



Australian Domestic & Family Violence Clearinghouse

SUBMISSION TO THE SENATE STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS INQUIRY INTO THE FAIR WORK AMENDMENT BILL 2013

Australian Domestic and Family Violence Clearinghouse (ADFVC)

April 2013

SUMMARY

The Australian Domestic and Family Violence Clearinghouse (ADFVC) welcomes the proposed amendment in the Fair Work Amendment Bill 2013 to extend the right to request flexible work arrangements to employees experiencing domestic or family violence, and to employees providing care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family [17 Subsection 65(1) (1A) (e)(f)]

Recommendation One

The ADFVC recommends a further amendment to Sc 351(1) Discrimination of the FWA (2009) to extend protection to employees experiencing domestic violence by naming the status of victim of domestic violence.

Recommendation 2

To protect employees who are already vulnerable due to their experience of domestic violence the Fair Work Amendment Bill 2013 should provide for an appeal process if a reasonable request is denied.

Recommendation 3

Limitations of the right to request flexible working arrangements are removed for all employees whatever their status.

Recommendation 4

Section 351 (1) and 772(1)(f) of the FWA (2009) should be amended to extend protection to employees experiencing domestic violence by naming the status of victim of domestic violence

SAFE AT HOME, SAFE AT WORK PROJECT

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 workplace¹.

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 risk² for those that most need to maintain economic independence³.

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 violence leave⁴. This progress has been recognised as international best practice⁵ and should be a source of great pride to the Australian people, unions, employers and governments.

THE RIGHT TO REQUEST FLEXIBLE WORK ARRANGEMENTS

We welcome the significant acknowledgement of the impact of domestic violence at work by the inclusion of the right to request flexible work arrangements in the FWA.

This amendment was recommended by the Australian Law Reform Commission Report on Family Violence and Commonwealth Employment Law 2011 (R.17-1). The inclusion of domestic violence in the Fair Work Act is both Australian Council of Trade Union Policy (Congress May 2012), and Australian Labor Party Policy (December 2011).

In order to avoid excluding any person or relationship currently protected by state or territory domestic or family violence legislation we recommend that the amendment reads 'experiences domestic or family violence' rather than 'violence from a member of the employee's family' [1A(e) and (f)]. The Australian Law Reform Commission Inquiry on Family Violence (2010) sought a common Australian definition for family violence in legislation. There are variations in the definition of domestic and family violence in states and territories, including a range of persons and relationships protected by the definitions, and these may not be members of the person's family.

¹ Murray, S, & Powell, A (2008) *Working It Out: domestic violence issues and the workplace*, Issues Paper 16, ADFVC, Sydney

² 2011 *Safe at Home, Safe at Work? National Domestic Violence and the Workplace Survey* (National Workplace Survey), conducted by ADFVC in conjunction with Micromex

³ 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

⁴ See appendix 1 - total number of employees covered by domestic and family violence entitlements to date

⁵ European Council of Trade Unions Action Plan on Gender Equality, 6-7 March 2012

Recommendation 1

To be compatible with state and territory domestic and family violence legislation, the Fair Work Amendment Bill 2013 should provide for a right to request flexible work arrangements in circumstances where the employee is experiencing domestic or family violence, or is supporting a person experiencing domestic or family violence.

Importantly, we see that the right to request flexible work arrangements for those experiencing domestic violence will lead to the provision of information and resources to employers and employees about the impact and support that can be provided at the workplace.

Our monitoring of the implementation of domestic violence clauses has demonstrated the crucial need for both employees and employers to be well informed of the workplace aspects of domestic violence and strategies such as safety planning and referral to domestic violence experts. We are specifically seeking confirmation that this amendment will trigger the FWO to prepare and publish a new Fair Work Information Statement for all employees.

We remain concerned that employees who have disclosed their experience of domestic violence to their employer may not have a reasonable request granted. Employees may be reluctant to disclose to their employer, citing fear for their job security or for career advancement (see *Safe at Home, Safe at Work? National Domestic Violence and the Workplace Survey* (National Workplace Survey 2011)).

Recommendation 2

To protect employees who are already vulnerable due to their experience of domestic violence the Fair Work Amendment Bill 2013 should provide for an appeal process if a reasonable request is denied.

We understand that the Fair Work Amendment Bill 2013 removes certain restrictions to the right to request flexible working arrangements to casual employees, but as 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, we seek the right for all employees whatever their status.

Recommendation 3

Limitations of the right to request flexible working arrangements are removed for all employees whatever their status.

DISCRIMINATION AGAINST EMPLOYEES WHO ARE EXPERIENCING DOMESTIC VIOLENCE

Acts of discrimination against employees experiencing domestic violence have been well documented by the National Alliance of Working Women's Centres (NAWWC).

This is a very significant issue for the clients of the Working Women's Centre. It is one that we see that very regularly. Over the 20 to 30 years that the centres have been in operation it is one that has come up again and again. We have found that the

majority of clients who approach us with this issue share some common themes in their cases and we have case studies on all of these issues.

Generally, we see women who have been terminated because the perpetrators of domestic violence have basically made their lives hell at work by coming to work, harassing them or their co-workers or by interrupting their work. We have seen women who have been terminated or treated adversely because of their poor performance at work or their absenteeism and this absenteeism and poor performance has been caused by either stress from the domestic violence they have been experiencing or sometimes from their efforts to try to deal with the domestic violence.

We have seen women who are unable to get to work because of the domestic violence, whether that is the perpetrator withholding their keys, barring their access to transport or money or sabotaging childcare arrangements. We have seen it quite regularly. We have also seen women who resign or feel forced to resign because of the shame, embarrassment and stress of dealing with domestic violence and also sometimes because of the disclosure of domestic violence and the prejudice or perceived prejudice from employers or fellow workers.

For almost all of these cases, unfortunately, we found that there is no statutory readdress.

(Anna Davis, NAWWC. Senate Legal and Constitutional Affairs Legislation Committee, Human Rights and Anti-Discrimination Bill 2012. Hansard (p29) Public Hearing 23/1/2013 Melbourne)

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 right to request flexible work arrangements due to domestic violence would constitute a workplace right and as such the general protection provisions would apply. However, we are concerned that an employee would not be protected from adverse action for being a victim of domestic violence unless they also accessed or tried to access a workplace right in relation to domestic violence, and the employer specifically took action against them because they accessed or tried to access a workplace right.

Section 351 of the *Fair Work Act 2009* (Cth) 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.

We submit that in the Australian context it is appropriate and timely for the Fair Work Amendment Bill 2013 to include the personal characteristic 'status as a victim of domestic violence' in the list of attributes protected from discrimination.

The Senate Legal and Constitutional Affairs Committee (February 2013), in relation to the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012, recommended that 'subclause 17(1) of the Draft Bill be amended to include 'domestic violence' as a protected attribute, and that clause 6 of the Draft Bill be amended to include an appropriate definition of this attribute'. The Committee noted that:

this is an area where the Commonwealth must lead the way, and is encouraged by the Australian Government's recent commitment to amend the Fair Work Act to provide more flexible working conditions for victims of domestic violence in places of employment. The committee considers that this action, together with a further amendment to the Draft Bill, will assist victims of domestic violence to increasingly participate in the workforce and broader community.

Should the Human Rights and Anti-Discrimination Bill 2012, which has been returned to the Attorney-General's Department for redrafting, not incorporate the Senate Committee recommendations, or should there be insufficient sitting time to allow passage through Parliament, it is essential that protection against discrimination in the workplace is addressed in the Fair Work Amendment Bill 2013.

Recommendation 4

Section 351 (1) and 772(1)(f) of the FWA (2009) should be amended to extend protection to employees experiencing domestic violence by naming the status of victim of domestic violence.

CONCLUDING REMARKS

In a number of submissions to the Commonwealth Government the ADFVC has drawn attention to the historic opportunity to extend meaningful protections to a large number of Australians who continue to experience domestic or family violence. Nearly a third of Australian women will experience a form of domestic or family violence in their lives and nearly two thirds of those will be in paid employment. Staying safely in their homes, in their communities and in their jobs is a critical pathway to ending the violence and to a financially secure and healthy future. Providing a legislative framework will assure Australia of a world leadership role in workplace support to those experiencing domestic or family violence.

Further discussion:

SHORTCOMINGS OF THE ENTERPRISE BARGAINING AGREEMENT APPROACH

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, there are a number of shortcomings in the enterprise bargaining approach.

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 address this issue.

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.

The scope of EAs is limited as their coverage does not extend to all Australian workers. Currently federal EAs only cover 2.33 million employees⁶ out of a workforce of 11,546,400⁷ 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 domestic violence clause. Currently EAs with domestic violence clause only make up a negligible proportion of the 23 230⁸ federal EAs.

⁶ Department of Education, Employment at Workplace Relations (DEEWR), Trends in Federal Enterprise Bargaining September Quarter 2012 Report

⁷ Labour Force November 2012, Australia Bureau of Statistics, (cat. no. 6202.0)

⁸ Department of Education, Employment at Workplace Relations (DEEWR), Trends in Federal Enterprise Bargaining September Quarter 2012 Report