



Victorian Equal Opportunity  
& Human Rights Commission

# Submission to the Royal Commission into Family Violence

28 May 2015

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## Introduction

The Victorian Equal Opportunity and Human Rights Commission (the Commission) welcomes the opportunity to make a submission to the Royal Commission into Family Violence (the Royal Commission).

The Commission is an independent statutory body that has functions under the *Equal Opportunity Act 2010*, the *Racial and Religious Tolerance Act 2001* and the *Charter of Human Rights and Responsibilities Act 2006* (the Charter).

Our functions include dispute resolution, providing education about human rights and equal opportunity, undertaking projects and activities aimed at eliminating discrimination and promoting human rights, conducting research, and providing legal and policy advice. In addition the Commission has a role to report to the Victorian Attorney- General on the operation of the Charter, to conduct Charter and Equal Opportunity Act interventions and, at the request of an organisation or public authorities, conduct compliance reviews.

## Focus of this Submission

The Commission has considered the Issues Paper released by the Royal Commission on the 31 March 2015. This submission focuses predominantly on question eight of the Issues Paper, namely, *any gaps or deficiencies in current responses to family violence, including legal responses, any recommended improvements to overcome these gaps and deficiencies or improve current responses.*

## Definitions

### Family Violence

The Commission is using the definition of family violence as defined in section 5 of the *Family Violence Protection Act 2008* (Vic), namely:

- (a) behaviour by a person towards a family member of that person if that behaviour is
  - i. physically or sexually abusive; or
  - ii. emotionally or psychologically abusive; or
  - iii. economically abusive; or
  - iv. threatening; or
  - v. coercive; or
  - vi. in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or
- (b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).<sup>1</sup>

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<sup>1</sup> *Family Violence Protection Act 2008*, s5.

## Family member

Family member is defined in section 8 of the Family Violence Protection Act and includes a person's spouse or domestic partner, a person who has had an intimate personal relationship with the person, a relative of the person, or a child who normally or regularly resides with the person or has previously resided with the person on a normal or regular basis.<sup>2</sup>

At times during this submission reference is made to "domestic violence", which the Commission has used as an interchangeable term to "family violence".

## Violence against women

The submission also refers to the term 'violence against women.' The 1993 United Nations (UN) Declaration on the Elimination of Violence against Women describes the term to mean:

*'any act of gender based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'.*

The UN Declaration defines and describes the range of acts that may constitute violence against women and calls on countries to condemn violence against women and pursue a policy of eliminating it.<sup>3</sup>

## The Commission's interest in the issue

Violence against women (including family violence and sexual assault) is globally recognised as one of the most systemic, widespread and pervasive human rights violations.<sup>4</sup> The health, social and economic impacts are widely documented with intimate partner violence reported as being the leading contributor to death, disability and illness in Victorian women aged 15 to 44 years.<sup>5</sup> In addition, since the age of 15 one in six Australian women has experienced physical or sexual violence from a current or former partner, while one in four has experienced emotional abuse by a current partner.<sup>6</sup>

The challenge before the Royal Commission is a significant and complex one, made more urgent by an increasing number of family violence related police reports,<sup>7</sup> and homicide incidents.<sup>8</sup> In this year alone there has already been a reported 36 deaths

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<sup>2</sup> Family Violence Protection Act 2008, s8.

<sup>3</sup> United Nations (UN) Declaration on the Elimination of Violence against Women (1993).

<sup>4</sup> R Manjoo "Report of the Special Rapporteur on violence against women, its causes and consequences" Human Rights Council, 26<sup>th</sup> sess, Agenda Item 3, A/HRC/26/38, (28 May 2014).

<sup>5</sup> Victorian Health Promotion Foundation, 'Preventing violence before it occurs: A framework and background paper to guide the primary prevention of violence against women in Victoria' (2007), p24.

<sup>6</sup> Our Watch - End Violence Against Women and Children "Key terms, definitions and statistics" Policy Brief 1, (September 2014).

<sup>7</sup> Victoria Police attended more than 65,000 family violence incidents in 2013-14 – an increase of more than 83 per cent since 2009-10. Victoria Police *Annual Report 2013-14* (2014).

<sup>8</sup> According to the Australian Institute of Criminology of the 479 homicide incidents in Australia between 1 July 2010 and 30 June, the largest proportion, 39 per cent were classified as domestic homicide. (Willow Bryant and Tracey Cussen, 'Homicide in Australia:2010-11 to 2011-12 National Homicide Monitoring Program Report' Monitoring Report No 23, Australian Institute of Criminology 2015).

of women killed by violence, with a reported 84 deaths in 2014.<sup>9</sup> Despite the considerable efforts made in recent times by the service system, police and legal sector, it is clear by the increasing number of reports and fatalities that the system has at times failed the people it has been designed to protect. Furthermore, more efforts need to be concentrated to the primary prevention of violence against women as we need to work towards stopping the violence before it occurs.

The Commission does not underestimate the considerable task before the Royal Commission both in considering the wide reaching terms of reference and making recommendations across the full range of issues identified.

The Commission is keen to ensure that family violence (and violence against women more broadly) is characterised as the human rights abuse that it is internationally recognised as being. The Commission believes the adoption of a rights based approach will strongly assist the Royal Commission in finding workable solutions to the challenges facing the current system.

In addition, the Commission's legislative mandate includes projects and activities to eliminate systemic discrimination and promote equality. The recognised drivers of violence against women include unequal power relations between men and women, adherence to rigid gender stereotypes and broader cultures of violence.<sup>10</sup> Both the Equal Opportunity Act and the Charter of Human Rights and Responsibilities aim to eliminate sex discrimination and promote the right to equality for all Victorians. All duty holders and public authorities are obliged to comply with these standards. Therefore, it is the Commission's view that all prevention of family violence efforts can be supported by the principles of non-discrimination and gender equality that are enshrined in Victorian Law.

Finally, the Commission is interested in providing direct input into the Royal Commission as family violence should also be considered as an employment and housing/ accommodation issue. The Commission intends to provide some practical legislative and policy recommendations to support victim/ survivors who have also experienced discrimination.

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<sup>9</sup> This figure is as of 13 May 2015. *'Destroy the joint 'Counting Dead Women Project'*.

<sup>10</sup> Victorian Health Promotion Foundation, *'Preventing violence before it occurs: A framework and background paper to guide the primary prevention of violence against women in Victoria'* (2007).

## Recommendations

### 1. Promoting Charter compliance

1. That the Royal Commission in its report, contextualise family violence within a human rights framework, drawing on relevant Charter rights that apply to public authorities.
2. That all Victorian public authorities are required by government policy, to complete a *Human Rights Impact Assessment Statement* to ensure that their new policies and practices relating to family violence (and its drivers) are compatible with the Charter of Human Rights and Responsibilities, that they give proper consideration to human rights in decision-making, and that they continue to work to promote the right to equality and non discrimination. Existing policies and practices should be audited for compliance every two years.
3. That public authorities engage the Commission to assist them with the initial development and implementation of the Human Rights Impact Assessment Statements.

### 2. Legislative changes to improve legal protections offered to victim/ survivors of family violence

4. That section 6 of the *Equal Opportunity Act 2010* (Vic) be amended to insert a new protected attribute of “status of victim/survivor of family violence”.
5. That consultation take place with relevant family violence stakeholders, to determine the most appropriate wording of the new protected attribute.
6. If the Equal Opportunity Act is amended according to recommendation 4, that an additional amendment be made to the Equal Opportunity Act to align the definition of family violence with the definition of family violence as found in the *Family Violence Protection Act 2008* (Vic).

### 3. Miscellaneous Leave Provisions in the Victorian Public Service

7. That dedicated leave for Family Violence be included in the Victorian Public Service Enterprise Bargaining Agreement (EBA) as “miscellaneous leave”, and that in doing so:
  - i. The miscellaneous leave be additional paid leave on top of an employee’s other leave entitlements and should be available for people experiencing family violence, subject to appropriate evidence requirements.
  - ii. Mechanisms are put in place, such as through the payroll system, to ensure the confidentiality of employee’s applications and taking of leave.
8. That a complementary family violence policy for the Victorian Public Service accompany the introduction of this Family Violence “miscellaneous leave” that includes the following minimum requirements:
  - i. Development and understanding of Safety Planning strategies to apply in the workplace, to ensure the employee’s safety (with direction in the policy for managers or human resources staff to contact specialist family violence support services if workplaces require support and advice).
  - ii. Referral pathways to appropriate family violence support services for those who wish to be referred.
  - iii. Requirements that Human Resources staff, managers and other relevant staff undertake training and support in order to create an environment

where those needing support feel safe to disclose that they need the miscellaneous leave, and that all support will be provided confidentially. This training would assist staff to ask the right questions and to put in place the right supports and safety measures.

- iv. Ensuring that employees entitled to family violence leave are also able to access flexible work where appropriate.
- v. That all existing Equal Opportunity policies be updated to include the new protected attribute.
- vi. Ensuring employees are protected from any adverse action or discrimination based on their disclosure of family violence.<sup>11</sup>

## 1. Human rights compliance and family violence

### **Recommendation 1: Promoting Charter compliance**

1. That the Royal Commission in its report, contextualise family violence within a human rights framework, drawing on relevant Charter rights that apply to public authorities.
2. That all Victorian public authorities are required by government policy, to complete a *Human Rights Impact Assessment Statement* to ensure that their new policies and practices relating to family violence (and its drivers) are compatible with the Charter of Human Rights and Responsibilities, that they give proper consideration to human rights in decision-making, and that they continue to work to promote the right to equality and non discrimination. Existing policies and practices should be audited for compliance every two years.
3. That public authorities engage the Commission to assist them with the initial development and implementation of the Human Rights Impact Assessment Statements.

The Commission welcomes the Royal Commission's aim to eliminate family violence, to prevent its occurrence, facilitate early intervention, support victim/ survivors and children and to hold perpetrators to account for their actions. In addition the Commission welcomes the Royal Commission's mandate of building respectful relationships and reinforcing community rejection of the use of family violence.

A human rights based approach to the evidence and formulation of findings (discussed below) can help the Royal Commission with its deliberation and recommendations by providing a legal, policy, and conceptual framework that is consistent with the aims of the Royal Commission. Such an approach respects and promotes the dignity of all victim/survivors by valuing the right to life, protection from cruel, inhumane and degrading treatment and the protection of families and children, yet also targets the drivers of family violence being gender inequality and discrimination. Adopting a human rights approach provides strong legislative basis to preventing family violence through the values of equality and non-discrimination.

Violence against women (and in some instances the girl child) is referred to in broad terms in numerous international human right treaties and instruments. This includes:<sup>12</sup>

<sup>11</sup> Domestic Violence Workplace Rights Entitlement Project 'Safe at Home, Safe at Work submission: Equal Opportunity for Women in the Workplace Amendment Bill 2012' including specific benchmarks on domestic violence workplace rights and entitlements (14 March 2012).

- The International Covenant on Civil and Political Rights,
- The Convention on the Rights of the Child,
- The Convention on the Elimination of All Forms of Discrimination against Women,
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and
- The Declaration on the Elimination of Violence Against Women.

State signatories to these international instruments have a duty to act with due diligence to eliminate violence against women. State responsibility to act with due diligence entails: responding effectively to violence (through a range of protection measures and criminal sanctions), ensuring gender equality frameworks, promoting attitudinal change, proactively ensuring women's participation in decision-making and undertaking programmes with a strong focus on promoting women's empowerment and agency.<sup>13</sup> Reference to these international treaties and obligations could also assist the Royal Commission to develop initiatives and strategies to meet its stated aims.

Australia is a signatory to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), which provides that States condemn discrimination against women in all its forms, and agree to take appropriate measures to eliminate discrimination.<sup>14</sup>

The CEDAW Committee's General Recommendation No.19 notes that discrimination against women includes "violence that is directed at a woman because she is a woman or that affects women more disproportionately".<sup>15</sup> The CEDAW Committee further states that gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men. This includes the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment, the right to liberty and security of the person, and the right to equality (including equal protection under the law) – which are all human rights protected in the Victorian Charter discussed below.<sup>16</sup>

While CEDAW applies to violence perpetrated by public authorities, the obligation to take appropriate action to prevent discrimination has been interpreted by the CEDAW Committee to amount to an obligation on States (both Nation States as well as Australian states and territories) to take due diligence to prevent and respond to private violations of rights.<sup>17</sup> As noted above, this means that governments must take reasonable and effective measures to prevent, punish and redress domestic violence.<sup>18</sup>

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<sup>12</sup> R Manjoo *Report of the Special Rapporteur on violence against women, its causes and consequences*, Human Rights Council, 26<sup>th</sup> sess, Agenda Item 3, A/HRC/26/38, (28 May 2014) p7.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981), art 2.

<sup>15</sup> CEDAW Committee, *General Recommendation No. 19: Violence Against Women*, 11<sup>th</sup> sess, UN Doc A/47/38 (1992) para 6.

<sup>16</sup> *Ibid.*, paras 1, 7.

<sup>17</sup> *Ibid.*, paras 8-9.

<sup>18</sup> *Ibid.*, para 5; Yakin Erturk, *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women: Report of the Special Rapporteur on Violence Against Women, its causes and consequences*, Commission on Human Rights, 62<sup>nd</sup> sess, Agenda Item 12(a), E/CN.4/2006/61 (20 January 2006).



## The Charter of Human Rights and Responsibilities

The primary legislative vehicle for human rights protection in Victoria is the Charter of Human Rights and Responsibilities. The Charter sets out the human rights that underpin our systems response to family violence, and also provides a strong basis to address the drivers of violence against women. The Charter mandates that public authorities comply with these internationally accepted rights, and can also guide improvements to the system.

Relevant Charter rights to the Royal Commission include:

**Recognition and equality before the law**, which protects the rights of all Victorians, including children, to enjoy their human rights free from discrimination (s8).

**Right to life** which in the context of family violence, may include a positive duty to protect the life of victim and their children (s9).

**Protection from cruel, inhuman and degrading treatment.** Which is concerned not only with physical integrity, but also with a person's mental integrity and their inherent dignity as human rights. This right is of particular importance to family violence victims as it recognises the impact and harm that both emotional and psychological abuse can have on a victim/ survivors mental integrity (s10).

**Privacy and reputation including arbitrary interference with family life (s13).** This right includes that a person is not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with and not to have his or her reputation unlawfully attacked.

**Protection of families.** The Charter recognises that families are the fundamental group unit of society and are entitled to be protected by society and the State. The right to family protection is a right of both parents and children (s17(1)).

**Protection of children**, because "every child has the right, without discrimination, to such protection as in his or her best interest" and is needed by him or her by reason of being a child (s17(2)).

The Charter also recognises that human rights are not absolute and that there are circumstances where a right may be reasonably limited. The test of a reasonable limitation of a right is contained in s7(2) of the Charter. This section outlines that such a limitation must be reasonable, justifiable and proportionate, taking into account the nature of the right, the purpose of the interference, and applying the least restrictive means of limiting the right.

Section 7(2) of the Charter could be of use to the Royal Commission in testing potential solutions to this complex social issue. The Charter provides a mechanism to balance out how different rights can come into conflict with one another, and what should be considered when this occurs.

## Human Rights Impact Assessment Statement

The rights outlined in the Charter are of direct relevance to both the prevention and response to family violence. The rights as articulated above, have direct relevance to the impacts of family violence, but also are relevant to the drivers of family violence.

As mentioned, the Charter mandates that public authorities act in a manner that is compatible with these rights and take human rights into consideration when making decisions.

In order to promote protection of employees experiencing family violence and the consideration of their human rights, the Commission recommends that all Victorian public authorities be required to complete a Human Rights Impact Assessment Statement for new policies and practices relating to family violence (and its drivers i.e gender inequality) prior to their introduction.

This assessment process would be a practical measure to ensure that decision-makers turn their minds to the rights outlined in the Charter as they affect victim/survivors of family violence, document this process, and ensure that any new policies and practices are compatible with human rights. It would also be important that existing policies and practices are audited to ensure compliance every 2 years. Where a human right is engaged and limited as a result of the actions or decisions of a public authority, s7(2) would need to be invoked to ensure that any limitation is reasonable, justified and proportionate.

The Commission could work with public authorities to assist them with the initial development and implementation of the Human Rights Impact Assessment Statements.

## 2. Legislative changes to improve legal protections offered to victim/ survivors of family violence

### **Recommendation 2: Legislative changes to improve legal protections offered to victim/ survivors of family violence**

4. That section 6 of the *Equal Opportunity Act 2010* (Vic) be amended to insert a new protected attribute of “status of victim/survivor of family violence”.
5. That consultation take place with relevant family violence stakeholders, to determine the most appropriate wording of the new protected attribute.
6. If the Equal Opportunity Act is amended according to recommendation 4, that an additional amendment be made to the Equal Opportunity Act to align the definition of family violence with the definition of family violence as found in the *Family Violence Protection Act 2008* (Vic).

### **Amend the Equal Opportunity Act to insert a new protected attribute**

The Commission recommends that the Equal Opportunity Act be amended to insert a new protected attribute of victim/ survivor of family/ domestic violence.

Currently, the Equal Opportunity Act prohibits discrimination in an area of public life (for example work) due to one of 18 personal attributes (such as sex).<sup>19</sup> Discrimination may be direct or indirect.<sup>20</sup>

Direct discrimination is when a person treats, or proposes to treat, a person with a protected personal attribute unfavourably because of that attribute.<sup>21</sup> Direct discrimination may result because people make assumptions about an individual's capabilities or it can arise from personal preference and prejudices. For example, refusing to employ someone because of their sex or nationality.

Indirect discrimination occurs when a person imposes, or proposes to impose, an unreasonable requirement, condition or practice that on its face treats everyone the same, yet in practice has or is likely to have the effect of disadvantaging persons with one of the 18 protected attributes.<sup>22</sup> For example, a requirement that all staff attend training commencing at 7am is likely to have the effect of disadvantaging parents in their employment, and the employer would need to prove that it was a reasonable requirement in the circumstances. In determining either direct or indirect discrimination a person's motive is irrelevant.

Discrimination can become 'systemic' or entrenched when institutional patterns of behaviour or actions affect a range of people. These behaviours or actions can form part of organisational culture that may be reinforced by policies or procedures.

Based on the evidence outlined below, the Commission is of the view that there is the potential for victim/ survivors of family violence to experience discrimination across the spectrum of public life that is covered by the Equal Opportunity Act and they may also experience intersectional discrimination (that is, discrimination on more than one ground). This submission focuses on the following two pertinent areas of public life – *employment and accommodation/ housing*. This focus is based on the very real, practical impacts that discrimination in these areas can have on a victim/survivor's ability to stay safe or to leave a violent relationship.

If the Equal Opportunity Act is amended to include the protected attribute, the Commission would recommend that the definition of family violence be aligned with the definition of family violence as found in the Family Violence Protection Act. There may also be additional definitions that the Royal Commission may want to incorporate from the Family Violence Protection Act into the Equal Opportunity Act, as there are currently some inconsistencies. For example the Equal Opportunity Act does not use the term "family" in any substantive provisions. It refers to parental and carers, not families. Another example is 'domestic partners' which are also defined differently in both Acts.

<sup>19</sup> *Equal Opportunity Act 2010* (Vic) s6.

<sup>20</sup> *Equal Opportunity Act 2010* (Vic) s7. There are also other types of discrimination that do not rely on the tests for direct and indirect, but rather relate to a breach of a specific provision in the Act. For example, failure to provide reasonable adjustments for an employee with a disability. However, these provisions are not as relevant for the purpose of this submission as the introduction of a new protected attribute would be only be used in relation to direct or indirect claims of discrimination.

<sup>21</sup> *Equal Opportunity Act 2010* (Vic) s8(1).

<sup>22</sup> *Equal Opportunity Act 2010* (Vic) s9(1).

## Family Violence and Employment

It is clear from the current public discourse, changes to legislation and policies, and increasing evidence base, that family violence is increasingly recognised not as an 'individual' or 'private' issue, but rather a systemic issue that arises from a complex interplay of social, cultural, economic and gender factors. Accordingly, the response to family violence needs to be dealt with as a broader community issue that encompasses both the private and public sphere. This includes workplaces as a key setting.<sup>23</sup>

### Benefits of employment on victim/survivors

The research shows that it is predominantly women that experience domestic and family violence.<sup>24</sup> Increasingly policy makers and practitioners are recognising that the majority of those women are in paid employment, and that paid employment plays an important role in promoting women's independence and wellbeing upon exit from violent relationships.<sup>25</sup> Financial security is a key enabler for victim/survivors of family violence to leave a violent relationship, whilst workplace participation is also a vital structural and social support for victims.

The key benefits of employment on victim/ survivors should not be understated, with some of the critical advantages including:

- financial independence,
- social support network,
- a sense of belonging and self-confidence and
- in some workplaces, access to additional practical supports (such as counseling services).

### Impact of family violence on employment and job applicants

*The Safe at Home, Safe at Work: National Domestic Violence Impact at Work Survey*,<sup>26</sup> firmly recognized domestic/family violence as an Australian workplace issue. The survey results showed that domestic/family violence impacted on workers ability to travel to and from work and their productivity and safety whilst in the workplace. The following results are taken from this survey:

- 30% of 3,611 respondent workers had experienced some form of domestic/family violence in the course of their lifetime.
- Of the workers who had experienced domestic violence, nearly half reported that it had affected their capability to get to work, through either physical restraint, hiding/stealing keys or transportation money or refusal/failure to show up to care for the children.
- 19% of the workers who had experienced domestic violence reported that the violence impacted on them in the workplace; the most common forms of abuse experiences were through the perpetrator abusing them via phone or email whilst at work, or attending the workplace.

<sup>23</sup> Australian Law Reform Commission 'Family Violence and Commonwealth Laws: Employment and Superannuation', Issues Paper 36 (22 February 2011).

<sup>24</sup> Our Watch - End Violence Against Women and Children 'Key terms, definitions and statistics', Policy Brief 1, (September 2014).

<sup>25</sup> R Braaf & I Barrett-Meyering. 'Seeking security: promoting women's economic wellbeing following domestic violence', Australian Domestic and Family Violence Clearing House (March 2011).

<sup>26</sup> Ludo Mc Ferran, 'Safe at Home, Safe at Work? National Domestic Violence and the Workplace Survey (December 2011).

- The impacts of victim/ survivors of family/ domestic violence which affected their performance at work included: feeling tired, distracted, unwell, having to take time off work or being late for work.

The International Labour Organisation (ILO) also recognises that family violence can cause both immediate and long-term disruptions on the workplace. In a study by the ILO across several regions of the United States, 75 percent of women suffering domestic violence were found to have been harmed or harassed at their workplace by abusive spouses or partners. This abuse was either on the phone or in person. The study showed that violence can also affect co-workers who may intervene to stop the abuse, or may experience vicarious trauma through witnessing the violence. Additionally, violence can affect the broader working environment, impacting on how the work is organised and on interpersonal relationships.<sup>27</sup>

Family violence can also directly impact on a person's ability to secure employment, with multiple barriers being reported to the Australian Law Reform Commission. This may include a violent partner's active interference with the job search process (e.g. blocking transportation, abuse occurring prior to the interview, attempts to make the victim sleep deprived to impact on performance, failure to care for children), through to other pertinent factors such as lack of housing or transportation when leaving an abusive relationship.<sup>28</sup>

### **Workplace Discrimination**

Despite the key benefits that employment can provide, victims/survivors of family violence can experience discrimination in the workplace (or in job applications) because of their status as victim/survivor. This can often compound and exacerbate the initial experience of violence.

Victims/ survivors may be reluctant to disclose family violence for a myriad of reasons, including:

- Fear that disclosure will jeopardise their job or career,
- Concern that they will be stigmatised, or
- Fear that their employer will not be responsive.<sup>29</sup>

These fears are not unjustified, as discrimination does and can manifest in a number of ways. Primarily this is likely to be direct discrimination, where the employee or prospective employee is treated unfavourably because they are a victim/survivor of family violence, or because of characteristics associated with or assumed to be held by a victim/survivor of family violence.

In Victoria it is unlawful for an employer to discriminate against an employee by:

- Denying or limiting access by the employee to opportunities for promotion, transfer or training, or other benefits connected with the employment;
- Dismissing the employee or otherwise terminating their employment (i.e. constructively dismissing the employee);
- Denying the employee access to a guidance program, apprenticeship, or other occupational training or retraining; or

<sup>27</sup> Adrienne Cruz and Sabine Klinger, *Gender based violence in the world of work, Overview and Selected Annotated Bibliography* (Working Paper No 3/2011, Geneva, International Labour Office, 2011).

<sup>28</sup> Australian Law Reform Commission 'Family Violence and Commonwealth Laws: Employment and Superannuation', Issues Paper 36 (22 February 2011)

<sup>29</sup> Ibid.

- Subjecting the employee to any other detriment (including being subjected to humiliation or denigration).

where the protected attribute is the substantial reason for the conduct.<sup>30</sup>

It is also unlawful to discriminate against a job applicant (where the protected attribute is the substantial reason for the conduct):

- In determining who should be offered employment;
- In the terms and conditions offered to a person;
- By refusing or deliberately omitting to offer employment to the person; or
- By denying a job applicant access to a guidance program, apprenticeship, or other occupational training or retraining.<sup>31</sup>

Some examples that may constitute direct discrimination on the basis of victim/survivor of family violence may include:

- Not being selected for a job or promotion because of the perception that victim/survivors are unreliable or take too much sick leave, or because of perceived damage to workplace reputation that employing the person might occur.
- Being subjected to detrimental or humiliating comments by colleagues about the amount of leave a person is taking for family violence reasons or calling them an attention seeker.
- Being denied access to more beneficial terms of employment unless the employee provides a letter stating they will leave their abusive partner.<sup>32</sup>
- Having a reasonable request for flexible work arrangements or application for leave denied, where those requests were to facilitate attendance at family violence-related appointments (e.g. medical, legal, court dates, financial, or child related appointments), and that decision has been made because they hold certain stereotypes of the victim/ survivor and this is the substantial reason for denying the leave/ flexibility request (and not for genuine business reasons).
- Not giving an employee a fair opportunity to improve their performance with support, after they advise the reason is due to experiencing family violence. where the employer has formed the view that the employee's situation means there is no chance of improvement due to their situation.
- Being dismissed for not attending work due to being hospitalised by a family violence incident or having to attend the police station to seek an intervention order.
- Being dismissed or subjected to disciplinary action after the employee's violent partner attends the workplace and causes a disruption or threatens other staff members.<sup>33</sup>

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<sup>30</sup> *Equal Opportunity Act 2010*, s8(2)(b), s18.

<sup>31</sup> *Equal Opportunity Act 2010*, s8(2)(b), s16.

<sup>32</sup> Case study included in Alana Heffernan and Lee Matahaere, *Domestic violence discrimination in the workplace: Is statutory protection necessary?* Our Work, Our Lives Conference 2010, Queensland Working Women's Service, p5.

- Even where not disclosed family violence, might constitute indirect discrimination.

### **Ensuring victim/survivors of family violence are adequately protected**

If we are to take the issue of family violence seriously then we need to ensure that a victim/ survivors' ability to obtain and retain employment is protected. However, Victorian anti-discrimination law does not currently protect the attribute of being a victim/ survivor of family violence, and it is conceptually difficult to attempt to fit the treatment of people experiencing family violence into other attributes such as sex or disability. Moreover, whilst the *Fair Work Act 2009 (Cth)* provides that employees experiencing family violence have the right to request flexible working arrangements, those requests can be refused on reasonable business grounds with no right of appeal.<sup>34</sup>

It is important therefore that anti-discrimination law is amended to fill the gap in protection for victims/survivors in the workplace. The Australian Human Rights Commission has also advocated that the elimination of discrimination against victim/survivors in employment will improve their access to, and ability to remain in, employment, which plays a critical role in assisting victims/survivors transition out of family violence.<sup>35</sup>

The Commission recommends that the attribute of victim/survivor of family violence be included in the Equal Opportunity Act as a way of providing legal redress for employees who are experiencing unfavourable treatment or being disadvantaged by their employer's policies because of their status as a person experiencing family violence.

The inclusion of the protected attribute would also require that employer's review conditions, requirements and practices to ensure that they are not indirectly discriminating against victim/ survivors. That is, that policies, conditions, requirements are not unreasonably having a disproportionate impact on victim/ survivors.<sup>36</sup> An example of potential indirect discrimination is:

- Where a requirement, practice or condition is imposed on employees that they must work at particular locations or hours of the day without variation, or that they must have public phone and email addresses. This is likely to disadvantage victims/ survivors of family violence who require changes to their work conditions (e.g. changes to location, schedule of hours, change in phone/ email details) to avoid contact with the perpetrator who may know their movements and stalk or attack them at work. The imposition of this condition may constitute indirect discrimination if the working conditions are not reasonably justified by the employer.
- Another example is where a promotion is based on attendance. This is likely to disadvantage victims/ survivors of family violence who may have had to

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<sup>33</sup> Case study included in Alana Heffernan and Lee Matahaere *Domestic violence discrimination in the workplace: Is statutory protection necessary?* Our Work, Our Lives Conference 2010, Queensland Working Women's Service, p4.

<sup>34</sup> *Fair Work Act 2009 (Cth)* s65.

<sup>35</sup> Australian Human Rights Commission, *Consolidation of Commonwealth Discrimination Law Supplementary Submission* (January 2012) para 25.

<sup>36</sup> T Orchiston.& B Smith, '*Empowering victims of family violence: could anti discrimination laws play a role?* (March 2012).

attend a number of external appointments impacting their attendance record, or who have had breaks in their employment history due to the violence.

### **Workplaces as settings for primary prevention**

Workplaces have been identified by the Victorian Government as a key setting in the primary prevention of violence against women.<sup>37</sup> Workplaces function as environments where social norms and attitudes are both shaped and reinforced and can also be settings where violence in itself can take place (such as sexual harassment, stalking, or assault).

Workplace environments that are safe, inclusive of women and encourage the participation and leadership of women at all levels reinforce social norms of respect, non violence and equity.<sup>38</sup> Initiatives within workplaces that promote gender equity and non discrimination (such as equity policies and programs) and respectful relationships are important in this regard. The Equal Opportunity Act and the Charter of Human Rights and Responsibilities can also underpin such programs based on the principles of non discrimination and equality.

### **Housing Discrimination**

Another important factor in escaping family violence is access to and the ability to obtain safe, secure and affordable housing. In spite of this survivors of family violence frequently face considerable upheaval, disruption and social and economic disadvantage, impacting on their ability to secure adequate housing. This creates the very real threat of homelessness.

The Council to Homeless Persons have found that Government-funded agencies had reported that one in every two women with children seeking homelessness services was escaping a violent home situation.<sup>39</sup> Other studies have also highlighted domestic and family violence as being overwhelmingly the major reason women seek housing assistance. For women with children, domestic and family violence was the reason in 55 per cent of cases where they accessed housing support, while an additional 7.7 per cent of support periods were sought for relationship and family breakdown.<sup>40</sup> For unaccompanied women aged 25 years and over domestic and family violence was the most cited reason (in 36.9 per cent of support periods), with relationship and family breakdown accounting for 4.5 per cent of support cases. For women aged under 25 relationship and family breakdown was the most cited reason (21.0 per cent); domestic and family violence was the second most cited reason (16.2 per cent of periods).<sup>41</sup>

More recently, in 2012 the Australian Institute of Health and Welfare collected data from specialist homeless services for 2011-12 which included the following findings:

<sup>37</sup> State of Victoria, '*Victoria's Action Plan to Address Violence Against Women and Children: Everyone has a responsibility to act. 2012-2015*'. (October 2014)

<sup>38</sup> Ibid.

<sup>39</sup> Council to Homeless Persons Factsheet, '*Homelessness in Victoria: Key statistics #1*' (September 2010) [www.ittakesahome.org.au](http://www.ittakesahome.org.au).

<sup>40</sup> Support periods refers to the support provided to clients of a supported accommodation assistance program. Each occasion of support is defined as a support period, which may be as short as one hour or may extend over several years.

<sup>41</sup> Commonwealth of Australia Department of Social Services, *Women, Domestic and Family Violence and Homelessness: A Synthesis Report*, (August 2008), p13, citing a 2008 Australian Institute of Health and Welfare study



- One-third of clients had experienced domestic or family violence.
- The majority of these (78 per cent) were female and one-fifth were less than 10 years of age.
- Over four times as many females as males reported domestic and family violence as the reason for seeking assistance.
- Of the female clients reporting domestic and family violence as a main reason, 63 per cent were aged between 18 and 44.
- The most common main reason for seeking assistance reported by Aboriginal and Torres Strait Islander clients (as for all clients) was 'domestic and family violence'.
- Female Aboriginal and Torres Strait Islander clients were significantly more likely than male clients to report 'domestic and family violence' as the main reason for seeking assistance (almost a third of females compared with 14 per cent of males, most of whom were children).<sup>42</sup>

However, establishing the true extent of homelessness caused by domestic and family violence remains difficult, as much of the problem remains hidden and unreported. There is no 'typical' woman who becomes homeless because of domestic and family violence. Such violence can and does affect women of all ages, cultural, social and economic backgrounds, and women living in all sorts of relationships.<sup>43</sup> The most comprehensive data available is collected as part of the Supported Accommodation Assistance Program (SAAP) and only presents data on persons who present to a SAAP service.<sup>44</sup>

Transgender women and men (from homosexual or heterosexual relationships) who are also victim/ survivors of family violence also face particular barriers in escaping family violence and accessing housing support services and accommodation. This is partly based on a lack of services designed to assist this group of victim/ survivors, but may also be partly caused by discriminatory attitudes and stereotypes towards these groups. More work needs to be undertaken to assist these groups of victim/survivors to safely leave violent relationships and access the supports that they require.

In the past, crisis accommodation services, particularly women's refuges and shelters, have played a pivotal role in raising public awareness of family violence and enabling women to leave situations of violence and stay in safe and secure accommodation.<sup>45</sup> More needs to be done in this regard, as this is another key area where victims/survivors of family violence report experiencing discrimination.

### **Discrimination in housing**

In a study conducted by Partnerships Against Domestic Violence '*Home Safe Home*', 161 stakeholders and 52 women were interviewed. The broad aim of the study was to investigate the relationship between domestic and family violence as experienced by women (including those alone and those with children) and homelessness. It

<sup>42</sup> Our Watch - End Violence Against Women and Children "Key terms, definitions and statistics" Policy Brief 1, (September 2014).

<sup>43</sup> Commonwealth of Australia Department of Social Services, *Women, Domestic and Family Violence and Homelessness: A Synthesis Report*, (August 2008), p13

<sup>44</sup> Ibid, p12.

<sup>45</sup> Donna Chung et al, *Home safe home: the link between domestic and family violence and women's homelessness* (Social Policy Research Group, University of South Australia, November 2000).

explored a range of housing issues and made a number of recommendations on the options and strategies required to help victim/ survivors of family violence. Of particular relevance to this submission is that the study found discrimination against victims in the private rental market.<sup>46</sup> The study cited evidence that sole parent families experienced the highest level of refusals and discrimination when attempting to access the private rental market when compared with other household types.<sup>47</sup>

More recent data from a 2011 Australian Domestic and Family Violence Clearinghouse Financial Security project, found that victims continue to face discrimination in housing due to prejudice and negative assumptions by landlords and real estate agents. The study reported that many women felt that they were discriminated against because they were single mothers or they had pets. Some had ended up lying about their relationship status in order to secure a rental property:

*“They’ve put me in a box of ‘I’m a no-hoper, single mother with three kids, there’s something wrong with me, I can’t pay my bills’... One social worker – which I think is hilarious – has said, ‘Why don’t you just say you’re widowed and they might look at you in a different light’. And you shouldn’t have to do that. That is discrimination. [Service 2 Client 1]...”<sup>48</sup>*

Some women may also lose housing as a consequence of their violent partner’s actions.<sup>49</sup>

Additional difficulties were encountered by women who had not previously rented or who had only lived in rental properties in their ex-partners’ name. They felt disadvantaged because they were unable to supply real estate agents with a rental history.<sup>50</sup> Financial abuse and control is often one of the behaviours that perpetrators of family violence exert over family members in an attempt to maintain power and control. Consequently, it would not be uncommon for victim/survivors to not have leases and other financial records/ bills in their own names. Education and awareness on the dynamics of family violence is required for duty holders to understand the practical constraints and realities that victim/ survivors encounter. In addition workers in the ADFVC study also spoke about real estate agents discriminating against Indigenous and CALD women, compounding the level of difficulty faced by these victim/survivors.<sup>51</sup>

### **Protected attribute in accommodation**

In Victoria it is unlawful under the Equal Opportunity Act for a person to discriminate in the provision of accommodation and housing:

- by refusing, or failing to accept another person’s application for accommodation,
- in the way in which another person’s application for accommodation is processed, or
- in the terms on which the accommodation is offered.

where the person’s protected attribute is a substantial reason for the conduct.<sup>52</sup>

<sup>46</sup> Donna Chung et al, *Home safe home: the link between domestic and family violence and women’s homelessness* (Social Policy Research Group, University of South Australia, November 2000).

<sup>47</sup> *Ibid*, 23.

<sup>48</sup> R Braaf & I Barrett-Meyering. ‘Seeking security: promoting women’s economic wellbeing following domestic violence’, *Australian Domestic and Family Violence Clearing House*, March 2011, 47.

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid*.

<sup>51</sup> *Ibid*.

<sup>52</sup> *Equal Opportunity Act 2010*, s8(2)(b), s52.

It is also unlawful for a person to discriminate against another person in relation to existing accommodation (where the person's protected attribute is a substantial reason for the conduct):

- by varying the terms on which the accommodation is provided,
- by denying or limiting access to any benefit associated with the accommodation,
- by evicting the person,
- by refusing to extend or renew the provision of accommodation,
- in the terms on which the renewal or extension of the provision of accommodation is granted, or
- by subjecting the person to any other detriment in connection with the provision of accommodation.<sup>53</sup>

Victim/Survivors of family violence need access to a range of housing options. Legislative changes in the Family Violence Prevention Act, that have introduced exclusion orders, have been a positive step in assisting victim/ survivors to remain in their homes.<sup>54</sup> However, this is not always an option for all victim/ survivors. There needs to be a range of options available including (not limited to) remaining in the home, public housing, private rentals, outreach services, transitional housing, long term housing and refuge services.

The Commission recommends that the protected attribute be introduced and apply in the area of accommodation. This introduction would mean that victim/survivors of family violence would have redress for any of the above conduct, if it were taken substantially because the person seeking or utilising that accommodation was a victim/survivor. It is one-step to assisting victim/ survivors who have been discriminated against by an accommodation provider, whether that be in the public or private sphere.

### **The Equal Opportunity Act “Positive Duty”**

In addition to the legal redress that the Equal Opportunity Act could provide to victim/ survivors who have been discriminated against in public life (if the protected attribute were included), the Act can also serve a preventative, educative function.

The Equal Opportunity Act places a positive obligation on duty holders to take positive action to eliminate discrimination, sexual harassment and victimisation. This includes an obligation to take reasonable and proportionate measures to eliminate discrimination as far as possible.<sup>55</sup> The insertion of the recommended attribute of victim/survivor could be used as a proactive tool to encourage employers, accommodation providers and other duty holders under the Act to address their policy and practice.

Through the protection of the new attribute, duty holders could be expected to:

- Introduce or review existing policy/ practices which either directly relate to, or indirectly affect, people experiencing family violence;
- Increase awareness of the issue of family violence in the workplace or the provision of accommodation;

<sup>53</sup> *Equal Opportunity Act 2010*, s8(2)(b), s53

<sup>54</sup> *Family Violence Protection Act 2008*, s82.

<sup>55</sup> *Equal Opportunity Act 2010*, s15.

- Introduce staff training on the issue (particularly for management and human resource personnel), including training on the causes of violence against women, and
- Conduct an environmental scan of their organisation's policies, procedures and practice to look more broadly at what they can do to support victim/survivors (e.g. whether to provide external counselling, safety planning, peer support, flexible arrangements). This scan should also consider the drivers of family violence and what the organisations can do to improve gender equity.

### **Overseas Jurisdictions**

If Victoria was to introduce this new attribute into the Equal Opportunity Act it has the benefit of being able to look to overseas jurisdictions for guidance in its introduction and implementation.

There are many overseas jurisdictions that provide express protection from workplace discrimination for victims/survivors of family violence. This includes at least eight jurisdictions within the United States while the Philippines and Spain also provide protection.<sup>56</sup>

In relation to international labour law, gender based violence (including family/domestic violence) is recognised by the ILO as posing a barrier to accessing decent work. The introduction of this attribute would also accord with Australia's international obligations under a range of treaties, as it would assist victim/survivors to leave an abusive relationship.<sup>57</sup>

For example, Article 10 of the international Covenant on Economic, Social and Cultural Rights states the Covenant recognises the family as the 'natural and fundamental group unit of society' and requires State parties to accord "the widest possible protection and assistance. There are also articles in both the International Covenant on Civil and Political Rights and The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, that the introduction of this 'protected attribute' could go towards providing the protection outlined.

While international law obligations fall onto the Federal government of Australia for implementation, this does not excuse State and Territory governments from complying with these obligations. If State and Territory governments wished to ensure best practice in public policy on preventing violence against women, they should look to international law and its jurisprudence for guidance.

### **Equal Opportunity Act - as a mechanism for attitudinal change**

Overall, the inclusion of the protected attribute of victim/survivor of family violence in the Equal Opportunity Act can serve a number of functions:

- providing practical, legal redress for victim/survivors who have been discriminated against on this basis in public life (as defined by Equal Opportunity Act) by removing barriers that lead to unequal participation in the workforce or in accessing accommodation;
- providing an opportunity to raise awareness about the issue of family violence with duty holders and the community more broadly;

<sup>56</sup> T Orchiston & B Smith, 'Empowering victims of family violence: Could anti discrimination laws play a role?' (March 2012) [www.australianreview.net/digest/2012/03orchiston\\_smith.html](http://www.australianreview.net/digest/2012/03orchiston_smith.html).

<sup>57</sup> 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).

- educating the broader community to change attitudes and stereotypes about victim/ survivors of family violence;
- providing a preventative effect by encouraging duty holders to consider their policies and wider practices to prevent discrimination to victim/ survivors; and
- being used as a platform to encourage discussions with duty holders about the determinants of family violence and what can be done to prevent it more broadly.

### 3. Miscellaneous Leave Provisions in the Victorian Public Service Enterprise Bargaining Agreement

#### **Recommendation 3: Miscellaneous Leave Provisions in the Victorian Public Service**

7. That dedicated leave for Family Violence be included in the Victorian Public Service Enterprise Bargaining Agreement (EBA) as “miscellaneous leave” and in doing so:

- i. The miscellaneous leave be additional paid leave on top of an employee’s other leave entitlements and should be available for people experiencing family violence, subject to appropriate evidence requirements.
- ii. Mechanisms are put in place, such as through the payroll system, to ensure the confidentiality of employee’s applications and taking of leave.

8. That a complementary family violence policy for the Victorian Public Service accompany the introduction of this Family Violence “miscellaneous leave” that includes the following minimum requirements (as outlined in the Domestic Violence Workplace Rights Entitlement Project):

- i. Development and understanding of Safety Planning strategies to apply in the workplace, to ensure the employee’s safety (with direction in the policy for managers or human resources staff to contact specialist family violence support services if workplaces require support and advice).
- ii. Referral pathways to appropriate family violence support services for those who wish to be referred.
- iii. Requirements that Human Resources staff, managers and other relevant staff undertake training and support in order to create an environment where those needing support feel safe to disclose that they need the miscellaneous leave, and that all support will be provided confidentially. This training would assist staff to ask the right questions and to put in place the right supports and safety measures.
- iv. Ensuring that employees entitled to family violence leave are also able to access flexible work where appropriate.
- v. That all existing Equal Opportunity policies be updated to include the new protected attribute.
- vi. Ensuring employees are protected from any adverse action or discrimination based on their disclosure of family violence.

Including domestic violence leave as a form of “miscellaneous leave”, including on the internal payroll system, would give supervisors discretion to allow leave on this basis, but would also protect privacy in not having to flag a domestic/family violence category (provided it was not the only form of leave in this category). Employees would need to have the discussion with their managers prior to applying for this leave

who might request reasonable evidence (discussed below) to support the application in the same way as an application for personal/carer's leave.

These clauses are not gendered and recognise that men may experience violence from heterosexual partners, and men or women may experience violence from same sex partners or other members of their family. However it is likely that it will be mostly women who access the entitlements as the evidence firmly suggests that women are overwhelmingly the victim/ survivors of family violence.<sup>58</sup>

The minimum policy requirements outlined in recommendation 3.8 are drawn from the Domestic Violence Workplace Rights Entitlement Project '*Safe at Home, Safe at Work submission: Equal Opportunity for Women in the Workplace Amendment Bill 2012*', (14 March 2012) which includes specific benchmarks on domestic violence workplace rights and entitlements.

### **Experience of Family Violence clauses in other organisations**

The Victorian Public Service would not be the first to incorporate family violence type clauses into the Enterprise Bargaining Agreement (EBA). In September 2010 the first Australian family violence clauses were incorporated into the enterprise agreement between the Surf Coast Shire Council and the Australian Services Union.<sup>59</sup> These clauses reflect best practice with up to twenty days extra paid leave for reasons of family violence.<sup>60</sup> Since this time, additional corporations and banking institutions have also included family violence clauses. For example, Virgin Australia has agreed to provide an additional five days of leave for workers experiencing family violence.<sup>61</sup>

The Australian Capital Territory (ACT) has also incorporated domestic violence leave clauses into 14 public sector EBA's. Leave is available "to employees who are experiencing domestic violence to allow them to be absent from the workplace to attend counseling appointments, legal proceedings and other activities related to, and as a consequence of, domestic violence".<sup>62</sup>

<sup>58</sup> Our Watch - End Violence Against Women and Children "Key terms, definitions and statistics" Policy Brief 1, (September 2014).

<sup>59</sup> *Surf Coast Shire Council Enterprise Agreement No.8 2013-2016* (approved 9 September 2013), clause 4.3

<sup>60</sup> *Surf Coast Shire Council Enterprise Agreement No.8 2013-2016* (approved 9 September 2013), clause 4.3.4

<sup>61</sup> Virgin Australia Ground Crew Agreement 2013 (approved 29 January 2014), clause 44: Anna Patty, "call for airlines to follow Virgin in granting domestic violence leave", Sydney Morning Herald (online) 27 November 2014, <http://www.smh.com.au/national/call-for-airlines-to-follow-virgin-in-granting-domestic-violence-leave-20141127-11v93k.html>.

<sup>62</sup> *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* clause F22; *ACT Public Sector Health Professionals Enterprise Agreement 2013-2017*, clause F22; *ACT Public Sector Infrastructure Services Enterprise Agreement 2013-2017*, clause F22; *ACT Public Sector Legal Professionals Enterprise Agreement 2013-2017*, clause F22; *ACT Public Sector Support Services Enterprise Agreement 2013-2017*, clause F22; *ACT Public Sector Technical and Other Professional Enterprise Agreement 2013-2017*, clause F22; *ACT Public Sector Office of the Legislative Assembly Enterprise Agreement 2013-2017*, clause F22, *ACT Public Sector ACT Ambulance Service Enterprise Agreement 2013-2017*, clause F22; *ACT Public Service Nursing and Midwifery Enterprise Agreement 2013-2017*, clause 138; *ACT Public Sector ACT Fire & Rescue Enterprise Agreement 2013-2017*, clause 81; *ACTION Enterprise Agreement 2013-2017*, clause F22, *ACT Public Service Cultural Facilities Corporation Enterprise Agreement 2013-2017*, clause F22; *ACT Public Sector Canberra Institute Of Technology (Teaching Staff) Enterprise Agreement 2013-2017*, clause 96; *ACT Public Sector Canberra Institute Of Technology Enterprise Agreement 2013-2017*, clause F22.

The ACT entitlement is up to a maximum of 20 additional paid days/shifts leave per calendar year, subject to the provision of appropriate evidence that domestic violence is occurring. Paid domestic violence leave does not accumulate, is counted towards service, and is available to all employees except casuals – who are entitled to unpaid leave. The EBA provision also contains confidentiality requirements by managers dealing with applications for leave, including returning all documentation back to the employee, and classifying their situation as “where leave cannot be granted under any other provision” under “other leave types”. **Attached** to this submission is an excerpt from the *ACT Public Sector Support Services Enterprise Agreement 2013-2017* setting out the relevant clause by way of example.

In January 2015 the Australian Council of Trade Unions President Ged Kearney reported that domestic violence leave was becoming increasingly common and that “We have about 1.6 million workers already covered by domestic leave clauses.”<sup>63</sup> These measures continue a trend which includes the inclusion of domestic violence protections into the flexible working provisions of the Fair Work Act by the Australian Government, which were passed in June 2013 and came into effect 1 January 2014.

Other Australian businesses are providing for domestic violence leave within company policy (rather than their EBA). For example, in November 2014, Telstra announced that it would be introducing 10 days of extra paid leave for full time employees experiencing family violence, to assist them in attending court, counseling or medical appointments, seeking legal advice, or having time out from their situation.<sup>64</sup> The *Financial Review* also reported in January 2015 that QBE offers four additional days of flexible leave and CSL offers five additional days of personal leave to the industry standard, for employees experiencing domestic violence.<sup>65</sup> The National Australia Bank also has a domestic violence support policy, which provides for access to counseling and additional leave as required. It also provides employees with flexibility in managing their work schedules if needed.<sup>66</sup>

## Issues to consider when introducing Family Violence Clauses

### Privacy and confidentiality

One of the key risks with introducing the clauses is the concern that human resource staff and managers may not maintain confidentiality and privacy adequately, putting the victim at further risk of harm. This risk could be mitigated through training with peak family violence training providers.

In relation to the clause in the EBA, having the leave fall into the category of ‘miscellaneous’ (including on the organisation’s payroll system) would allow leave to be accessed without needing to flag ‘family violence’. However, as there is no current ‘miscellaneous leave category’ in the *Victorian Public Service Determination 2012*, if

<sup>63</sup> Lily Partland, ‘Telstra’s introduction of domestic violence leave welcomed by ACTU’ *ABC News*, 14 January 2015. <http://www.abc.net.au/news/2015-01-14/actu-welcomes-telstra-domestic-violence-leave/6016212>

<sup>64</sup> Lily Partland, ‘Telstra’s introduction of domestic violence leave welcomed by ACTU’ *ABC News*, 14 January 2015. <http://www.abc.net.au/news/2015-01-14/actu-welcomes-telstra-domestic-violence-leave/6016212>; Joanna Mather and Jaclyn Keast, ‘Telstra introduces domestic violence leave’, *Financial Review* (online), 13 January 2015, <http://www.afr.com/news/policy/industrial-relations/telstra-introduces-domestic-violence-leave-20150113-12na7h>

<sup>65</sup> Joanna Mather and Jaclyn Keast, ‘Telstra introduces domestic violence leave’, *Financial Review* (online), 13 January 2015, <http://www.afr.com/news/policy/industrial-relations/telstra-introduces-domestic-violence-leave-20150113-12na7h>

<sup>66</sup> *NAB leaders the industry in domestic violence support*, 2 June 2013, [www.nab.com.au](http://www.nab.com.au).

a miscellaneous category were to be created, 'family violence' would be the only situation that fits into this category. One solution for this would be to provide the additional leave within an existing leave category such as 'personal/carer's leave', or have the entitlement in the EBA described as "family violence leave" but ensure that the categorisation of the entitlement on the payroll system/leave application process was incorporated into an existing leave category.

### **Status as a victim/survivor of family violence**

Another issue centers on what evidence would be required to prove to an employer that an individual is a victim/survivor of family violence (e.g. whether medical evidence, an intervention order, family law injunction or statutory declaration is sufficient). The Commission considers it would be fair to require evidence – but of course the provision of that evidence should not be too onerous on the employee and should be reasonable in the circumstances. The requirement for evidence should not be set too high.

At first instance, guidance could be taken from the evidence requirements for personal/carer's and compassionate leave in section 107 of the Fair Work Act which provides that an employee who has notified their employer they are taking leave "must, if required by the employer, give the employer evidence that would satisfy a reasonable person" that the leave is taken for the permissible reason. Of course, EBAs are also able to provide guidance on what is "evidence that would satisfy a reasonable person" and for personal/carer's leave, usually include medical certificate or a statutory declaration. Practically speaking, there may also need to be a notice requirement in the same way as set out for personal/carer's leave under section 107.

### **Surveillance/ monitoring of workers**

Another risk that arises when family violence is brought into the employment sphere is the concern that managers may misconstrue their legal responsibilities and monitor workers for 'indicators' of domestic violence and may question them about what is occurring at home. This is another risk that can be mitigated with proper training of Human Resource personnel and management staff.





*Contact us*

Enquiry Line	1300 292 153 or (03) 9032 3583
Fax	1300 891 858
Hearing impaired (TTY)	1300 289 621
Interpreters	1300 152 494
Email	<a href="mailto:information@veohrc.vic.gov.au">information@veohrc.vic.gov.au</a>
Website	<a href="http://humanrightscommission.vic.gov.au">humanrightscommission.vic.gov.au</a>
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[2014] FWCA 7621



## DECISION

*Fair Work Act 2009*  
s.185—Enterprise agreement

**Australian Capital Territory T/A ACT Public Service**  
(AG2014/7709)

### **ACT PUBLIC SECTOR SUPPORT SERVICES ENTERPRISE AGREEMENT 2013-2017**

Australian Capital Territory

DEPUTY PRESIDENT KOVACIC

MELBOURNE, 28 OCTOBER 2014

*Application for approval of the ACT Public Sector Support Services Enterprise Agreement 2013-2017.*

[1] An application has been made for approval of an enterprise agreement known as the ACT Public Sector Support Services Enterprise Agreement 2013-2017 (**Agreement**). The application was made pursuant to s.185 of the *Fair Work Act 2009* (**Act**). It has been made by the Australian Capital Territory T/A ACT Public Service. The Agreement is a single-enterprise agreement.

[2] I am satisfied that each of the requirements of ss. 186, 187 and 188 of the Act as are relevant to this application for approval have been met.

[3] The CPSU, the Community and Public Sector Union, the Health Services Union, the “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU), the Construction, Forestry, Mining and Energy Union and the Australian Municipal, Administrative, Clerical and Services Union being bargaining representatives for the Agreement, have given notice under s.183 of the Act that they want the Agreement to cover them. In accordance with s.201 (2) of the Act I note that the Agreement covers these organisations.

[4] The Agreement is approved and in accordance with s.54 of the Act, will operate from 4 November 2014. The nominal expiry date of the Agreement is 30 June 2017.



DEPUTY PRESIDENT

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**ACT**  
Government

**ACT PUBLIC SECTOR  
SUPPORT SERVICES  
ENTERPRISE AGREEMENT  
2013 – 2017**

## Section F - Leave

**Rate of Payment**

- F21.13 Foster and Short Term Care leave will be granted with pay or without pay.
- F21.14 The rate of payment during absence on a period of paid Foster and Short Term Care leave is the same rate as would be paid if the employee was granted personal leave.
- F21.15 The approved leave period may be taken at full pay in a single block or as single or part days.

**Effect on Other Entitlements**

- F21.16 Paid Foster and Short Term Care leave will count as service for all purposes and unpaid Foster and Short Term Care leave will not count as service for any purposes but will not break continuity of service.
- F21.17 Public holidays for which the employee is entitled to payment that fall during periods of absence on paid Foster and Short Term Care leave will be paid as a normal public holiday and will not be considered to be Foster and Short Term Care leave.

**Access to Other Leave Entitlements**

- F21.18 An eligible employee will be required to have exhausted their entitlement under this leave clause before accessing their personal leave credit to care for a child, for whom they are responsible under a short term caring arrangement, who is ill or injured.

**F.22 LEAVE FOR DOMESTIC VIOLENCE PURPOSES****Purpose**

- F22.1 Leave for domestic violence purposes is available to employees who are experiencing domestic violence to allow them to be absent from the workplace to attend counselling appointments, legal proceedings and other activities related to, and as a consequence of, domestic violence.
- F22.2 Domestic violence is defined in the Dictionary.

**Eligibility**

- F22.3 Leave for domestic violence purposes is available to all employees with the exception of casual employees.
- F22.4 Casual employees are entitled to access leave without pay for domestic violence purposes.

**Entitlement**

- F22.5 An employee experiencing domestic violence will have access up to a maximum of 20 days/shifts per calendar year paid leave, subject to the provision of appropriate evidence. Leave for domestic violence purposes is non-accumulative.
- F22.6 Leave for domestic violence purposes is in addition to other leave entitlements and is not to be used as a substitute for personal leave. However, where supporting evidence is not immediately available the head or service will, grant paid leave under clause F5 of this Agreement (Personal Leave in Extraordinary and Unforeseen Circumstances), subject to available credit. If the employee subsequently produces supporting evidence, the personal leave will be re-credited and the leave taken will be converted to leave for domestic violence purposes.

## Section F - Leave

F22.7 Leave for domestic violence purposes is to be used to:

- attend appropriate medical appointments for referral to other appropriate counselling or support services;
- obtain legal advice;
- attend counselling appointments;
- seek assistance from other relevant support services;
- attend court proceedings;
- attend prosecution appointments;
- attend police appointments;

or to access:

- alternative accommodation;
- alternative childcare or schooling for children;

the need for which is as a consequence of domestic violence occurring.

F22.8 Leave for domestic violence purposes may be taken as consecutive or single days, or as part days.

F22.9 For confidentiality and privacy reasons leave for domestic violence purposes will be attributed as coming under "where leave cannot be granted under any other provision" which is included and identified within "Other Leave Types" in Annex D of this Agreement.

***Evidence and Conditions***

F22.10 Employees wishing to access leave for domestic violence purposes should discuss making an application with their manager/supervisor or an appropriate HR Manager as soon as reasonably practical.

F22.11 As a general rule, a leave application should be submitted by an employee for approval by the head of service before the commencement of the leave. However, retrospective applications may be approved provided that appropriate evidence is provided as soon as reasonably practicable upon the employee's return to the workplace.

F22.12 Evidence of the occurrence of domestic violence will be required to access leave for domestic violence purposes.

F22.13 Evidence may include:

- a document issued by the Police;
- a written referral, issued by a registered medical practitioner or registered nurse, to a counsellor trained in providing support in domestic violence situations;
- a document issued by a Court, or a counsellor trained in providing support to people experiencing the effects of domestic violence;
- written confirmation from an Employee Assistance Program provider or from a domestic violence support service that the employee is experiencing domestic violence issues.

F22.14 Managers are to keep all information concerning the leave application strictly confidential. This includes, after sighting any supporting documentation, returning that documentation to the employee.

## Section F - Leave

**Rate of Payment**

- F22.15 Leave for domestic violence purposes is granted with pay. Casual employees are entitled to access leave without pay for domestic violence purposes.
- F22.16 Leave for domestic violence purposes will not be granted at half pay, unless there are extenuating circumstances.

**Effect on Other Entitlements**

- F22.17 Leave with pay for domestic violence purposes will count as service for all purposes. Leave without pay for domestic violence purposes will not count as service for any purpose, but will not break an employee's continuity of service.

**Access to Other Leave Entitlements**

- F22.18 Where leave for domestic violence purposes credits have been exhausted the head of service may grant an employee leave without pay or other forms of paid leave, such as annual leave or long service leave.
- F22.19 Employees should utilise personal leave for an illness or injury, or to seek treatment for an illness or injury, caused by domestic violence.
- F22.20 Leave entitlements under clause F5 of this Agreement (Personal Leave in Extraordinary and Unforeseen Circumstances) may be used by an employee who is seeking leave to support a person who is experiencing domestic violence.

**Further Consideration**

- F22.21 The head of service and unions covered by this Agreement, agree to examine options to deal with the work-related consequences for employees who are victims of sexual assault in instances that occur outside the confines of a domestic relationship. Consultation with subject matter experts and interested stakeholders will be undertaken with a view to developing an ACTPS-wide policy that may provide for additional entitlements for ACTPS employees in such circumstances. The Chief Minister, Treasury and Economic Development Directorate will commence this work in consultation with ACTPS workplace unions not later than six months from the commencement of this Agreement.