

General Recommendation on Violence Against Women as a form of discrimination under CEDAW

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I welcome the opportunity to provide input to the Committee on the Elimination of Discrimination against Women (CEDAW Committee) for its General Recommendation on violence against women. Specifically, I am concerned with the impacts of domestic violence in the workplace, the discrimination faced by working women who are affected by domestic violence, and the implementation of state obligation to address violence against women in the workplace.

I have been an activist in the Australian domestic violence sector since 1978. I pioneered policies to enable women and children to stay safely in their homes, and the introduction of domestic violence rights and entitlements in Australian industrial and discrimination instruments.

I was founder and manager of the national Safe at Home, Safe at Work program (2010-2013) at the Australian Domestic and Family Violence Clearinghouse (University of New South Wales). This program developed and promoted domestic violence clauses and the training and resources to implement the clauses. I am a foundation member of the International Domestic Violence at Work Network, and currently attached to the Women and Work Research Group at the University of Sydney Business School

Australia's contribution to international knowledge on domestic violence in the workplace

Australia has been recognized by the United Nations for good practice by providing 'domestic violence entitlements in industrial awards and agreements, including access to paid family violence leave of up to 20 days a year'.¹

The International Labour Organisation (ILO) and Australian Government co-hosted a CSW57 Side Event on the impact of domestic violence in the workplace. The event highlighted the Australian progress of domestic violence clauses achieved through collective bargaining. The CSW57 agreed conclusions [paragraph 34(yy)] included a commitment to full employment and decent work, named the role of both employers and trade unions, and recommended governments address violence against women and girls in the workplace through '**regulatory and oversight frameworks and reforms, collective agreements, codes of conduct, including appropriate disciplinary measures, protocols and procedures**' (my emphasis).²

The ILO's Governing Body (November 2015) debated an international labour standard on gender-based violence in the world of work that includes domestic violence. The decision was:

- 1.1.1. to place a standard-setting item on "Violence against women and men in the world of work" on the agenda of the 107th Session (June 2018) of the Conference;
- 1.1.2. to convene a tripartite meeting of experts to provide guidance on which basis the Governing Body will consider, at its 328th Session (November 2016), the preparations for the first discussion of possible instruments by the Conference.

Development of Australian good practice

A number of Australian policy-based initiatives to address the issue of domestic violence and the workplace before 2010 were found to have been valuable but limited by the commitment of a senior, influential individual within the organisation. The challenge for Australia was to introduce

¹ Report of the United Nations Secretary for the Commission on the Status of Women 57th Session (CSW 57, March 2013) on *General Multi-sectoral services and responses for women and girls subjected to violence*. P.12, Point 32)

² Commission on the Status of Women Fifty-seventh session 2013, *Agreed conclusions*, http://www.un.org/womenwatch/daw/csw/csw57/CSW57_agreed_conclusions_advance_unedited_version_18_March_2013.pdf

sustainable and widespread change.³ Discussions between the Australian Domestic and Family Violence Clearinghouse (ADFVC)⁴ and the NSW Public Service Association (PSA) in 2009 led to the development of a model domestic violence clause.⁵ This model clause contained dedicated and additional paid domestic violence leave; the provision of a trained workplace contact for employees who wish to disclose domestic violence; processes and procedures to ensure confidentiality for employees disclosing domestic violence; referral provisions to expert domestic violence services; anti-discrimination protections for employees disclosing domestic violence; the provision of safety planning policies; and that mandatory reporting and Privacy Act 1988 (Cth) requirements must be addressed if relevant.

This clause was logged by the PSA as part of bargaining for an enterprise agreement in the university sector in April 2010. The first Australian family violence clauses were incorporated into a local government enterprise agreement in September 2010. The domestic violence clause was adopted by the ACTU in 2012 and all affiliates urged to include the clause in log of claims. By September 2015, 776 current agreements contained a domestic violence clause, covering 654,419 employees, predominantly in the private sector, across a broad range of industries such as retail, public transport, banking, education, manufacturing, airline and maritime, and including some of the country's largest employers.⁶

The Australian National Plan to Reduce Violence against Women and their Children (2011) contained a commitment to economic security for women experiencing domestic violence. As signatories, all Australian Governments (except Western Australia) have, through enterprise agreements, directives and awards, introduced domestic violence protections for their public servants, including paid leave. Further, the national employment legislation, the Fair Work Act, was amended in 2013 to include the right to request flexible work for reasons of domestic violence.

These developments were supported by the funding of a national program, Safe at Home, Safe at Work 2010-2013 (SAHSAW) by the Commonwealth government to promote the clauses and legislative reform, to resource and train employers and unions, and monitor and research the implementation of domestic violence clauses at work. This program was acknowledged as an expert

³ Sue-Ellen Murray and Andrea Powell, 2008 *Working It Out: domestic violence issues and the workplace* Issues Paper 16, Australian Domestic and Family Violence Clearinghouse, University of New South Wales.

⁴ The ADFVC was a Commonwealth funded project of the Centre for Gender Related Violence Studies at the University of New South Wales from 1999-2014. It was effectively the national domestic and family violence center for research, information collection and dissemination, and good practice monitoring.

⁵ Based on domestic violence agreements developed by UNISON in the U.K.

⁶ Commonwealth Department of Employment in the Workplace Agreement Database (WAD).

third party, playing a key role in the successful introduction and implementation of domestic violence clauses in the world of work.⁷

Evidence of the impacts of domestic violence on employment and the workplace

An Australian survey of women who had separated from a violent partner found that the majority (75%) did not continue in the same workplace: that just over half of the women were employed full-time before the violence, which decreased to 29.6% after separation, that part-time employment increased, and those who were in the category 'not working and not seeking work' rose to 16.3% after leaving the violence.⁸ Yet research shows that keeping their job is critical to prevent a woman becoming economically trapped in a violent relationship and is a key pathway to leaving a violent relationship.⁹

The 2011 Australian survey on the impacts of domestic violence in the workplace conducted by SAHSAW found that domestic violence had a negative effect on work attendance, performance and safety.¹⁰ Nearly a third of the 3611 survey respondents, members of the National Tertiary Education Union, the NSW Nurses Association and the Victorian branch of the Australian Services Union, had experienced domestic violence over their lifetime.

- a. Nearly half those who had experienced domestic violence reported that the violence affected their capacity to get to work primarily due to injury or being restrained. Nearly one in five (19%) who had experienced domestic violence in the previous 12 months reported that the violence continued at the workplace. The major forms of violence at work reported in the survey were abusive phone calls, emails or texts and the abusive person coming to the workplace.
- b. The majority of workers who had experienced domestic violence (59%) reported a negative effect on their work performance- feeling distracted, anxious, and/or unwell.

⁷ Marian Baird, Ludo McFerran and Ingrid Wright, 2014 *An equality bargaining breakthrough: Paid domestic violence leave*. Journal of Industrial Relations, vol.56: 2, pp. 190-207

⁸ Suzanne Franzway, Sarah Wendt, Nicole Moulding, Carole Zufferey, Donna Chung, Alison Elder, 2015, *Gendered violence and citizenship: the complex effects of intimate partner violence on mental health, housing and employment*. University of South Australia

⁹ Shirley Patton, 2003 *Pathways: How Women Leave Violent Men*, Government of Tasmania, Hobart, p. 71.

¹⁰ Ludo McFerran, 2011 *National domestic violence and the workplace survey*, ADFVC, UNSW. http://dvatworknet.org/sites/dvatworknet.org/files/Australia_survey_report_nov2011.pdf

- c. Nearly half (45%) of workers with recent experience of domestic violence disclosed at work, more to co-workers than management or HR. Though nearly half did disclose to a manager or supervisor, only 10% found their response helpful.
- d. Co-workers were affected more than anticipated. Co-workers are more likely to disclose their experience of violence to each other or to be aware of what is occurring; co-workers can be directly affected by the abuse by having to support and protect their colleagues; co-workers can be directly threatened or assaulted.

The Australian survey has since been replicated in New Zealand, Canada, the United Kingdom, Turkey and the Philippines with similar findings.¹¹

An emerging issue is the employed domestic violence offender. Research conducted in the United States¹² found that the behaviour of employed domestic violence offenders in the workplace created a parallel cost to the employer due to absence, poor performance, the misuse of work time and resources, and occupational health and safety risks.¹³

Costs to industry and business

The impacts of domestic violence at work are reflected in the costs to industry and business, not only in lost productivity and absenteeism, but also in staff turnover, recruitment and retraining. Costs of lost productivity alone have been estimated at \$727.8 million (in 1995 dollars) in the United States (2003)¹⁴ and NZ \$954.1 million (2014) in New Zealand¹⁵ or Euros 534-712 million in Norway in 2010.¹⁶ The cost of time off work due to domestic violence injuries in Britain was calculated to cost the economy £1.9 billion in 2008/2009.¹⁷ Lost productivity by victims and perpetrators being unable to attend work due to death, illness or imprisonment was calculated at Aus\$2.1 billion in 2014-2015.¹⁸

¹¹ See surveys at <http://dvatworknet.org/research/national-surveys>

¹² Michele Cranwell Schmidt and Autumn Barnett, 2012, *Effects of domestic violence on the workplace; A Vermont Survey of male offenders enrolled in batterer intervention programs*, Vermont Council on Domestic Violence

¹³ A third of respondents took paid and unpaid time off work to be abusive or as a result of the abuse; a third made abusive and threatening calls during working hours (a third using work phones); and one in five said that they had caused or almost caused an accident because they were distracted (a finding that may be of special importance in blue collar industries)

¹⁴ Centers for Disease Control and Prevention, 2003, *Costs of Intimate Partner Violence Against Women in the United States*. National Center for Injury Prevention and Control

¹⁵ Sherilee Kahui and Suzanne Snively, 2014, *Measuring the economic costs of child abuse and intimate partner violence to New Zealand*, Glenn Inquiry

¹⁶ Rasmussen I. et. al.,2012, *Samfunnsøkonomiske kostnader av vold i nære relasjoner*. Vista Analyse AS Rapport 2012/41

¹⁷ Sylvia Walby, 2009, *The Cost of Domestic Violence: Up-date 2009*, Lancaster University

¹⁸ PwC 2015, *A High Price to Pay: The economic case for preventing violence against women*, p.12

Cost and effects of introducing domestic violence entitlements at work

A survey of 102 Australian employers (2015) who had a domestic violence clause in their enterprise agreement found that the average paid domestic violence leave taken in the past 12 months was 43 hours, with a range of 8-202 hours. Per incident, where time off was requested most took 2-3 days or less.¹⁹ In a separate report, Telstra Australia states that the inclusion of 10 days paid domestic violence leave in their Enterprise Agreement 2015-2018 has not 'opened the floodgates' as 22 out of a workforce of 32,000 have accessed the leave in six months, taking an average leave of 2.3 days.²⁰

According to the survey of employers who had a domestic violence clause, very few 'reported that their organisation experienced any challenges implementing the domestic violence clause'. Instead, employers reported positive effects in the workplace: "*the most common comment from respondents was that having domestic/family violence clauses demonstrated support for staff and resulted in a more positive, supportive work environment.*"²¹

Other positive effects noted by respondents were: the clause raised awareness of the issue within the workplace and reduced stigma, enhanced the overall employer reputation and status, staff were able to take leave without stress, improved cooperation with unions which helped with bargaining, employees felt more comfortable and confident speaking to management about requesting support, and contributed to morale-building within their organization.²²

The Productivity Commission inquiry into the Australian workplace relations framework (2015) noted '*widespread acknowledgement by employers that family and domestic violence has workplace impacts*'.²³ A group of Chief Executive Officers from many of Australia's leading companies, a Vice-Chancellor and Chief of Army publically endorsed paid domestic violence leave in 2015.²⁴ A number of these organisations have paid domestic violence leave in their enterprise agreements.

¹⁹ Gendered Violence Research Network, 2015, *Implementation of Domestic Violence Clauses – an employers' perspective*. ACTU and UNSW.p.7. 'just under half of the respondents indicated that employees usually requested two-to-three days (40%; n=14), about one-fifth reported there was no clear pattern (22.9%; n=8), and a similar proportion of respondents reported that employees typically requested less than one day of leave (17.1%; n=6)'.

²⁰ Male Champions of Change, 2015, *Playing our part: Workplace responses to domestic and family violence*. NSW

²¹ Ibid, 19, p.12

²² Ibid,19, p.12-13

²³ Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra p. 549

²⁴ Ibid, 20

Protection against adverse action and discrimination afforded by paid domestic violence leave in modern awards

Australian anti-discrimination and employment legislation does not protect employees affected by domestic violence from adverse action or discrimination. Evidence of discrimination, both direct and indirect, and adverse action experienced by employees affected by domestic violence were documented in the Australian Domestic and Family Violence Clearinghouse (ADFVC) submission to the proposed consolidation of federal anti-discrimination laws into a Human Rights and Anti-Discrimination Bill 2012 (For more on this submission see Appendix 1).²⁵

The ADFVC submission suggested that specific negative assumptions about employees affected by domestic violence stereotype them as “*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 attach blame to victims, who can be perceived as complicit in their own abuse (For examples of discrimination provided in the submission see Appendix 1).

The ADFVC submission, supported by eighty-five violence against women peak bodies, organisations and services; legal practitioners; academics; employment advice services and government agencies, recommended that the personal characteristic ‘status as a victim of domestic violence’ be included in the list of attributes protected from discrimination. This was a position also supported by the Australian Human Rights Commission, who submitted to the Commonwealth Attorney-General’s Department that discrimination on the grounds of domestic violence be unlawful in all areas of public life.²⁶

Protection from adverse action due to domestic violence has become more common in Australian courts. In July 2015 the Fair Work Commission ordered a Melbourne employer to pay maximum compensation to a domestic violence victim who was unfairly sacked because her employer claimed they could not protect her from her partner who worked in the same office. This has been hailed as a landmark decision that requires employers to provide ‘added duty’ of care for domestic violence victims at work.²⁷ A recent Fair Work Commission judgement reinforced this point, stating: “...a

²⁵ Tashina Orchiston, , 2012, *Submission to Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, ADFVC, p.7

²⁶ Australian Human Rights Commission, 2012, *Consolidation of Commonwealth Discrimination law - domestic and family violence*, Supplementary Submission to the Attorney-General’s Department

²⁷ Ms L. Moghimi v. Eliana Construction and Developing Group Pty.Ltd. [2015] FWC 4864, 23/08/2015. Reported in HCA Mag, 2015, *Landmark case sees FWC rule in favour of domestic violence victim*. <http://www.hcamag.com/hr-news/landmark-case-sees-fwc-rule-in-favour-of-domestic-violence-victim-203135.aspx>

policy in relation to paid domestic and family violence leave...would have sent a very clear message to the respondent's employees that it attaches no stigma to the victims of domestic and family violence and that it would support them to recover, attend court and medical appointments, seek legal advice and make alternative living arrangements without the repercussion of adverse action being taken in relation to their employment. Increasingly, employers are turning their mind to policies in relation to paid domestic and family violence leave or the inclusion of such an entitlement in enterprise agreements. This is to be encouraged.”²⁸

International developments

Internationally, there have been a number of strategies to address domestic violence in the workplace besides collective bargaining or employment law reform: notably anti-discrimination law reform in the United States; occupational health and safety law reform in Ontario; and Violence Against Women (VAW) legislation that addresses the workplace in Spain and the Philippines.

There has, for example, been rapid growth in US state and local legislation and regulations that offer unpaid work leave for victims or use of paid sick leave for domestic violence related issues, prohibit domestic violence-related employment discrimination, increase access to unemployment insurance benefits and increase awareness and safety in the workplace.

In the Philippines the 2004 Violence Against Women legislation provided women workers with ten days paid domestic violence leave and protection from discrimination. However, the results of the 2015 domestic violence at work survey in the Philippines found that respondents' awareness of legally mandated paid domestic violence leave was low at 39 per cent, and one in four (26 per cent) said employers did not “act in a positive way when workers report their domestic violence experience.”²⁹ The Philippine survey also included respondents who are domestic workers. Thirty per cent had experienced various forms of abuse either from current or former employees or members of their household, often in the form of psychological or emotional abuse, sexual or physical abuse. Some respondents have been abused both at home (by family) and by their employers.

Conclusion

²⁸ Decision, Fair Work Act 2009 s.394—Unfair dismissal, Alexis King v D.C Lee & L.J Lyons (U2015/12294), Commissioner Johns, Melbourne 16 March 2016] FWC 1664, at para.56 (a).

²⁹ ITUC-Asia Pacific, 2015, *National survey on the impacts of domestic violence on workers and workplaces in the Philippines*, Launch of the joint ITUC-AP/Philippine Affiliates research findings and dissemination forum, Manila.

The global strategies to promote the economic independence and security of women that protects them from becoming trapped in violence relationships must now include standardized protections in the workplace. The global workplace must be part of the solution in supporting women to stay safely in their homes, their jobs and their communities.

Australian experience reinforces the conclusion that national and international best practice would be to introduce domestic violence protections across the range of strategies, maximizing the safety net and the resources for implementation. An overwhelming lesson is that good reform needs to be carefully monitored, especially when introducing a new workplace right and responsibilities.

Recommendations

That the CEDAW General Recommendation No. 19: Violence against women should include the following:

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
2. General Comments includes the CSW57 Agreed Conclusion [paragraph 34(yy)] that contains a commitment to full employment and decent work, names the role of both employers and trade unions in addressing violence against women and girls urges governments to adopt **‘regulatory and oversight frameworks and reforms, collective agreements, codes of conduct, including appropriate disciplinary measures, protocols and procedures’**.
3. Article 11 includes: *The impacts of domestic violence at work can include absenteeism, poor performance, and harassment of the affected employee by their abusive partner or family member. These impacts may constitute a health and safety problem and may become discriminatory when the woman has reasonable ground to believe that the impacts of domestic violence disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment or dismissal.*
4. Under Specific Recommendations include: *States parties should ensure that employment, occupational health and safety, anti-discrimination laws give adequate protection to working women affected by domestic violence, and provide the resources to guarantee training, information, and monitoring of these laws.*
5. Under Specific Recommendations include the impacts of domestic violence at work when States parties report on sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion in the workplace.

6. Under Specific Recommendations include that monitoring of the employment conditions of domestic workers should recognize their vulnerability to domestic violence in their homes and at work.
7. That all states are urged to support an international labour standard on gender-based violence in the world of work that includes domestic violence.

Appendix 1

Extracts from *Submission to Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, Tashina Orchiston, 2012, ADFVC

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 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.

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.

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.

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.

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.

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.³⁰ 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.

³⁰ SDA, s 4A.

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.³¹

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.

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 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).³²

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.

Adverse Action (Discrimination)

³¹ DDA, ss 4(1) and 15.

³² DDA, ss 5(2) and 6(2).

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.³³

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.

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.

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 expectation of continuing employment'. Once these pre-conditions are

³³ 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.

satisfied, the applicant must demonstrate that the dismissal was 'harsh, unjust or unreasonable' and not a case of genuine redundancy.³⁴

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.

'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.

³⁴ FW Act, Division 2.

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.