether or not economic abuse is a feature of the intimate partner relationship.

5.27. In her report, Dr Cortis defines economic abuse as involving:

... a wide range of tactics and behaviours, through which perpetrators seek to exert control or generate costs for women, by interfering with women's acquisition of, and use of resources, denying them financial autonomy. This may include preventing access to joint assets; preventing or interfering with workforce participation or work attendance (eg forbidding employment, hiding keys or sabotaging childcare arrangements); coercing or preventing someone from acquiring or relinquishing assets or obtaining credit; or withholding financial support. By controlling victim's use of or access to resources, perpetrators exert harm by exacerbating women's economic disadvantage or dependence on men. Economic abuse is defined in the family violence legislation of four Australian jurisdictions but definitions and examples of behaviour vary, reflecting the very wide range of behaviours and tactics it may involve.¹⁰⁷

5.28. As Bernadette Pasco, Manager at the Financial and Consumer Rights Council states, family violence and financial problems can also interconnect in other ways such as:

- (a) The financial detriment as a result of leaving a relationship, having fewer resources and implications for ongoing employment;
- (b) Victims who are subjected to economic abuse from their partners including restricting access to joint accounts or coercion to sign loans; and
- (c) Situations where victims are pursued for their partners, or former partner's, debts and liabilities.¹⁰⁸

5.29. In her statement, Julie Kun, Deputy CEO of the Women's Information and Referral Exchange, provides evidence about the nature of financial abuse. WIRE's work with women suffering financial abuse began with the recognition of a growing number of women seeking their services who described their choice to leave their partner as a choice between safety and poverty. In the words of Kun, they choose to be "safe but poor".¹⁰⁹

¹⁰⁶ Cox Report at para 1.6 and Cortis Report at para 8.

¹⁰⁷ Cortis Report at 6.

¹⁰⁸ Bernadette Pasco, Financial and Consumer Rights Council, Witness Statement at 30.

¹⁰⁹ Julie Kun Witness Statement at 22.

- 5.30. This work is particularly relevant to the ACTU’s application because strategies to protect the financial security of women must include enabling women to acquire and maintain secure employment. In the words of Kun “*the most effective way to counter poverty for these women is meaningful and decently paid employment.*”¹¹⁰

Stalking

- 5.31. Stalking involves being followed, monitored or watched. This sort of abuse can take place well after the victim has left their abusive partner. In some jurisdictions, it may also be a criminal offence.
- 5.32. Technology is often a means by which the perpetrator will stalk his victim, and improvements and accessibility of technology have seen this as “a rapidly growing problem.”¹¹¹ A survey of 546 family violence workers in 2015, reported in the RC Report, found that 98 per cent had clients who had experienced technology facilitated abuse, with the most common form of abuse being text messages (usually a large amount of messages sent in a short period).¹¹² The survey also found a rise in the use of GPS trackers on smartphone apps, with 34 per cent of family violence workers identifying the use of such technology ‘often or all the time’ and 40 per cent identifying their use ‘sometimes’.¹¹³
- 5.33. Partner stalking has additional negative consequences for employment. Employment may create an increased risk of stalking because although the victim might attempt to avoid the stalker, the workplace is an easy point of access. A US study showed that employed stalking victims were pursued three times longer than unemployed stalking victims.¹¹⁴ It also found that women who had violent partners who also stalked them, had more difficulty keeping a job compared to women with violent partners who did not stalk them.¹¹⁵

D. Prevalence of Family and Domestic Violence

*It’s not all about statistics...there are people dying and people whose lives are absolutely ruined as a result of domestic violence and, what’s more, we are all, as a society, the victim.*¹¹⁶

¹¹⁰ Julie Kun Witness Statement at 31.

¹¹¹ RC Report, Vol I page 29.

¹¹² RC Report, Vol I page 29

¹¹³ RC Report, Vol I page 29

¹¹⁴ Logan TK, Shannon L, Cole J, Swanberg J (2007) ‘Partner Stalking and Implications for Women’s Employment’ 22(3) *Journal of Interpersonal Violence*, 269.

¹¹⁵ Ibid.

¹¹⁶ David Morrison, Australian of the Year 2016, Q&A, ABCTV, 1 February 2016. See ABC article <http://www.abc.net.au/news/2016-02-02/qanda-david-morrison-fires-up-over-domestic-violence-claim/7131460>

- 5.34. Family violence affects the lives of a significant number of Australians, yet it is often something that people live with in silence. For that reason, we know that the one of the key problems with the data is under-reporting. As such, many consider that all statistics will be a conservative estimate of the actual extent of the problem.¹¹⁷
- 5.35. Nevertheless, some attempt must be made to understand the incidence and prevalence of family violence in Australia. The ACTU rely primarily on the Australian Bureau of Statistics survey titled the Personal Safety Survey (**PSS**). This is the most comprehensive source of data in Australia that assess, in some detail, the prevalence and the impact of family violence on victims.

Prevalence of Domestic / Intimate Partner Homicides

- 5.36. Deaths resulting from family violence represent the extreme end of a continuum of violence by a family member, against another member of their family or household. Death is a stark reminder of what is at stake and what could be the result of the community's failure to take urgent action.
- 5.37. Domestic and intimate partner homicides represent the highest proportion of any category of homicides in Australia. On average, at least one woman a week is killed by a partner or former partner in Australia.¹¹⁸
- 5.38. The Australian Institute of Criminology reported that of the 2,631 homicide incidents in Australia over a 10-year period (to 30 June 2012), 1,088 or 41 per cent were classified as domestic/family homicides.¹¹⁹
- 5.39. Intimate partner homicides account for 23 per cent of *all* homicides in Australia.¹²⁰
- 5.40. Within the category of domestic/family homicides, intimate partner homicides account for 56 per cent of deaths. Children comprised the second most frequent group of victims, accounting for 21 per cent of deaths.¹²¹
- 5.41. The majority of victims of domestic/family homicides overall were female and accounted for 75 per cent of victims in intimate partner homicides. Males accounted for the majority of

¹¹⁷ As confirmed by Professor D Chung, *Understanding the Statistics about Male Violence Against Women*, a paper for White Ribbon Australia and ABS, *Defining the Data Challenge: Family, Domestic and Sexual Violence Australia 2013: A Conceptual Data Framework* p.7 as reported in the Senate Inquiry Report, *Domestic Violence Australia*, August 2015 at page 50.

¹¹⁸ Cussen T & Bryant W, *Domestic/family homicide in Australia*, Research in Practice, No.36 May 2015, Australian Institute of Criminology. at [Australian Institute of Criminology](http://www.aic.gov.au/publications/current%20series/rip/21-40/rip38.html),

¹¹⁹ Cussen T & Bryant W, *Domestic/family homicide in Australia*, Research in Practice, No.36 May 2015, Australian Institute of Criminology, page 2 at <http://www.aic.gov.au/publications/current%20series/rip/21-40/rip38.html>

¹²⁰ Ibid.

¹²¹ Ibid.

offenders in both domestic/family and non-domestic/family homicides (except for filicides where females account for approximately half). Males were the offender in 77 per cent of intimate partner homicides.¹²²

- 5.42. Most homicides occur at the victim's home, with 68 per cent of intimate partner homicides taking place at home, rising to 79 per cent of homicides when the offender's home is taken into account. By contrast, the workplace or school represents one per cent of locations of intimate partner homicides.¹²³
- 5.43. It is important to also note that of the 129 women victims, 37 per cent (48) were killed by a former partner. Of these 48 women, almost two-thirds (30) had ended the intimate relationship with the domestic violence abuser within 3 months of the killing.¹²⁴
- 5.44. More detailed analysis about homicide related deaths is conducted by the relevant States and Territories, through specialist units, usually positioned within the Coroners Court who are dedicated to examining deaths that occur in a context of family violence. These units focus attention on the context in which family violence related homicides and homicide-suicide incidents occur.¹²⁵

Personal Safety Statistics

- 5.45. The ACTU rely on the expert report of Dr Peta Cox to provide an in-depth analysis of the most recent and comprehensive study of interpersonal violence in Australia, known as the Personal Safety Statistics. The PSS is administered by the ABS and collates the personal experiences of over 17,000 women and men.
- 5.46. The PSS is one of few household surveys administered by the ABS where the survey is conducted face to face. The interviewers follow a series of questions and prompts and enter the data into a secure laptop, collecting a vast amount of data in the process.¹²⁶
- 5.47. Based on her analysis of the PSS, Dr Cox finds that one in four women in Australia have experienced at least one incident of violence by an intimate partner who they may, or may not, have been living with. This represents almost 2.2 million women.¹²⁷

¹²² Ibid, page 3.

¹²³ Ibid.

¹²⁴ Ibid at page 6

¹²⁵ Refer to Walsh C, McIntyre S-J, Brodie L, Bugeja L & Hauge S, 2012, [Victorian Systematic Review of Family Violence Deaths – First Report](#), Coroners Court of Victoria, Melbourne, Victoria and [A report of the Domestic Violence Death Review Team](#), Sydney, NSW, 2015.

¹²⁶ Cox Report pages 2-5.

¹²⁷ Cox Report 1.3

- 5.48. With regards to their most recent incident of domestic violence perpetrated by their cohabitating partner violence, most women:
- (a) Reported that the incident happened in their home;
 - (b) Did not perceive the incident as a crime;
 - (c) Experienced fear and anxiety after the incident; and
 - (d) Did not take time off work as a result of the assault.¹²⁸

*Prevalence of violence*¹²⁹

- 5.49. In her analysis of the PSS, Dr Cox found that since the age of 15, 40.8 per cent of women (3.6 million) and 49 per cent of men (4.1 million) have experienced violence.
- 5.50. Both men and women are more likely to be physically assaulted by a man. However, the relationship with the perpetrator is a critical point of difference. Men were more likely to be victimised by a stranger. Over three million men had experienced violence perpetrated by a stranger: this is more than one in three men (35.7 per cent of the male population), with the violence is most likely to occur in a place of entertainment.
- 5.51. By contrast, women were more likely to be victimised by a partner they were living with. Approximately 1.5 million women have experienced violence by a cohabitating partner, almost all by a male perpetrator. Over one million women experienced their most recent physical assault by a male in their own home (61.5 per cent of all women who had recently experienced violence by a cohabitating partner).

*Women's experience of partner violence*¹³⁰

- 5.52. Since the age 15, 16.9 per cent of women and 5.3 per cent of men have experienced violence from a partner or former partner.
- 5.53. Of women who have lived with their violent partner, most had experienced more than one incident of violence. For example, 73 per cent of women who had experienced violence by a former cohabitating partner reported that violence occurred more than once (about one million women). Of those one million women, about 35 per cent reported experiencing abuse 'all or most of the time' and 20 per cent reported that the abuse happened 'a little of the time'.
- 5.54. About half the women who reported that they had experienced violence by their current cohabitating partner also reported that they had experienced emotional abuse by that partner.

¹²⁸ Cox Report page 1.

¹²⁹ Cox Report pages 9-11.

¹³⁰ Cox Report pages 16-21.

- 5.55. Over 750,000 women were pregnant during their relationship and had experienced violence perpetrated by a former cohabitating partner.
- 5.56. Similarly, almost 750,000 women who have since left their violent cohabitating partner had children in their care when the violence occurred. Of those women, 77.5 per cent reported that their children had seen or heard the violence.

Employment impacts

- 5.57. The Cox Report found that approximately 62 per cent of women who experienced intimate partner violence in the last 12 months were in paid work.¹³¹
- 5.58. Most women continue to attend work after their most recent assault by a cohabitating partner. Of those women who were employed during this time, only one in four women who had experienced physical assault took time off work.¹³² Of those employed women who had been sexually assaulted by a male cohabitating partner, one in five took time off work as a result of the most recent incident of violence.¹³³
- 5.59. A greater proportion of women took time off work because of their most recent physical assault by a male cohabitating partner than after a physical assault by a stranger or other known person.¹³⁴

Financial impacts

- 5.60. The findings in the PSS demonstrate that women struggle to leave violent relationships. Almost 82,000 women have wanted to leave their violent current partner but never have. While almost half the women said they returned because their partner promised to stop the assaults, threats or abuse, one in eight said they returned because they had no money/financial support and one in twelve women returned to their violent previous partner because they had nowhere to go.¹³⁵
- 5.61. Even when women do leave violent relationships, they do so at a cost. It was reported that seven out ten women (over 500,000) leave behind property and assets when they moved away after their final separation.¹³⁶ Further to this, two out of three women who left their relationship with a violent cohabitating partner the relationship (61.8 per cent). Most of these

¹³¹ Cox Report page 17.

¹³² Cox Report at 8.14.

¹³³ Cox Report at 8.15.

¹³⁴ Cox Report at 8.16.

¹³⁵ Cox Report at 8.22-8.23.

¹³⁶ Cox Report at 8.30.

stayed with friends or family or relocated to a new home. Others stayed at a refuge or shelter (7.8 per cent) or slept rough (1.7 per cent).¹³⁷

Is domestic violence increasing?

- 5.62. There is no detailed data source that provides insight into how, or if, rates of domestic violence are changing over time. This makes it difficult to determine whether domestic violence is increasing, and if so, to what extent.
- 5.63. The RC Report suggests that the greater recognition of domestic violence may have encouraged additional disclosure, which in turn might explain the increase in reporting. The RC Report accepted that despite this, many incidents of domestic violence are under-reported.¹³⁸
- 5.64. Homicide data referred to above from the Institute of Criminology suggests that domestic violence homicides *declined* between 2002 and 2012. However, data from police reports of domestic violence show an *increase* in the number of domestic violence incidents. In NSW ‘domestic assault’ has risen from a rate of 257 per 100,000 people in 1995 to a rate of 400 incidents per 100,000 in 2014. Victoria has shown a similar trend. Domestic violence incidents have been increasing since 2010/11, with an 8.8 per cent increase from 2013/14 to 2014/15. Over the five year period from July 2009 to 2013/14, the number of domestic violence incidents recorded by Victoria Police has increased by 82.7 per cent, from 35,666 to 65,154 incidents per year.¹³⁹
- 5.65. Across Australia, police deal with an estimate of 240,000 domestic violence incidents per year.¹⁴⁰ This includes attendance at suspected domestic violence incidents, domestic violence court orders made by the police, domestic violence assaults and associated agencies reporting incidents to the police. The ABC reported this data could be broken down as follows:

	Date	By hour	By day	By week	By year
VIC	2014	8	187	1,307	68,134
QLD	2013	8	181	1,266	66,016
NSW	2014	7	159	1,115	58,140
TAS	2013/2014	0	11	78	4,071
WA	2013/2014	2	41	289	15,095
ACT	2013/2014	0	9	63	3,309
NT	2014	0	12	81	4,224

¹³⁷ Cox Report at 8.29.

¹³⁸ RC Report Vol I, page 52

¹³⁹ RC Report, Vol VII, Commissioned Research at page 30

¹⁴⁰ Based on data provided by police services in Australia about how often their officers work on domestic violence cases, presented at <http://www.abc.net.au/news/2015-05-29/domestic-violence-data/6503734>.

SA	2015	2	57	400	20,857
AUS		27	657	4,600	239,846

- 5.66. As shown above, across Australia, police are responding to 27 family violence incidents every hour. These figures provide a stark illustration of the overwhelming frequency of family violence.
- 5.67. For the purposes of this application, it is relevant that family violence is a pervasive and all too common experience of many Australians, particularly Australian women. The victims of family violence are in the majority of instances, also workers. This fact alone makes family violence a matter for employers, and supports the task of the Commission to grant the ACTU's application in order to provide a 'fair and relevant' safety net for Australian workers.

E. Gendered Violence

- 5.68. Why is it said that family violence should be regarded a 'gendered violence' and why is this important in the context of the ACTU's application?
- 5.69. Understanding the gendered nature of violence against women as a primary driver of family violence is vital when considering reform designed to achieve better support for victims. Gender equality is the framework within which many modern policy reform agendas have been considered. The connection between gender inequality and domestic violence has been recognised by the Victorian government, which has recently launched its *Gender Equality Strategy* designed to address the fundamental connection between gender inequality and violence against women, and to guide Victoria's work towards achieving equality between men and women in Victoria.¹⁴¹
- 5.70. This is equally important in the context of this application where the Fair Work Commission is required to take into account s 134(1)(c) of the modern awards objectives that oblige the Commission to consider "*social inclusion through increased workforce participation*". This consideration is at the heart of the ACTU's application.
- 5.71. Any person can be affected by family violence. The ACTU accepts that all victims regardless of gender should be eligible to access family violence leave. However, it is uncontroversial that most intimate partner violence is by men against women. The victims of intimate partner violence who suffer serious injuries, who live in fear, or who are killed by their current or former partners are far more likely to be female than male.¹⁴²

¹⁴¹ See submission of the Victorian government to the Fair Work Commission dated 16 May 2016 at [25].

¹⁴² Flood Report at 1.4

5.72. In addition to the data from the PSS analysed by Dr Cox and described above, the ACTU relies on the expert report of Dr Michael Flood. In his report, Dr Flood found that intimate partner violence is highly gendered, based on:

- (a) Data which demonstrates that most intimate partner violence is by men against women;
- (b) The substantial contrast between women's and men's experiences as the victims of intimate partner violence; and
- (c) The substantial contrasts in women and men's perpetration of intimate partner violence.

Gender Inequality – the primary driver of domestic violence

5.73. Gender inequalities are a root cause of violence against women. As Dr Flood concludes:

*Gender inequalities based on male privilege and female disadvantage, at multiple levels of society, are central in explaining violence against women. Addressing such inequalities is vital if we are to reduce and prevent violence.*¹⁴³

5.74. Dr Flood's conclusion that has been reached after reviewing over four decades of scholarship concerned with the empirical link between various characteristics of individuals, relationships, communities and societies that are predictive of domestic and family violence.¹⁴⁴

5.75. In his work with Kim Webster, Dr Flood contributed to the development of the national violence prevention framework, *Change the Story: A shared framework for the primate prevention of violence against women and their children in Australia*. This work provides a succinct, graphical representation of the drivers of violence against women. Dr Flood summaries the key points of this work as follows:

- (a) Gender inequalities are a root cause of violence against women. At the individual level agreement with sexist, patriarchal and violence-supportive attitudes is an important predictor of men's perpetration of violence against women. At the relationships level and families, important predictors include male dominance of interpersonal power and decision making, and marital conflict. At the macro level of entire communities and societies, rates of men's violence against women are higher in contexts based on male dominate and gender inequality.¹⁴⁵

¹⁴³ Flood Report at 5.8.

¹⁴⁴ Flood Report at 5.1.

¹⁴⁵ Flood Report at 5.5.

- (b) While gender inequalities are the primary driver of violence against women, other factors include ‘first cluster factors’ such as child victimisation or perpetration, media representations that normalise violence and impact of natural disasters and ‘second cluster factors’ such as poverty, harmful drug and alcohol use and social isolation.¹⁴⁶

Victimisation and experience

5.76. In his report, Dr Flood analysed a range of data including, patterns of violence, patterns of intimate partner violence, lifetime victimisation and victimisation in the last 12 months. He found that looking at all forms of family violence (whether by partners or family members), family violence among adults is overwhelmingly a crime against women. In particular:

- (a) Since the age of 15, about 2.2 million women have experienced at least one incident of violence by a male intimate partner, and just fewer than 700,000 men have experienced at least one incident of violence by a female intimate partner.¹⁴⁷
- (b) Roughly 1 in 6 women and 1 in 20 men have experienced violence by a cohabitating partner.¹⁴⁸
- (c) Women are far more likely than men to experience sexual violence, with 1 in 5 women (19.4 per cent) of women experiencing sexual violence since the age 15, compared with 1 in 22 men (2.5 per cent).¹⁴⁹
- (d) In the last 12 months, 186,900 women and 75,300 men experienced violence by an intimate partner (including a current partner, former partner or boyfriend, girlfriend or date).¹⁵⁰

5.77. This does not mean that men are not also the victims of intimate partner violence; the data clearly demonstrates that this is also the case. However as Dr Flood states:

These figures could be used to claim that men are ‘one in three’ or ‘one in four’ of the adult victims of intimate partner violence. However such claims are both simplistic and misleading. These figures tell us about the numbers and proportions of men and women who have ever experienced any kind of violence – any physical or sexual aggression or the threat of these – by a partner or former partner. They do not, however, tell us about the severity, frequency, history, impact, or context of this violence. In other words, these

¹⁴⁶ Flood Report at 5.8.

¹⁴⁷ Flood Report at 3.9.

¹⁴⁸ Flood Report as above.

¹⁴⁹ Flood Report at 3.3.

¹⁵⁰ Flood Report at 3.10.

*figures by themselves do not allow a proper assessment of women's or men's experiences of intimate partner violence.*¹⁵¹

- 5.78. In his analysis of the PSS, Dr Flood suggested that whilst the PSS indicate which proportion of males and females experienced an 'incident' of physical assault or threat of assault, the PSS does not inform us whether the violence was part of a systematic pattern of physical abuse, how the violence was initiated, or whether it was accompanied by other forms of power and control. In that regard, while the PSS is an extremely useful as a surveillance method in the general population, it is not able to capture the substance, impact or dynamics of intimate partner violence, and particularly the more serious forms of this violence.¹⁵²
- 5.79. For that reason, it is necessary to consider and draw upon additional sources to understand the experiences of women and men of intimate partner violence.
- 5.80. Based on his analysis of the available material, Dr Flood summarises the contrasts in experience that women are more likely than men to:
- (a) Be subjected to frequent, prolonged and extreme violence;¹⁵³
 - (b) Be sexually assaulted;¹⁵⁴
 - (c) Sustain injuries;¹⁵⁵
 - (d) Fear for their lives;¹⁵⁶ and
 - (e) Experience other negative consequences such as psychological harm.
- 5.81. Australian data supports that women are far more likely than men to be injured as a result of intimate partner violence. In particular, whilst men and women inflict injury at comparable rates, women are more likely to sustain severe or more frequent injury.¹⁵⁷
- 5.82. Further studies have shown that women's reactions, or the adverse consequences suffered by women, are not the result of 'women being more fragile than men'. Their worse health impacts were the outcome of the worse violence that they had experienced.¹⁵⁸
- 5.83. It is clear that men and women experience intimate partner differently, with women suffering more adverse consequences than men.

¹⁵¹ Flood Report at 3.11.

¹⁵² Flood Report at 3.18.

¹⁵³ Flood Report at 3.21 to 3.23.

¹⁵⁴ Flood Report at 3.24 to 3.29.

¹⁵⁵ Flood Report at 4.3 to 4.6.

¹⁵⁶ Flood Report at 4.7 to 4.10.

¹⁵⁷ Flood Report at 4.4 to 4.5.

¹⁵⁸ Flood Report at 4.10.

6. THE IMPACT OF FAMILY AND DOMESTIC VIOLENCE

*The journey is not clear; the journey is not supported; the journey is very ad hoc. There is a long way to go before you can expect that a very well-informed, compassionate policeman is going to take your call or help you on the journey or a very informed, compassionate and understanding magistrate or judge is going to listen to you. The whole system of response has a long way to go.*¹⁵⁹

Rosie Batty, 2015

6.1. This next section looks at the impact of domestic violence, which necessitates the need for employees to access family violence leave. The subheadings below are consistent with the ACTU's application, which provides that family violence leave may be taken for the purpose of:

- (a) attending legal proceedings, counselling, appointments with a medical or legal practitioner;
- (b) relocation or making other safety arrangements; or
- (c) other activities associated with the experience of family and domestic violence.

6.2. The Victorian Royal Commission into Family Violence, like many other inquiries before it, attempted to unravel the complexity of the domestic violence system. For victims, navigating this system is overwhelming and consuming, both in terms of time and emotionally. The primary objective of policy reform is to improve the system to make it easier for women to escape violence.

6.3. The Report by the Victorian Royal Commission (**RC Report**) states that:

*Responding to family violence can bring a woman into contact with many different services as she deals with things such as legal matters, court appearances, securing immediate alternative accommodation, supporting children and helping them with school, medical treatment, telling family and friends about the violence, considering and applying for medium-term accommodation, and obtaining financial and material support. None of these are easy on their own, let alone managing all of them at the same time.*¹⁶⁰

¹⁵⁹ Finance and Public Administration References Committee - 11/06/2015 - Domestic violence in Australia at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Fcommmsen%2Fe83cfcbb-9277-4584-83e9-e10e1f2b189c%2F0001;query=Id%3A%22committees%2Fcommmsen%2Fe83cfcbb-9277-4584-83e9-e10e1f2b189c%2F0000%22>

¹⁶⁰ RC Report, Vol II, page 13.

6.4. It is clear there are many necessary and urgent tasks that women need to attend to in order to leave abusive relationships. It is the performance of these tasks for which the domestic violence leave is necessary.

A. Legal Proceedings

6.5. Many of the protections for victims of domestic violence need to be accessed through the Australian legal system. As Emma Smallwood, Senior Lawyer at Women’s Legal Services Victoria, states *“the different systems and jurisdictions that women are required to manage themselves across are multiple and complex.”*¹⁶¹

6.6. Smallwood provides an example of a typical client who may have:

- (a) Children and property matters in the Federal Circuit Court, as well as, urgent interim applications in relation to the same proceedings;
- (b) Divorce proceedings in the Federal Circuit Court or Family Court;
- (c) Intervention order proceedings in the Magistrates Court;
- (d) Criminal proceedings;
- (e) Victim of Crime assistance proceedings; and
- (f) Debt issues that require resolution through the relevant agencies.¹⁶²

6.7. Based on her experience, Smallwood outlines the work involved for victims of domestic violence to attend to legal matters. Each of the matters above require the applicant (usually the victim) to seek advice, prepare the relevant paperwork, make the application and then participate in the court proceedings in order to obtain the relevant remedy or order sought.

6.8. The applicant has little control over the timing of these matters or the duration of time that they will take to resolve, especially given the unpredictability of the respondent’s (or perpetrator) response, which could be vigorous. Even in a relatively minor application, such as a contested intervention order, the applicant may be required to attend court a minimum of four occasions; to make the application, for a mention, for a directions hearing and then finally a contested hearing. On average, these matters can take between four and six months to resolve. The hearings are always during working hours and there is limited flexibility with respect to hearing dates which are set by the court.¹⁶³

¹⁶¹ Emma Smallwood Witness Statement at para 30.

¹⁶² Emma Smallwood Witness Statement at para 38.

¹⁶³ Emma Smallwood Witness Statement at para 40–41.

- 6.9. Family law matters are more complex, require more time in court and run for longer – typically they can take between one and two years to resolve, although it is not unheard for contested matters to run much longer. In many instances, victims will have to represent themselves (about 30 per cent), which requires accessing services for information and preparing the various (and onerous) applications and evidence themselves. Smallwood refers to her research report, *Stepping Stones*, that sets out the immense difficulties faced by unrepresented applicants with no legal training. Resolving matters in the family law system was noted as being particularly onerous and time consuming.¹⁶⁴
- 6.10. For those that do have representation, they will need time to meet with and discuss their matters with their legal and other advisors. As legal aid is only available to the most disadvantaged and marginalised clients in family law matters, some victims engage private solicitors. Private solicitors are expensive and not something that is readily affordable for many victims, even those who work and are earning the median income.
- 6.11. Applying for and participating in these matters is not a choice for victims. It is something that they must do in order to ensure their safety, and enable themselves the opportunity to put in place long term protective and custody measures, which will assist them to recover.

B. The Impact on Health

- 6.12. The most comprehensive review of the health costs of violence was conducted by the Victorian Health Promotion Foundation (**VicHealth**) in 2004 titled *The Health Costs of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence (VicHealth Report)*. The background to the VicHealth Report is described by Marilyn Beaumont, Chairperson for Australian Women’s Health Network who was involved in its development.¹⁶⁵
- 6.13. The Vic Health Report and subsequent work by VicHealth has found that intimate partner violence is the leading contributor to death, disability and ill-health in Australian women aged 15 to 44 in Victoria. Violence is more damaging to the health of women aged 15 to 44 than any other well known risk factors for chronic disease, including high blood pressure, obesity and smoking.¹⁶⁶

¹⁶⁴ Emma Smallwood Witness Statement at para 51.

¹⁶⁵ Marilyn Beaumont Witness Statement.

¹⁶⁶ Victorian Health Promotion Foundation (VicHealth) – Submission to the Royal Commission into Family Violence, May 2015.

- 6.14. A New South Wales literature review confirmed that victims of domestic violence experience wide-ranging and persistent health impacts that increase with severity and length of exposure to abuse. Family violence is associated with:
- (a) lower physical and mental health functioning scores;
 - (b) greater risk of self-harm, depression and anxiety;
 - (c) higher rates of chronic pain, gastrointestinal and gynaecological problems; and
 - (d) reduced access to contraception, increased rates of miscarriage, pre-term deliveries and lower birth weight babies, and increased sexually transmitted diseases.¹⁶⁷
- 6.15. Family violence can have a detrimental effect on the victim's mental and physical health. In particular, it can exacerbate existing mental health problems and mental illness. Most studies have found that partner violence increases the risk of subsequent depression.¹⁶⁸ Further studies have supported that partner violence significantly predicted subsequent anxiety disorders.¹⁶⁹
- 6.16. In particular an Australian study by Rees et al demonstrated that of a group of 1,218 women who had experienced gender-based violence concluded that women who report such violence are more likely to experience mental illness over the course of their lifetime. The study found that approximately 77 per cent of women who have experienced three or four types of gender-based violence had anxiety disorders, 56 per cent had post-traumatic stress disorder and 35 per cent had made suicide attempts.¹⁷⁰
- 6.17. Partner violence is the greatest risk factor for preventable depression, anxiety and other mental health issues for Victorian women aged 15-44 years.¹⁷¹ Unsurprisingly, prolonged or severe violence can have long-term effects on the person. There is evidence that the health impacts of violence persist long after the abuse has stopped.
- 6.18. It has been reported in research studies that just under half of all abused women suffered from clinical depression compared with 10.2 to 21.3 per cent in women in the general community.

¹⁶⁷ Spangaro J and Ruane J (2014), Health Interventions for Family and Domestic Violence: A literature review, NSW Kids and Families (**Spangaro and Ruane**),

¹⁶⁸ ANROWS Health Outcomes State of Knowledge Paper at page 20.

¹⁶⁹ Ibid.

¹⁷⁰ Rees S et al 'Lifetime Prevalence of Gender-based Violence in Women and the Relationship with Mental Disorder and Psychosocial Function' (2011) 306(5) *Journal of the American Medical Association* 513, 518 (referred to in the RC Report at 72).

¹⁷¹ VicHealth Report 2004.

The same study found that women who access women's refuges show higher rates of depression and problematic alcohol/substance abuse or dependency.¹⁷²

- 6.19. There is a substantial body of research that also supports the specific implications for mother and baby, including termination of pregnancy, premature births and low birth weight outcomes.¹⁷³
- 6.20. In light of the health impacts of family violence, it is not surprising that people experiencing family violence (mostly women) also have frequent interactions with the health system, in both primary and acute settings. A 2007 Monash University Report found that a higher than average long-term GP attendance rate among victims of family violence.¹⁷⁴ Women who experience FDV have more health needs and therefore seek health services more frequently than the general population. The reliance and use of these services increases according to the frequency and severity of the violence.
- 6.21. A US study of more than 3,000 women found that annual health care costs were 42 per cent higher among those currently experiencing DFV, and 19–24 per cent higher among those who had experienced it within the past five years.¹⁷⁵ Similar results have been found in the Australian context, with recent studies showing a higher prevalence of DFV among women who present at hospitals emergency departments, than the general population. It is estimated that 38 per cent of women who present to emergency departments have experienced physical abuse in their lifetime. A further study found that as high as 65 per cent to 85 per cent of women attending emergency departments have experienced emotional abuse.¹⁷⁶
- 6.22. A useful summary of the causal pathways from exposure to domestic violence and the resulting adverse health outcomes was illustrated by the World Health Organization (WHO), is referred to in the ANROWS State of Knowledge paper published in March 2016.¹⁷⁷

¹⁷² Golding J (1999), 'Intimate partner violence as a risk factor for mental disorders: a meta-analysis', 14 *Journal of Family Violence*.

¹⁷³ ANROWS Health Outcomes State of Knowledge Paper at pages 21 to 23.

¹⁷⁴ Evans, I (2007), *Battle scars: long-term effects of prior domestic violence*, Centre for Gender Studies and Women's Research, Monash University.

¹⁷⁵ [Understanding and addressing violence against Women-Intimate Partner Violence](#), World Health Organisation referring to Bonomi AE et al, *Health care utilization and costs associated with physical and non-physical-only intimate partner violence*, Health Services Research, 2009.

¹⁷⁶ Spangaro and Ruane.

¹⁷⁷ Lum On M, Ayre J, Wenster K and Moon L, [Examination of the health outcomes of intimate partner violence against women: State of Knowledge paper](#), ANROWS, Issue 03, March 2016 at page 7.

C. Children and Family

- 6.23. It is clear that children living with domestic violence are also at risk of significant harm. The published work of Professor Humphreys has been pivotal in understanding not only the impact on children, but also the impact on the relationship between women and their children.
- 6.24. The ACTU rely on the expert report of Professor Cathy Humphreys. At sections 6 and 7 of Humphreys Report, Professor Humphreys describes the impact of domestic violence on children, and in particular, evidence that shows that children living with domestic abuse have much higher rates of depression and anxiety and trauma symptoms. Links have also been made between exposure to domestic violence and behavioural problems in children.¹⁷⁸
- 6.25. The impact on children is relevant to the ACTU Application because women with dependent children who experience domestic violence are more likely to take time off than women without dependent children.¹⁷⁹ This arises because women with children will, in addition to seeking other services, need to make necessary safety arrangements or relocate to new schools or childcare. Women with children will also have to juggle their carer's responsibilities, meaning that they are more likely to access (and potentially exhaust) their personal/carers leave for the purpose of caring for their children before, during and after separation.

D. Housing

- 6.26. Common to all victims of domestic violence is the need to quickly access safe and affordable housing once they have reached the difficult decision that they can no longer remain in their own homes. For almost all victims, relocation will be necessary, whether this be a permanent relocation, or a temporary stay at the home of a friend or refuge.
- 6.27. A lack of housing options can exacerbate the trauma and dislocation of the violence, disrupting social and economic participation and education.¹⁸⁰
- 6.28. While there are policy moves to better enable victims to safely stay at home, the conventional model remains for victims to leave the home and enter crisis accommodation to escape the risk posed by the perpetrators. The point of separation is a critical time, as it represents a period of increased safety risk for victims.¹⁸¹

¹⁷⁸ Humphreys Report at para 6.2

¹⁷⁹ Kahui S, Ku B and Snively S (2014) *Productivity Gains from Workplace Protection of Victims of Domestic Violence* at pages 18-22

¹⁸⁰ RC Report, Vol II, page 37.

¹⁸¹ Most homicide victims of intimate partner violence are murdered within three months of separation refer to NSW and VIC Domestic Violence Review Team Reports.

- 6.29. Domestic violence is a major reason for women seeking assistance from homelessness support services in Australia. The Victorian Royal Commission Report notes that 31 per cent of all people seeking assistance from homelessness services in Victoria did so as a result of domestic violence.¹⁸²
- 6.30. The longer women and children remain homeless or in temporary accommodation the more likely it is that the crisis will extend and repeat. Homelessness, in conjunction with the consequential (and reciprocal) economic insecurity, can force victims to return to violent partners. Irrespective of how long, and where victims need to relocate to in order to escape violence, this period of dislocation is a difficult time for victims. In addition to the physical necessity of actually moving, victims need to access services and apply for accommodation, and they may be required to do this several times before they can settle in a location for any reasonable length of time.
- 6.31. The ACTU Application will enable victims the time necessary to find accommodation, move into safe housing and make necessary adjustments to schools or childcare arrangements.

E. Economic and Financial

6.32.

6.33.

6.34.

¹⁸² RC Report, Vol II, page 38.

¹⁸³ Cortis Report, [7].

¹⁸⁴ See Cortis Report, [6].

6.35.

6.36.

6.37.

6.38.

¹⁸⁵ Cortis Report, [5].
¹⁸⁶ *Annual Wage Review* [2016] FWCFB 3500, [559].
¹⁸⁷ Cortis Report, [25], [26].
¹⁸⁸ Cortis Report, [28].
¹⁸⁹ Cortis Report, [30], [32].
¹⁹⁰ Cortis Report, [44], [50].
¹⁹¹ Cortis Report, [44].

7. MEASURING THE COST OF FAMILY AND DOMESTIC VIOLENCE

7.1. A number of Australian studies have been undertaken to assess the cost of violence against women, particularly domestic violence and the cost benefits of prevention strategies. In particular, the ACTU relies on the most recent report by Price Waterhouse Coopers, *A High Price to Pay – the Economic Case for Preventing Violence Against Women (PwC Report)*, prepared at the request of Our Watch and VicHealth. The report was submitted to the Victorian Royal Commission into Family Violence in November 2015 and used data based on the 2012 PSS.¹⁹²

7.2. Relevantly, KPMG prepared a report in conjunction with the National Plan in 2009, *The Cost of Violence Against Women and their Children (KPMG Report)*,¹⁹³ and Access Economics was commissioned by the Office of the Status of Women in 2004 to prepare *The Cost of Domestic Violence to the Australian Economy (AE Report)*.¹⁹⁴

A. The cost of Domestic Violence to the Australian Economy

7.3. The PwC Report demonstrated that “*the cost of violence against women to society remains high and is increasing.*”¹⁹⁵ In estimating the benefits of preventing violence against women, the PwC Report used a cost-benefit analysis approach where the economic cost associated with violence and the benefit was measured by the degree to which that cost is avoided. This approach is similar to that adopted by the KPMG and AE Reports, with the PwC Report using the most current data available (the PSS 2012).¹⁹⁶

7.4. Using an estimate of 470,309 women who experienced partner violence in the year 2014-15,¹⁹⁷ the PwC Report found that the cost to the Australian economy of women experiencing physical violence, sexual violence or emotional abuse by a partner is \$12.6 billion.

7.5. This can be compared to the estimates in the AE Report some ten years earlier. The AE Report estimated that that in 2002/03 the total annual cost of domestic violence was \$8.1 billion, of which \$3.5 billion was for pain, suffering and premature death. The AE Report noted in particular the difficulty in assessing the value of pain, suffering and premature death which requires considerable judgement and uncertainty.

¹⁹² [The PwC Report.](#)

¹⁹³ [The KPMG Report.](#)

¹⁹⁴ [The AE Report.](#)

¹⁹⁵ PwC Report at page 4.

¹⁹⁶ PwC Report at page 8.

¹⁹⁷ Estimates were calculated by applying the respective prevalence rates in 2012 to the population of women aged 18 and over in 2014-15. ABS analysis of the Personal Safety Survey showed no statistically significant increase in the prevalence of violence between the 2005 and 2012 survey. Therefore it was assumed that there is no increase in the prevalence rate of violence between 2012 and the present.

- 7.6. The PwC Report estimated the cost to the Australian economy for women who have experienced *any* type of violence in 2014–15 was \$21.7 billion (based on an estimate of 1,032,835 women who experience violence in a year). This was an increase from the figures estimated in the KPMG Report which found the equivalent of \$15.6 billion. The difference in costs is likely to be the result of changes in use of the underlying prevalence data, as the PwC Report picks up on a broader range of incidents of emotional abuse and stalking as reported in the 2012 PSS data.¹⁹⁸
- 7.7. Noting that there were some differences in the scope of violence that were considered between the respective reports, KPMG estimated that the total cost of violence against women in 2008/09 in Australia, including violence by strangers at \$13.6 billion. It projected that by 2021/22, violence against women would cost the Australian economy an estimated \$15.6 billion.
- 7.8. The PwC Report estimated the cost of lost productivity as a result of domestic violence as \$2.1 billion.¹⁹⁹ This includes the opportunity cost to victims and perpetrators of being unable to attend work due to death, illness or imprisonment. Employers also incur a cost in the form of paying leave and necessary associated administrative work. It also includes the costs from loss of unpaid work that although does not generate income is still valuable to the community, such as childcare and domestic chores.
- 7.9. The resulting loss of income translates to a loss of taxation revenue for government at approximately \$449 million.
- 7.10. The Commonwealth government will also incur costs in the provision of income support, victim compensation and the fund organisations delivering services to victims. This forms the ‘transfer cost’ category which is estimated to cost the economy \$1.5 billion in 2014/15.²⁰⁰

B. The Cost of Domestic Violence for Stakeholders

- 7.11. The costs of family violence are shared by a number of stakeholders including victims, their children, governments, employers and society/community. Table 1 – Costs of Violence Against Women by stakeholders in the PwC Report describes those stakeholders and the category or types of costs that they incur.²⁰¹
- 7.12. The PwC Report analysis confirms that victims bear 31 per cent or approximately \$6.7 billion of the total cost of violence. By comparison, governments bear 36 per cent or \$7.8 billion

¹⁹⁸ PwC Report, Table 4 at page 12.

¹⁹⁹ PwC Report page 12.

²⁰⁰ PwC Report page 12.

²⁰¹ PwC Report at page 9 .

(largely the cost of delivering health services, criminal justice and social welfare for victims).²⁰²

7.13. Employers are estimated to bear 6 per cent of the total cost.²⁰³

7.14. The figure below illustrates the proportions of cost allocated to each stakeholder.²⁰⁴

Insurance	1%
Employer	6%
Perpetrator	6%
Children	7%
State and Territory Governments	10%
Society / Community	14%
Commonwealth Government	26%
Victim	31%

7.15. The PwC Report estimates that for women experiencing physical violence, sexual violence and emotional abuse by a partner, each of them will incur an average cost of \$27,000 per person. This is consistent with estimates in previous reports. In 2008/09, the estimate was \$21,000 which gives a 2014/15 real cost of about \$24,000.²⁰⁵ These estimates do not consider the potential costs associated with children who might collaterally experience violence.

7.16. Table 5 of the PwC Report provides a breakdown of estimate annual per person cost for each woman experiencing violence.²⁰⁶ In particular, the ‘productivity’ category comprises the cost impact that domestic violence has on women who work and includes women being late for work or absent altogether. This equates to approximately \$2,000 cost for the victim.

7.17. This figure estimates only the short-term cost. The PwC Report also estimates the long term cost impact of violence (noting that this relates to the broader category of violence). The lifetime costs of violence are at Table 6 of the PwC Report,²⁰⁷ and equates to an estimate of lifetime costs of all violence for the 10 year cohort of victims is approximately \$362 billion in 2014/15, a significant portion of this cost (\$262 billion) being the non-economic cost of pain, suffering and premature mortality.

²⁰² PwC Report page 13.

²⁰³ PwC Report page 12.

²⁰⁴ PwC Report, Figure 1, page 13.

²⁰⁵ PwC Report, page 14.

²⁰⁶ PwC Report page 14.

²⁰⁷ PwC Report page 16.

7.18. Importantly, all studies found that victims bear the greatest proportion of the overall cost. The PwC Report estimated this at 31 per cent, while the KPMG Report and the AE Report estimated this at 52 and 50 per cent respectively.²⁰⁸

Summary of findings

7.19. The Victorian Royal Commission Report summarised the findings of each of the reports as follows:²⁰⁹

Report	Scope	Year	Estimate
Access Economics	Domestic Violence (male and female victims)	2002/03	\$8.1 billion
KPMG	Domestic Violence against women and children (excludes male victims) and non domestic sexual assault (excludes male victims)	2007/08 2021/22	\$13.6 billion \$15.6 billion
PWC	Partner violence – physical violence, sexual violence or emotional abuse by current or previous partner perpetrated against women (excludes male victims)	2014/15	\$12.6 billion
PWC	All violence against women - physical violence, sexual violence or emotional abuse (by a partner) or stalking by any person perpetrated against women (excludes male victims)	2014/15	\$21.6 billion

C. Estimating the Cost for Employers

7.20. The ACTU acknowledges that the introduction of paid leave for domestic and family violence will come at a cost to employers. However, we estimate the cost to be minimal in light of evidence:

- (a) Contained in PSS data of employed persons who took time off after an assault;
- (b) Concerning the actual use of family violence leave where such an entitlement currently exists; and
- (c) About the capacity for family violence leave costs to be offset by the costs already borne by employers with respect to lost productivity associated with family violence.

7.21. The evidence supports the proposition that the take up of the entitlement is unlikely to be burdensome from a cost or administration perspective. This is for three reasons.

²⁰⁸ PwC Report, page 13; KPMG Report, page 8; AE Report, page VII.

²⁰⁹ RC Report, Volume VI at page 222.

- 7.22. First, recent evidence suggests that the cost of administering family violence leave will be offset by the productivity costs that employers already bear due to family violence.
- 7.23. On any measure, the costs in lost productivity in the workplace as a result of domestic violence is exceptionally high. The PwC Report anticipated the cost of lost productivity to be \$2.1 billion.²¹⁰ The KPMG Report estimated that without policy reform, the cost to the Australian economy in lost production in 2021-22 would be \$609 million.²¹¹ The AE Report estimated the total cost of lost productivity in the workplace in 2002-2003 as \$483.9 million, or 6 per cent of the overall costs.²¹²
- 7.24. These results are consistent with international studies. In 2014, the New Zealand Public Service Association commissioned research to examine the impact of workplace protections on domestic violence victims, other staff and colleagues, the employer and overall productivity (**NZ Productivity Report**).²¹³ The NZ Productivity Report found that for every woman whose experience of violence is prevented as a result of the workplace protections in a particular year, an average of \$3,371 (a conservative estimate) in production-related costs can be avoided. The NZ Productivity Report endorses appropriate workplace protections to address violence against employees because in the absence of those protections, employers will face disruption and lost time worked.
- 7.25. The NZ Productivity Report ultimately estimated that in 2014, domestic violence cost employers \$371 million broken down into lost hours of production caused by distraction, tardiness, days of leave lost and termination of employment. The Report states:

The implementation of the programme of protections for domestic violence victims in the workforce initially results in cumulative net loss to employers because of the costs of the programme (incurred from training, HRM support, etc). By 2024, however, the implementation of the programme results in a net savings/productivity gains to employers. The framework designed for this project estimates these to be about \$84 million under the moderate scenario and \$480 million under the (more) optimal scenario²¹⁴.

- 7.26. These figures are based on an analysis of the New Zealand wide population and recommended workplace protections that include 10 days leave, workplace training, induction and flexible working arrangements.

²¹⁰ PwC Report, page 12.

²¹¹ KPMG Report, page 45.

²¹² AE Report, 43 and Figure 12 (page 64).

²¹³ Kahui S, Ku B, Snively S, 'Productivity Gains from Workplace Protection of Victims of Domestic Violence' 21 March 201 ([NZ Productivity Report](#)).

²¹⁴ NZ Productivity Report at page 42.

- 7.27. Based on this data, the ACTU submit that the costs associated for employers by having to provide paid family violence leave, will be significantly offset by the benefits of providing paid family violence leave.
- 7.28. Second, the experience of employers who have already implemented family violence leave entitlements does not demonstrate that a significant number of employees will apply for this leave.
- 7.29. In November 2014, the School of Social Sciences at the University of New South Wales, investigated the implementation of domestic violence clauses in select industrial instruments in order to analyse the effects.²¹⁵ This included analysing the number of requests for family violence leave. The UNSW Report showed that 35.3 per cent of employers had received a request for family violence related leave in the past 12 months. In other words, 64.7 per cent of employers covered by agreements with domestic violence had *no* family violence related leave requests.
- 7.30. Of those that had requests, the average time off for paid leave in the past 12 months was 43 hours (ranging between 8 and 202 hours). The average time off for unpaid leave was in the past 12 months was 19 hours (ranging between one and 65 hours).²¹⁶ The UNSW Report also found that the most typical period of leave requested was two to three days (40 per cent), followed by 25.7 per cent of one day or less, 11.4 per cent of one week or more and 22.9 per cent indicated there was no pattern.²¹⁷
- 7.31. In summary, the UNSW Report showed that where employers have implemented family violence entitlements, the number of employees who access the leave, and the number of days those employees request as leave, is low. Further, none of the organisations that participated in the survey reported any significant financial cost associated with family violence leave.
- 7.32. This is consistent with what other employers have identified. In particular, Telstra, have stated that for the period November 2014 (when the family violence policy was introduced) to July 2015, 17 individuals across Australia had used the leave entitlement (12 women and 5 men), taking a total of 45 days leave.²¹⁸ Telstra employ approximately 33,000 employees across Australia.

²¹⁵ *Implementation of Domestic Violence Clauses – An Employer’s Perspective*, Gendered Violence Research Network, University of NSW, Sydney, November 2015 (jointly funded by UNSW and the ACTU) (**UNSW Report**).

²¹⁶ We note that this is the calculation after the adjustment and removal of an extreme outlier where a respondent noted 912 hours, refer to page 7 of the Report.

²¹⁷ Report, Table 2, Page 7.

²¹⁸ See [witness statement of Katherine Paroz, Human Resources Adviser, Telstra, to the Victorian Royal Commission](#) at [16].

7.33. Finally, not all employees who experience family violence will seek to access this entitlement, even where it is available. This is supported by the PSS which suggests that most women continue to attend work after their most recent assault by a cohabitating partner.²¹⁹ As explained in the Cox Report:

Survey participants were asked if they took time off work in the twelve months after their most recent assault, where the most recent incident by a male was perpetrated by a cohabitating partner. This leave was “as a result of the incident” and not just general time off work.

*147,500 women who had been physically assaulted by a male cohabiting partner, took time off work in the 12 months after the incident. This is over 1 in 4 women who were employed during this time and who had experienced this type of violence as their most recent incident.*²²⁰

²¹⁹ Cox Report at 8.11.

²²⁰ Cox Report at 8.13-8.14

8. GOVERNMENT POLICY RESPONSES

Police should not interfere in domestic quarrels, unless there is, or is likely to be a serious assault committed. Husbands should not be taken into custody for minor assaults on their wives, but the latter should apply to a magistrate for a summons.

The NSW Handbook for Police and Police Magistrates 1905.

- 8.1. In this section of the submissions, we look at how the ACTU's Application sits within broader policy reforms by governments aimed at addressing domestic violence.

A. History of Domestic Violence Laws

- 8.2. The Commonwealth government, and many state governments, took their first steps towards a domestic violence policy agenda in Australia in the 1970s.
- 8.3. Researchers often trace the beginnings of the movement to the opening of Elsie Refuge in 1974 in Glebe, New South Wales. The refuge was set up by a group of feminist activists who squatted in a housing commission property for the purpose of helping homeless women. However, it quickly became clear to those activists that the greatest need for refuge was from women who had a home, but could not live there due to violence.
- 8.4. The Whitlam Government granted funding to this Service in 1975 and more refuges quickly followed. However, it was another ten years before NSW introduced its first substantial policy agenda on domestic violence.
- 8.5. Of course, domestic violence has been a feature of society well before the 1970s. Records documenting women's experiences of survival in the late nineteenth century are typically found through their interaction with the divorce courts and the social support agencies, as they existed at the time.
- 8.6. The needs of women surviving violence, then and now, are fundamentally similar. As Janet Ramsay stated in her PhD thesis work about the making of domestic violence policy by governments between 1970 and 1985:

...women striving to survive violent partners, whether by negotiating to change the perpetrator's behaviour or by trying to escape the violent relationship, need both legal and economic resources. They may seek justice, but their primary needs are protection from the violent man, either temporarily or permanently, and, if they have chosen to

*leave him, the means of legal separation, and economic resources to re-establish a viable life, that is to form an autonomous household for themselves and their children.*²²¹

- 8.7. These themes continue to resonate through modern domestic violence policy reform: protection from violence, homelessness and economic security.
- 8.8. Early policy reform in the 1980s concentrated on a criminal justice response to domestic violence, principally through state-based legislation, specifically the protection order, and through improvements to public housing post-refuge.²²² As McFerran points out, in the 1980s, the best scenario for escape meant that the woman and children would be granted a protection order and eventually rehoused in public housing, after a period in a refuge.²²³
- 8.9. By the early 2000s, the government response was a little more sophisticated. ‘Integrated models’ were developed to provide a more coordinated response between the various systems and services. Under the integrated models, it became more common to talk about women staying safely in their homes, rather than being forced to leave.
- 8.10. Safe at Home Programs, such as the NSW Pilot in Bega, reflected the need to support all women experiencing domestic violence, the majority of whom were in paid employment. The NSW Bega Program found that three quarters of the clients were in some form of employment.²²⁴ McFerran described the Program as ‘taking back the castle’ which reinforced the need for women to stay in their homes and workplaces. This meant that workplaces needed to be “*a crucial part of any integrated community and government response to domestic violence.*”²²⁵
- 8.11. Borne from the discussion with these women was the genesis of the growing recognition for the need for employee entitlements and protections to be created within the industrial relations system.

B. Government Policy Reform Initiatives

Advocacy

- 8.12. Owing to the persistent efforts of many women advocates, there has been increased community attention to the widespread problem of family violence. Some suggest this responsiveness is in part due to the high number of deaths of women at the hands of their

²²¹ Ramsay, J, *The Making of Domestic Violence Policy by the Australian Commonwealth Government and the Government of the State of New South Wales between 1970 and 1985 – An Analytical Narrative of Feminist Policy Activism*, University of Sydney, December 2004.

²²² McFerran Report 1 at 4.1.

²²³ Ibid.

²²⁴ McFerran Report 1 at 4.9.

²²⁵ McFerran Report 1 as above.

current or former partner. This is not surprising given that as at 1 May, the number of women killed in 2016 as a result of domestic violence has already reached 30 deaths.²²⁶

- 8.13. Policy reform is a difficult task because the family violence system crosses a number of jurisdictions, is highly complex, and involves a range of sectors and agencies, including police, the legal, housing and income support systems, child protection and corrections, as well as specialist family violence services.²²⁷
- 8.14. As Fiona McCormack of Domestic Violence Victoria states, for victims “*at best navigating the system is extremely time-consuming and demanding, at worst, women and children can fall through the gaps and their safety is put at risk.*”²²⁸ As such, a key reform focus has been to improve integration effectiveness and information sharing.
- 8.15. It should also be emphasised that much of this policy reform is underpinned by initiatives to tackle family violence through cultural change (promoting a culture that opposes violence against women) and to remove barriers to gender equality (e.g. gender pay gap, women representation in leadership, sex discrimination in the workplace). These policy initiatives demand a concerted and comprehensive cultural shift within all facets of society. Such a shift requires a long term sustained and coordinated policy effort.
- 8.16. More recently, and as a part of the broader community response, there has also been an increased focus on the impact that family violence has on workers and workplaces. The result of this is a number of policy reform initiatives driven by Commonwealth, state, and territory governments that draw attention to the workplace, and in particular, the role that employers play in addressing family violence.
- 8.17. Organisations are increasingly aware that their workforce will include people who are both victims and perpetrators of family violence.²²⁹ There has also been a concerted focus on the role of the workplace as a setting for primary prevention. There is now, broadly speaking, acceptance from employers that workplaces need to play a part in responding to and preventing family violence. This includes how they support their employees who experience family violence through employee entitlements.

²²⁶ Counting the Dead Women, Destroy the Joint at <https://www.facebook.com/DestroyTheJoint/>

²²⁷ Fiona McCormack Witness Statement at 15 to 22.

²²⁸ Fiona McCormack Witness Statement at 18.

²²⁹ Refer to the witness statement of Katherine Paroz as filed in the Victorian Royal Commission at <http://www.rcfv.com.au/MediaLibraries/RCFamilyViolence/Statements/WIT-0045-001-0001-Paroz-16.pdf>

- 8.18. By way of example, in November 2015, Male Champions of Change released its report titled *Playing Our Part – Workplace Responses to Domestic and Family Violence (MCC Report)*.²³⁰ The Male Champions of Change is a coalition of 30 Australian CEOs, Department Heads and Non-Executive Directors across business and government.
- 8.19. The MCC Report is a call to action for business leaders to lead by example and take steps to reduce the prevalence and impact of domestic violence within their own organisations. Their firm belief is that domestic violence impacts on employees and workplaces alike and that workplaces can make a significant difference by supporting victims. As stated in the MCC Report:

*Given the prevalence and cost of violence and our ability to make a difference, we are not prepared to dismiss domestic and family violence as a personal matter, outside our interest. We believe organisations can play a significant role when they have a robust response – thought – through, leader-led, implemented strongly and not left to chance.*²³¹

Commonwealth government action

National Plan to Reduce Violence against Women and their Children 2010–2022

- 8.20. A good starting point is the Commonwealth initiative, National Plan to Reduce Violence against Women and their Children 2010-2022 (**National Plan**). The National Plan brings together the efforts of governments to coordinate action across Australia to reduce levels of violence against women. It is underpinned by the belief that “no government or group can tackle this problem alone” and that “reducing violence is everyone’s responsibility”.²³²
- 8.21. The National Plan sets out the framework for action over the next 12 years. It was built from an evidence base of new research and extensive consultation with experts and the community and demonstrates Australia’s international commitment to upholding the human rights of women.²³³
- 8.22. The National Plan is comprised of six ‘National Outcomes’, the first of which is that ‘communities are safe and free from violence’. National Outcome 1 recognises that community attitudes are critical to Australian women and their children living free from violence and that social norms, attitudes and beliefs (which can be excused or hidden from

²³⁰ Playing Our Part – Workplace Responses to Domestic and Family Violence’, Male Champions of Change at <http://malechampionsofchange.com/wp-content/uploads/2015/11/Playing-Our-Part-Male-Champions-of-Change-Letter.pdf>

²³¹ MCC Report, page 4.

²³² Refer to [National Plan](#), foreword.

²³³ Through the Convention on the Elimination of All Forms of Discrimination against Women, the Declaration to End Violence Against Women and the Beijing Declaration and Platform for Action.

view) contribute to all forms of violence against women, and focuses on strategies to promote community involvement, primary prevention and advancing gender equality. The workplace is a critical setting for each of these strategies.²³⁴

Australian Law Reform Commission Report 2012

- 8.23. In February 2012, the ALRC published its report titled *Family Violence and Commonwealth Laws – Improving Legal Frameworks (ALRC Report)*.²³⁵ The ALRC Report built upon the work undertaken by the ALRC and NSW Law Reform Commission that emanated from the work of the National Council to Reduce Violence Against Women and their Children established in 2008.
- 8.24. The ALRC Report provided a significant contribution to the improvement of legal frameworks to protect the safety of those experiencing family violence. The Commission consulted exhaustively with respect to a number of legal related matters, but in particular looked at intersections between family violence and employment law. The report then made a number of recommendations relevant to the ACTU’s Application.
- 8.25. The first finding and recommendation, which at the time was a significant progressive step, was for the Australian government to initiate a coordinated and whole-of-government national education and awareness campaign around family violence and its impact in the employment context.
- 8.26. Despite employers protests at the time – one employer representative even went as far to state that “*Individuals, not employees are subject to family violence. There is not and should not be a connection between workplace obligations and violence within a home*”²³⁶ – the ALRC Report found overwhelming evidence in support of the connection to the workplace and the need, and benefits, for employers to support their employees who were experiencing domestic violence.
- 8.27. The ALRC Report recommended that the government implement workplace law reform in a five-phase approach:
- (a) Phase One – coordinated whole-of-government national education and awareness campaign; research and data collections; and implementation of government focussed recommendations.

²³⁴ Refer to [National Plan](#), page 14

²³⁵ Final Report *Family Violence and Commonwealth Laws—Improving Legal Frameworks* (ALRC Report 117), February 2012 at <http://www.alrc.gov.au/publications/family-violence-and-commonwealth-laws-improving-legal-frameworks-alrc-report-117>

²³⁶ Australian Federation of Employers and Industries, *Response to Family Violence and Commonwealth Laws ALRC Discussion Paper 76* at page 4.

- (b) Phase Two – continued negotiation of family violence clauses in enterprise agreements and development of associated guidance materials.
 - (c) Phase Three – consideration of family violence in the course of modern award reviews.
 - (d) Phase Four – consideration of family violence in the course of the Post-Implementation Review of the Fair Work Act 2009.
 - (e) 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.
- 8.28. Importantly, the ALRC Report found that there was a need to review, and consider the incorporation of paid leave entitlements within collective agreements, modern awards and the NES. Specifically, the ALRC Report considered “*the inclusion of such clauses is likely to serve important educative function and increase the safety of employees experiencing family violence.*”²³⁷ It was further suggested in the ALRC Report that modern award reviews “*provide a timely and constructive opportunity during which to consider the inclusion of family violence-related terms in modern awards*”.²³⁸
- 8.29. For completeness, we note that the ALRC Report did not recommend that the FW Act ‘mandate’ the inclusion of family violence leave entitlements in collective agreements, noting this would be counter-intuitive to collective agreements being negotiated at an individual workplace level. Rather, the ALRC Report encouraged the inclusion of the following specific elements as minimum content in a collective agreement clause dealing with domestic violence:

Recommendation 16—4

The Australian Government should support the inclusion of family violence clauses in enterprise agreements. At a minimum, agreements should:

- (a) include a statement outlining when and what type of verification of family violence may be required;
- (b) ensure the confidentiality of personal information supplied;
- (c) establish lines of communication for employees;
- (d) set out relevant roles and responsibilities of employers and employees;
- (e) provide for flexible working arrangements; and

²³⁷ ALRC Report 117 – 15.38 at page 367.

²³⁸ ALRC Report 117 – 15.38 at page 367.

(f) provide access to paid leave.

- 8.30. Importantly with respect to access to paid leave the ALRC found that *“an employee experiencing family violence will quickly exhaust his or her leave entitlements but will require leave, for example, to attend court proceedings or medical appointments. Employers’ provision of additional paid family violence leave is an important component of workplace responses to family violence.”*²³⁹
- 8.31. The ALRC Report found that modern award reviews present a timely and constructive opportunity to consider the inclusion of family violence related entitlements in modern awards. In particular, the safety net in the modern award system was considered important because women are more likely to be award reliant than men, and the modern award will apply to the relevant industry or occupation as a benchmark for assessing enterprise agreements.²⁴⁰ The ALRC stated that *“the inclusion of such terms is consistent with the modern awards objective of promoting social inclusion through increased workforce participation- primarily by ensuring employees experiencing family violence make flexible working arrangements or access leave to deal with circumstances arising from family violence, which increases the likelihood of their retaining employment.”*²⁴¹
- 8.32. With regards to the NES, the ALRC determined that existing leave entitlements were inadequate. Whilst it might be the case that a majority of employers will permit employees to use existing forms of leave for family violence reasons, the evidence presented to the ALRC demonstrated that frequently those experiencing violence exhaust their existing entitlements.²⁴²
- 8.33. In summary, the ALRC Report stated that a minimum safety net of leave entitlements for domestic violence was necessary for the following reasons:
- (a) It will ensure a universal entitlements to leave in light of the evidence that outcomes in bargaining are inconsistent and that progress is slow;
 - (b) The leave will play an educative role and give recognition to family violence as a national issue with a significant impact; and
 - (c) The leave entitlement would be enforceable through the application of civil remedy provisions.²⁴³

²³⁹ ALRC Report 117 – 16.57 at page 400.

²⁴⁰ ALRC Report 117 – 16.68 at page 405.

²⁴¹ ALRC Report 117 – 16.68 at page 405.

²⁴² ALRC Report 117 – 17.31 at page 421.

²⁴³ ALRC Report 117 – 17.34-17.36 at page 421.

- 8.34. Finally, the ALRC determined that one of the basic requirements of the leave is that it be paid, or a combination of paid or unpaid in order “to avoid provision of a ‘hollow’ entitlement, risk further disadvantaging victims of family violence, or to fail to achieve the objects underlying its introduction.”²⁴⁴ In doing so, the ALRC relied on the evidence about the need for economic security and independence for victims.
- 8.35. The ACTU endorses and adopts the findings of the ALRC outlined above for the purposes of the ACTU Application.

Domestic Violence in Australia, Senate Inquiry, August 2015

- 8.36. In 2014, the Senate referred a number of domestic violence related matters to the Senate Finance and Public Administration References Committee for inquiry.²⁴⁵ The Senate Committee received over 165 public submissions, held a number of hearings across Australia, and handed down its report in August 2015 (**the Senate Inquiry Report**).
- 8.37. Ultimately, the Senate Committee supported the need for victims of domestic violence to be able to access appropriate leave provisions to assist them to maintain employment and financial security while attending necessary appointments.²⁴⁶ Noting it was their first recommendation, the Senate Committee made the following recommendation:

Recommendation 1

The committee supports victims of domestic and family violence having access to appropriate leave provisions which assist them to maintain employment and financial security while attending necessary appointments such as court appearances and seeking legal advice. The Commonwealth Government should investigate ways to implement this across the private and public sector.

- 8.38. For completeness, we note that this was not the view of all the Committee’s Senators. The Senate Inquiry Report acknowledges that whilst they worked hard to ensure that the report was for the most part bipartisan, there was a difference of opinion with respect to Recommendation 1. The dissenting Senators Bernardi and Smith wished to make the additional comment:

The Fair Work Act 2009 already provides for a right to request flexible working arrangements, including for employees experiencing or caring for someone experiencing

²⁴⁴ ALRC Report 117 – 17.47 at page 425.

²⁴⁵ *Domestic Violence in Australia, Senate Inquiry, August 2015*
http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Domestic_Violence/Report (**Senate Inquiry Report**).

²⁴⁶ Senate Inquiry Report – 2.30 at page 15.

*domestic violence. If an employer wishes to provide additional entitlements, they can do so through enterprise bargaining. Government Senators believe that it is appropriate for employers and employees to consider specific leave provisions for domestic and family violence in that context.*²⁴⁷

8.39. We note that this was not the view of the majority of the Senators on the Committee.

State government action

Stop the Violence, End the Silence, NSW Government – June 2010

8.40. In June 2010, the NSW Government launched a five year Domestic Violence Action Plan titled *Stop the Violence, End the Silence (NSW Plan)*. The five key policy reform areas identified were prevention and early intervention; protection, safety and justice; provision of services and support; building capacity; and data collection and research.

8.41. Like all other governments, the NSW Plan considered the workplace an important setting for prevention work.

8.42. At the same time as the NSW Plan was released, the NSW government introduced domestic violence leave for public sector employees.²⁴⁸ In doing so, the NSW government became the first government to provide this entitlement to its public sector employees.

8.43. This introduction of domestic violence leave became the leading Australian precedent for the recognition of family violence in awards. Under clauses 84A and 84.11 of the *Crown Employees (Public Service Conditions of Employment) Award 2009 (NSW)* (which is still in force), NSW public sector employees are entitled to five days special leave as well as access to other forms of leave for the purpose of responding to family violence. Consistent with this award, a number of other NSW awards have also been amended to include family violence entitlements.

8.44. The NSW award entitlement means that employees who experience domestic or family violence are able to access existing leave entitlements and when those entitlements are exhausted, special leave at the discretion of the employer.²⁴⁹ It also provides at clause 84A.5 that any “*personal information concerning domestic violence will be kept confidential by the agency*”.

²⁴⁷ Senate Inquiry Report – Government Senators Additional Comments at paragraph 1.4

²⁴⁸ <http://arp.nsw.gov.au/c2011-08-support-employees-experiencing-domestic-violence>

²⁴⁹ *Crown Employees (Public Service Conditions of Employment) Award 2009 (NSW)*, Clause 84A. Leave for Matters Arising from Domestic Violence

- 8.45. In 2014, a Special Taskforce was set up in Queensland to investigate and make recommendations to inform the development of a long term vision and strategy for Government and the community to rid of domestic violence. The Special Taskforce was chaired by The Honourable Quentin Bryce AD CVO.
- 8.46. The report of the Special Taskforce, titled *Not Now, Not Ever – Putting an End to Domestic and Family Violence in Queensland (Qld Report)* was handed down in February 2015. Including survey information conducted as part of the review, the Taskforce heard submissions from almost 2,000 individuals and organisations.
- 8.47. The Qld Report demonstrates the overwhelming evidence that supports the proposition that domestic violence is a workplace issue. However, it also found that Australian workplaces have been slow to address domestic violence and that an effort to improve safety and support in the workplace cannot be achieved by government alone.²⁵⁰
- 8.48. In particular, the Special Taskforce found that workplace entitlements are “*the most effective way to encourage women to disclose, to provide safety to individuals and ensure a safe and productive work environment for all staff.*”²⁵¹
- 8.49. The Taskforce made a number of key recommendations to the Queensland government concerning workplace reform:
- (a) Recommendation 33 – the Queensland government amend the *Industrial Relations Act* to create a new category of leave for the public sector for victims of domestic and family violence that may be taken for any purpose related to the violence, such for injury recovery, finding accommodation, court preparation and court appearance.
 - (b) Recommendation 34 –the Queensland government ensure the amendment provide for 10 days a year of leave, non-accumulative, to be taken in conjunction with other leave and incorporating sensitivity as to the proof requirements for approval of the leave.
 - (c) Recommendation 36 – the Queensland government request that the Commonwealth government considers similar leave and dismissal amendments to the *Fair Work Act* to protected Queensland workers engaged under federal legislation, from unfair dismissal and provide appropriate support to workers experiencing domestic violence.
- 8.50. On 25 November 2015, the Queensland government announced that would provide 10 days paid leave for public sector employees who experience domestic violence.²⁵²

²⁵⁰ Not Now, Not Ever Report page 181.

²⁵¹ Not Now, Not Ever Report page 184.

Taking A Stand, South Australian Government – October 2014

- 8.51. The murder of 44 year old Zahra Abrahamzadeh by her estranged husband in March 2010 sparked an inquest into her death by the South Australian Coroner.²⁵³ The inquest found that Ms Abrahamzadeh was repeatedly stabbed to death by her estranged husband at the Adelaide Convention Centre while attending a Persian New Year's Eve celebration, and that ultimately her death was the devastating result of Zahra's and her three children's experience of many years of physical and psychological abuse.
- 8.52. Following this inquest, the South Australian government developed a 'whole-of-government' policy response titled *Taking a Stand, Responding to Domestic Violence (SA Report)*. The SA Report built on the recommendations of the Coroner and includes many broad measures designed to help prevent domestic violence.
- 8.53. The SA Report includes a number of policy responses aimed at addressing domestic violence in the community such as a new early warning system, assistance for women to navigate the courts and the roll-out of a significant workplace program to prevent and respond to domestic violence. In particular, the report affirmed the SA government's commitment to lead by example, and required that all government departments obtain White Ribbon Workplace accreditation, in addition to their existing workplace policies on domestic violence.
- 8.54. The White Ribbon Workplace Accreditation Program recognises workplaces that have taken active steps to prevent and respond to violence against women by accrediting them as a White Ribbon Workplace. The government further committed to work with the private sector to encourage similar initiatives in private sector workplaces.
- 8.55. Following this work, the SA government announced in 2015 that it would provide paid leave to all SA public sector employees. This additional leave provides 15 days paid 'special leave' per year. The purpose of this 'special leave' was "*aimed at ensuring victims can maintain their jobs while they take action to break the cycle of violence.*"²⁵⁴

Victorian Royal Commission into Family Violence – March 2016

- 8.56. On 22 February 2015, the Victorian government embarked on perhaps the most comprehensive review of domestic violence policy by establishing the Royal Commission

²⁵² <http://statements.qld.gov.au/Statement/2015/11/25/qld-government-champions-workplace-cultural-change-on-white-ribbon-day>

²⁵³ Refer to [Coronial Inquest of Zahra Abrahamzadeh pursuant to Coroners Act 2003 \(SA\)](#).

²⁵⁴ [Paid leave to help break the cycle of domestic violence](#), SA Government Media Release dated 25 November 2015.

into Family Violence.²⁵⁵ The Royal Commission's terms of reference required the Commission to, inter alia, examine and evaluate strategies, frameworks, policies, services and establish best practice for prevention, early intervention, measures to support and redress the impacts of FDV; and improved accountability for perpetrators of FDV.

- 8.57. The Royal Commission received almost 1000 written submissions, 491 from individuals and 477 from organisations. In addition, nearly 850 people attended the 44 consultation sessions across Victoria. The result of this work was the Victorian Royal Commission Report handed down in March 2016 (**RC Report**). The RC Report is a comprehensive review of the evidence from those that participated, as well as important research commissioned by the Royal Commission itself. The RC Report marks the high point of family violence policy review and development in Australia.
- 8.58. The RC Report considered in some detail the concept of paid family violence leave, including information from employers about how they have effectively implemented family violence leave. The Victorian Royal Commission Report found that the *“lack of dedicated family violence leave can make the situation worse for people who are experiencing family violence.”*²⁵⁶ As Phil Cleary (whose sister was killed by her former partner) stated, paid family violence leave *“validates a woman’s experience of violence.”*²⁵⁷ Similarly, Will Stracke of the Victorian Trades Hall Council submitted to the Royal Commission that paid family violence leave sends a message that *“this is a workplace where we all stand together to support you in this situation.”*²⁵⁸
- 8.59. The Report confirms that workplaces are an important site for intervening to prevent and respond to family violence, stating *“the manner in which family violence intersects with the workplace is profound and multi-faceted.”*²⁵⁹ We know that there are many different workplace practices currently in operation across Australia that are all designed to assist victims of domestic violence. The problem is that there is little consistency or uniformity with respect to how they operate.
- 8.60. Ultimately the RC Report supports all moves to extend the availability of dedicated family violence leave to as many Victorian employees as possible by embedding an entitlement in the NES and modern awards. This support is encapsulated in Recommendations 190 and 191 that provide:

²⁵⁵ Victorian Royal Commission into Family Violence, March 2016 at <http://www.rcfv.com.au/Report-Recommendations>

²⁵⁶ RC Report at page 82.

²⁵⁷ RC Report at page 82.

²⁵⁸ RC Report at page 82.

²⁵⁹ RC Report at page 89.

Recommendation 190

The Victorian Government ensure that the inclusion of family violence leave in all public sector enterprise agreements is accompanied by access to suitable support services and referrals, as well as adequate planning, training and resources to equip managers and human resources staff to communicate and implement the leave entitlements.

Recommendation 191

The Victorian Government, through the Council of Australian Governments, encourage the Commonwealth Government to amend the National Employment Standards in Part 2-2 of the Fair Work Act 2009 (Cth) to include an entitlement to paid family violence leave for employees (other than casual employees) and an entitlement to unpaid family violence leave for casual employees [within 12 months].

- 8.61. On 17 December 2015, the Victorian government reached an in-principle agreement for a new Victorian Public Service Enterprise Agreement that included 20 days paid domestic violence leave.²⁶⁰ The Victorian government is also acting the recommendation in the RC Report that it advocate through the Council of Australian Governments to amend the NES to include an entitlement to family violence leave for employees.²⁶¹

C. Family and Domestic Violence Leave Entitlements in the Public Sector

- 8.62. As at the date of writing, the following states and territories have some of form of domestic violence leave available to public sector employees as set out in the table below.

Jurisdiction	Leave Entitlement
Commonwealth	N/A
New South Wales	Access to existing leave entitlements and once exhausted, 5 days discretionary ‘special leave’ via State Awards.
Queensland	10 days paid dedicated leave via IR legislation (yet to be implemented)
South Australia	15 days paid dedicated leave via Public Sector Enterprise Agreements.
Victoria	20 days paid dedicated leave via Public Sector Enterprise Agreements
Tasmania	10 days paid dedicated leave via Public Sector Enterprise Agreements
Australian Capital Territory	20 days paid dedicated leave via Public Sector Enterprise Agreements

²⁶⁰ See submission of the Victorian Government to the Fair Work Commission dated 16 May 2016 at [23].

²⁶¹ See submission of the Victorian Government to the Fair Work Commission dated 16 May 2016 at [6].

Northern Territory	Access to existing leave entitlements and once exhausted, discretionary ‘special leave’ via the Public Sector Management By-Laws and the Commissioner’s Guideline . Employee with excess leave may be directed to take personal/recreational leave instead.
Western Australia	No dedicated paid leave. May be able to access to personal leave via the Public Service and Government Officers General Agreement 2014 . However the relevant clause does not expressly refer to domestic violence.

8.63. The ACTU Application fits neatly within the policy objectives and context of government policy reform. In fact, the ACTU’s application is specifically contemplated, consistent with and supported by most of these reform agendas. As a matter of consistency, uniform entitlements within the modern award system would help, and not hinder, employers who are unsure how to respond to an employee’s disclosure about domestic violence.

9. RECOGNISING OUR INTERNATIONAL OBLIGATIONS

A. International Human Rights Obligations

- 9.1. Gender-based violence is one of the most prevalent human rights violations in the world. More than 35 per cent of women worldwide have experienced physical and/or sexual violence,²⁶² and between 40 per cent and 50 per cent of women experience unwanted sexual advances, physical contact or other forms of sexual harassment at work.²⁶³ Of the varied ways in which sex discrimination manifests itself across the globe, such violence is exceptionally dehumanising, pervasive and oppressive.
- 9.2. Addressing violence against women and children is critical to the achievement of fundamental human rights and freedoms enshrined in the 1948 UN Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (**ICCPR**) and International Covenant on Economic, Social and Cultural Rights (**ICESCR**). These rights include:
- (a) the right to life, liberty and security of person (Article 6 of ICCPR);
 - (b) not to be subject to torture or to cruel, inhuman or degrading treatment or punishment (Article 7 of the ICCPR);
 - (c) liberty and security of the person (Article 9 of the ICCPR);
 - (d) the rights to equality, equal protection under the law and to be free from all forms of discrimination (Article 26 and 2 of the ICCPR);
 - (e) equality in the family (Article 16 of the CEDAW²⁶⁴ and article 17 of the ICCPR);
 - (f) the highest standard attainable of physical and mental health (Article 12 of the CEDAW and Article 12 of the ICESCR);
 - (g) The right to just and favourable conditions of work (Article 11 of the CEDAW and Articles 6 and 7 of the ICESCR).
- 9.3. The Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**) and the Convention on the Rights of the Child and the Optional Protocols, as well as other relevant conventions and treaties, provide an international legal framework and a comprehensive set of measures for the elimination and prevention of all forms of discrimination and violence against women and girls.

²⁶² World Health Organization, Department of Reproductive Health and Research, London School of Hygiene and Tropical Medicine, South African Medical Research Council, *Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence* (2013) p.2. See more at: <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures#notes>

²⁶³ <http://www.ituc-csi.org/gender-based-violence>

²⁶⁴ *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

- 9.4. The obligations imposed on nation states under these conventions are outlined in the submission of the Australian Human Right Commission to the Fair Work Commission dated 12 May 2016. The ACTU supports and relies on those submissions.
- 9.5. The ACTU considers that the provision of paid family and domestic violence leave is consistent with the requirement in Article 2(2) of CEDAW that Australia “*take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise*” and provide assistance to those experiencing domestic violence including by providing adequate opportunities for employment.
- 9.6. The United Nations Commission on the Status of Women (**UNCSW**) is the principal global intergovernmental body dedicated to the promotion of gender equality and the empowerment of women. The agreed conclusions from the 57th session of UNCSW concerning the prevention and elimination of all forms of violence against women and girls:²⁶⁵
- (a) stress that “*the realisation of empowerment of women, including women’s economic empowerment*” and “*their full integration into the formal economy... is essential for addressing the structural and underlying causes of violence against women and girls*”;²⁶⁶
 - (b) recognise that “*prevention of and response to such violence require States to act, at all levels, at each and every opportunity in a comprehensive and holistic manner*”;²⁶⁷ and
 - (c) call on States to “*take measures to ensure that all workplaces are free from discrimination and exploitation, violence, and sexual harassment and bullying, and that they address discrimination and violence against women and girls, as appropriate, through measures such as regulatory and oversight frameworks and reforms, collective agreements, codes of conduct, including appropriate disciplinary measures, protocols and procedures, referral of cases of violence to health services for treatment and police for investigation; as well as through awareness-raising and capacity-building, in collaboration with employers, unions and workers, including workplace services and flexibility for victims and survivors.*”²⁶⁸
- 9.7. The implementation of a modern award entitlement to family and domestic violence leave is consistent with these recommendations.

²⁶⁵ Extracted from E/2013/27-E/CN.6/2013/11. Available at [http://www.un.org/womenwatch/daw/csw/csw57/CSW57_Agreed_Conclusions_\(CSW_report_excerpt\).pdf](http://www.un.org/womenwatch/daw/csw/csw57/CSW57_Agreed_Conclusions_(CSW_report_excerpt).pdf)

²⁶⁶ Ibid, [19].

²⁶⁷ Ibid, [20].

²⁶⁸ Ibid, B(yy).

Proposed ILO standard on Gender Based Violence at Work

- 9.8. Section 3(a) of the FW Act provides that the objects of the Act include providing workplace laws that take into account Australia’s international labour obligations.²⁶⁹
- 9.9. Key International Labour Organisation (ILO) conventions dealing with violence, discrimination and working conditions for women include:
- (a) Forced Labour Convention, 1930 (No. 29);
 - (b) Migration for Employment (Revised) Convention, 1949 (No. 97);
 - (c) Equal Remuneration Convention, 1951 (No. 100);
 - (d) Discrimination (Employment and Occupation) Convention, 1958 (No. 111);
 - (e) Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143);
 - (f) Workers with Family Responsibilities Convention, 1981 (No. 156);
 - (g) Worst Forms of Child Labour Convention, 1999 (No. 182); and
 - (h) Maternity Protection Convention, 2000 (No. 183).
- 9.10. In addition, there are three ILO instruments that contain references to gender-based violence.
- (a) [Convention 169](#) on Indigenous and Tribal People acknowledges the link between gender and ethnic discrimination.
 - (b) [Recommendation 200](#) on HIV and AIDS and the World of Work (2010) advocates that steps be taken to prevent and put an end to violence and harassment at work.
 - (c) [Recommendation 204](#) concerning the Transition from the Informal to the Formal Economy (adopted by the International Labour Conference in June 2015) requires Member States to ensure that an integrated policy framework is included in national development strategies or plans that, among other matters, addresses “*the promotion of equality and the elimination of all forms of discrimination and violence, including gender-based violence, at the workplace*”.²⁷⁰
- 9.11. Discussions are currently taking place within the ILO to introduce a new international labour standard on gender-based violence at work. These discussions build on the work done by constituents and delegates at ILO conferences over the years, as outlined below.
- 9.12. Gender-based violence was raised as a key area of concern by ILO tripartite constituents at the 2009 International Labour Conference when they engaged in an in-depth discussion of sex discrimination. The 2009 Conference Resolution described gender-based violence as “a

²⁶⁹ s 3.

²⁷⁰ [11(f)].

*critical and major global challenge to the goal of equality between women and men*²⁷¹ and recommended specific strategies to prevent and eliminate sexual harassment and violence against women at work.²⁷²

- 9.13. At the 320th and 323rd sessions of the ILO Governing Body in 2014–2015 the ILO workers group and a number of governments expressed their support for a new international standard on violence against women and men in the world of work.²⁷³
- 9.14. In 2015 the Economic and Social Committee of the European Union (**EESC**) which consists of trade unions, civil society organisations and employer organisations, adopted an Opinion calling on the Member States of the European Union “*to speak with one voice*” in support of an international labour standard outlawing gender-based violence in the world of work.²⁷⁴
- 9.15. At the November 2015 Governing Body meeting, the ILO decided to place a standard-setting item on the agenda of the 107th Session of the Conference in June 2018 and to convene a tripartite meeting of experts to provide guidance on which basis the Governing Body will consider the preparations for the first discussion of possible instruments by the Conference.²⁷⁵ The meeting of experts is scheduled to take place in October 2016 and participants include representatives from the Australian government and the ACTU.
- 9.16. The International Trade Union Confederation advocates for the proposed new standard to include:
- (a) A broad definition of gender-based violence at work;
 - (b) Provisions to prevent gender based violence at work;
 - (c) Measures to protect and support workers affected by gender based violence; and
 - (d) A description of the groups most affected by gender based violence including LGBT, Indigenous and migrant workers, workers living with HIV/AIDS and disabilities, people trapped in forced and child labor.²⁷⁶

²⁷¹ *ILC Provisional Record 13, Sixth item on the agenda: Gender equality at the heart of decent work (General discussion)*, Report of the Committee on Gender Equality, ILO, Geneva (2009) p 13.

²⁷² *Ibid*, p 13/65 to 13/78.

²⁷³ ITUC, Campaign and Briefing Tool, Available at <http://www.ituc-csi.org/gender-based-violence>

²⁷⁴ *Opinion of the European Economic and Social Committee on Towards and ILO standard against gender-based violence at work* (2015). Available at <http://www.ituc-csi.org/opinion-of-the-eesc-in-favour-of>

²⁷⁵ ILO, Decisions and other outcomes of the 325th Session, November 2015, Item 2. Available at <http://www.ilo.org/gb/decisions/GB325-decision/lang--en/index.htm>

²⁷⁶ ITUC, Campaign and Briefing Tool, Available at <http://www.ituc-csi.org/gender-based-violence>

B. International Comparisons

- 9.17. Australia has been at the forefront of efforts to raise awareness internationally about the economic costs of family violence and the benefits of engaging workplaces as part of a broader strategy to reduce the prevalence of violence and minimise its impacts.
- 9.18. Family violence leave clauses in enterprise agreements were pioneered in Australia in 2010 and this claim represents the first attempt anywhere in the world to provide a nationally consistent entitlement to paid family violence leave for both public and private sector workers.
- 9.19. The ACTU is a founding member of an international domestic violence at work network (www.dvatworknet.org) of researchers, experts, social and labour organisations, and employers. The network was established in 2014 with funding from the Social Science and Humanities Research Council of Canada to conduct research and mobilize knowledge about the impacts of domestic violence in the workplace. Among the first steps, it carried out a series of national surveys to learn about the impact of domestic violence on workers and the workplace. Findings across the surveys have consistently found similar negative impacts on attendance, performance and safety.²⁷⁷
- 9.20. Australian unions and employers have also been involved in international events sponsored by the ILO highlighting the Australian achievement of domestic violence entitlements in industrial awards and agreements, including access to paid family violence leave.²⁷⁸
- 9.21. Gender-based violence and workplace measures to support those experiencing domestic violence are rapidly emerging as industrial issues around the world. The ACTU Application is broadly consistent with developments taking place in a handful of countries with a similar economic and social profile.
- 9.22. For example, over the last five years, trade unions in the UK, Canada and New Zealand have been actively pursuing family violence provisions through collective bargaining.

²⁷⁷ There were six national surveys completed by December 2015 (Australia, Canada, New Zealand, UK, Philippines, Turkey). For further information about the surveys see: <http://dvatworknet.org/research/national-surveys>

²⁷⁸ For example, the ACTU and Telstra participated in a side event hosted by the Canadian Government and Canadian Labour Congress at CSW60 in March 2016 entitled “Partnerships to Address Domestic Violence in the Workplace”.

- 9.23. In 2014, the UK public sector union, Unison, reported that workplace family violence agreements have been signed in the national health sector (NHS); in higher education and in the civil service.²⁷⁹ The federation of trade unions in the UK, the Trade Unions Congress, has produced a guide for unions and employers that includes facts and figures about the prevalence of family violence, case studies, and advice on drawing up a workplace policy to address the key issues of support, referral, and confidentiality.²⁸⁰ UNISON has also drawn up a model workplace agreement and guidelines on family violence.²⁸¹
- 9.24. Similarly, Canadian trade unions have developed a Workplace Violence and Harassment Prevention Kit that includes resources to assist unions to bargain for family violence provisions.²⁸² It provides examples of existing entitlements in collective agreements that:
- (a) provide for five days paid leave for domestic violence victims;
 - (b) provide up to 2 months unpaid leave and protection from penalties related to work attendance or performance for workers experiencing domestic violence;
 - (c) recognise domestic violence as a workplace concern and require follow up such as training, referrals and accommodation of employee needs;
 - (d) establish specialised union representatives to help women experiencing harassment or violence at work or in their personal lives; and
 - (e) ensure occupational health and safety law on domestic violence are written into collective agreements.
- 9.25. In New Zealand, trade unions have successfully negotiated up to 10 days leave with community sector organisations and government agencies and are currently lobbying for access to paid leave to be included in legislation following an extensive review of New Zealand’s family violence laws.²⁸³
- 9.26. In 2007, the European Social Partners (ETUC, BUSINESSEUROPE, UEAPME and CEEP) negotiated a framework agreement to prevent, manage and eliminate violence at work. The agreement recognises that the EU and national law define the employers’ duty to protect workers against harassment and violence in the work-place and the responsibility of

²⁷⁹ ETUC 8th March Survey (2014) p 37. Available at https://www.etuc.org/sites/www.etuc.org/files/other/files/etuc_8th_march_survey_2014_en_eh.pdf

²⁸⁰ TUC, *Domestic violence: A guide for the workplace* (2002). Available at <http://www.ituc-csi.org/tuc-domestic-violence-a-guide>

²⁸¹ UNISON, *Model Domestic violence and abuse policy* (2010). Available at <http://www.ituc-csi.org/unison-model-domestic-violence-and>

²⁸² CUPE, *Domestic Violence and the workplace: A bargaining guide* (2015). Available at http://cupe.ca/sites/cupe/files/domestic_violence_english_lr.pdf

²⁸³ See Jones. N, “Calls for paid leave for domestic violence victims”, *NZ Herald*, Published March 2016. Available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11598860

employers to consult with workers and/or their representatives, on appropriate procedures for preventing and dealing with problems of harassment and violence at the workplace. It requires companies to have a clear statement outlining that harassment and violence at the workplace are not tolerated and specifying the procedure to be followed in case of problems, including investigation and dealing with complaints, taking appropriate measures against the perpetrator and allowing for support for the victim. It recognises that pre-existing company procedures may be suitable for dealing with harassment and violence at the workplace and allows for the provisions of the agreement to deal with cases of violence by third parties where appropriate.

9.27. Findings from the European Trade Union Confederation's 8th March Survey (2014) show that the vast majority of trade unions in Europe are involved in tackling workplace-related violence and sexual harassment.²⁸⁴ As a result of the 2007 framework agreement, clauses have been introduced in collective agreements at national, sectoral and company levels including provisions that:

- (a) oblige employers to develop procedures for dealing with violence;
- (b) require training for managers and employees to identify signs of workplace violence and how to prevent it; and
- (c) require employers to provide medical and psychological support for employees who are victims of domestic violence.²⁸⁵

9.28. The link between domestic violence and the workplace constitutes a specific focus for a small but growing number of national trade union confederations in Europe. For example, company agreements have been negotiated in Spain that provide for legal, medical and psychological support to employees that are victim of domestic violence; time-off for medical assistance, legal aid, psychological aid, and up to one year off for employees victims of domestic violence and the possibility to receive advance cash.²⁸⁶

9.29. National domestic violence strategies also include the implementation of workplace entitlements through legislation. These measures include paid and unpaid leave entitlements for employees experiencing domestic violence as well as access to other forms of personal leave.

²⁸⁴ *ETUC 8th March Survey* (2014), Section II.

²⁸⁵ ETUC Press Release, "Trade unions for the elimination of violence against women", Published September 2015. <https://www.etuc.org/press/trade-unions-elimination-violence-against-women#.Vz6IUeSheUk>

²⁸⁶ *ETUC 8th March Survey* (2014) p 37.

- 9.30. For example, in Canada, domestic violence protections for workers are provided mainly through Occupational Health & Safety (**OHS**) legislation. Most jurisdictions have a ‘general duty provision’ requiring employers to take all reasonable precautions to protect employees. This provision includes protection from a known risk of workplace violence and domestic violence that spills over into the workplace.
- 9.31. Most provinces, and federally regulated workplaces, also have specific workplace violence prevention regulations. For example Ontario includes specific responsibilities for employers to prevent and respond to domestic violence in its OHS legislation and British Columbia has a regulation that outlines responsibilities for employers if a DV situation puts the workplace at risk.
- 9.32. Moreover, new laws have recently been implemented in Manitoba that enable an employee who is a victim of domestic violence to take up to 10 days of leave, either intermittently or in a continuous period, as well as a continuous leave period of up to 17 weeks.²⁸⁷ Up to five days are to be paid leave. Domestic violence leave must be for specified purposes relating to the domestic violence such as medical attention or law enforcement assistance. Amendments to the Employment Standards Code also enable an employee who is seriously injured or ill to take unpaid leave of up to 17 weeks, and extend the length of the compassionate care leave an employee may take from eight weeks to 28 weeks. Employers must maintain confidentiality in respect of all matters relating to an employee's leave, and they are prohibited from disclosing such information except to persons who require the information to carry out their duties.²⁸⁸
- 9.33. In the United States, federal agencies are required to develop policies to address the effects of domestic violence and provide assistance to employees who are exposed to it. Federal contractors are entitled to access paid sick leave for absences resulting from domestic violence.²⁸⁹

²⁸⁷ *The Employment Standards Code Amendment Act (Leave for Victims of Domestic Violence, Leave for serious injury or illness and Extension of Compassionate Care Leave)*. Available at <https://web2.gov.mb.ca/bills/40-5/b008e.php>

²⁸⁸ A private members bill has also been introduced in Ontario. *Bill 177, Domestic and Sexual Violence Workplace Leave, Accommodation and Training Act, 2016* provides employees with a leave of absence of reasonable duration including up to 10 days paid leave, requires employers to accommodate the employee's need to work in a different location and amends the Occupational Health and Safety Act to ensure that every manager, supervisor and worker receives information and instruction about domestic violence in the workplace. The Bill is available at http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=3795.

²⁸⁹ Office of the Press Secretary, Presidential Proclamation – National Domestic Violence Awareness Month (2015). Available at <https://nebula.wsimg.com/496471b5c59a67f5adb54e7efd5cb007?AccessKeyId=04AEF55388781ABCE21C&disposition=0&alloworigin=1>

- 9.34. A growing number of US states and municipalities have enacted laws requiring some form of reasonable accommodation, including paid or unpaid time off work and protection from domestic violence-related employment discrimination.²⁹⁰ For example the law in Connecticut as amended in 2010:
- (a) prohibits an employer with three or more employees from terminating or penalizing an employee because the employee is a victim of family violence, or attends or participates in a court proceeding related to a civil family violence case;
 - (b) requires employers to allow family violence victims to take paid or unpaid leave (limited to 12 days per calendar year) during any calendar year in which such leave is “reasonably necessary”;
 - (c) enables an employer to request that the employee provide a signed written statement certifying that the leave is for a purpose authorised by the statute. The employer may also request other formal documentation; and
 - (d) requires that any such documentation shall be maintained as confidential and shall not be disclosed by the employer, unless as required by law or as necessary to protect the employee’s safety in the workplace, provided the employee is given prior notice of the disclosure.
 - (e) The details of each state’s laws vary significantly with respect to the amount of time off, reasons for leave and notice requirements.²⁹¹
- 9.35. Some states that have not passed domestic violence leave laws have paid sick leave laws or crime victim protection laws that prohibit an employer from firing crime victims who take time off work to appear in criminal court. In addition to rights under state laws, victims of domestic violence, stalking or sexual assault may be able to take leave under the federal *Family and Medical Leave Act* or under comparable state or local laws.²⁹²
- 9.36. A number of US states also require employers to make “reasonable accommodations” to permit a victim to perform his or her job including schedule modifications or security measures unless doing so would impose an undue hardship on the employer.²⁹³

²⁹⁰ J. Deschenaux, “Domestic Violence Victims Granted Leave Rights Under State Laws”, Society for Human Resource Management, Published January 2014. Available at: <https://www.shrm.org/legalissues/stateandlocalresources/pages/domestic-violence-state-law.aspx#sthash.ImAKTLh5.dpuf>

²⁹¹ Legal momentum, *State Law Guide – Employment Rights for Victims of Domestic or Sexual Violence*, Updated September 2015, p2.

²⁹² Ibid, p 1.

²⁹³ See for example: *N.Y., N.Y., Admin. Code § 8-107*.and *Westchester Cty., N.Y., Code §§ 700.02 (25) & 700.03*. An overview of these provisions is contained in the *State Law Guide* cited above.

- 9.37. The Productivity Commission Report into the *Workplace Relations Framework*²⁹⁴ notes two other examples from overseas jurisdictions:
- (a) In Spain, victims of domestic violence are entitled to take an unpaid leave of absence for an initial period of six months, which can be extended up to a maximum of 18 months. Victims are also entitled to reduce their working hours (with a proportional salary reduction), work schedules and to transfer to another job within the company.²⁹⁵
 - (b) In the Philippines, a female victim of domestic violence is entitled to up to 10 days paid leave (in addition to other paid leave) to attend to medical and legal concerns.²⁹⁶
- 9.38. The preceding discussion is not intended to provide an exhaustive list of national strategies to address domestic violence at work. These examples merely illustrate the point that the ACTU Application is consistent with developments taking place internationally.
- 9.39. Awarding ACTU Application would represent a major step forward for workers in Australia and is likely to be regarded internationally as an advance worth emulating, particularly in the context of the proposed ILO standard on gender-based violence.

²⁹⁴ Productivity Commission Inquiry Report, *Workplace Relations Framework*, November 2015, Volume 1, p 547.

²⁹⁵ Baker and McKenzie, *The Global Employer – Focus on Spain* (2015) p 17. Available at http://www.bakermckenzie.com/files/Publication/6a22853a-87f7-46ae-b580-df7223ed8a06/Presentation/PublicationAttachment/0e83f243-d8ff-4f68-b729-e0b20b86a4b4/bk_employment_globalemployerspainspan_jan15.pdf

²⁹⁶ Quisumbing Torres, *Guide to Philippine Employment Law: An Overview of Employment Laws for the Private Sector* (2013) p5. Available at http://www.bakermckenzie.com/files/Publication/6e2edcc4-648a-458f-8995-e862e90192f0/Presentation/PublicationAttachment/40c18d0d-1c55-4e07-9a14-4ccfbf9152ed/bk_manila_guideemploymentlawv2_2013.pdf

10. MEETING THE MODERN AWARDS OBJECTIVE

- 10.1. As set out above in Section 3, in exercising its modern awards powers, the Fair Work Commission must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions.²⁹⁷ The criteria in the modern awards objective can be properly described as “*broad social objectives*”.²⁹⁸ Based on the evidence outlined above, in particular regarding the actions of government in Section 8, it is clear that greater structural support for victims of family violence is consistent with the objectives of the Australian community.
- 10.2. Family violence is a workplace issue. Around 62 per cent of women who experienced family violence in the last 12 months were in paid employment.²⁹⁹ The workplace is central to the Australian community, and is an essential source of financial security and empowerment. In circumstances where the major institutions of Australian society, including government, the legal system, the health system, and social services, are devoting considerable effort to developing appropriate policies and practices to deal with family violence, it is anomalous that the workplace should have no role in supporting victims of family violence.
- 10.3. The ACTU submits that the proposed clause represents a fair and relevant minimum term and condition of employment.
- 10.4. Family violence leave has increasingly been present in collective bargaining, workplace policies, and the subject of recommendations in government reports. However, as important and worthwhile as these industrial strategies are, they are insufficient to support and protect the majority of Australian workers.
- 10.5. The proposed clause is underpinned by two key principles. First, it is critical that employees who are victims of family violence are able to maintain the employment relationship and continuity of employment. Second, employees who are already disadvantaged by being exposed to family violence are not further disadvantaged financially as a result of having to take time off work to deal with family violence related matters. Victims of family violence need to be able to access paid leave in order to meet their needs, and ultimately support them to leave abusive relationships. The only legal means the ACTU have to achieve a uniform safety net entitlement of paid leave is through the NES and modern awards.

²⁹⁷ Section 134(1) of the FW Act

²⁹⁸ See paragraph 3.10 above.

²⁹⁹ See paragraph 4.2 above.

Ten days paid leave

- 10.6. The proposed clause entitles workers suffering from family violence who need time off work to ten days paid leave. As set out above at paragraph 4.71, the ACTU has developed a model clause for use in enterprise bargaining that provides for 20 days paid leave. The ACTU maintains that 20 days is the more appropriate figure, given what we know about the *work* involved in accessing services to ameliorate the effects of family violence. However, in the context of minimum terms and conditions, the ACTU accepts that 10 days is an appropriate *minimum* standard. We note that there is some stakeholder support for this approach – the Male Champions of Change ‘Playing Our Part’ Report suggests that the additional “*10 days paid leave appears to be a developing norm*”.³⁰⁰

Two days unpaid leave per incident

- 10.7. The inclusion of clause X.2.2 in the proposed clause is essential to maintenance of the employment relationship over the long term, and is aimed at striking the balance between the needs of victims who may need to take more time off than the minimum 10 days, and the cost to employers.

Eligibility and casual employees

- 10.8. The proposed clause is not limited in its application. All employees are eligible for ten days paid family violence leave, plus the additional two unpaid days per occasion.
- 10.9. The ACTU submits that casual employees should also be entitled to access paid family violence leave.
- 10.10. Family violence is a society-wide problem and one that must be addressed at the level of the workplace. The objectives of domestic violence leave include:
- (a) providing the necessary support for victims of domestic violence to break the cycle of violence and to escape violent situations;
 - (b) reducing the impact of domestic violence on those experiencing it; and;
 - (c) helping to eradicate domestic violence through education and cultural change.
- 10.11. Only an inclusive right that includes as many workers as possible, including casual workers, can achieve these objectives.
- 10.12. Casual employees are a significant proportion of the workforce, making up 24.1 per cent of employees. Women are more likely than men to be casual employees (27 per cent compared

³⁰⁰ ‘Playing Our Part – Workplace Responses to Domestic and Family Violence’, Male Champion of Change, November 2015 at page 12.

to 21 per cent of male employees), and women are more likely than men to be long-term, regular casual employees.

- 10.13. As McFerran has observed, casual employees are more likely than permanent employees to experience family violence:

The evidence is that women with a history of domestic violence have a more disrupted work history, are consequently on lower personal incomes, have had to change jobs more often and are employed at higher levels in casual and part time work than women with no experience of violence (Family Violence Fund 1998).³⁰¹

- 10.14. Casual employees experience a range of financial and social pressures inhibiting their ability to take leave, including the fact that any leave is unpaid, lack of guaranteed hours (lower predictability and security of future work) and lack of bargaining power. These pressures and disadvantages mean casual employees are often under pressure not to refuse work or to refrain from taking leave. Hence, while in principle casual employees have the ability to refuse shifts, the reality is casual employees often have limited capacity to do so.
- 10.15. We recognise that a defining characteristic of casual employment under modern awards is the absence of other forms of paid leave and the payment of casual loading in lieu of those rights and entitlements.
- 10.16. As discussed above, the lack of paid family violence can prevent women from accessing support and escaping the cycle of violence. In general, this is likely to be an even more significant issue for casual employees; compared to permanent workers, casual employees are paid less, have a more tenuous connection to the workplace, lower bargaining power and suffer a range of other financial and social consequences as a result of their casual employment.
- 10.17. The casual loading that is intended to compensate for certain other specific absences of leave was not calculated to incorporate a lack of this type of leave, and is, to a large degree, incapable of doing so.
- 10.18. The casual loading under awards was calculated on the basis of casual workers' loss of entitlements compared to permanent workers at a time that permanent workers did not have paid family violence leave under awards. Hence, the casual loading does not incorporate a component for that form of leave.

³⁰¹ Ludo McFerran, *Safe at Home, Safe at Work?: National Domestic Violence and the Workplace Survey* (2011), Report of the Australian Domestic and Family Violence Clearinghouse (December 2011), at section 1.2.

- 10.19. The cycle of violence is closely connected with gender inequality and women's lack of financial independence and security. Women who are experiencing a lack of financial independence and security are less likely to be able to escape violence. Casual employees are more likely than permanent employees to lack both financial independence and economic security so are less likely than permanent employees to escape violence without paid leave.
- 10.20. The rise of both casual employment and part-time employment is intimately connected with the 'one and a half' wage earner model that has emerged in Australia, whereby the average household is typically financially dependent on one full-time worker and one part-time worker.
- 10.21. Most part-time workers are casual and casual employees lack job security. Many experience financial pressure as a result of their casual status. Casual employees are also more likely to be low paid and to live week to week and to be financially dependent on their partner. Hence, casual employment status is closely correlated with lack of financial independence and the structural barriers that prevent many victims of family violence from escaping it.
- 10.22. The objective of encouraging victims of family violence to take leave in order to escape the cycle of violence would be undermined unless it was paid at the time the leave was taken. Research shows that many casual employees take less leave due to the absence of paid leave entitlements, despite receiving a casual loading. This is particularly the case for lower paid workers, many of whom live week to week without significant savings.
- 10.23. The overarching concern of the modern awards objective is to provide a fair and relevant safety net. Fairness and equity between casual and permanent employees demands they be treated equally. Casual employees are already disadvantaged with respect to permanent employees and should not be further disadvantaged.

The factors in s 134(1)

- 10.24. The following matters are relevant to the consideration of the modern awards objective in respect of the ACTU Application.
- 10.25. First, the safety net as it stands established by the modern award is not "fair" as mandated by s 134(1). It is not fair because, absent an entitlement to family violence leave:
- (a) Employees who need to take time off work to attend to legal and medical matters, or access services, are forced to use paid leave intended for leisure or illness, or to take unpaid leave.
 - (b) Employees may be placed in a position where they feel they have no choice but to leave paid employment. Others may be dismissed. In either case, the loss of

financial security as well as the social and mental health benefits of work are lost, with potentially devastating effects.

- (c) Employees are potentially exposed to discriminatory conduct as outlined in these submissions.

- 10.26. The evidence of the union organisers referred to in these submissions, suggests that family violence leave as a minimum award standard will encourage collective bargaining per s 134(1)(b). We submit that it is likely to encourage greater efficiency in bargaining as parties will have a measurable minimum standard against which to assess proposals for the inclusion of family violence clauses in agreements. Further, as can be demonstrated by the analysis conducted by McFerran of collective agreements, there are a range of supportive entitlements that may also be provided for in collective agreements. The proposed clause was drafted in contemplation of providing a safety net entitlement to paid leave, as such, leaving space for these other supportive entitlements to be determined at a workplace level.
- 10.27. Third, the absence of paid domestic violence leave cannot be said to promote “*social inclusion through increased workforce participation*” per s 134(1)(c). There is no doubt that domestic violence is a highly gendered experience. Women are overwhelmingly the victims of domestic violence. As set out in Part 4 of these submissions, women who have experienced domestic violence are associated with a more disrupted work history, casual and unstable employment, and lower
- 10.28. Yet the workplace is a critical source of support for women suffering from domestic violence; workplace support logically leads to greater retention of women in employment.
- 10.29. Fourth, the findings of the PwC Report, the KPMG Report, and the Access Economics Report, indicate that the cost of lost productivity in the workplace attributable to domestic violence is enormous. Based on this material, the granting of the ACTU Application will not have any undue or deleterious effects on business including productivity and employment costs (s 134(1)(f)).
- 10.30. The variation of modern awards is necessary to permit employees to deal with the scourge of domestic violence without jeopardising their employment and financial stability, and with dignity, by recognising and acknowledging at a broader level the pervasiveness of the problem in Australian society.

The Australian Council of Trade Unions

1 June 2016

Annexure A: Key Documents

Government Reports

Commonwealth of Australia, [National Plan to Reduce Violence against Women and their Children 2010–2022](#)

Commonwealth of Australia, [Domestic Violence in Australia, Senate Inquiry](#), August 2015 (**Senate Inquiry Report**).

Australian Law Reform Commission, [Final Report Family Violence and Commonwealth Laws—Improving Legal Frameworks \(ALRC Report 117\)](#), February 2012

New South Wales, *Stop the Violence, End the Silence*, NSW Government, June 2010: <http://arp.nsw.gov.au/c2011-08-support-employees-experiencing-domestic-violence>

South Australia, [Taking a Stand: Responding to Domestic Violence](#), October 2014.

Queensland, [Not Now, Not Ever, Queensland Government Special Taskforce](#), February 2015

Victoria, [Victorian Royal Commission into Family Violence](#), March 2016

Economic Studies

Price Waterhouse Coopers, [A High Price to Pay: The Economic Case for Preventing Violence Against Women](#), November 2015.

KPMG, [The Cost of Violence Against Women and their Children](#), March 2009

Access Economics, [The Cost of Domestic Violence to the Australian Economy](#), 2004

Other Material

McFerran, L (2011) ['Safe at Home, Safe at Work?'](#) National Domestic Violence and the Workplace Survey.

WITNESS STATEMENTS

[Witness Statement of Marilyn Beaumont](#)

[Witness Statement of Jocelyn Bignold](#)

[Witness Statement of Sandra Dann](#)

[Witness Statement of Mick Doleman](#)

[Witness Statement of Brad Gandy](#)

[Witness Statement of Michelle Jackson](#)

[Witness Statement of Sunil Kemppi](#)

[Witness Statement of Julie Kun](#)

[Witness Statement of Fiona McCormack](#)

[Witness Statement of Michele O'Neil](#)

[Witness Statement of Samantha Parker](#)

[Witness Statement of Bernadette Pasco](#)

[Witness Statement of Emma Smallwood](#)

[Witness Statement of Jessica Stott](#)

[Witness Statement of Karen Willis OAM](#)

EXPERT REPORTS

[**Expert Report of Dr Peta Cox**](#)

[**Expert Report of Dr Michael Flood**](#)

[**Expert Report of Professor Cathy Humphreys**](#)

[**Expert Reports of Ms Ludo McFerran**](#)

[**McFerran Expert Report 1 - Master Data.xlsx**](#)