



Australian Domestic & Family Violence Clearinghouse

Submission to Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper

Improving Protection for Victims of Domestic Violence

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81. Women's Council for Domestic and Family Violence Services (WA)
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1. INTRODUCTION

This submission has been prepared by the Australian Domestic and Family Violence Clearinghouse (ADFVC), a project of the Centre for Gender Related Violence Studies at the University of New South Wales.

The ADFVC is a national, non government organisation, providing high quality information about domestic and family violence issues and practice. The primary goal of the ADFVC is to prevent domestic and family violence.

Our ongoing 'Safe at Home, Safe at Work Project', funded by the Commonwealth Department of Education, Employment and Workplace Relations, and campaign with unions and employers around promotion of domestic violence provisions in industrial instruments has informed this submission. It is substantially based on a current Working Paper by Belinda Smith and Tashina Orchiston¹ and draws on research undertaken by ADFVC on the impact of family violence on women's financial security and safety.²

2. OUTLINE OF RECOMMENDATIONS

Paragraph 85 of the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper ('Discussion Paper') notes that earlier submissions to the Consolidation have recommended that victims of domestic violence be protected from unlawful discrimination.

We strongly recommend that an express protection for victims of domestic violence is included in the consolidated Act. There are two key reasons why this is necessary: (i) to address the double-harm experienced by victims of domestic violence who are discriminated against on the basis of their experience of violence in addition to experiencing the violence itself; and (ii) to streamline existing protections, providing for clarity and consistency and ameliorating the extent to which existing legal protections are inadequate.

- Recommendation 1: the personal characteristic 'status as a victim of domestic violence' should be included in the list of attributes protected from discrimination, across all areas of life.
- Recommendation 2: duty holders should have a standalone obligation to make reasonable adjustments up to the point of undue hardship.
- Recommendation 3: 'status as a victim of domestic violence' should include current and former victims and their associates.
- Recommendation 4: 'domestic violence' should be defined as per the Australian Law Reform Commission's recommended definition, as set out in the final report of its Family Violence Inquiry.

¹ Belinda Smith and Tashina Orchiston, *Domestic Violence Victims at Work: The Role of Anti-Discrimination Law* (Working Paper, Sydney Law School, University of Sydney, 12 December 2011). Available at: http://sydney.edu.au/law/about/staff/BelindaSmith/Smith_Orchiston_DV_and_Anti_Discrimination_Law_Working_Paper_12Dec2011_revised.pdf. Used with authors' permission.

² Rochelle Braaf and Isobelle Barrett Meyering, *Seeking Security: Women's Economic Wellbeing During and Following Domestic Violence* (ADFVC, March 2011). Available at: www.austdvclearinghouse.unsw.edu.au/financial_security.htm.

- Recommendation 5: the relationships covered under the definition of domestic violence should extend to dating relationships, whether sexual in nature or not.
- Recommendation 6: complainants should not have to identify which attribute is the reason for the discrimination they have experienced; it should be sufficient to demonstrate that they were discriminated against on the basis of one or more of the protected attributes.

3. DISCRIMINATION AGAINST VICTIMS OF DOMESTIC VIOLENCE

3.1 DEFINING DOMESTIC VIOLENCE

Domestic violence is pervasive in all Australian communities, extending across cultural, ethnic and socioeconomic groups.³ The most recent ABS *Personal Safety Survey* in 2005 found that 15 percent of Australian women had experienced physical or sexual violence from a previous partner, and 2.1 percent from a current partner, further 4.9 percent of Australian men had experienced violence from a previous partner and 0.9 percent from a current partner, since the age of fifteen.⁴ The *Personal Safety Survey* does not provide specific data on the incidence of violence perpetrated by non-partner family members or the incidence of non-physical forms of abuse, suggesting that the total incidence of family violence is much higher.

Domestic violence involves physical injury and a wide range of abusive behaviours designed to control the victim, including psychological, financial and spiritual abuse, and social isolation.⁵ Domestic violence can be cyclical in nature and financial and social push/pull factors constrain victims' ability to leave violent relationships.⁶ Ultimately, for many victims it takes several attempts to finally leave a violent relationship.⁷ Domestic violence is the leading preventable cause of death, injury and illness for Australian women under 45 years, a higher health risk for women in this age group than smoking and obesity, and can have long-term impacts on victims' health and wellbeing.⁸

3.2 WORKPLACE DISCRIMINATION

3.2.1 IMPACT OF DOMESTIC VIOLENCE ON WORK

There is evidence that over sixty percent of victims of domestic violence are in paid work and violence has a damaging, yet often hidden, impact on victims' working lives.⁹ The 2011 *Safe at Home, Safe at Work? National Domestic Violence and the Workplace Survey (National Workplace Survey)*, conducted by ADFVC in conjunction with Micromex, found that thirty percent of 3,611 respondent workers had experienced some

³ This submission uses the term 'domestic violence' interchangeably with 'family violence'.

⁴ ABS, *Personal Safety Survey* (2006) at 11. Additionally, Mouzos and Makkai found that 34 percent of Australian women had experienced physical or sexual partner violence, and up to 40 percent had experienced at least one form of controlling behavior, see Jenny Mouzos and Toni Makkai, *Women's experiences of male violence: findings from the Australian component of the International Violence Against Women Survey (IVAWS)* (Canberra, Australian Institute of Criminology, Research and Public Policy Series 56, 2004) at 44, 48.

⁵ ALRC, *Family Violence - A National Legal Response: Final Report* (ALRC Report No 114, October 2010) at para [5.9].

⁶ For further discussion see Braaf and Barrett Meyering, above n 1. See also Sascha Griffing et al, 'Domestic Violence Survivors' Self-Identified Reasons for Returning to Abusive Relationships' (2002) 17 *Journal of Interpersonal Violence* 306 at 307-8.

⁷ See eg, Michael Strube, 'The Decision to Leave an Abusive Relationship: Empirical and Theoretical Issues' (1988) 104 *Psychological Bulletin* 236.

⁸ VicHealth, *The Health Costs of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence* (Melbourne, January 2004) at 10.

⁹ ABS, above n 4 at 23.

form of domestic violence over the course of their lifetime, with 25 percent having experienced it more than 12 months ago and five percent within the past 12 months.¹⁰

Of the respondents who had experienced domestic violence, nearly half reported that it had affected their capacity to get to work, through either physical restraint, hiding/stealing keys or transportation money or refusal/failure to show up to care for children.¹¹ Nineteen percent of respondents who had experienced domestic violence reported that the violence had impacted on them in the workplace; abusive calls and emails and the abusive person attending the workplace were the most common form of abuse experienced.¹² The impacts on workers included feeling distracted, tired or unwell, having to take time off and being late to work.¹³

In many instances, the abusive person targets the victim at work or their capacity to get to work in order to force them to resign or abandon their job, or get them fired or disciplined. Once the victim loses their job, it can be difficult - if not impossible, to leave the violent relationship: without an independent income source, the victim is unlikely to have the means to pay rent or mortgage repayments and other necessary expenses.¹⁴ This is supported by range of research findings: a United States Government review found that 24 – 52 percent of victims reported losing a job, at least in part, due to domestic violence.¹⁵ Women who are victims of domestic violence have more disrupted work histories, on average have 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.¹⁶ Income security and employment are identified as a key structural supports to women leaving violence relationships.¹⁷

3.2.2 IMPACT OF DOMESTIC VIOLENCE ON ECONOMY

The negative impacts of domestic violence on victims' employment outcomes has broader economic ramifications: Access Economics estimated the total cost of lost productivity associated with domestic violence at \$484 million in 2002/3, set to rise to \$609 million by 2021/2.¹⁸ This includes costs associated with both victims and perpetrators' absenteeism, misuse of work resources by perpetrators and retraining and rehiring costs due to staff turnover.

3.2.3 TYPES OF WORKPLACE DISCRIMINATION EXPERIENCED

Victims of domestic violence experience both direct and indirect forms of discrimination in the workplace. The following case studies collected from Queensland Working Women's Service and Working Women's Centre SA exemplify situations where victims of domestic violence have been sacked or bullied out of their

¹⁰ Ludo McFerran, *National Workplace Survey* (ADFVC, October 2011) at 6, table 2. This study is the first of its kind conducted in Australia, providing specific data on the impact of domestic violence on working Australians. Also note that these rates are higher than ABS results because of concentration of ages in working years and broader definition of violence used in the survey design.

¹¹ Ibid at 8, table 6.

¹² Ibid at 10.

¹³ Ibid.

¹⁴ The cost of seeking post-separation legal advice for non-legally aided matters (for example, property division) may contribute to financial difficulty.

¹⁵ United States General Accounting Office, *Domestic Violence: Prevalence and Implications for Employment Among Welfare Recipients* (Washington DC, GAO Publication No B-280099, 24 November 1998) at 8 (citing the results of three earlier studies). Available at: www.gao.gov/products/HEHS-99-12.

¹⁶ 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.

¹⁷ Shirley Patton, *Pathways: How Women Leave Violent Men* (Government of Tasmania, 2003) at xviii. Available at: www.dpac.tas.gov.au/data/assets/pdf_file/0014/47012/pathways_how_women_leave_violent_men.pdf.

¹⁸ Access Economics, *The Cost of Domestic Violence to the Australian Economy: Part I* (Commonwealth of Australia, Canberra, 2004) at 43.

jobs due to negative assumptions and prejudice, or in one example, as punishment for divorcing the perpetrator. All identifying information has been removed.

Mary

Mary had worked for 2 months and in that time had been promoted to Manager. Her husband had come in to the workplace one day and caused problems. After another incident at home she rang her boss to say she would be in a bit late as she was at the police station reporting a domestic violence incident and had been delayed. He sacked her as he said she was just 'too difficult'.

Anna

Anna had worked for her sister in law for 15 years. Anna divorced her husband following domestic violence. When she spoke about the domestic violence to her sister in law (who was also her boss) she was sacked.

Donna

Donna disclosed to her boss that she was experiencing domestic violence. Donna had been head hunted for her position but once she revealed the domestic violence she was systematically bullied out of her position.

Jessica

Jessica received a threatening call from her ex and had to pack up and leave her workplace at short notice. Her employer sacked her and claimed she'd abandoned her employment, refusing to pay her notice period, even after she explained the reason why she had left at short notice.

Specific negative assumptions and stereotyping about victims of domestic violence include that they are unreliable, likely to underperform or bring danger or disruption into the workplace. These assumptions are likely to reflect community attitudes towards domestic violence and specifically, stigma attributed to victims, who are perceived as complicit in their own abuse. An extensive 2009 survey found very low levels of understanding around the issue of why women remain in violent relationships, with 80 percent of respondents agreeing with the statement: 'it's hard to understand why women stay in violent relationships' and almost 50 percent of community respondents believe that a woman can leave a violent relationship if she wants to.¹⁹

Some victims of domestic violence may need special measures from their workplace for reasons associated with the abuse they have experienced and its impacts on their performance, safety or productivity. Safety measures and other accommodations provide worker victims with the necessary support to stay in their jobs, therein maintaining economic stability and critically improving their chances of leaving the violence relationship.²⁰

The types of workplace supports required vary according to the worker's role and their organisation but include changes to location, schedule or hours to avoid contact with the perpetrator who may know their movements and stalk or attack them on their way to or from work; reduced hours to manage their workload when coping with the physical or psychological effects of the abuse and/or access to paid leave, to attend court and/or appointments with domestic violence services, medical professionals, child/ren's schools and/or financial institutions – all of which are typically closed outside regular business hours.²¹ Other modifications that victims may need include allowing another worker to answer the victim's work phone or manage the counter where the victim is in a customer service role and easily accessible to the public (and by extension, the perpetrator).

¹⁹ VicHealth, *National Survey on Community Attitudes to Violence Against Women 2009* (Melbourne, March 2010) at 49.

²⁰ See further, www.dvandwork.unsw.edu.au.

²¹ Note that the *National Workplace Survey* found more than 1/3 of respondents who had experienced domestic violence had reported the violence to police and a quarter had obtained a domestic violence protection order, see *National Workplace Survey*, above n 10 at 15. Ordinarily this process requires taking time off work to go to court on at least one occasion.

Unfortunately, many workers are unwilling or unable to ask for access to these measures even where they desperately need them due to fear, shame and embarrassment about disclosing their experience of domestic violence and the perception they will be judged negatively, disbelieved and/or blamed for the situation.²² Further, victims may fear they will not receive assistance, or in a worst case scenario, be disciplined or fired.²³

Protection from discrimination on the basis of status as a victim of domestic violence would improve the likelihood that victims will disclose domestic violence where it is adversely impacting on them in the workplace, allowing them to get help and stay safely in their jobs. It would serve an important normative function, signalling that domestic violence is unacceptable and acknowledging the harm experienced by victims can be exacerbated by negative attitudes and inflexible policies.

3.3 HOUSING DISCRIMINATION

Victims of domestic violence also experience discrimination in the area of housing/accommodation. This issue was identified in the Commonwealth's Partnerships Against Domestic Violence research report: *Home Safe Home: The Link Between Domestic and Family Violence and Women's Homelessness* (Home Safe Home), based on consultation with 161 stakeholders and interviews with 52 women.²⁴ Home Safe Home found discrimination against victims of domestic violence in the private housing rental market and recommended that the real estate industry engage in discussions to address the issue.²⁵ However, the problem persists.

According to interview data gathered as part of the ADFVC's 2011 Financial Security research project, victims of domestic violence continue to face discrimination in finding housing due to prejudice and negative assumptions by landlords. In the words of one interviewee who had experienced domestic violence:

...when I did finally find somewhere [to rent] the woman clicked straight away. She was a private landlord and she clicked straight away that it was DV [domestic violence] and she didn't want to have a bar of me. In the end I told her, 'No, me and my husband have a wonderful relationship, we just don't live together'. I had to lie to her to actually get housing, and because of our assets I can't go into [public housing]. Even though I don't have a cent of it. I don't have two cents to my name, but [the public housing authority] won't look at me because they say, 'You're going to get a settlement'.²⁶

Another interviewee, a worker in a domestic violence support service, reiterated the difficulties faced by victims in obtaining rental accommodation post-separation:

'[w]e always tell women not to tell [landlords] that they're living in a [domestic violence] shelter because they're going to be discriminated against, because they think that they're going to damage the place.'²⁷

Victims may also lose housing as a consequence of experiencing domestic violence, in a recent speech Deputy Sex Discrimination Commissioner Andrea Durbach stated:

²² Ibid at 13.

²³ Ibid at 14.

²⁴ Donna Chung, Rosemary Kennedy, Bev O'Brien and Sarah Wendt, *Home Safe Home: the Link Between Domestic and Family Violence and Women's Homelessness* (Partnerships Against Domestic Violence, Commonwealth of Australia, November 2000).

²⁵ Ibid at 8.

²⁶ Unpublished data gathered as part of Financial Security research study conducted by ADFVC. See further, final report: Braaf and Barrett Meyering, above n 1.

²⁷ Ibid.

'[v]ictims and survivors may be...evicted from housing because of the abusive and threatening behaviour of their partner'.²⁸

Obtaining safe housing is a key factor in escaping violence.²⁹ Discrimination protection would facilitate better housing outcomes for victims of domestic violence by combating negative attitudes and assumptions held by realtors about victims that serve as potential barriers to victims successfully obtaining and maintaining housing.

4. LEGAL PROTECTIONS IN OVERSEAS JURISDICTIONS

A number of United States jurisdictions provide express protection from workplace discrimination for victims of domestic violence: Oregon, Illinois, New York State, New York City, Westchester County, Rhode Island and Hawaii.³⁰ Illinois, New York City and Hawaii also impose a duty on workplaces to provide reasonable accommodation to victims, up to the point of undue hardship. At least one United States jurisdiction has equivalent protection in relation to housing discrimination.³¹ Additionally, many states have implemented legislation to protect victims from arbitrary dismissal or unfair treatment in relation to taking time off to go to court for domestic violence matters.³²

The Philippines has an express workplace discrimination protection for female employees who experience domestic violence and have to take leave to attend court in relation to a domestic violence protection order.³³ This protection extends to employees who take leave to attend court as a support person for a victim of domestic violence.³⁴

Spain has extensive workplace protections for female victims of domestic violence including the right to paid leave, reduction or reorganisation of working hours, temporary suspension of employment with right to return to work and relocation of the affected worker.³⁵

Internationally, the International Labour Organisation (ILO) Bureau for Gender Equality recognises gender-based violence (including domestic violence) as gender inequality, posing a barrier to decent work.³⁶ It acknowledges the 'immediate' and 'long-term' disruption caused by domestic violence for victims of violence and for workplaces, and that there are strong human rights and economic incentives for the elimination of gender-based violence in the context of work.³⁷

²⁸ Andrea Durbach, 'Domestic Violence Discrimination and the Consolidation of Commonwealth Anti-Discrimination Laws' (Presentation at Safe at Home, Safe at Work Conference, Melbourne, 5-6 December 2011). Available at: www.hreoc.gov.au/about/media/speeches/sex_discrim/2011/20111205_domestic_violence.html.

²⁹ Patton, above n 17 at xviii.

³⁰ Or. Rev. Stat. §§ 659A.290 Illinois Comp. Stat. § 180/30(B)(3); N.Y. Exec. Law § 296(15); NYC Administrative Code § 8-107.1(3)(a); Westchester County Code §§ 700.03; R.I. Gen. Laws § 12-28-10; Haw. Rev. Stat. § 378.2.

³¹ See eg, Westchester County Code §§ 700.05.

³² See eg, Massachusetts: Mass Gen. Laws Ch. 258B, § 3(l) and Mass Gen. Laws § 268-14(b), Colorado: Colo. Rev. Stat. § 24-34-402.7 and California: Cal. Lab. Code §§ 230 & 230.1. See further, Lisalyn Jacobs and Maya Raghu, 'The Need for a Uniform Federal Response to the Workplace Impact of Interpersonal Violence' (2010) 11 *Georgetown Journal of Gender and the Law* 593 at 601.

³³ Anti-Violence Against Women and Their Children Act of 2004 (Act No 9262, 8 March 2004), section 43.

³⁴ *Ibid.*

³⁵ Workers' Statute Act, as amended by Organic Act 1/2004 of 28 December on Integrated Protection Measures Against Gender Violence, article 21. See also equivalent public sector legislation.

³⁶ See generally Adrienne Cruz and Sabine Klinger, *Gender-Based Violence in the World of Work: Overview and Selected Bibliography* (Working Paper No 3/2011, Geneva, International Labour Office, 2011).

³⁷ *Ibid* at 13.

5. CURRENT FEDERAL PROTECTIONS

There are significant gaps in existing Commonwealth anti-discrimination and employment law protections, which fail to adequately address the needs of victims of domestic violence. This section briefly details relevant applicable discrimination protections: sex, family responsibilities and disability and statutory remedies under the *Fair Work Act 2009* (Cth) (FW Act): general protections and unfair dismissal, demonstrating their failure to consistently address the harm experienced by victims of domestic violence.

5.1 SEX DISCRIMINATION

The *Sex Discrimination Act 1984* (Cth) (SDA) prohibits both indirect and direct discrimination on the ground of sex. Domestic violence is generally understood as gender-based violence that disproportionately impacts on women. However, despite it being a gendered experience, this does not necessarily mean that disadvantage experienced by victims of domestic violence in the workplace is actionable as sex discrimination.

5.1.1 DIRECT SEX DISCRIMINATION

To use the current ground of direct sex discrimination, a victim would need to prove that the stereotyping or assumptions were made because of the victim's sex not because of her status as a victim of domestic violence. While there may be some intersectionality where a female victim of domestic violence experiences discrimination that is both because she is female and a victim of domestic violence, only the sex discrimination component is actionable and would require specific proof of the sex discrimination, separate from the domestic violence discrimination.

A case where an employer or realtor acts not merely out of prejudice or stereotyping, but concludes that the victim claimant is unreliable, or likely to underperform based on actual past behaviour would be even more difficult to prove, even if the reason for the past conduct was related to the domestic violence. This is because the direct discrimination provisions merely require that duty holders treat men and women the same. No special adjustments or accommodation are required. For example, many working victims experience difficulties getting to work. The prohibition on direct discrimination only requires an employer to treat the employee the same as male workers who behave in a similar way, regardless of the reason.

5.1.2 INDIRECT SEX DISCRIMINATION

Under the current ground of indirect sex discrimination, duty holders have an obligation to consider how the same treatment of all employees might disadvantage protected groups and ensure that facially neutral requirements, conditions and practices are reasonable. However, this provision is framed only to protect the groups that are identified in the legislation. Duty holders are not required to accommodate specific subsets of women (or men), so a female victim would need to prove that the requirement or condition disadvantaged women as a group, not merely the subset of women who experience domestic violence.

There are many workplace requirements, conditions and practices that might affect victims of domestic violence but not necessarily women in general. These include fixed rules about not changing schedules, work location or contact details, which victims of domestic violence may need for safety reasons or the requirement that personal or annual leave is only available with a certain number of days notice, which may be impossible for a victim of domestic violence to satisfy if they are required to attend court urgently to obtain a domestic violence protection order.

Finally, it should also be noted that male victims and victims who do not identify as either male or female are almost wholly excluded from protection under the ground of sex.

5.2 FAMILY RESPONSIBILITIES DISCRIMINATION

Some victims of domestic violence have children and other caring responsibilities that can be a factor in the nature of the violence they experience and in the difficulties they face in escaping the violent relationship. Caring responsibilities can also be an important aspect of the difficulties faced by victims in attending work, but in ways that are not necessarily shared by other workers with caring responsibilities. As stated above, the *National Workplace Survey* found a significant number of worker victims of domestic violence had been prevented from getting to work by an abuser, including instances where the abuser failed to turn up to provide care for dependent children as pre-arranged, leaving the victim to find last minute alternative childcare arrangements or miss work.

The SDA prohibits employers from discriminating against workers with family responsibilities in respect of hiring, terms and conditions, promotions and termination. However, while this ground covers personal care of children, it is unlikely to extend to situations where a victim needs to attend court to apply for a domestic violence protection order to protect children or other members of the household who may also be at risk.³⁸ Nor is it likely cover other interactions with the criminal justice system that might be indirectly about caring responsibilities, such as a parent providing evidence in criminal proceedings against the perpetrator in order to escape a violent relationship and protect dependents from future violence.

Further, protection on this ground is limited to direct discrimination and does not require reasonable adjustments to accommodate workers with family responsibilities, let alone workers whose family responsibilities arise out of domestic violence.

5.3 DISABILITY DISCRIMINATION

The *Disability Discrimination Act 1992* (Cth) (DDA) provides some protection for victims of domestic violence who are injured because of physical violence or develop impairments such as depression, post-traumatic stress or anxiety disorder. The DDA covers both direct and indirect forms of discrimination and extends to past, present, future, actual and imputed impairments.³⁹

5.3.1 DIRECT DISABILITY DISCRIMINATION

As noted above, the protection that direct discrimination prohibitions provide is largely protection against assumptions and stereotyping made about a person because of their status group. Under the DDA, for example, an employer must not exclude a potential employee with a disability out of bias or prejudice against people with that disability or any disability. Nor can they simply assume a worker with a disability could not perform the job because of their disability, will require too much support or pose a risk. A person who experiences bouts of anxiety or depression (which could be a consequence of domestic violence), for instance, is entitled to be assessed on the basis of their qualifications and merit rather than dismissed or excluded because of their condition.

5.3.2 REASONABLE ADJUSTMENTS

The DDA also imposes an obligation on duty holders to provide ‘reasonable adjustments’ to facilitate equal participation of persons with a disability. This obligation is embedded in the definition of both direct and

³⁸ SDA, s 4A.

³⁹ DDA, ss 4(1) and 15.

indirect discrimination; failure to provide reasonable adjustments can constitute less favourable treatment (direct discrimination) or have the effect of disadvantaging a particular group of people with disability (indirect discrimination).⁴⁰

To summarise, protection on this ground afforded to victims of domestic violence appears more substantial than the other grounds, because it covers both forms of discrimination and imposes an additional duty to make reasonable adjustments. However, its scope is limited to victims who are injured and identify as having an impairment covered by the DDA. Reasonable adjustments are only required in respect of the disability only, therefore a victim may be able to rely on these provisions to get time off work to attend a counselling appointment or some allowance for underperforming due to the impairment, however this does not extend to attend to other needs arising out of domestic violence, such as paid leave to attend to legal matters, visit financial institutions or children's schools.

5.4 ADVERSE ACTION (DISCRIMINATION)

Section 351 of the FW Act refers to 'discrimination' and prohibits employers from taking 'adverse action' against an employee or prospective employee because of certain prescribed attributes.⁴¹ 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 at work as the types of discrimination experienced may not fit within these attributes – as discussed above. Further, section 351(2) limits the operation of this section to applicants who have corresponding protection under the relevant discrimination Act in force in their state or territory. In other words, state and territory law underpins the FW Act protections. For this reason, express protection for victims of domestic violence needs to be included in consolidated federal discrimination law, rather than simply amending the FW Act itself.

5.5 ADVERSE ACTION (WORKPLACE RIGHT)

Section 340 of the FW Act prohibits taking adverse action against another person because the person has a workplace right or has exercised or failed to exercise a workplace right. A relevant workplace right includes being entitled to the benefit of a workplace instrument, for example, a domestic violence clause in an enterprise agreement providing for paid leave and/or the right to request flexible working arrangements. A victim who takes leave or requests flexible working arrangements in accordance with their agreement entitlements may be eligible to bring a claim under section 340 if adverse action was taken (or threatened) as a result. This type of claim has not yet been litigated, however, it is currently limited to the minority of employees in the national system, who have access to FW Act protections and also have a domestic violence clause in their enterprise agreement – currently around 8,000.

5.6 UNFAIR DISMISSAL

Discriminatory treatment resulting in dismissal could potentially come under current FW Act unfair dismissal protections. However, 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 workers, were employed on a 'regular and systemic basis' through the qualifying period and had a 'reasonable

⁴⁰ DDA, ss 5(2) and 6(2).

⁴¹ Defined to include conduct such as discrimination, dismissal, demotion or injuring the employee's employment; or in relation to a prospective employee, refusing to employ or discriminating with respect to the terms and conditions of employment offered. See FW Act s 342.

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.⁴²

As set out above, 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. Consequently, many victims of domestic violence are unlikely to be able to satisfy the pre-conditions prescribed by the FW Act in relation to duration and regularity of employment in order to access the statutory unfair dismissal regime, potentially excluding the most vulnerable workers. This further demonstrates the need for express protection from discrimination on the basis of domestic violence victim status.

6. 'VICTIM OF DOMESTIC VIOLENCE' AS A PROTECTED GROUND

As set out above, victims of domestic violence are subjected both to different treatment and the disproportionate impact of apparently neutral rules of workplace policy, practice and behaviour. On this basis, any law seeking to address discrimination against victims should prohibit both direct and indirect discrimination.

First, this would mean that victims of domestic violence who are potential employees or tenants could not be treated differently because of this status. This prohibition is designed to address stereotyping, assumptions, harassment and other marginalising conduct. While same treatment may not be enough to achieve substantive equality, it would be a fundamental first step in promoting attitudinal change and empowering victims.

Second, by extending the prohibition to encompass indirect discrimination, duty holders would also be subject to an obligation to act reasonably in respect of victims of domestic violence. This would require conditions, requirements and practices to be reviewed for their potentially disproportionate impact on this group and their reasonableness assessed. For example, an employer of a worker who is a victim of domestic violence should consider what would be required to enable the victim to engage in work equally with others who are not victims and then explore how this might be done without causing unjustifiable hardship on the employer.

In addition, duty holders should have a separate duty to make reasonable adjustments to accommodate victims of domestic violence, up to the point of undue hardship. This would enable victims to access workplace supports and modifications needed to maintain their employment.

Recommendation: **the personal characteristic 'status as a victim of domestic violence' should be included in the list of attributes protected from discrimination, across all areas of life.**

Recommendation: **duty holders should have a standalone obligation to make reasonable adjustments up to the point of undue hardship.**

7. DEFINING THE GROUND TO BE PROTECTED

The ground of 'status as a victim of domestic violence' could be defined using the definition of 'family violence' (used interchangeably with domestic violence) recommended by the ALRC in its *Family Violence – A National Legal Response: Final Report*:

⁴² FW Act, Division 2.

...family violence is violent or threatening behaviour, or any other form of behaviour, that coerces and controls a family member, or causes that family member to be fearful. Such behaviour may include, but is not limited to:

- (a) physical violence;
- (b) sexual assault and other sexually abusive behaviour;
- (c) economic abuse;
- (d) emotional or psychological abuse;
- (e) stalking;
- (f) kidnapping or deprivation of liberty;
- (g) damage to property, irrespective of whether the victim owns the property;
- (h) causing injury or death to an animal irrespective of whether the victim owns the animal; and
- (i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.⁴³

The ground should be drafted in gender and sexuality neutral language, recognising that whilst domestic violence is predominantly experienced by women and children, some men are also victims and domestic violence occurs approximately as often in same sex relationships as it does in opposite sex relationships.⁴⁴

The ground should also be defined to cover not only those victims who are experiencing domestic violence at the time of the discriminatory conduct but also those who have experienced such violence in the past. There is clear evidence that the experience of domestic violence has psychological and other health effects on victims even long after the violence itself has ceased.⁴⁵

For the ground to be effective the definition would also need to encompass the imputation of being a victim of domestic violence to address negative assumptions and stereotyping associated with domestic violence. It would cover the situation of an employer assuming that an employee is in a violent relationship, applying a stereotype that this is likely to cause problems in the workplace and dismissing her on the basis of this assumption.

A possible definition might be drafted in the following way:

In this Act:

“domestic violence” is violent or threatening behaviour, or any other form of behaviour, that coerces and controls a **family member or intimate partner**, or causes that **family member or intimate partner** to be fearful. Such behaviour may include, but is not limited to:

- (a) physical violence;
- (b) sexual assault and other sexually abusive behaviour;
- (c) economic abuse;
- (d) emotional or psychological abuse;
- (e) stalking;
- (f) kidnapping or deprivation of liberty;
- (g) damage to property, irrespective of whether the victim owns the property;
- (h) causing injury or death to an animal irrespective of whether the victim owns the animal; and
- (i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.

⁴³ ALRC, above n 5 at 17.

⁴⁴ Marian Pitts et al, *Private Lives: A Report on the Health and Wellbeing of GLBTI Australians* (Australian Research Centre in Sex, Health and Society, La Trobe University, March 2006).

⁴⁵ See eg, VicHealth, above n 8; Rachel Kimerling, Jennifer Alvarez and Joanne Pavao et al, ‘Unemployment Among Women: Examining the Relationship of Physical and Psychological Intimate Partner Violence and Posttraumatic Stress Disorder’ (2009) 24 *Journal of Interpersonal Violence* 450 at 451 (citing a large number of earlier studies); Golding, J, ‘Intimate Partner Violence as a Risk Factor for Mental Disorders: a Meta Analysis’ (1999) 14 *Journal of Family Violence* 99.

“victim of domestic violence” means a person who has been subjected to domestic violence by a **family member or intimate partner**

- (a) in the past but it has ceased; or
 - (b) in the past and the violence is continuing;
- and includes persons to whom this experience has been imputed.

“family member or intimate partner” in relation to a person includes:

- (a) a spouse of the person [defined to include former spouse, a de facto partner and a former de facto partner, not limited to heterosexual relationships];
- (b) someone with whom the person has or has had an intimate relationship, whether or not the intimate relationship involves or has involved a relationship of a sexual nature;
- (c) an adult child, parent, grandparent, grandchild or sibling of the person or spouse of one of these persons; and
- (d) in the case of an Aboriginal person or a Torres Strait Islander, is or has been part of the extended family or kin of the other person according to the Indigenous kinship system of the person’s culture.

Recommendation: **‘victim of domestic violence’ should include current and former victims and their associates.**

Recommendation: **‘domestic violence’ should be defined as per the Australian Law Reform Commission’s recommended definition.**

Recommendation: **the relationships covered under the definition of domestic violence should extend to dating relationships, whether sexual in nature or not.**

8. COMPOUNDED/INTERSECTIONAL DISCRIMINATION

The Equality Rights Alliance (ERA) submission to the Consolidation Discussion Paper highlights the problem of discrimination on the basis of multiple attributes, where it is unclear or impossible to isolate which individual attribute is the reason for the discriminatory conduct. We support ERA’s recommendation that the complainant should not have to identify which attribute is the cause of the disadvantage, provided that they can establish that they were subject to discrimination on the basis of one or more of the attributes protected under the Act.⁴⁶

In relation to a victim of domestic violence, domestic violence may be one of a number of different attributes combining to give rise to discriminatory treatment. For example, a single Aboriginal woman with young children, who has experienced domestic violence, seeking private rental accommodation could be discriminated against on the basis of her sex, marital status, race or family responsibilities, compounded by prejudice towards victims of domestic violence. Interview data gathered as part of the ADFVC’s Financial Security research project reveals compounded discrimination experienced by victims of domestic violence seeking accommodation. According to one interviewee, a domestic violence service worker:

One of the biggest things is... the discrimination of the real estate agents. Basically if you’re Aboriginal, or of another culture apart from Anglo-Saxon, you can be discriminated against. Then if you’ve got children, that’s a third reason to discriminate. The more children you’ve got, the more reason to discriminate.

Without scope in the consolidated Act to bring a complaint based on discrimination on a combination of grounds, vulnerable complainants experiencing compounded discrimination will be precluded from seeking redress. This area of inconsistency should be addressed in the consolidated Act.

⁴⁶ ERA, *Submission to the Attorney-General’s Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper* (December 2011) at 14-16.

Recommendation: complainants should not have to identify which attribute is the reason for the discrimination they have experienced; it should be sufficient to demonstrate that they were discriminated against on the basis of one or more of the protected attributes.

9. CONCLUSION

In light of evidence that victims of domestic violence experience discrimination in the workplace and in accommodation, inclusion of a ground protecting victims of domestic violence should be a priority in the consolidated Act.

Protection on this specific ground would make the Act clearer and more consistent, assisting duty holders to comply and enhance social inclusion for victims of domestic violence who experience social and financial disadvantage in addition to violence and harassment. The inclusion of this ground is also consistent with Australia's national framework for addressing the issue of domestic violence, as set out in the Commonwealth's *National Plan to Address Violence Against Women and Their Children 2012-22* and the Australian Labor Party's recent resolution to 'ensure that Fair Work and anti-discrimination frameworks provide appropriate protection to victims of domestic violence in the workplace'.⁴⁷

⁴⁷ See Ben Aveling, *All the Motions from National Conference 2011* (4 December 2011), amendment 448A. Available at: <http://ouralp.net/2011/12/04/all-the-motions-from-national-conference-2011/#448>.