



Australian Domestic & Family Violence Clearinghouse

SUBMISSION SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

DOMESTIC VIOLENCE AS A GROUND OF DISCRIMINATION

The Australian Domestic and Family Violence Clearinghouse (ADFVC) congratulates the Commonwealth Government for the significant advances made to consolidate federal anti-discrimination laws in the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012. We believe that the addition of protections for sexual orientation, gender identity and same sex relationship status is essential if human rights legislation is to properly reflect contemporary human rights needs and protections.

The ADFVC is, however, disappointed that the Exposure Draft does not include domestic violence as a new protected attribute in section 17 of the Bill. This inclusion has been expressly ruled out by the Attorney-General and this position is made clear in the Bill's Explanatory Notes (1.4e, 1.5a, 4.1, 5a, 5.6 with Recommendation 21 of the Commission being rejected). This omission is particularly concerning given that paragraph 85 of the Commonwealth's Consolidation of Anti-Discrimination Laws Discussion Paper 2011 acknowledges that there is currently 'no specific protection for victims of domestic violence in either Commonwealth or state or territory anti-discrimination law' (p. 24).

The inclusion of 'status as a victim of domestic violence' in the list of attributes protected from discrimination is necessary to give effect to our international obligations to uphold human rights including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Labour Organisation Convention No. 111, Discrimination (Employment and Occupation) Convention, 1958 (ILO C111) as gender based violence¹ is recognised as discrimination² in these international instruments.

Article 2 of CEDAW states that Parties are under an obligation to enact legislation that prohibits discrimination in all fields of women's lives and throughout their lifespan. Article 2 further imposes on State Parties a due diligence obligation to prevent, investigate, prosecute and punish acts of gender based violence and discrimination.

ILO C111, Article 2 states 'Each Member for which this convention is in force undertakes to declare and pursue a national policy designed to promote, by methods *appropriate to national conditions*

¹ Article 2 of the Declaration on the Elimination of Violence Against Women, Resolution 48/104 of 20 December 1993, UN General Assembly states 'Violence against women shall be understood to encompass, but not be limited to, the following:

(a) Physical, sexual and psychological violence occurring in the family...'

² General Recommendations No.19 and No.28, the CEDAW Committee

*and practise*³, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.’

We submit that in the Australian context it is appropriate and timely for the proposed Human Rights and Anti-Discrimination Bill 2012 to include the personal characteristic ‘status as a victim of domestic violence’ in the list of attributes protected from discrimination.

While it may be argued by some that the recent success in propagating industrial entitlements for victims of domestic violence renders the inclusion of ‘status as a victim of domestic violence’ in the list of attributes protected from discrimination unnecessary, the ADFVC submits that the inclusion is absolutely necessary as employment legislation, at a federal as well as state and territory level, does not and cannot adequately protect employees from discrimination on the ground of domestic violence.

This submission strongly urges the government to include the personal characteristic ‘status as a victim of domestic violence’ in the list of attributes protected from discrimination in the proposed Bill.

Whilst this submission focuses on discrimination in the workplace; due to the nature of the Safe at Home, Safe at Work Project which advocates for industrial rights and entitlements for victims of domestic violence; the ADFVC strongly supports anti-discrimination legislation for victims of domestic violence in all areas of life.

The consolidation of the Commonwealth anti-discrimination legislation presents a timely and unique opportunity to address the rights of Australians who experience domestic violence.

SUPPORT FOR INCLUSION OF DOMESTIC VIOLENCE

There has been strong support in Australia since the 1970’s⁴ for public policy and legislation to adequately protect victims of domestic violence from discriminatory conduct and has received strong support from various stakeholders:

- Our submission to the Discussion Paper in January 2012 was supported by eighty-five violence against women peak bodies, organisations and services; legal practitioners; academics; employment advice services and government agencies;
- Support for the inclusion was expressed in the Australian Council of Trade Union Domestic Violence Policy passed at Congress in May 2012, and is Australian Labor Party Policy (December 2011); and
- During her study tour of Australia, the UN Special Rapporteur on Violence Against Women, Ms Rashida Manjoo, expressed support for domestic violence being incorporated within legislation as a potential new ground of discrimination.

³ My italicisation

⁴ As evidenced by the National Plan to Reduce Violence Against Women and their Children

This consolidation process presents a rare opportunity for the government to introduce significant protections by including the personal characteristic 'status as a victim of domestic violence' as a protected attribute in anti-discrimination law.

We submit that carriage of the issue by mainstream national agencies to acknowledge discrimination which occurs on the grounds of domestic violence is now timely and appropriate, given the burgeoning response to the issue as evidenced by over 150 enterprise agreements (EAs), award variations and directions that now contain rights and entitlements for employees who are victims of domestic violence.

A further imperative is the requirement to implement the protections in informed workplaces, a process requiring education and information resources. The Safe at Home, Safe at Work Project, funded by DEEWR since July 2010 has been tasked with promoting the introduction of domestic violence clauses and the development of information resources such as the website www.dvandwork.unsw.edu.au and approved training packages. Project funding ends in June 2013, requiring the take up of these responsibilities by mainstream national agencies.

Domestic violence entitlements are now neither new nor untested in Australia and it is now appropriate to ensure that the human rights needs of all Australians are protected and safeguarded by our National Human Rights Institutions.

SAFE AT HOME, SAFE AT WORK PROJECT AND ENTERPRISE BARGAINING AGREEMENTS

Through the Safe at Home, Safe at Work Project, the ADFVC has been specifically concerned with the need for workplace protections for employees who are victims of domestic violence. This project has sought a guaranteed and standard right to protection at the workplace after the ADFVC found that a voluntary system of workplace policy had failed to provide widespread and sustainable change in the Australian workplace⁵.

The goal of the project is for the impact of domestic violence at work to be understood as an industrial issue: one that affects attendance, performance and safety and puts jobs at risk⁶ for those that most need to maintain economic independence⁷. The project has successfully mobilised employers and unions to pilot industrial rights and entitlements for employees who are victims of domestic violence and now seeks to have protections against the workplace impact of domestic violence incorporated into national law and implemented by national agencies such as the Fair Work Ombudsman, Safe Work Australia and the Australian Human Rights Commission.

Since the first domestic violence clause was negotiated through collective bargaining two years ago, over one million employees in Australia are now able to access protections including paid domestic

⁵ Murray, S, & Powell, A (2008) *Working It Out: domestic violence issues and the workplace*, Issues Paper 16, ADFVC, Sydney

⁶ 2011 *Safe at Home, Safe at Work? National Domestic Violence and the Workplace Survey* (National Workplace Survey), conducted by ADFVC in conjunction with Micromex

⁷ Section 3.2.1 ADFVC Submission to Consolidation of Commonwealth Anti- Discrimination Laws Discussion Paper, *Improving Protection for Victims of Domestic Violence*, 31 January 2012

violence leave⁸. This progress has been recognised as international best practice⁹ and should be a source of great pride to the Australian people, unions, employers and governments.

SHORTCOMINGS OF THE ENTERPRISE BARGAINING AGREEMENT APPROACH

1. LIMITED PROTECTION FROM ADVERSE ACTION ON THE BASIS OF BEING A VICTIM OF DOMESTIC VIOLENCE

Whilst over a million employees currently have access to some domestic violence entitlements through Enterprise Agreements (EA) and other industrial instruments, the majority of these employees are not safeguarded against adverse action as a result of being a victim of domestic violence as all clauses do not comprehensively adhere to the 7 key principles¹⁰ as recommended by the Safe at Work, Safe at Home Project and endorsed by the ACTU.

Currently out of the 93 organisations with domestic violence entitlements, only 40 expressly commit to not engaging in adverse action on the basis that the employee is a victim of domestic violence. Out of the 1,097,890 employees with access to domestic violence workplace entitlements only 19,376 employees are protected from adverse action.

Sc 340 of the *Fair Work Act 2009* (Cth) (*'Fair Work Act'*), protects workers from adverse action on the basis that:

they have a workplace right; or has, or has not, exercised a workplace right; or proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or...because...[another] person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the...[worker's]...benefit, or for the benefit of a class of persons to which the...[worker] belongs.

Therefore under the majority of current agreements, a worker may be protected from adverse action on the basis of their workplace right, such as the right to leave. However, they may not be protected from adverse action on the basis of being a victim of domestic violence.

2. NOT ALL WORKERS ARE COVERED BY ENTERPRISE BARGAINING AGREEMENTS

The scope of EAs is limited as their coverage does not extend to all Australian workers. Currently federal EAs only cover 2.33 million employees¹¹ out of a workforce of 11,546,400¹² with those excluded either relying on Modern Awards and/or on the National Employment Standards (NES), on common law contracts or in state jurisdictions.

Currently, out of the 11,546,400 people in employment in Australia only 9.5% have access to any domestic violence entitlements as most EAs and other industrial instruments do not include a

⁸ See appendix 1 - total number of employees covered by domestic and family violence entitlements to date

⁹ European Council of Trade Unions Action Plan on Gender Equality, 6-7 March 2012

¹⁰ See appendix 2 – Key Principles as endorsed by the ACTU Congress 2012 in their Work Life Policy

¹¹ Department of Education, Employment and Workplace Relations (DEEWR), Trends in Federal Enterprise Bargaining September Quarter 2012 Report

¹² Labour Force November 2012, Australia Bureau of Statistics, (cat. no. 6202.0)

domestic violence clause. Currently EAs with domestic violence clause only make up a negligible proportion of the 23 230¹³ federal EAs.

Federal and state governments who are signatories to the National Plan to Reduce Violence Against Women and their Children, have shown leadership by providing domestic violence rights and entitlements to their own staff. Governments across Australia also employ 90.23% of workers who have access to domestic violence entitlements.

Whilst an increasing number of unions supported by the ACTU are logging domestic violence clauses in the private sector, take up of the clause in non-government sectors has been slower due to the sheer number of current agreements which cover fewer employees.¹⁴

Quantitative bargaining outcomes will be more protracted, now that major government employers have implemented domestic violence rights and entitlements.

NATIONAL EMPLOYMENT STANDARDS

The Australian Law Reform Commission Report on Family Violence and Commonwealth Employment Law 2011 recommended that the Australian Government consider amending the National Employment Standards to provide paid family violence leave (R.17-2). The Fair Work Review, in our opinion, also left room for the Australian Government to act on this matter. However, express protection for victims of domestic violence needs to be included in consolidated federal discrimination law, to give effect to any amendments to the *Fair Work Act*.

1. ADVERSE ACTION (DISCRIMINATION)

Section 351 of the *Fair Work Act 2009* (Cth) (*'Fair Work Act'*) refers to 'discrimination' and prohibits employers from taking 'adverse action' against an employee or prospective employee because of certain prescribed attributes. These include 'sex', 'physical or mental disability' and 'family or carer's responsibilities'.

These provisions do **not** provide comprehensive coverage for victims of domestic violence who experience discrimination, as the form of discrimination experienced by victims of domestic violence may not fit within these attributes. For example, a woman who experiences an adverse action within the workplace such as demotion or termination of her employment because she is forced to take time off work to attend a court case against an abusive partner, has no means of redress under section 351; she has not been discriminated against on the basis of her sex, her carer responsibilities or a disability.

Further, section 351(2) limits the operation of this section to applicants who have corresponding protection under the relevant discrimination Act in force federally or in their state or territory. In other words, federal, state and territory anti-discrimination laws underpins the *Fair Work Act* protections.

¹³ Department of Education, Employment and Workplace Relations (DEEWR), Trends in Federal Enterprise Bargaining September Quarter 2012 Report

¹⁴ See appendix 1 - total number of employees covered by domestic and family violence entitlements to date, for a sectoral analysis

2. ADVERSE ACTION (WORKPLACE RIGHTS)

Sections 340 and 341 of the *Fair Work Act* protect employees against adverse action such as termination of employment where an employee exercises or proposes to exercise a 'workplace right'. This section relies on the assumption that employees already have access to a 'workplace right' such as a domestic violence clause in an EA. This severely limits the scope for victims of domestic violence to utilise this section.

Sections 342(1)(c) and (d) also have limited application as 'status as a victim of domestic violence' is not mentioned in the list of attributes to be protected from discrimination in section 351. It would therefore be challenging for an employee to prove domestic violence was the grounds for which their position was altered 'to the employee's prejudice' or that it was the reason for why an employer 'discriminates between the employee and other employees'.

3. UNFAIR DISMISSAL

Unfair dismissal protections in the *Fair Work Act* may provide redress for workers sacked as a result of the perceived impact of domestic violence in the workplace where Fair Work Australia may judge a dismissal as harsh, unjust or unreasonable. For example, the Safe at Work, Safe at Home Project is aware of one case where a club sacked an employee who was being harassed behind the bar by an ex-partner who was also a club member. The reason given for the employee's dismissal was that the worker had allowed their personal life to interfere with their job. Supported by her union, the employee was able to proceed with an unfair dismissal claim that was settled in conciliation.

However for most employees, particularly those in precarious employment, there are several limitations posed by the unfair dismissal protections. These limitations were well documented in our first submission:

'access to the federal statutory unfair dismissal regime is only available to applicants who earn under the high income threshold or are covered by a modern award or enterprise agreement; have been employed for a 'minimum employment period'; and in the case of casual workers¹⁵, were employed on a 'regular and systemic basis' through the qualifying period and had a 'reasonable expectation of continuing employment'. Once these pre-conditions are satisfied, the applicant must demonstrate that the dismissal was 'harsh, unjust or unreasonable' and not a case of genuine redundancy. This further demonstrates the need for express protection from discrimination on the basis of domestic violence victim status' (ADFVC submission, 31 January 2012, p. 14).

¹⁵ Victims of domestic violence are more likely to have a disrupted work history, and more likely to be employed on a casual basis than persons with no experience of violence. [Suzanne Franzway, Carole Zufferey and Donna Chung, *Domestic Violence and Women's Employment*, (Paper presented at Our Work, Our Lives 2007: National Conference on Women and Industrial Relations, 20 – 21 September, 2007) citing Jody Raphael, 'Domestic Violence as a Welfare-to-Work Barrier: Research and Theoretical Issues' in Renzetti et al, *Sourcebook on Violence Against Women* (California, Sage Publications, 2001) at 443-457] One quarter of all Australian employees are casually employed, with women employed under these precarious arrangements at much higher rates than men, and especially women who experience family violence [ACTU 2012, *Lives on Hold: Unlocking the potential of Australia's workforce, Independent Inquiry into insecure work*].

Employees not eligible for unfair dismissal protections under the *Fair Work Act* will only have clear redress against discrimination if 'status as a victim of domestic violence' is incorporated into the list of attributes protected from discrimination.

ANTI-DISCRIMINATION LEGISLATION

We believe we have established the limitations of discrimination provisions in employment law for the victims of domestic violence. Moreover, we have established that domestic violence is an issue that cuts across different aspects of people's lives; it is a fundamental human rights issue which demands to be treated alongside other human rights issues.

The existing grounds of discrimination in the Draft Exposure Bill are inadequate for the victims and survivors of domestic violence. Some victims may be able to access protection on the grounds of *sex*, *disability* or other personal characteristics. However, there is a clear gap in the law for persons who have been subject to domestic violence but who do not proscribe to one of these protected attributes.

In the absence of an express, broad protection against discrimination based on 'domestic violence victim status' in the federal anti-discrimination legislation, vulnerable workers will continue to experience discrimination, in the workplace and elsewhere.