

Domestic violence discrimination in the workplace: Is statutory protection necessary?

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Domestic violence: discrimination in the workplace

1.0 Synopsis

The Queensland Working Women's Service Inc. (QWWS) is a service providing free and confidential assistance to women with work-related issues. Our service advises women from all over Queensland and offers practical and supportive advice covering federal and state industrial and anti-discrimination issues, and related workplace concerns.

QWWS specifically provides assistance to clients who do not have access to other forms of assistance, such as union or legal representation. While our service is not means-tested, it provides a safety net service for women who are in a disadvantaged bargaining position and/or who identify with one of these specified target groups:

- Aboriginal or Torres Strait Islander peoples
- Non-English speaking background
- Precarious and/or low status employment.

The authors of this paper are Industrial Officers of QWWS.

From time to time, QWWS encounters clients who are victims/survivors of domestic violence. These clients often report that the domestic violence has profound effects on their employment. Stable employment is a particularly important means by which victims/survivors of domestic violence can gain financial independence. Our experience, however, is that employers often place employees with domestic violence issues in the "too hard basket", refusing to make adjustments or accommodations and, at times, terminating their employment. There is currently no statutory redress in Australia for clients who are treated adversely in the workplace on the basis that they are victims/survivors of domestic violence. Statutory measures do exist in a number of other countries. In particular, several states throughout the United States of America have addressed the need for statutory protection in the workplace for victims/survivors of domestic violence from an anti-discrimination standpoint. On a local level, some organisations, such as the University of New South Wales, have recognised that the employment relationship plays a key role in reducing the effects of domestic violence and have addressed adverse treatment in workplace agreements and/or internal policies and procedures.

This paper explores the effects of domestic violence on the employment relationship, supported by case studies; discusses the lack of statutory redress for victims/survivors who are being

treated adversely in workplaces in Australia; illustrates various measures to address the adverse treatment, globally and locally; and provides recommendations on how Australia can address adverse treatment on the basis of domestic violence in the workplace from an anti-discrimination standpoint. We assert that given the general vulnerability of the victim/survivor and the need for accommodations in the workplace, such measures constitute an effective and appropriate method. We specifically consider why redress under anti-discrimination statutory regimes is the most appropriate.

2.0 Domestic violence—the impact on the employment relationship

In 2009, KPMG estimated that violence against women and their children costs the Australian economy \$13.6 billion annually, and if appropriate action is not taken to prevent violence this sum will increase to \$15.6 billion per year by 2021 (National Council 2009).

Australian research commissioned by the Victorian Government (VicHealth) examines the economic benefits (as distinct from the costs) of reducing the prevalence of intimate partner violence. The research suggests that even modest reductions would result in savings of over \$35 million in health sector costs and over \$300 million in productivity and leisure costs (VicHealth 2004).

While domestic and sexual violence rarely occurs in a workplace itself, it does have direct and indirect impacts on workplaces and those who work in, or interact with, them: ‘We know that almost one in three women who experience domestic and family violence are in the workforce, so there is no question that the issue of violence affects many in our workplaces’ (Broderick 2010).

Examples of the impact of domestic violence on the employment relationship and the workplace

Domestic violence can impact on the workplace and the employment relationship through increased absenteeism due to injury, sickness, stress, court attendance, relocation and other factors. It can limit a worker's ability to perform effectively, which may result in performance management scenarios, terminations and forced resignations (Australia's CEO Challenge 2010). Employees who suffer domestic violence may be fired or forced to resign from their jobs for absenteeism or for reasons related to the safety of other employees. Employees with a history of experiencing domestic violence are more likely to have a disrupted work history and are more likely to work in casual and part-time work than women with no experience of violence (Franzway et. al 2007). It is

arguable that they may experience the same vulnerabilities and require similar types of “adjustments” in the workplace as other workers who are considered “vulnerable”, such as persons with impairments and persons with family responsibilities.

Co-workers of victims/survivors of domestic violence may also be affected by the imposition of additional workloads resulting from victim/survivor absenteeism or distraction. They may have to deal with harassing calls or disruption in the workplace, or they may personally be put at risk by the perpetrator of domestic violence. This can result in costs to employers associated with lost productivity, misuse of resources, absenteeism and staff turnover (McFerran & Braaf 2009). The issue of vicarious trauma is an obvious consequence for co-workers when one of their colleagues is experiencing abuse. Some may be called on for emotional support and may become involved in, or affected by, the violence.

QWWS case studies

QWWS has assisted numerous clients whose employment or workplaces have been affected by domestic violence. Although the issues presented to QWWS are multi-faceted, there are common themes present in these cases. These include disciplinary action and/or termination resulting from absenteeism and the employer responding adversely on becoming aware of the client being a victim/survivor of domestic violence.

The following case studies exhibit the multi-faceted nature of the effect of domestic violence on the employment relationship and the extent to which these clients are adversely treated in the workplace.

Jane

Jane was a casual employee who had taken out a Domestic Violence Order against her ex-husband and had been working regular and systematic hours for eight months in the retail sector. On Christmas Eve, her ex-husband came into work and started yelling at her. After the incident, her employer advised her to take three weeks of unpaid leave. When Jane attempted to return to work her employer advised that he had terminated her employment, stating that he owed the clients of the business a duty of care. He advised that it was a workplace health and safety issue. Jane had no legal basis to make a claim for unfair dismissal, as she was a casual employee who had not worked for the employer for at least twelve months. QWWS advised Jane that she might be able to argue that the domestic violence was a characteristic of her family responsibilities (a ground of discrimination under federal and state anti-discrimination laws), and a termination on this basis could be unlawful. The Industrial Officer advised Jane to contact

the industrial relations commission and acquire the appropriate paperwork to pursue a claim, but advised it may be difficult to show domestic violence as a characteristic of family responsibilities.

Anne

Anne was employed at a regional hotel for twelve months as a casual food and beverage attendant. The employer had, via the organisation's counselor (who had spoken with Anne), been made aware that Anne was living with an abusive partner and was subject to domestic violence. The employer offered Anne a transfer to another location for work on the condition that she left her abusive partner. The employer advised Anne that should she fail to provide a written statement advising that she would leave her partner, the transfer offer would be withdrawn. QWWS advised that because she had not been disciplined or terminated, there were no statutory provisions that could address the adverse treatment by her employer. QWWS referred Anne to counseling.

Holly

Holly worked for four years at a hotel. She was a single mother who had previously taken out a Domestic Violence Order against her ex-husband. She was facing eviction from her residence, as the real estate agent had received complaints from neighbours regarding the domestic violence. Holly's employment was extremely important to her, as it helped her gain and maintain economic security. Holly had been late to work three times in the four years of her employment. The employer had internal policies stipulating that where an employee has two or more absences in six months, they would be issued with a formal warning. The policy further stated that if an employee received such a warning, another absence in the next six months might result in dismissal. (Such policy is arguably unlawful in itself). Holly received a warning for being absent twice in six months. After receiving the formal warning, Holly sustained an injury from domestic violence and was unable to attend work due to bruising and swelling on her face. As a result, Holly was terminated for being absent within six months of receiving the formal warning. QWWS advised she might be able to argue discrimination on the basis of temporary impairment or family responsibilities. Holly became overwhelmed and decided not to pursue a complaint.

3.0 Lack of redress for victims/survivors of domestic violence who experience adverse treatment in the workplace

Government policy and the importance of the workplace to victims/survivors of domestic violence

On 29 April 2009, the Commonwealth Government welcomed and publicly released the report of the National Council to Reduce Violence Against Women and their Children ('the National Council') titled *Time for action: the national council's plan to reduce violence against women and their children 2009-2021*. The council's extensive report provides clear directions to help Australian women live free of violence, within respectful relationships and in safe communities. A relevant recommendation from the report was that the government:

...encourage an expansion of governments' activities and the capacity of services and the workforce to better meet the needs of women and their children, perpetrators of violence, and their communities (National Council to Reduce Violence Against Women and their Children 2009 p.23).

While this plan and the report are welcome, they fail to highlight the importance of the role the workplace plays in reducing the impact of domestic violence. The only reference to this issue is found in recommendation 1.4.5, where the recommendation to 'encourage, support and recognise business initiatives' is made. The provisions fail to recognise the importance of protecting the employment relationship for a victim/survivor of domestic violence and fail to propose measures to safeguard this relationship at a time when the employee is most vulnerable.

The Australian Human Rights Commission has acknowledged the role employment plays in a victim's/survivor's economic security and has made calls to address adverse treatment in the workplace. Elizabeth Broderick, the Sex Discrimination Commissioner, stated recently that, 'We must develop better workplace responses to domestic and family violence to ensure that women can stay attached to the workforce' (Broderick 2010).

Despite the above policy agendas and commitments, there is currently no legislative framework that specifically deals with unfair or less favourable treatment of employees who are victims/survivors of domestic violence. The current Commonwealth, State and Territory workplace laws fail to provide effective or specific redress for victims/survivors of domestic violence who are treated adversely in the workplace on the basis of this violence.

The (then) Deputy Prime Minister Gillard has committed funding to programs that will provide education to employers about addressing the effects of domestic violence on the workplace. However, the government is essentially placing the onus on businesses to be 'sensitively educated' (on a voluntary basis), without providing any underpinning regulatory or statutory requirements. Unfortunately, this confirms that policy aimed at tackling the employment-related effects of domestic violence is not likely to be enshrined in legislation any time soon. Even

though the Commonwealth Government appears committed to tackling the occurrence and effects of domestic violence, it has fallen short of recognising the subsequent discrimination that occurs in the workplace. The lack of statutory redress means that victims/survivors of domestic violence are often forced to use alternative statutory provisions to address the discrimination. This can create difficulties and lead to unfavourable outcomes. As such, we provide the following analysis of current options.

Statutory redress under current anti-discrimination law

Due to the vulnerability of victims/survivors of domestic violence and their frequent need to access adjustments in the workplace, we consider anti-discrimination legislation to be the most appropriate method for providing statutory protection. This assertion is based both on the Australian Human Rights Commission's eagerness to develop a legislative framework to ensure victims/survivors of domestic violence are able to participate in the workforce, and consideration of the effectiveness of other nations' moves to incorporate 'domestic violence victim status' as a specific ground in anti-discrimination legislation.

The inappropriateness of using existing anti-discrimination "grounds"/"attributes"

In our experience as Industrial Officers, victims/survivors of domestic violence often use other provisions of the anti-discrimination legislation to seek redress for less favourable treatment in the workplace. These provisions primarily include those relating to family responsibilities discrimination and impairment discrimination. Further, if pursuing redress through the *Fair Work Act 2009* (Cth), s352 (the 'temporary absence due to illness or injury' provision) is often used.

Our experiences with clients show that pursuing statutory anti-discrimination claims based on grounds that are not specifically designed to capture domestic violence results in the foundations of the discrimination case being inherently weak. In order to bring a complaint of less favourable treatment based on (being a victim/survivor of) domestic violence, a complainant appears to have two potential courses of action. First, the complainant could claim that, if the reason for the less favourable treatment was the domestic violence, then the domestic violence is a 'characteristic generally appertaining to' one of the established grounds of unlawful discrimination, such as sex. This is referred to as 'characteristics extension'. (Rees, et al 2008 p.113). The 'characteristics extension' argument is a challenging one to mount.

The second possible course of action would be for a complainant to base their claim on the **effects** of the domestic violence (such as illness and injury—characteristics that are explicitly

covered by anti-discrimination law), if there are any, and not the domestic violence itself. Neither of these options offers certainty over outcomes. Generally, success with these types of complaints relies on them settling “out of court” or at formal conciliation. The lack of legal precedent for the ‘characteristics extension’ argument, in particular, also limits the prospects of success. Not only does using indirectly related provisions result in uncertain outcomes, it can result in further feelings of shame about being a victim/survivor of domestic violence if the focus needs to be moved to (for example) injury or illness as opposed to the domestic violence itself. In essence, being a victim/survivor of domestic violence is treated as an attribute not warranting statutory protection, and the current anti-discrimination regimes are a constant reminder of this.

4.0 How are other nations addressing domestic violence within the context of the employment relationship?

A number of nations have enacted legislation to combat adverse treatment in the workplace on the basis being a victim/survivor of domestic violence. Notably, Spain, the Philippines and several states in the USA, which have taken considerable steps to ensure victims/survivors of domestic violence, are provided with statutory protection in the workplace. Of significance is New York (along with Illinois and Oregon), which has injected ‘domestic violence victim status’ into its anti-discrimination legislation. On a more local level, some initiatives, such as those of Australia’s CEO Challenge, have addressed the importance of the workplace for victims/survivors of domestic violence.

There are differing perspectives on whether domestic violence is a gendered issue. We caution against proposed legislative provisions entrenching gender (as in only male-to-female violence) in legislation, while recognising that victims/survivors are predominantly women, there exists the potential to discount domestic violence that occurs in same-sex relationships.

Spain: *Constitutional Act 1/2004 of 28 December, On Integrated Protection Measures Against Gender Violence (2004)*

In 2004, Spain enacted legislation that includes provisions for women who are victims/survivors of ‘gendered violence’ to access reduced or flexible working hours, geographical mobility, change of workplace and suspension of employment with their substantive position still being reserved. Women are also not required to pay any social security contributions during this suspension. Absences or lateness that are consequences of the violence are deemed justifiable and are protected, provided there is evidentiary support by social services or the health department. The

legislation also refers to the establishment of a specific *Employment Action Plan* to cater for gender violence victims/survivors seeking work.

According to the Association of Women's Rights in Development (AWID), the *Constitutional Act 1/2004 of 28 December* has inspired drafting and ratification of similar legislation in countries such as Brazil, Chile, Mexico, Costa Rica, Venezuela, Guatemala, Columbia and Argentina. However, AWID stresses that there have been complaints from all of these countries regarding the governments' unwillingness to enforce the laws (AWID 2009).

Like Spain, the Philippines has addressed domestic violence as a gendered issue.

Philippines: *Anti-Violence Against Women and Their Children Act of 2004* and the *Magna Carta of Women (2009)*

The Philippines' legislation aims to enhance women's financial security by prohibiting employers from discriminating against employees who experience domestic violence. The legislation includes specific entitlements to paid leave of up to ten days, in addition to other paid leave, for women employees to address domestic violence issues.

United States of America

A large number of states across the USA have enacted legislation to protect victims/survivors of domestic violence from discrimination in the workplace. The states differ on the type of relationship that qualifies under domestic violence and to what extent protections are afforded the victim/survivor in the workplace. Most states require the perpetrator and victim/survivor to be current or former spouses, live together or have a child in common. A significant number of states include current or former dating relationships in domestic violence laws. Delaware, Montana and South Carolina specifically exclude same-sex relationships in their domestic violence laws. States also differ significantly on the level of entitlements offered to victims/survivors of domestic violence. For example, Californian legislation only provides that the employer is prohibited from discriminating against a victim/survivor of domestic violence who requires time off to obtain judicial relief. However, larger businesses (with twenty-five or more employees) are further prohibited from discriminating against a victim/survivor of domestic violence for requiring time off to access assistance and/or attend medical appointments. Colorado, Connecticut and Miami-Dade County legislation provide up to thirty days of leave for a victim/survivor of domestic violence to address the violence. Other states that provide various workplace laws relating to domestic violence include, Hawaii, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, North Carolina, New Jersey, Rhode Island, Oklahoma, Pennsylvania, Tennessee, New York, Oregon and Illinois.

Notably, in 2009, New York State passed a pioneering bill that added 'domestic violence victim status' to their anti-discrimination/human rights legislation, making it unlawful to discriminate against an employee who is a victim/survivor of domestic violence.

New York State—*Pioneering Bill*

This Bill has resulted in workers gaining significantly stronger protections in maintaining their jobs when dealing with domestic violence. In 2001, New York City amended its anti-discrimination legislation to include 'victim of domestic violence' as an attribute upon which workplace discrimination is prohibited. Under the new state legislation, New York State joined Illinois and Oregon as the only states prohibiting workplace discrimination on the grounds of being a victim/perceived victim of domestic violence. The legislation also imposes an onus on the employer to make 'reasonable accommodations' for victims/survivors of domestic violence. *The New York State Executive Law Article 15* now provides:

Section 296—Unlawful discriminatory practices:

1. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

New York State's Division of Human Rights and New York City's Commission of Human Rights have provided excellent examples (for the benefit of both employers and employees) of how anti-discrimination legislation can be used to protect victims/survivors of domestic violence from adverse treatment in the workplace.

Local non-statutory initiatives

A number of organisations, such as Australia Post, Linfox and The Body Shop, have implemented policies and training and provided support to staff who are experiencing domestic violence. Notably, Australia's CEO Challenge (an initiative of the Brisbane Lord Mayor's Women's Advisory Committee) was developed in response to a gap in domestic violence awareness throughout the corporate sector. CEO Challenge encourages businesses to support domestic violence services and promote awareness of this issue in their organisations and in the wider community. The

program aims to raise awareness that also benefits the domestic violence and refuge sector through mutually beneficial partnerships. For example, a business may support a women's refuge through fundraising or donations and in return receive awareness training and support to develop policies around domestic violence in their workplace (McFerran & Braaf 2009).

The CPSU, in conjunction with the Australian Domestic and Family Violence Clearing House, has developed a model draft clause to be inserted into the University of New South Wales' workplace agreement (Public Service Association 2010). The clause provides that no employee will be adversely treated if his or her performance or attendance at work suffers as a result of domestic violence. The clause specifies the evidentiary requirements of demonstrating the existence of domestic violence and does not limit the violence to being of a physical nature. The agreement also provides that a human resources officer will be identified to deal with domestic violence-specific issues and will receive appropriate training in domestic violence awareness and privacy issues. This agreement has been heralded as 'leading the way' by the Sex Discrimination Commissioner, Elizabeth Broderick (Broderick 2010).

5.0 Further measures—what more can Australia do?

The Australian Human Rights Commission has expressed interest in tackling adverse treatment on the basis of domestic violence from a discrimination standpoint (Broderick 2010). We consider anti-discrimination law reform to be appropriate for laying down the foundations of protecting the employment relationship and reducing the effects of domestic violence for victims/survivors. Anti-discrimination legislation should adopt 'victim/survivor of domestic violence' as an attribute upon which discrimination is prohibited. This would then naturally flow on to provide protection under the General Protections/Unlawful Dismissal provisions of the *Fair Work Act 2009* (Cth) and state industrial relations laws, as all provide that dismissals in contravention of anti-discrimination legislation are deemed unlawful. Inserting 'victim/survivor of domestic violence' as an attribute in anti-discrimination law will also ensure protection from *indirect* discrimination. It would then create the foundations for other 'flow-ons', such as statutory leave provisions. These fact sheets should detail employers' obligations and suggest adjustments and accommodations that could be made in the workplace, as well as template policies that can be adopted by employers.

Assumedly, there will be significant debate over the definition of 'victim/survivor of domestic violence' for the purposes of legislation. We suggest that examples of how to define 'domestic violence' and its subsequent evidentiary requirements could be derived from the CPSU/UNSW

model clause and New York's anti-discrimination legislation. For example, the CPSU/UNSW model clause defines domestic violence as 'physical, sexual, financial, verbal or emotional abuse by an immediate family member as defined in this Agreement' (Public Service Association of NSW 2010). We would caution against using the wording 'immediate family member' in any legislative definition, as this may limit the rights of same-sex partners or non-family members/ex-member of the household who suffer violence. The New York City Commission on Human Rights defines 'victim of domestic violence' as:

A person who has been subjected to acts or threats of violence, not including acts of self defense, committed by a current or former spouse of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim, by a person who is or has been in a continuing social relationship of a romantic or intimate nature with the victim, or a person who is or has continually or at regular intervals lived in the same household as the victim (The New York City Human Rights Law, s8-102).

We consider this extended definition, in conjunction with the express inclusion of financial, verbal and emotional abuse by the CPSU, as appropriate for Australian anti-discrimination legislation. It is inclusive of various relationships and manifestations of abuse, and does not exclude those who are experiencing domestic violence by a non-family member. The CPSU/UNSW agreement also provides that evidentiary requirements of such violence can be satisfied by '*an agreed document issued by the Police Service, a Court, a Doctor, a Domestic Violence Support Service or Lawyer*'.

6.0 Conclusion

This paper examines the issue of domestic violence in the workplace largely from the perspective of employees. We note that this issue, while common, is neither well-recognised nor addressed in Australian workplaces, despite government policies aimed at reducing domestic violence in the community overall. While legislation has been enacted in certain overseas regions, it has not been mirrored in Australia. Instead, discrimination in the workplace based on domestic violence status has been addressed by only a handful of larger organisations that, in recognition of this gap and its detrimental effects in the workplace, have implemented non-statutory initiatives to prohibit discrimination and provide support within their own workplaces. As such, the issue has been left largely to individual employers, with no regulatory underpinnings in place. The initiatives implemented by New York City and New York State in acknowledging the need for 'domestic violence status' to be an attribute in their anti-discrimination legislation, coupled with the Sex Commissioner's eagerness to protect domestic violence victims/survivors in the workplace, demonstrates the capacity for its inclusion in Australia's anti-discrimination jurisdictions. The appropriateness of such reform is demonstrated by both the vulnerable nature of victims/survivors of domestic violence,

which is comparable to the situations of others with attributes listed in various pieces of anti-discrimination legislation and the (albeit piecemeal) measures already in place.

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