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DISCUSSION PAPER
Employment and Superannuation Issues Paper Submission

To Whom It May Concern:

We are pleased to have the opportunity to make comment on the Discussion Paper released by the Australian Law Reform Commission on Employment and Superannuation Issues.

WEAVE (Inc) Convenor, Dr Elspeth McInnes AM, would be available to provide oral evidence or offer any other information as requested.

Yours sincerely,

Marie Hume
Secretary
WEAVE Inc



Women Everywhere Advocating Violence Elimination Inc (Australia)

Women Everywhere Advocating Violence Elimination Inc (WEAVE Inc), formed in 2009, is a National Women's Alliance that aims to eliminate gendered violence (including sexual assault, domestic violence, stalking, sexual exploitation and trafficking). As a non-partisan coalition WEAVE Inc brings together groupings that have sometimes worked separately from one another, such as sexual assault services, women's health services, women's legal services, domestic and family violence services, and organisations working against trafficking. In drawing together key stakeholders that make up the 'violence against women sector' as well as survivors, and activist and interest groups, WEAVE embeds a wealth and diversity of experience and expertise within a single body.

WEAVE Inc Vision

To ensure that all women and children are able to live free from all forms of violence and abuse.

WEAVE Inc Values and Principles

HUMAN RIGHTS

WEAVE Inc employs a human rights framework that recognises that gendered violence is one of the most serious and widespread violations of fundamental human rights, in particular, the right not to be treated in an inhuman and degrading way, the rights to respect, physical, sexual and psychological integrity.

FEMINIST FRAMEWORK

WEAVE Inc works within a feminist framework that recognises that gendered violence is both a consequence and cause of gender inequity, embedded deeply within all levels of our society, and that efforts to end such violence must be accountable to women and promote women's empowerment and gender equality.

EQUITY, DIVERSITY & INCLUSIVITY

WEAVE Inc is committed to representing and working respectfully with the diversity of women in Australia. WEAVE Inc recognises, and seeks to advocate and lobby for, the particular and urgent needs of Indigenous women, women from immigrant, refugee and/or non-English speaking backgrounds, women with disabilities, as well

as the challenges faced by young women, older women and women in rural and remote areas.

WEAVE Objectives

- (a) To provide leadership and advocacy at state and national levels in relation to all aspects of gendered violence.
- (b) To bring together in a single body the key stakeholders concerned with all aspects of gendered violence in order to access and disseminate the wealth and diversity of knowledge within the sector as a whole.
- (c) To contribute to and monitor policies, legislation and programs which impact on women and children experiencing gendered violence.
- (d) To promote and prioritise equity of access to services for all women including Aboriginal women, Torres Strait Islander women, women from immigrant, refugee and/or non-English speaking background, women in rural and isolated areas, older women, young women and women with disabilities.
- (e) To promote greater community awareness of gendered violence and its personal and social consequences using community development and educational strategies.
- (f) To build and promote alliances and collaborative relationships with other key stakeholders and networks.
- (g) To promote, further develop and disseminate 'cutting edge' knowledge of gendered violence arising from practice, research, community and activism.
- (h) To connect with international developments in advocacy, research and practice concerning gendered violence.

Question 1 What barriers, if any, do employees who are experiencing family violence currently face in disclosing family violence in employment related contexts?

Targets of family violence face community attitudes wherein many people regard family violence variously as

- a mutual conflict
- a private matter between husband and wife
- a husband's right and duty
- something the victim must have deserved or asked for

With the beliefs listed above and widespread tolerance for family violence in Australia, disclosure risks stigmatisation of victims as deserving or responsible for what happens to them.

Employers want workers who are able to reliably come to work and perform their duties without disruption to the workplace or other workers. Family violence means that victims can be injured, hospitalised, depressed or prevented from coming to work by their abuser. Where abusers harass, stalk, threaten, abuse and use actual violence in the workplace, employers' interests lie in ensuring that such behaviour does not disrupt the workplace. These factors mean that family violence victims face risks of stigma and dismissal if they reveal their circumstances to their employer.

Question 2 What impact might disclosure of family violence by employees have on the responsibility or liability of employers, union delegates or others?

Mandatory reporting requirements for children at risk of abuse are applied in the Northern Territory. Disclosure of family violence when children are present can result in a mandatory report to child protection. Child protection interventions triggered by children witnessing family violence routinely focus on the mother's culpability for being in a relationship with a violent man. The conduct of the violent man and the responsibility for his actions is normally ignored by child protection agencies.

There are also concerns that private information about the family's circumstances may be circulated as gossip in the workplace or agency.

Unions could potentially be powerful agencies for intervention to (a) develop and provide support services for workers who are or have experienced family violence and (b) develop and provide anti-family violence education to workers.

Question 3 Does the administration of the Job Seeker Classification Instrument encourage jobseekers to disclose the existence of sensitive information such as family violence? Have reforms implemented in 2009 affected the frequency with which family violence is disclosed?

The experiences of women in the income support system after ending a relationship with an abusive partner are highly problematic. When women contact Centrelink seeking income support they are not routinely advised of the availability of domestic violence exemptions from jobseeker participation requirements on the Social Security Act (Division 3A 502C). If a woman is fortunate enough to be advised of the existence of the exemption, and she is able to verify that she has experienced family violence in the past 26 weeks, then the Centrelink social worker may grant an exemption for up to 16 weeks. In practice this rarely happens. Women may also be assessed as experiencing Special Circumstances and be exempted under that provision. The normal period of exemptions, when these are granted, is one or two weeks which is not enough for the victim to recover from trauma and to support her children through their recovery and the change in family circumstances when the parents have separated. They may need re-housing, changes to school and child care, and dealing with police, family law, child protection, legal aid, and medical services for themselves and their children. The more normal process is for women to be referred to a Jobs Services Provider to meet her participation requirements.

Many women report that the issue is not one of non-disclosure, but rather a sceptical attitude amongst Centrelink staff to domestic violence, and a belief that jobseekers routinely try to get out of their obligations any way they can. The lack of information about the existence of a Domestic Violence exemption is the fear that it would provide a 'perverse incentive' to jobseekers victims to claim Domestic Violence exemptions to try to avoid their obligations.

Once referred to a Job Services provider the administration of the JSCI does not easily allow for the disclosure of domestic violence and victims may not know that experiences of violence may be relevant to the next steps within the system. A usual process for women victims is that physical and mental illnesses arising from violence are recognised and the victim is treated as a medical case with referrals for a Job Capacity Assessment focusing on their health concerns. The process of leaving a violent man who may be continuing to threaten, stalk, harass and abuse becomes reduced to an issue of the victim needing anti-depressants and anti-anxiety medications so they can jobsearch.

In undertaking the JSCI, staff routinely skip questions bundling several questions into one generic question such as "Is there anything else you'd like to tell us about", "are there any other issues that impact on your ability to undertake employment?" For many women, these questions are not sufficiently specific for them to disclose the existence of domestic violence and they will routinely answer no, having no understanding that such issues could be considered. In addition, many women will not identify their experience as domestic violence, so being able to name it as such will simply not happen. For most women, naming their experience as domestic violence comes after appropriate counselling.

Question 4 What changes would facilitate jobseekers' disclosure of family violence in completing the Job Seeker Classification Instrument?

There needs to be a requirement for Centrelink staff to (a) publicise the existence of the Domestic Violence exemption to NSA, PPS and PPP income support claimants and (b) directly ask applicants for income support if they have any reason to be concerned for their own safety or the safety of people they live with. If an abuse situation is disclosed there should be mandatory referral to a Centrelink social worker and social workers should be trained to implement the Domestic Violence exemption as per the legislation. If this were the case then people who had left a domestic violence situation in the past 26 weeks would not be channelled into Job Services Providers in the first place.

The Job Services System was initially established to respond primarily to the needs of able-bodied unemployed men without carer responsibilities. Since July 2006 the influx of single parents under Welfare to Work meant that single parent jobseekers came with the needs of dependents who are not present in the job services provider office and therefore invisible to the system. There has been no significant adaption of job services practices to identify and deal systemically with the additional complexities of jobseekers with high care responsibilities.

A first requirement should be an overhaul of Job Services practices with regard to jobseekers with responsibility for dependent others whereby the assessment included an assessment of the care obligations being carried by the person – the number and ages and circumstances of those for whom care is provided.

A mother with one able-bodied 15 year old to care for will experience substantially less demand than a mother with trauma and depression arising from violence who has sole care for two primary school aged children traumatised by violence with additional medical needs such as asthma. The current system does not extend to assessing the broader context of clients with significant care loads and so cannot take realistic account of their circumstances. This needs to change.

Job Services Providers like to argue that domestic violence cases have been screened out so they don't need to do anything. However Job Services Providers need to have domestic violence education and training as part of their accreditation process so they can deal with the issue of family violence

professionally. Such accreditation should be displayed so that clients know that the JSP staff has been trained in responding to family violence. This would increase clients' confidence to disclose.

When a client discloses family violence and they have not seen a Centrelink social worker the JSP should refer the client back to Centrelink for exemption under the Domestic Violence exemptions provision.

JSPs also need to inquire on intake if there are any threats to the person's safety or other in their household. If the person discloses current or recent violence they should be given full information about all Centrelink supports and exemptions available to them so they can make an informed decision about their next steps.

JSPs need to develop a service provider protocol for victims of family violence which should include:

- A pathway referral back to Centrelink for DV exemptions assessment
- A 'high privacy' flag on personal information held about the victim which is only accessible to a case worker with personal responsibility for the client and a clear understanding that there is a safety risk for the person if information is accessible to others (There have been reports of instances where perpetrators have rung JSPs and successfully obtained personal information by tricks such as 'My sister Judith has an appointment there today and asked me to pick her up when she finished but I forgot the time she told me and I don't have her mobile number, can you tell me when her appointment is or give me her phone number so I can call her?').
- A process to ensure that the victim attends a different JSP from the perpetrator if both parties are in the income support system. Victims have gone to JSPs and found their perpetrator in the same seminar.

Question 5 Does the Job Seeker Classification Instrument adequately assist Centrelink in evaluating the level of disadvantage faced by jobseekers experiencing family violence? How might the assessment be improved?

The JSCI instrument should directly inquire with regard to family violence victimisation. Do you have any concerns for your own safety or the safety of others in your household? Family violence can impact on housing status, transport, access to a phone, physical and mental health of the adult and the physical and mental health of any dependent children.

The JSCI should also include an assessment of the circumstances of the people the client has care responsibilities for so the impact of family violence on children and the consequent demand on the mother becomes visible. Traumatized children are often fearful of leaving their protective parent, of attending child care services or being placed in the care of the perpetrator: this means that the protective parent carries 100% of the care load and has to deal with their children's mental and physical injuries as well as their own.

Question 6 What are the practical effects of disclosing family violence for a jobseeker?

There is little evidence of any reliable relief or support for victims of family violence from Centrelink or JSP staff, so there is no clear signal to victims that they will receive any help by disclosing violence.

There is a risk for family violence victims in being disbelieved, labelled as malingering, seen as equally culpable or even responsible for violence against them. Such responses to disclosures of violence are an additional systemic violation which harms the victim. Victims can also be blamed for 'getting themselves into' an abusive relationship and held responsible for the violence.

Victims may be labelled as mentally ill and this assessment might form part of an official record about them as people with a mental health problem – in reality it is normal for people who are being abused to feel depressed and anxious and traumatised. They recover when they are safe.

Victims might be subjected to a mandatory child protection report for exposing their children to family violence and threatened with loss of their children by child protection agencies.

Victims' information might be wrongly circulated or mis-used to the benefit of the perpetrator.

Question 7 Does the Job Seeker Classification Instrument adequately assist administrators in identifying when family violence is a 'significant barrier' to work? What, if any, improvements to the Job Capacity Assessment referral process would provide better support to jobseekers experiencing family violence?

It should be assumed that the presence of family violence is a 'significant barrier' to work when violence is disclosed. An accredited JSP with training in responding to family violence should carefully document the source(s) of violence, the nature of abuse, the targets of abuse, the duration of the violent relationship, the frequency of abuse, the severity of abuse and the impact of the abuse on:

- The physical and mental health of the victim and the victim's dependents
- The housing circumstances of the victim
- The financial circumstances of the victim
- The transport circumstances of the victim
- The communication circumstances of the victim
- Any current domestic violence restraining orders and their conditions applying to the victim
- Any current family law proceedings
- Any current criminal law proceedings
- Post-separation child care arrangements between parents
- Children's schooling and care arrangements

JCA referrals should form part of an informed consultation with the victim about their options – they may prefer to seek a Domestic Violence or Special Circumstances exemption, or be assessed for work capacity. Women report that JCA assessments often demonstrate ignorance about domestic violence and find their interactions patronising, humiliating, coercive and unwilling or unable to recognise their circumstances.

JCA providers should also have compulsory training in identifying and responding to family violence as part of their accreditation and such accreditation should be displayed to clients.

JCAs should have authority to grant exemptions solely based on the women's experience of family violence. As noted, Centrelink social workers should be the first referral point to grant exemptions, but we are aware that this frequently does not happen. In addition, where it does happen, Centrelink social workers advise women that they cannot renew such exemptions and that they have to refer to JCAs. JCAs in turn advise that they can't recommend ongoing exemptions without medical evidence. They usually refer the woman to their GP for a Centrelink medical certificate. This medical certificate must document what medical condition the woman is experiencing, so they usually suggest she mention to her doctor that she is experiencing anxiety/depression. Once again this medicalises the issue, making her pathology the problem, not the perpetrator's use of violence.

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

Yes. Too often women are forced to leave their employment as a direct response to their experience of family violence. They are forced to use up any sick or annual leave, meaning that this is then not

available to them to use for holidays or times of illness. In addition, women experiencing DV need flexibility in work hours – being able to take time off when needed to attend appointments for themselves and/or their children (eg medical, legal, court hearings, etc). In fact, it is not uncommon for women to have to appear in court repeatedly (both criminal justice and family) as matters get adjourned, part heard, etc. This then also impacts on women's income support and activity test as when they take time off they may not then meet the minimum number of hours to work and Centrelink then refers them to a JSP to look for further hours of work. It is all too apparent that C/Link, JCA and JSP staff have no or very little understanding of the dynamics and impacts of family violence on a woman's life and therefore she is routinely met with disbelief when she tries, yet again, to explain her situation.

The experience of disbelief (is she lying to get out of work?), stigma (one of those 'battered women'; pathologisation (mental illness) and judgement (what did she do to provoke him?) is a layer of systemic abuse which reinforces the messaging from perpetrators of domestic violence. Perpetrators exert emotional control over targets by:

- calling them liars and mad
- that they'll never survive without him
- that nobody will believe them
- that they cause his violence to them

This replication of abuse will not change without ongoing training and accreditation in responding to domestic and family violence for all workers across the income support and jobs services systems who deal with clients.

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

Yes – minimum of 20 days per year.

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

Leave should be granted with verification from a DV service, family support or counselling service or GP or medical specialist. The leave should be paid leave.

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

There should be a 'vulnerable employees advocacy service' as part of the Fair Work Office in every state whereby vulnerable employees (these might include domestic violence targets, people with disabilities or chronic illness, people with a first language other than English) could apply for support in negotiating flexibility arrangements with their employer appropriate to their circumstances.

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

Such clauses should provide that the employer will undertake to provide a safe environment for the employee and take all reasonable steps to protect the employee and provide for flexible leave and working hours to allow the employee to respond to their situation as needed.

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

Employers need to be brought to understand that NOT being responsive to the needs of targets of family violence is more expensive than being responsive. Better awareness and understanding of the dynamics and impacts of domestic violence can be built through training/education – at level of boards, management and staff and awards recognising best practice by employers.

Question 14 In practice, are existing terms in modern awards sufficient to respond to the needs of employees experiencing family violence?

No.

Question 15 Should s 139(1) of the *Fair Work Act 2009* (Cth) be amended to allow the inclusion of a matter related to family violence in the allowable matters in modern awards?

Yes.

Question 16 In practice, are employees' experiences of family violence being considered in unfair dismissal cases as part of the 'harsh, unjust or unreasonable' formulation?

No.

Question 17 If employees' experiences of family violence are not being raised or considered in unfair dismissal cases, in what other ways do victims of family violence raise the issue, where the violence caused or affected the termination of their employment?

The issue can surface when the victim makes a Centrelink claim and needs a certificate from their former employer to establish that they have not voluntarily left their job or caused their dismissal. This impacts on their access to income support.

Question 18 In practice, how effective are the current grounds under ss 351(1) and 772(1)(f) of the *Fair Work Act 2009* (Cth), where an employee has been discriminated against for reasons arising from their experiences of family violence?

They are not effective.

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

Yes.

Question 20 In practice, are ss 352 and 772(1)(a) of the *Fair Work Act 2009* (Cth) sufficient to protect employees who are experiencing family violence from having their employment terminated while they are absent from work as a result of a family violence-related or induced illness or injury?

No.

Question 21 What measures would improve employers' understanding of their obligations to protect the safety of workers threatened by family violence in the workplace?

Marketing the message to employers about their obligations could be the focus of a national campaign.

Question 22 Should the definition of ‘notifiable incident’ in the Safe Work Australia model Bill be amended to include acts or threats of violence, including family violence, directed toward workers? If so, how?

The definition of notifiable incidents should include directed actions, statements or events in the workplace which caused an employee to be fearful for their personal safety (that is they felt targeted). Such actions, statements or events may be by other staff or involving a person external to the workplace.

Question 23 Should family violence as an occupational health and safety risk be addressed in the regulations, a code of practice, or guidance material? How would its inclusion in any of these affect the likelihood that employers will be aware of, and responsive to, the occupational health and safety risks posed by family violence?

Yes. OHS is a well recognised workplace concept and inclusion in this context would underline the safety aspects of the issue.

Question 24 What steps should an employer be required to take in assessing and responding to risks associated with family violence entering the workplace? In what ways might workplace risks associated with family violence be minimised or eliminated?

Services which support employers’ safety audits should be developed or encouraged, and specifically include family violence risk assessment by examining:

- How employees’ personal information is gathered and managed and whether it seeks to identify any family violence risks
- Access to personal support for employees with family violence concerns
- Access to personal support for colleagues of employees with family violence concerns who become fearful for their own safety due to the threat to their colleague
- Protocols and training for responding to abusive phone-calls, repeated phone calls, verbal threats on the premises, physical threats on the premises, physical assaults on the premises, bringing of weapons to the premises
- Workplace design and security

Question 25 What requirements, suggestions or information should be included in regulations, codes of practice or guidance materials addressing family violence as an occupational health and safety risk?

Information needs to include:

- Prevalence and gender profiles of family violence perpetration and victimisation
- The costs and impacts of family violence to individuals, families, businesses and communities
- The dynamics and behaviours of family violence perpetration and victimisation
- Differentiated responses to perpetrators and victims
- How employers can help

Question 26 Are the powers of the court to set aside a superannuation agreement—whether a financial agreement or a pt VIIIAB financial agreement—under the *Family Law Act 1975* (Cth) adequate to protect people experiencing family violence? If not, how might these provisions be improved?

They could be improved by explicitly referring to family violence as defined within the Act.

Question 27 Should a trustee have any obligation to consider whether a request to transfer an amount to a spouse under the superannuation contribution splitting regime is being made as a result of coercion?

Yes

Question 28 Should a 'claw-back' provision be introduced so that a victim of family violence may seek to recover benefits that they have been coerced into transferring to their spouse under the superannuation contribution splitting regime?

Yes

Question 29 What mechanisms should be established to provide better protection to people experiencing family violence from financial abuse in the context of self-managed superannuation funds (SMSFs)? For example, should the jurisdiction of the Superannuation Complaints Tribunal be extended to cover complaints concerning SMSFs?

Yes

Question 30 Should the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to require that an applicant, as part of satisfying the ground of 'severe financial hardship', has been receiving a Commonwealth income support payment for 26 out of a possible 40 weeks (or some other period)?

Yes

Question 31 Should the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to provide a specific 'compassionate ground' to enable the early release of superannuation benefits to a victim of family violence?

Yes

Question 32 Are there any other ways in which Commonwealth employment, occupational health and safety or superannuation law could be improved to protect the safety of those experiencing family violence?

Ensure that the legislation regulations and guidelines which exist to protect victims of family violence are appropriately implemented with sufficient resourcing and appropriate training and accreditation. It would be appropriate to the size of the national problem with family violence to establish a central agency or commission to:

- Monitor global best practice in social- legal policy responding to family violence
- Regularly review legislation, guidelines and regulations and recommend reforms for improved responses to family violence (as indicated by reduced incidence of family violence, increased safety and recovery for victims, increased accountability and behaviour change for perpetrators)
- Monitor implementation of legislation, guidelines and regulations responding to family violence
- Conduct research and maintain data on systemic responses (eg employment, health, welfare, child protection, policing, housing, criminal law, family law) to family violence in Australia
- Develop training and accreditation resources for governments, agencies, industries and businesses to assist them in responding to family violence
- Conduct investigations and respond to complaints of family violence victims where they have experienced systemic failures from governments, agencies, industries and businesses in responding to family violence.