
DOMESTIC VIOLENCE VICTIMS AT WORK: THE ROLE OF ANTI-DISCRIMINATION LAW

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All feedback on this paper is welcome.

ABSTRACT

For victims of domestic violence it is increasingly recognised that financial security is critical to their safety and ability to escape a violent relationship. The majority of victims of domestic violence are engaged in paid work, but are often reluctant to disclose their status even when it is affecting their performance, productivity or safety. This reluctance can persist even when the worker needs some workplace flexibility in order to navigate the criminal justice system, rehousing processes or counselling services. Two possible reasons for non-disclosure are: a fear that the widespread negative attitudes about victims of domestic violence will impair relationships with their colleagues and managers; and a belief that they have no rights to workplace flexibility or adjustments to deal with their circumstances. In this paper we explore whether anti-discrimination laws could be used to address these twin concerns and promote normative and behavioural change. By recognising ‘victims of domestic violence’ as a vulnerable group warranting protection against discrimination in the workplace, anti-discrimination laws could empower these workers to disclose their status and even expect reasonable adjustments to enable them to maintain their employment.

CONTENTS

I.	Introduction	2
II.	Domestic Violence and the Workplace	3
	A. Understanding domestic/family violence.....	3
	B. Domestic violence and the labour market.....	4
	C. Law and policy developments to date	6
III.	Workplace Protection: Current Anti-Discrimination Laws.....	7
	A. Sex Discrimination Act	8
	B. Disability Discrimination Act	13
IV.	‘Victim of Domestic Violence’ as a separate ground.....	15
	A. Discrimination laws: the right legal response to domestic violence?.....	15
	B. Defining the ground	16
	C. What kinds of discrimination would be covered?.....	19
V.	Conclusion.....	19

I. INTRODUCTION

A growing body of evidence shows that employment is a key pathway for victims of domestic violence to escape violent relationships.¹ However, victims of domestic violence face a range of barriers to entering and retaining employment. The harm inflicted by the violence can often be compounded by discrimination experienced in the workplace.² The types of workplace harm include (a) hostility, assumptions and stereotyping based on negative attitudes about victims of domestic violence, and (b) inflexibility in policies and practices that impacts particularly harshly on workers who experience domestic violence. Anti-discrimination laws are designed to address these kinds of workplace harms by promoting normative and behavioural change so as to enable the equal participation and dignity of members of identified marginalised groups.

This paper explores the potential role of anti-discrimination law in addressing the workplace harm faced by victims of domestic violence. The analysis is prompted by an appreciation of the importance of financial security for escaping violence as well as demonstrable links between domestic violence and negative labour market outcomes for victims more broadly: international research has found that domestic violence is a significant barrier to accessing and sustaining work,³ and victims are more likely to be engaged in precarious work than non-victims.⁴

Recognition of domestic violence as a workplace issue in Australia is evident in a series of inquiries and activities of law reform and human rights bodies. The Australian Law Reform Commission (ALRC) in its recent Family Violence and Commonwealth Laws Inquiry acknowledged the role of paid employment and associated 'financial security and independence', as an important protection for victims of domestic violence.⁵ The ALRC concluded that in addition to the *Fair Work Act 2009* (Cth), anti-discrimination laws should be examined for their potential to provide protection.⁶ Specifically the ALRC recommended that the Australian Human Rights Commission (AHRC) explore the scope for using anti-discrimination laws to provide such support and protection for victims of domestic violence⁷ and the AHRC has commenced this process.⁸ Further, the federal Government is currently conducting a review of federal anti-discrimination laws with the goal of consolidating these laws. In submissions to the ALRC Inquiry, and noted in the subsequent Discussion Paper, a number of

¹ Rochelle Braaf and Isobelle Barrett Meyering, *Seeking Security: Women's Economic Wellbeing During and Following Domestic Violence* (Australian Domestic and Family Violence Clearinghouse, March 2011). Available at: www.austdvclearinghouse.unsw.edu.au/financial_security.htm.

² VicHealth, *National Survey on Community Attitudes to Violence Against Women 2009* (March 2010) 47; Ludo McFerran, *National Domestic Violence and the Workplace Survey* (Australian Domestic and Family Violence Clearinghouse, October 2011).

³ Susan Lloyd and Nina Taluc, 'The Effects of Male Violence on Female Employment' (1999) 5 *Violence Against Women* 370 at 383-5.

⁴ Suzanne Franzway, Carole Zufferey and Donna Chung, *Domestic Violence and Women's Employment*, (Paper presented at Our Work, Our Lives 2007: National Conference on Women and Industrial Relations, 20 – 21 September, 2007) citing Jody Raphael, 'Domestic Violence as a Welfare-to-Work Barrier: Research and Theoretical Issues' in Renzetti et al, *Sourcebook on Violence Against Women* (California, Sage Publications, 2001) at 443-457; Eleanor Lyon 'Poverty, Welfare and Battered Women: What Does Research Tell Us?' (Welfare and Domestic Violence Technical Assistance Initiative, National Resource Centre on Domestic Violence, 2011) at 1-11. Available at: www.sapo.org.au/pub/pub12343.html.

⁵ Australian Law Reform Commission, *Family Violence - Commonwealth Laws, Discussion Paper No 76* (August 2011) at paras [14.11] and [14.13]. Available at: www.alrc.gov.au/publications/family-violence-and-commonwealth-laws-dp-76-summary.

⁶ ALRC Discussion Paper, above n 5, para [17.142].

⁷ ALRC Discussion Paper, above n 5, paras [1.99], [17.1].

⁸ Australian Human Rights Commission, *Submission to the Attorney-General's Department Consolidation of Commonwealth Discrimination Law*, 6 December 2011, [93]-[95] http://www.humanrights.gov.au/legal/submissions/2011/20111206_consolidation.html.

groups have proposed that a consolidated Act should include a new ground for protection of 'victim of domestic violence'.⁹

To explore the rationale and options for using discrimination law as a regulatory response to domestic violence, this paper first outlines the connection between domestic violence and the workplace in Part II. Then, in Part III, we specifically examine whether existing anti-discrimination laws provide adequate protection for victims of domestic violence against discrimination in the workplace.¹⁰ Finally, we explore whether it would be conceptually sound and more effective in protecting victims of domestic violence to introduce a separate ground of 'victim of domestic violence' into anti-discrimination laws.

II. DOMESTIC VIOLENCE AND THE WORKPLACE

A. UNDERSTANDING DOMESTIC/FAMILY VIOLENCE

i. PREVALENCE

Domestic or family violence is a pervasive issue in all Australian communities, extending across cultural, ethnic and socioeconomic groups.¹¹ The most recent ABS *Personal Safety Survey* in 2005 found that 15 percent of Australian women had experienced physical or sexual violence from a previous partner, and 2.1 percent from a current partner, further 4.9 percent of Australian men had experienced violence from a previous partner and 0.9 percent from a current partner, since the age of fifteen.¹² The *Personal Safety Survey* does not provide specific data on the incidence of violence perpetrated by non-partner family members or the incidence of non-physical forms of abuse, suggesting that the total incidence of family violence is much higher.

ii. DEFINING DOMESTIC VIOLENCE

Domestic/family violence is characterised as an abuse of power and is usually manifest as a pattern of abuse that escalates in frequency and severity over time.¹³ It may be perpetrated by a partner, ex-partner or other family member, including by someone with whom the victim has a kinship relationship.¹⁴ A common misconception about domestic violence is that it involves physical injury only. In reality, it includes a wide range of abusive behaviours designed to control the victim, including psychological, financial and spiritual abuse, and social isolation.¹⁵ Another dominant misconception is that victims *choose* to remain in violent

⁹ Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws - Discussion Paper* (Commonwealth of Australia, September 2011), [85].

¹⁰ A similar analysis could be undertaken in respect of other fields covered by anti-discrimination laws, such as education, accommodation and provision of goods and services.

¹¹ This paper will use the terms 'domestic' and 'family' violence interchangeably.

¹² ABS, *Personal Safety Survey* (2006) at 11. Additionally, Mouzos and Makkai found that 34 percent of Australian women had experienced physical or sexual partner violence, and up to 40 percent had experienced at least one form of controlling behavior, see Jenny Mouzos and Toni Makkai, *Women's experiences of male violence: findings from the Australian component of the International Violence Against Women Survey (IVAWS)* (Canberra, Australian Institute of Criminology, Research and Public Policy Series 56, 2004) at 44, 48.

¹³ See generally Australian Government, *National Plan to Reduce Violence Against Women and Their Children 2010-2022* (Commonwealth of Australia, April 2011) at 2; National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021* (2009) at 13-14.

¹⁴ Domestic violence occurs in same-sex relationships with roughly the same frequency as in heterosexual relationships, see Marian Pitts et al, *Private Lives: A Report on the Health and Wellbeing of GLBTI Australians* (Australian Research Centre in Sex, Health and Society, La Trobe University, March 2006).

¹⁵ ALRC, *Family Violence - A National Legal Response: Final Report* (ALRC Report No 114, October 2010) at para [5.9].

relationships.¹⁶ The reality is far more complex: domestic violence can be cyclical in nature. The cycle typically begins with a happy relationship - victims do not choose violent partners. Over time, the abusive partner becomes more controlling, increasing incrementally. After a major incident, the abuser apologises, saying it will never happen again and cajoles the victim into the belief that the relationship will return to the way it was originally. The cycle repeats itself: the victim gives the abuser another chance, believing (or hoping) that they will change. Each time the victim attempts to leave, the abuser increases promises to change. Ultimately, for many victims it takes several attempts to finally leave a violent relationship.¹⁷ Further, financial and social push/pull factors constrain victims' ability to leave.¹⁸ This will be expanded on below in relation to the role that discrimination law protections can play in protecting victims from further violence.

iii. HEALTH IMPACTS

Domestic violence is the leading preventable cause of death, injury and illness for Australian women under 45 years,¹⁹ and can have long-term impacts on victims' health and wellbeing. Specific negative health effects associated with domestic violence include gastrointestinal, gynecological and cardiac conditions; depression, anxiety and post traumatic stress disorder.²⁰

B. DOMESTIC VIOLENCE AND THE LABOUR MARKET

i. ESTABLISHING THE CONNECTION BETWEEN DOMESTIC VIOLENCE AND WORK

Whilst it is widely acknowledged that domestic violence is common and devastating, the link between domestic violence and the workplace is less immediately obvious. Domestic violence has a damaging yet often hidden, impact on the workplace, though presumably, the parameters of domestic violence do not begin and end at the home front gate. More than sixty percent of victims are in paid work,²¹ and recent research reveals that domestic violence frequently impacts on the working as well as personal lives of victims.²² For many victims the abuse has a markedly negative effect on workplace participation, increasing absenteeism, lateness and impeding performance. Some workers are targeted by the abusive person whilst at work, affecting performance, morale and the safety of both the victim and co-workers.²³ In the most severe cases, a number of women have been murdered at work by a partner or ex-partner.²⁴

ii. INCIDENCE OF WORKERS EXPERIENCING DOMESTIC VIOLENCE

The *National Domestic Violence and the Workplace Survey*, conducted by the Australian Domestic and Family Violence Clearinghouse (ADFVC) found that thirty percent of 3,611 respondent workers had experienced some

¹⁶ VicHealth, above n 2, at 48.

¹⁷ See eg, Michael Strube, 'The Decision to Leave an Abusive Relationship: Empirical and Theoretical Issues' (1988) 104 *Psychological Bulletin* 236.

¹⁸ For further discussion see Braaf and Meyering, above n 1; see also Sascha Griffing et al, 'Domestic Violence Survivors' Self-Identified Reasons for Returning to Abusive Relationships' (2002) 17 *Journal of Interpersonal Violence* 306 at 307-8.

¹⁹ VicHealth, *The Health Costs of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence* (Melbourne, January 2004) at 10.

²⁰ Rachel Kimerling et al, 'Unemployment Among Women: Examining the Relationship of Physical and Psychological Intimate Partner Violence and Posttraumatic Stress Disorder' (2009) 24 *Journal of Interpersonal Violence* 450 at 451 (citing a large number of earlier studies).

²¹ ABS, above n 12, at 23.

²² McFerran, *National Workplace Survey*, above n 2.

²³ See generally Jennifer Swanberg, Caroline Macke and TK Logan, 'Intimate Partner Violence, Women and Work: Coping on the Job' (2006) 21 *Violence and Victims* 391.

²⁴ See eg, Georgina Robinson, 'Slain Woman Just Wanted to Start a New Life', *Sydney Morning Herald* (18 December, 2008). Available at: www.smh.com.au/news/national/slain-woman-just-wanted-to-start-a-new-life/2008/12/17/1229189709682.html.

form of domestic violence over the course of their lifetime, with 25 percent having experienced it more than 12 months ago and five percent within the past 12 months.²⁵ Of the respondents who had experienced domestic violence, nearly half reported that it had affected their capacity to get to work, through either physical restraint, hiding/stealing keys or transportation money or refusal/failure to show up to care for children.²⁶ Nineteen percent of respondents who had experienced domestic violence reported that the violence had impacted on them in the workplace; abusive calls and emails and the abusive person attending the workplace were the most common form of abuse experienced.²⁷ The impacts on workers included feeling distracted/tired/unwell, having to take time off and being late to work.²⁸

iii. SPECIFIC TYPES OF ABUSE AND IMPACTS AT WORK

Physical, including sexual, abuse may result in the victim being physically incapable of attending work, either due to injury or associated psychological trauma. Physical abuse includes deprivation of liberty, where the abusive person prevents the victim from attending work.²⁹ Another common consequence for many workers experiencing physical abuse is needing to use large amounts of sick leave to take time off – either to treat or to hide injuries, receive medical attention, or simply cope with the psychological impacts of the violence.³⁰

Psychological abuse may impact on workers' morale, concentration and general wellbeing, each associated with both performance and productivity.³¹ Co-workers, can be indirectly affected by the abuse. Sleep deprivation, where the perpetrator intentionally prevents the victim from sleeping, is a commonly reported form of psychological abuse.³² Sleep deprivation can impede the performance of both mental and manual tasks. Blackmail is another form of psychological abuse victims may experience, for example, the abusive person may threaten to defame the victim to their manager or tell their manager information of a highly personal nature.³³ This is designed to force the victim into resigning to avoid embarrassment or compromise the victim's chances of promotion or progression. Additionally, the abusive person may use children as a form of control: as stated above, the *Domestic Violence and the Workplace Survey* found twenty percent of respondents had been prevented from getting to work by the abusive person failing to turn up to care for children, presumably, leaving the victim to find last-minute alternative childcare.³⁴ This may contribute to lateness or absenteeism. Moreover the abusive person may threaten to harm children; this is clearly articulated in responses to the qualitative component of the *Domestic Violence and the Workplace Survey*.³⁵

Financial abuse can also impact on workers and workplaces: the abusive person may prevent the victim from getting to work by leaving the victim with no money for petrol or transport. The victim may then be forced to take alternative transport, if available, leading to being late to work.³⁶

²⁵ McFerran, *National Workplace Survey*, above n 2, 6, table 2. This study is the first of its kind conducted in Australia, providing specific data on the impact of domestic violence on working Australians.

²⁶ *Ibid* at 8, table 6.

²⁷ *Ibid* at 10.

²⁸ *Ibid*.

²⁹ McFerran, *National Workplace Survey*, above n 2, at 9, table 7.

³⁰ *Ibid*.

³¹ Swanberg et al, above n 23.

³² Jennifer Swanberg, TK Logan and Caroline Macke, 'Intimate Partner Violence, Employment and the Workplace: Consequences and Future Directions' (2005) 4 *Trauma, Violence & Abuse* 286 at 290 citing Jody Raphael, *Domestic Violence: Telling the Untold Welfare-to-Work Story* (Chicago, Taylor Institute, 2005)

³³ Examples include threatened disclosure of LGBTI status, HIV status, previous criminal record, matters pertaining to sexual morality.

³⁴ McFerran, *National Workplace Survey*, above n 2, at 8, table 6.

³⁵ *Ibid* at 11.

³⁶ *Ibid*.

A significant number of workers are abused in the workplace, with the most common form of abuse perpetrated at work being calls and emails.³⁷ For example, the abusive person may call the victim persistently, particularly if the victim answers calls directly in a setting where the victim is the receptionist or other contact person or works in a role where it is necessary to answer their own calls. The calls may be abusive or threatening, warning the victim that the abusive person will harm them and/or dependents. Additionally, the abusive person may attend or loiter outside the workplace to intimidate or abuse the victim. In some instances, victims have been killed or seriously injured at work.³⁸ In the *Domestic Violence and the Workplace Survey*, eleven percent of the respondents who had experienced domestic violence reported that the abusive person attended their workplace.³⁹ The abusive person is more likely to enter the workplace where it is publicly accessible; this includes workplaces such as educational institutions, retail and hospitals – industries that are highly feminised.⁴⁰

iv. LONG TERM IMPACTS FOR WORKER VICTIMS

As stated above, domestic violence has broader labour market implications for victims: A United States Government review found that 24 – 52 percent of victims reported losing a job, at least in part, due to domestic violence.⁴¹ Women who are victims of domestic violence have more disrupted work histories, on average have lower personal incomes, have had to change jobs frequently and are more likely to be employed in casual and part time work than women with no experience of violence.⁴² In many instances, the abusive person targets the victim's capacity to work in order to undermine their employment and thereby maintain or regain financial control over the victim.

v. ASSOCIATED PRODUCTIVITY COSTS

Finally, domestic violence has a strong negative impact on Australia's economy associated with lost productivity. Access Economics has estimated the total cost of lost productivity associated with domestic violence at \$484 million in 2002/3, set to rise to \$609 million in 2021/2.⁴³ This includes costs associated with absenteeism, misuse of work resources by abusers, retraining and rehiring of new staff due to domestic violence related turnover.

C. LAW AND POLICY DEVELOPMENTS TO DATE

The 1970s saw Australia develop dedicated domestic violence services; in the decades that followed, prevention policies and corresponding legal protections were enhanced. Initially, domestic violence policies and programs focused almost solely on violence perpetrated within the home. In latter decades, regulators have gradually sought to minimise the broader health and socioeconomic impacts of domestic violence on victims, combining primary, secondary and tertiary approaches to reduce its frequency and impact.⁴⁴ More recently, domestic violence has been acknowledged as a potential workplace (and labour market) issue.⁴⁵

³⁷ Ibid at 9, table 7.

³⁸ See eg, Robinson, above n 24.

³⁹ McFerran, *National Workplace Survey*, above n 2, 10.

⁴⁰ Domestic Violence Workplace Rights & Entitlements Project, *Domestic Violence and the Workplace: Employee, Employer and Union Resources* (2011) at 6.

⁴¹ United States General Accounting Office, *Domestic Violence: Prevalence and Implications for Employment Among Welfare Recipients* (Washington DC, GAO Publication No B-280099, 24 November 1998) at 8 (citing the results of three earlier studies). Available at: www.gao.gov/products/HEHS-99-12.

⁴² Franzway, Zufferey and Chung, above n 4.

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

⁴⁴ For example, perpetrator intervention and diversion programs (primary), crisis support services (secondary) and legal supports (tertiary).

⁴⁵ Australian Government, above n 13; Access Economics, above n 43.

In 2010, Alana Heffernan and Lee Matahaere from the Queensland Working Women's Service delivered a landmark conference paper highlighting the need for anti-discrimination protection for workers who experience domestic violence.⁴⁶

In the same year, the Australian Domestic and Family Violence Clearinghouse (ADFVC) at the University of New South Wales raised the issue of domestic violence and the impact on the workplace as part of the Australian Law Reform Commission's (ALRC) *Family Violence Inquiry*.⁴⁷ The issue was later included in the second stage of the ALRC's Inquiry ('Family Violence and Commonwealth Laws'), the first component being an issues paper on Family Violence and Employment and Superannuation Law.⁴⁸ Numerous stakeholder submissions in response to the Issues Paper expressed support for the inclusion of domestic violence victim status as a separate attribute under section 351(1) of the *Fair Work Act 2009* (Cth), noting that protection under this ground is underpinned by state and federal discrimination law.⁴⁹ In August 2011 the ALRC released a discussion paper, Part E of which considered necessary changes to Commonwealth employment law.⁵⁰ As noted above, in its Discussion Paper, the ALRC determined that it was beyond the terms of reference of the Inquiry to consider the issue of whether anti-discrimination law should include an express protection for victims of domestic violence. Instead, it indicated that the issue was best dealt with through the consolidation of commonwealth discrimination law.⁵¹

In December 2011, the issue of domestic violence and work, including discrimination law protection was addressed at the first annual national Safe at Home, Safe at Work Conference, a culmination of the work of the Domestic Violence Workplace Rights & Entitlements Project.⁵² Further, the Australian Labor Party at its recent National Conference adopted a resolution to 'ensure that Fair Work and anti-discrimination frameworks provide appropriate protection to victims of domestic violence in the workplace',⁵³ placing the issue of domestic violence and work squarely on the national law reform agenda.

III. WORKPLACE PROTECTION: CURRENT ANTI-DISCRIMINATION LAWS

While discrimination has come to be understood in Australian society as wrong, only some forms of discrimination are illegal. Anti-discrimination legislation offers protection against discrimination but only in particular areas (such as work) and, importantly, only in respect of protected 'grounds' or 'attributes', such as sex or disability. The protection is currently provided by four federal anti-discrimination Acts⁵⁴ as well as the

⁴⁶ Alana Heffernan and Lee Matahaere, *Domestic Violence Discrimination in the Workplace: Is Statutory Protection Necessary?* (Paper presented at Our Work, Our Lives 2007: National Conference on Women and Industrial Relations, 20 – 21 September, 2007). Available at:

http://www.austdvclearinghouse.unsw.edu.au/workplace/Qld_WWS_Paper.pdf. The issue was adopted by other advocates, including the Equality Rights Alliance, in later submissions to the Consolidation Project.

⁴⁷ Tashina Orchiston, 'Domestic Violence and Labour Law: Making the Case for Change' (2011) (Winter) *Australian Domestic & Family Violence Clearinghouse Newsletter* (Workplace Special Bulletin) 7 at 7.

⁴⁸ The Employment and Superannuation Law Issues Paper is available at: www.alrc.gov.au/publications/family-violence-and-commonwealth-laws-employment-and-superannuation-law-ip-36.

⁴⁹ See eg, submissions of Australian Domestic and Family Violence Clearinghouse; Australian Council of Trade Unions; Women's Health Victoria.

⁵⁰ The ALRC's final report in this Inquiry will be released once tabled in Parliament (potentially, December 2011).

⁵¹ ALRC Discussion Paper, above n 5, paras [1.99], [17.1] and [17.142].

⁵² For more information see: www.adfvc.unsw.edu.au/dv_workplace_rights_entitlements_project.htm; www.dvandwork.unsw.edu.au.

⁵³ See Ben Aveling, *All the Motions from National Conference 2011* (4 December 2011), amendment 448A. Available at: <http://ouralp.net/2011/12/04/all-the-motions-from-national-conference-2011/#448>.

⁵⁴ *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth), *Age Discrimination Act 2004* (Cth).

Australian Human Rights Commission Act 1986 (Cth) which establishes the enforcement framework for the substantive Acts. The aim of the current federal review is to consolidate these Acts in a way that reduces their complexity, ensures simple, cost-effective mechanisms for resolving complaints and clarifies and enhances protections where appropriate.⁵⁵ While there is bi-partisan support for introducing two new grounds, namely sexuality and gender identity, there is uncertainty about how the substantive provisions or enforcement framework for these laws will otherwise be changed. The following analysis therefore is based upon the federal laws as they currently operate, but provided in the knowledge that discussion is being promoted about how these laws could be improved.

Attributes that might afford some protection for victims of domestic violence under existing federal law include sex, family responsibilities and disability.⁵⁶ Each of these attributes is explored below to demonstrate how the protection which could be afforded to victims of domestic violence under current legislation is both limited and inadequate.

A. SEX DISCRIMINATION ACT

i. INTRODUCTION

The *Sex Discrimination Act 1984* (Cth) (*SDA*) prohibits discrimination in work on the grounds of sex, pregnancy, potential pregnancy, breastfeeding and marital status as well as some protection against discrimination on the ground of family responsibilities. The Act applies to men and women and generally prohibits both direct and indirect discrimination, summarised briefly below.

Direct discrimination occurs when an employer treats an employee⁵⁷ detrimentally because of their status of being a woman or married, for example.⁵⁸ Specifically the employer is prohibited from treating any employee of the protected status 'less favourably' than someone without the employee's status but in the same circumstances. This has been interpreted to require a comparison of the complainant employee who is of a particular status (e.g. female) with an actual or hypothetical comparator employee who is not of the same status (in this case, male) but has behaved the same way.⁵⁹

Indirect discrimination on the other hand prohibits employers from applying apparently neutral conditions or requirements that disparately impact on the protected group (e.g. women) thereby disadvantaging that group.⁶⁰ Obvious examples of such a requirement would be that employees be of a particular height or be able to lift a particular weight, but could also cover the requirement to work full-time hours, to perform 12-hour shifts, comply with a code of behaviour or meet a performance standard. In effect the indirect discrimination prohibition means employers are not permitted to apply rules in a blanket fashion without considering how the rules might impact upon protected groups to disadvantage or further disadvantage them. For indirect discrimination there is a defense of reasonableness.⁶¹

⁵⁵ Attorney-General's Department, above n 9, at 6.

⁵⁶ State laws cover more grounds, but none explicitly include victims of domestic violence status.

⁵⁷ The prohibition also extends to other kinds of workers such as independent contractors and to potential employees in respect of hiring processes and decisions but these categories will be referred to generally as employees in this article. See definition of employment in section 4 SDA and the prohibitions in respect of various work relationships in sections 14-20 SDA.

⁵⁸ For example, sections 5(1) (direct sex discrimination) and 14 SDA.

⁵⁹ *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92; *Thomson v Orica Australia Pty Ltd* [2002] FCA 939. For discussion see Belinda Smith, 'From Wardley to Purvis: How far has Australian anti-discrimination law come in 30 years?' (2008) 21(1) *Australian Journal of Labour Law* 3.

⁶⁰ For example, section 5(2) SDA.

⁶¹ Section 7B SDA.

How might these protections against direct and indirect discrimination help victims of domestic violence in the workplace? Domestic violence disproportionately impacts on women. However, despite it being a gendered experience, this does not necessarily mean that disadvantage experienced by victims of domestic violence in the workplace is actionable as sex discrimination. This can be demonstrated by looking at different kinds of disadvantage experienced by victims of domestic violence and exploring whether the sex discrimination provisions would provide protection and relief.

ii. DIRECT DISCRIMINATION ON THE GROUND OF 'SEX'

One form of discrimination is when prejudice or assumptions about a particular group filter into decision-making about recruitment, promotion or management performance. For victims of domestic violence such biases might include assumptions that the person will be unreliable, likely to underperform, or bring danger or disruption into the workplace. These assumptions are likely to correspond with community attitudes towards domestic violence and specifically, stigma attributed to victims, who are perceived as complicit in their own abuse. An extensive 2009 survey found very low levels of understanding around the issue of why women remain in violent relationships, with 80 percent of respondents agreeing with the statement: 'it's hard to understand why women stay in violent relationships' and almost fifty percent of community respondents believe that a woman can leave a violent relationship if she wants to.⁶²

These pre-judgments or assumptions are about a particular group, namely victims of domestic violence, but the group that is protected under the current legislation is women, *as a whole*. To use the direct sex discrimination protections the claimant would thus need to prove that the stereotyping or assumptions were because of the claimant's sex not because of her status as a victim of domestic violence. While there may be some intersectionality whereby a female victim of domestic violence experiences discrimination that is both because she is female and a victim of domestic violence, only the sex discrimination is actionable and this would require specific proof of the sex discrimination disaggregated from domestic violence discrimination.

There is potentially some scope for protection for victims of domestic violence under the 'characteristics' extension of the SDA. Under this provision the rule against direct discrimination because of sex is extended to less favourable treatment of someone because of 'a characteristic that appertains generally' to the victim's sex or 'a characteristic that is generally imputed' to the victim's sex.⁶³ This extension is not limited to characteristics that appertain to most women but also includes characteristics that are more prevalent for one sex than the other. An illustration of this is pregnancy as a characteristic that appertains generally to women even though most women are not pregnant. Because victims of domestic violence are predominantly women⁶⁴ an assumption or imputation that a woman is or has been a victim of domestic violence arguably falls under this extension. However, this extension has been interpreted to not extend the protection very much at all. It would protect against assumptions or the use of stereotyping about women being the victims of domestic violence, but would not necessarily extend to assumptions or stereotyping about victims of domestic violence *per se*. The comparator requirement, explained below, also limits this extension.⁶⁵

If an employer does not act merely out of prejudice or stereotyping but concludes that a claimant is unreliable, or likely to underperform based on actual past behaviour, the claimant's case for direct sex discrimination would be even more difficult to prove even if the reason for the past conduct was related to the domestic violence. This is because the direct discrimination provisions merely require the employer to treat all employees – men and women - the same; no worse but also no better. No special adjustments or

⁶² VicHealth, *National Survey on Community Attitudes*, above n 2, 47.

⁶³ Section 5(1)(b) and (c) SDA. Equivalent provisions extend the SDA coverage in respect of other grounds.

⁶⁴ See eg, Australian Government, above n 13, 1.

⁶⁵ *Commonwealth v Human Rights & Equal Opportunity Commission* (1993) 46 FCR 191 (*Dopking*) (per Lockhart and Wilcox JJ).

accommodation is required. It is not unusual for an employee who is a victim of domestic violence to face difficulties getting to work or experience anxiety that could be distracting at work and lead to poor performance. Direct discrimination provisions only require the employer to treat this employee the same as male workers who behave in a similar way, *regardless of the reason*. The essence of the direct discrimination requirement is consistency; it does not require the employer to consider how to accommodate different employees to enable them to participate equally.⁶⁶

iii. INDIRECT DISCRIMINATION ON THE GROUND OF 'SEX'

In contrast, the rule against indirect discrimination does contain an implicit obligation on employers to consider how the same treatment of all employees might disadvantage protected groups and ensure that such apparently neutral rules are reasonable. However, this provision is still framed only to protect the groups that are identified in the legislation rather than promote equality generally. This means an employer must not impose apparently neutral rules if they disadvantage women (or men) as a group, but they are not necessarily required to accommodate specific subsets of women (or men). A female claimant would need to prove that the requirement or condition disadvantaged women as a group, not merely the subset of women who experience domestic violence.

It might be that some of the workplace difficulties experienced by victims of domestic violence are also experienced by other women for other (gendered) reasons, such as family responsibilities. Inflexible work hours, for instance, might disadvantage many women because of caring responsibilities, in which case a victim of domestic violence might be able to prove a disparate impact on women generally.⁶⁷ Australian courts have even taken judicial notice that the (inflexible) requirement to work full time disproportionately impacts women especially when they seek to return from maternity leave and are seeking to balance paid work and caring responsibilities.⁶⁸

However, there are many workplace requirements and conditions which might affect victims of domestic violence but not necessarily women generally. These would include fixed rules about not changing schedules, work location or contact details, which victims of domestic violence might request for safety reasons.

In each case, even if the claimant can prove that a requirement, condition or practice disadvantages women generally, the respondent still has available a defense of reasonableness. The respondent employer bears the burden of proof⁶⁹ and the assessment is one of balancing the costs and alternatives for the employer against the impact or disadvantage experienced by the complainant. Section 7B(2) of the SDA specifically sets out the relevant factors:

The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:

- (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and
- (b) the feasibility of overcoming or mitigating the disadvantage; and
- (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.

⁶⁶ Belinda Smith, 'Wardley to Purvis', above n 59.

⁶⁷ Male victims of domestic violence are not able to avail themselves of such provisions because they are not likely to be able to prove that inflexible work conditions disadvantage men generally.

⁶⁸ See *Hickie v Hunt & Hunt* [1998] HREOCA 8, (1998) EOC 92-910; *Escobar v Rainbow Printing (No 2)* [2002] FMCA 122, [33] and [37]; *Mayer v Australian Nuclear Science & Technology Organisation* [2003] FMCA 209, [69]-[73].

⁶⁹ Section 7C SDA.

This means conditions, requirements and practices will not be unlawfully discriminatory so long as they are reasonable in all the circumstances. By qualifying the prohibition in this way the legislation ensures that employers are not absolutely responsible for ensuring equality of protected groups, but they do bear at least a reasonable burden of enabling their inclusion.

iv. SUMMARY OF SEX DISCRIMINATION

What this analysis of direct and indirect sex discrimination demonstrates is that female victims of domestic violence might be able to use some of the protections against sex discrimination because most victims are women. Male victims have very little protection and, even for women, the circumstances and needs which are peculiar to victims of domestic violence and not generalisable to women as a group are not adequately addressed. This is in part because 'sex' as a ground is conceived of as dichotomous – only two sexes are recognized. This means that sex discrimination is either discrimination directed at women as a whole or men as a whole, not subgroups of women or men (or those who identify as neither). The bluntness of sex discrimination prohibitions in addressing specific manifestations of sex discrimination or the particular discrimination experienced by sub-groups of women has been recognised and addressed in some cases. Although only women can get pregnant, pregnancy was included in the SDA as a separate ground⁷⁰ to specifically target discrimination that was particularly experienced by this sub-group of women. 'Family responsibilities' was also introduced as a separate ground to target this kind of discrimination that is still primarily experienced by women. More recently, breastfeeding has been introduced as a separate ground.⁷¹

v. DISCRIMINATION ON THE GROUND OF 'FAMILY RESPONSIBILITIES'

The ground of family responsibilities under the SDA appears to hold promise for some victims of domestic violence, but upon examination this protection proves to be elusive. Many victims of domestic violence have children and other caring responsibilities and these can be an important factor in the nature of domestic violence they experience and the difficulties they face in escaping the violent relationships. Such caring responsibilities can also be an important part of the difficulties they face in attending work, but in ways that are not necessarily shared by other workers with caring responsibilities. The *National Domestic Violence and the Workplace Survey* (2011) found that a significant number of worker victims of domestic violence had been prevented from getting to work by an abuser, this included instances where the abuser failed to turn up to provide care for dependent children as pre-arranged, leaving the victim to find last minute alternative childcare arrangements or miss work.⁷²

The SDA prohibits employers from discriminating against workers with family responsibilities in respect of hiring, terms and conditions, promotions and termination.⁷³ However, the protection is limited to direct discrimination.⁷⁴ This means that in effect it only prohibits stereotyping, assumptions and inconsistent behaviour because of family responsibilities. As with sex discrimination, these general provisions would apply to victims of domestic violence workers who have family responsibilities, but they would not necessarily be

⁷⁰ Section 7 SDA defines pregnancy discrimination and section 14 SDA, for example, prohibits discrimination in employment on this ground.

⁷¹ Section 7AA SDA, inserted by the *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth).

⁷² McFerran, *National Workplace Survey* above n 2, 8, table 6.

⁷³ Section 14 SDA. Discrimination on this ground is also prohibited in other work related fields, including superannuation. See sections 15-20 SDA.

⁷⁴ Section 7A SDA. Amendments that would have extended the protection to indirect discrimination were included in the *Sex and Age Discrimination Legislation Amendment Bill 2010* (Cth) but were removed in the process of passing the bill. The Act did extend family responsibilities protection beyond termination of employment to cover other stages and aspects of work, but retained the direct discrimination limit.

attuned to the particular challenges that are created by the domestic violence. This is evident by looking no further than the definition of family responsibilities in the *SDA*.

The term 'family responsibilities' is defined in the *SDA* to cover a reasonably wide circle of family relationships,⁷⁵ including dependent children and other immediate family members who are in need of care or support. This extends to partners, parents, grandparents and siblings and is not limited to marriage or heterosexual relationships. However, it does not necessarily cover a wide array of activities in respect of family, extending only to 'responsibilities ... to care for or support' the family member.⁷⁶ So, for instance, it would cover personally caring for children,⁷⁷ but is unlikely to cover the situation of attending court to apply for a domestic violence protection order to protect children or other members of the household who may also be at risk. Nor would it likely cover other interactions with the criminal justice system that might be indirectly about caring responsibilities, such as a mother providing evidence as the victim of violence in order to escape a violent relationship and protect her children from future violence. In this way, victims of domestic violence may be able to use the general family responsibilities protections but only in respect of activities that are the norm or recognized as directly relating to caring obligations.

Being limited to direct discrimination, as noted above, the type of behaviour that is prohibited is that of making assumptions or stereotyping in reaching decisions about recruitment, performance or discipline, for instance, instead of relying upon actual qualifications, experience or workplace performance. Direct discrimination, however, does not require reasonable adjustments to be made to accommodate workers with family responsibilities. This means, for example, that an employer in noting that an employee has dependent children may not simply *assume* that she or he would not want a promotion to a more demanding job, work opportunities that require travel or overtime. Stereotyping about the worker being unreliable because of their family responsibilities is also prohibited. If, however, because of their family responsibilities the employee has been unreliable or advises the employer that they do not want to do overtime or work-related travel the employer is entitled to treat that employee the same as any other employee *who has behaved that way*. Promotions may legally be given to those workers who are more available, flexible and reliable without questioning how level the playing field is for the pool of employees.

For many workers with family responsibilities there is a need for protection against unjustified stereotyping and assumptions, but often a greater need for actual accommodation not merely same treatment. Having family responsibilities usually means bearing the often time-consuming, demanding and unpredictable responsibility for day-to-day care of dependants. Inflexible work rules about hours, attendance, leave, overtime, travel or work location are likely to impact disparately upon workers with family responsibilities and to participate equally with colleagues the worker might need different treatment. The impact of such inflexible conditions might be even more severe on victims with family responsibilities who by definition are also dealing with the threat or reality of violence or coercion which can complicate the arrangements they make for caring for dependants. However, by limiting family responsibilities protection to direct discrimination there is a significant weakness in the protection afforded to this disadvantaged group. Without a prohibition on indirect discrimination, combined with the High Court's narrow interpretation of the scope of direct discrimination,⁷⁸ the *SDA* exerts little pressure on employers to accommodate workers with family responsibilities. The subset of workers with family responsibilities who are further disadvantaged, namely victims of domestic violence, fares worse.

⁷⁵ Section 4A *SDA*

⁷⁶ Section 4(1) *SDA*.

⁷⁷ See *Song v Ainsworth Game Technology Pty Ltd* [2002] FMCA 31; *Escobar v Rainbow Printing Pty Ltd (No 2)* [2002] FMCA 122; *Evans v National Crime Authority* [2003] FMCA 375.

⁷⁸ *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92.

B. DISABILITY DISCRIMINATION ACT

i. INTRODUCTION

For those victims of domestic violence who are injured because of physical violence or develop impairments such as depression, post-traumatic stress or anxiety disorder the *Disability Discrimination Act 1992 (Cth) (DDA)* provides some workplace rights. International research has found a very high correlation between experience of domestic violence and depression and post-traumatic stress disorder: an analysis of 17 studies found an average depression prevalence rate of nearly 50 percent amongst female victims of domestic violence, far higher than that of the general population.⁷⁹ Similarly, an analysis of 11 studies of Post Traumatic Stress Disorder (PTSD) and female victims of domestic violence found an average prevalence rate between 31 and 84 percent.⁸⁰

The DDA prohibits direct and indirect discrimination in work on the basis of disability.⁸¹ Importantly, the term 'disability' is defined broadly to cover a very wide range of impairments including physical, sensory, intellectual impairments and mental disorders, and these can be in the past, present or future, actual or imputed, and need not be permanent.⁸² Protection is also extended to associates of people with disability.⁸³

ii. DIRECT DISCRIMINATION - DISABILITY

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

iii. REASONABLE ADJUSTMENTS

It is important to note that the *DDA* is unique among the federal anti-discrimination Acts in that it imposes an explicit obligation on duty-holders, such as employers, to provide 'reasonable adjustments' to facilitate equal participation in the workplace. This obligation is embedded in the definition of both direct and indirect discrimination; failure to provide reasonable adjustments can constitute less favourable treatment (direct discrimination) or have the effect of disadvantaging a particular group of people with disability (indirect discrimination).⁸⁴ For an adjustment to be reasonable it must not impose an 'unjustifiable hardship' on the employer and all relevant circumstances are to be taken into account in assessing this, including:

⁷⁹ See eg, Cathy Humphries and Ravi Thiara, 'Mental Health and Domestic Violence: "I Call it Symptoms of Abuse"' (2003) 33 *British Journal of Social Work* 209 at 211, citing Golding, J, 'Intimate Partner Violence as a Risk Factor for Mental Disorders: a Meta Analysis' (1999) 14 *Journal of Family Violence* 99.

⁸⁰ *Ibid* at 212, citing Cascardi, M, O'Leary, KD and Schlee, K, 'Co-Occurrence and Correlates of Post-Traumatic Stress Disorder and Major Depression in Physically Abused Women' (1999) 14 *Journal of Family Violence* 227 and Golding, J, 'Intimate Partner Violence as a Risk Factor for Mental Disorders: a Meta Analysis' (1999) 14 *Journal of Family Violence* 99.

⁸¹ Section 15 DDA.

⁸² Section 4(1) DDA.

⁸³ Section 4(1) DDA defines 'associates' and section 7 DDA extends the disability discrimination provisions to cover associates.

⁸⁴ Sections 5(2) and 6(2) DDA.

- (a) the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;
- (b) the effect of the disability of any person concerned;
- (c) the financial circumstances, and the estimated amount of expenditure required to be made, by the first person;
- (d) the availability of financial and other assistance to the first person;

...⁸⁵

This means that, unlike for other kinds of direct discrimination such as family responsibilities discrimination, it is not sufficient for an employer to simply treat all workers the same. In a sense there is an obligation of inclusion imposed on employers to ensure disabled workers get at least a reasonable chance to participate equally. Using the example above about anxiety or depression, failure of an employer to provide reasonable adjustments, such as flexibility with leave or temporary moderation of performance standards, can constitute direct discrimination.

iv. GENERAL LIMITATIONS OF DDA AND ANTI-DISCRIMINATION LAWS

In some ways the *DDA* thus offers the most hope for victims of domestic violence because it covers both direct and indirect discrimination and includes an obligation to provide reasonable adjustments. However, the scope of protection this affords to victims of domestic violence is limited. Firstly, by definition, it will only assist those victims who have an impairment and, more specifically, only those victims who *identify* as having an impairment covered by the Act. Second, the protection afforded by the *DDA* is only in respect of disability. So, a victim of domestic violence who has a disability might be able to use the reasonable adjustments provisions to get flexibility for counseling appointments or some allowances for underperformance *due to the impairment*. However, the Act will not entitle them to adjustments to attend to other needs arising from the violence such as leave to attend to criminal justice hearings, re-housing or child care changes.

Finally, the *DDA* still operates like the other federal anti-discrimination laws in that it requires individual victims to bring claims on their own and they face the prospect of limited compensatory damages and possible costs orders if the matter is pursued through to court. The substantive obligation of the *DDA* might be stronger than those under the other federal Acts, but for all the Acts the enforcement procedures are still not easy to navigate, require a range of resources that simply might not be available to victims of domestic violence and carry financial risks that are likely to deter claimants.⁸⁶ It has been noted that a regulatory system that is established to protect traditionally disempowered groups but relies solely upon members of those groups to drive change is 'arguably one of the weakest forms of achieving behavioural change'.⁸⁷ (The *Fair Work Act* protections against discrimination and the enforcement mechanisms available to victims, unions and the Fair Work Ombudsman might be of more help to those who can access these.⁸⁸)

⁸⁵ Section 11(1) *DDA*.

⁸⁶ Beth Gaze and Rosemary Hunter, *Enforcing Human Rights in Australia: an evaluation of the new regime* (2010).

⁸⁷ Belinda Smith, 'A Regulatory Analysis of the *Sex Discrimination Act 1984* (Cth): Can it Effect Equality or Only Redress Harm?' in Christopher Arup and et al (eds), *Labour Law and Labour Market Regulation - Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 115.

⁸⁸ Belinda Smith, 'Fair and Equal in the World of Work: Two significant Federal developments in discrimination law' (2010) 23(3) *Australian Journal of Labour Law* 199; Carol Andrades, 'Intersections between "General Protections" under the Fair Work Act 2009 (Cth) and Anti-Discrimination Law: Questions, Quirks and Quandaries' (Centre for Employment & Labour Relations Law, University of Melbourne, 2009).

IV. 'VICTIM OF DOMESTIC VIOLENCE' AS A SEPARATE GROUND

Given the urgent need to help victims of domestic violence gain or maintain economic independence, the kinds of barriers they face in gaining and retaining employment and the inadequacy of existing anti-discrimination law grounds to address these, it is worth exploring the introduction of a separate ground that specifically covers this vulnerable group. Many aspects of the anti-discrimination regulatory framework are under review in the Consolidation process; this analysis will focus on the particular ground rather than wider changes that could be made to these laws to make them all more effective. Specifically this paper explores whether an anti-discrimination ground of 'victim of domestic violence' would be conceptually sound, how it might be defined and the scope of a prohibition on this kind of discrimination in work.

A. DISCRIMINATION LAWS: THE RIGHT LEGAL RESPONSE TO DOMESTIC VIOLENCE?

Looking first to the ground and notion of preventing discrimination it is important to ask whether a ground of 'victim of domestic violence' would be compatible with the underlying conceptual framework and rationales of anti-discrimination laws. While there is incontrovertible evidence that victims of domestic violence are in need of better protections and support in Australia, the question here is whether anti-discrimination laws are an appropriate regulatory response. There are two aspects of this question: are anti-discrimination laws designed to address the kinds of problems victims of domestic violence face in the workplace; and can this status be defined adequately in both theoretical and practical terms?

Anti-discrimination laws are designed to do two important things: change attitudes about traditionally marginalised groups within society; and challenge barriers to the equal participation of these groups in work, education and other fields of life. There is evidence that community attitudes about victims of domestic violence are often unsupportive, often characterising victims as responsible for the harm they incur by entering or 'choosing' to remain in a violent relationship.⁸⁹ This means victims may be rationally wary of revealing their status as a victim, especially in the workplace where they are economically dependent on their employer and may fear derision or ostracism by their colleagues. Without some assurance that revealing their status will not subject them to such further harm in the workplace, victims might not even be able to access their general entitlements to flexibility and leave, for example, let alone have confidence that they may be able to get some specific adjustments to meet their particular needs. In addition to the risk of assumptions or pre-judgments being made about their reliability or capacity to perform at work, the inflexibility of many workplace policies and practices may pose significant barriers to the equal participation in work of victims of domestic violence. Even small, reasonable adjustments to hours, contact details, location of work or leave could provide substantial support for a victim who is trying to maintain her employment while dealing with the harm of an abuser and also possibly navigating the criminal justice system, accessing domestic violence support services, and/or seeking assistance with family law issues. In these ways victims of domestic violence face the same kinds of problems faced by groups that are afforded protection under anti-discrimination laws on other grounds such as race, sex, disability and age.

Defining the status of 'victim of domestic violence' does pose both theoretical and practical questions. However, in formulating anti-discrimination laws there have been numerous challenges in defining the groups that warrant protection and addressing the notion of intersectionality. These conceptual and practical problems have not been insurmountable to date in respect of other groups.

There are many bases for exclusion in any society or community and, importantly, these intersect in multiple ways and change over time. So, for example, the two original status grounds to be protected by civil rights and anti-discrimination laws, namely race and sex, clearly intersect and, over time have both been critiqued for their lack of clear meaning or a definition that accurately maps onto experience. Despite the lack of precision

⁸⁹ VicHealth, *National Survey on Community Attitudes*, above n 2.

and difficulties in dealing with intersectionality,⁹⁰ discrimination has been prohibited on these grounds for many decades and these laws have had significant effect in raising awareness of racism and sexism and changing norms about the acceptability of using these categories in employment decision making.

As awareness has been raised about other bases and forms of exclusion, and advocates have been able to analogise their experiences to those of racism and sexism, new grounds have been formulated for anti-discrimination laws. Like the grounds of sex and race, these newer grounds of disability, age, sexuality and religious belief, for example, operate within anti-discrimination laws by naming one aspect of an otherwise diverse group and seeking to address the exclusion that manifests in respect of that particular trait. People do not live their lives as if these different aspects of their identities are actually separable, but to address behaviour that is motivated by or impacts on someone because of one of these identity traits the legislation separates them into analytically distinct grounds. This poses significant problems in litigating against prejudice that is not clearly on any one single ground, but as a regulatory technique anti-discrimination law continues to use the notion of grounds or traits as the basis for defining protected groups.

While all grounds intersect, some are almost subsets of other grounds. As noted above, some of the newer grounds of protection have emerged out of the realisation that a very large group classification, like 'sex', was not sufficiently flexible to be able to address the particular exclusionary attitudes and practices experienced by subgroups. These include women who are pregnant or potentially pregnant, workers with family responsibilities, and breastfeeding mothers.

The grounds upon which discrimination occurs and that have been accepted as warranting legal protection do not have precise delineation, are not necessarily mutually exclusive, not immutable, and not always permanent or obvious. They are also not necessarily limited to traits that we, as a society, want to celebrate and promote. Race and religion, for instance, are often promoted as identities that one should have the right to celebrate; on the other hand a person living with Parkinson's disease or HIV might seek inclusion, accommodation and tolerance while simultaneously advocating for research into prevention of these conditions.

Even in this brief overview we can see that the status of 'victim of domestic violence' is analogous to other grounds in anti-discrimination laws and thus conceptually compatible with the regulatory framework. This leaves us to consider the practical task of defining the status in a way that is both sufficiently clear and workable.

B. DEFINING THE GROUND

In seeking to define the status of 'victim of domestic violence' as a protected ground in anti-discrimination legislation, there are at least four issues to address: the kind of behaviours or activities that need to be covered; the range of interpersonal relationships to be included; the temporal element; and imputation. These are examined in turn.

i. ACTIVITIES THAT CONSTITUTE DOMESTIC VIOLENCE

While the picture of a woman with a black eye has traditionally been the image used to portray domestic violence, as noted above, physical violence is only one kind of violence that comes under the umbrella of this term. Among researchers and advocates, domestic violence is understood as being a range of behaviours that are used to coerce or control other people. In defining 'family violence', which is a term often used

⁹⁰ Hilary Astor, 'A Question of Identity: the Intersection of Race and other Grounds of Discrimination' in Race Discrimination Commissioner (ed), *Racial Discrimination Act 1975: A Review* (1995).

interchangeably with 'domestic violence', the ALRC's *Family Violence – A National Legal Response: Final Report* provides a useful, non-exhaustive template for the kinds of behaviours that would need to be covered:

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

- (a) physical violence;
- (b) sexual assault and other sexually abusive behaviour;
- (c) economic abuse;
- (d) emotional or psychological abuse;
- (e) stalking;
- (f) kidnapping or deprivation of liberty;
- (g) damage to property, irrespective of whether the victim owns the property;
- (h) causing injury or death to an animal irrespective of whether the victim owns the animal; and
- (i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.⁹¹

ii. RELATIONSHIPS TO BE COVERED

To define the interpersonal relationships that should be covered the ALRC term 'family member' could be unnecessarily narrow. The definition of 'domestic relationship' used in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) may be preferable as it encapsulates a broader range of categories of victim who may be vulnerable to domestic violence including persons in dating relationships (whether or not of a sexual nature).⁹²

While domestic violence is predominantly experienced by women, some men are also victims and thus the ground should be drafted in a gender-neutral way to ensure both men and women are protected. Similarly, it is important to ensure the definition of relationships is sexuality-neutral to reflect the fact that domestic violence occurs as often in same-sex relationships as it does in opposite-sex relationships.⁹³

iii. VICTIMS AND SURVIVORS

Turning to the temporal element, it would be important that the ground is defined to cover not only those victims who are experiencing domestic violence at the time of the discriminatory conduct but also those who have experienced such violence in the past. There is clear evidence that the experience of domestic violence has psychological and other health effects on victims even long after the violence has ceased.⁹⁴ The inclusion of a temporal element in the definition would be similar to the definition of disability under the *DDA* in which it is recognised that a person may be discriminated against even before a disabling condition manifests or after an impairment has passed. The *DDA* thus defines disability to cover a range of impairments and then states that this

...includes a disability that:

- (h) presently exists; or
- (i) previously existed but no longer exists; or

⁹¹ ALRC, n 15 at 17.

⁹² *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 5.

⁹³ Pitts et al, above n 14.

⁹⁴ See eg, VicHealth, above n 19; Kimerling et al, above n 20; Humphries and Thiara, above n 79.

(j) may exist in the future (including because of a genetic predisposition to that disability).⁹⁵

iv. IMPUTATIONS

For the ground to be effective the definition would also need to encompass the imputation of being a victim of domestic violence. Again, this would be akin to the definition of disability under the *DDA*, which extends to a ‘disability that is imputed to a person.’⁹⁶ One benefit of this extension is that litigation time and energy would not be wasted at a preliminary stage of enforcing a right in arguing about whether or not the person was actually a victim of domestic violence. If someone can prove that they have been treated as if they were, then the focus should be in the conduct of the perpetrator who has used assumptions or stereotyping about victims in their decision-making. It would cover the situation of an employer assuming that an employee is in a violent relationship, applying a stereotype that this is likely to cause problems in the workplace and dismissing her on the basis of this assumption. It is worth noting that the inclusion of imputation operates primarily in respect of direct discrimination – it creates rights for all against being treated as if they are a victim of domestic violence, but it does not necessarily extend any rights of flexibility and accommodation beyond those persons who actually are victims of domestic violence.

v. PROPOSED WORDING OF DEFINITION

In an attempt to address all of these considerations, while also ensuring consistency with existing anti-discrimination laws and other federal laws, a possible definition might be drafted in the following way.

In this Act:

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

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

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

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

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

- (a) a spouse of the person [defined to include former spouse, a de facto partner and a former de facto partner, not limited to heterosexual relationships];
- (b) someone with whom the person has or has had an intimate relationship, whether or not the intimate relationship involves or has involved a relationship of a sexual nature;

⁹⁵ Section 4(1) DDA.

⁹⁶ Section 4(1) DDA.

- (c) an adult child, parent, grandparent, grandchild or sibling of the person or spouse of one of these persons; and
- (d) in the case of an Aboriginal person or a Torres Strait Islander, is or has been part of the extended family or kin of the other person according to the Indigenous kinship system of the person's culture.

C. WHAT KINDS OF DISCRIMINATION WOULD BE COVERED?

As set out above, the discrimination prohibited under current anti-discrimination laws generally extends to direct and indirect forms in order to address both the harm caused by treating a worker differently because of their particular attributes as well as harm caused by treating them the same when equality requires different treatment or adjustments to be made. Victims of domestic violence are subjected both to different treatment on this ground and the disproportionate impact of apparently neutral rules of workplace policy, practice and behaviour. On this basis legislation seeking to address discrimination against victims would need to prohibit both direct and indirect discrimination.

What this would mean for employers, as it does in respect of other grounds, is firstly that victims of domestic violence who are potential employees or employees should not be treated differently because of this status. This prohibition is designed to address stereotyping, assumptions, harassment and other marginalising conduct. While same treatment may not be enough to bring about substantive equality, it may be a fundamental first step in promoting attitudinal change and empowering workers who experience domestic violence. By extending the prohibition to indirect discrimination employers would also be subject to an obligation to act reasonably in respect of victims of domestic violence. It would mean conditions, requirements and practices in the workplace would need to be reviewed for their potentially disproportionate impact on this group and their reasonableness assessed. In any particular case of an employee victim of domestic violence, the employer should consider what would be required to enable the victim to engage in work equally with others who are not victims and then explore how this might be done without causing unjustifiable hardship on the employer.

Australian anti-discrimination laws as they are currently framed do not impose a heavy regulatory burden on employers. While protected groups are granted rights, discrimination is not easy to prove. In fact, as the law is currently drafted, complainants face an almost insurmountable hurdle in proving that any detriment they have experienced at work amounts to discrimination on a particular ground. The burden of proof is an onerous one and the difficulties this poses in the enforcement of anti-discrimination laws has been noted by many scholars and acknowledged by the Attorney-General's department in the current consolidation inquiry.⁹⁷ The burden of proof requirements might be amended as part of the consolidation. However, even if these requirements are not changed and claims of discrimination on the basis of 'victim of domestic violence' are difficult to prove, this does not completely undermine the value of introducing this separate ground. There is still a very important normative or symbolic purpose that could be served by the public, authoritative statement through legislation that domestic violence victims have the right to protection in work and should not be afraid to reveal their status as victims.

V. CONCLUSION

In this paper we have argued that anti-discrimination law is an appropriate regulatory response to domestic violence because it could provide important workplace rights to victims of domestic violence and promote normative change about this vulnerable group. Naming the harm experienced by victims of domestic violence in the workplace as discrimination may empower victims and enable their ongoing participation in work which has proven to be a critical factor in escaping violent relationships. While anti-discrimination laws impose a

⁹⁷ Attorney-General's Department, above n 9, at para [52].

very light regulatory burden on employers, at the same time they carry a powerful message about equality and fairness in our society. Introducing 'victim of domestic violence' as a separate ground of protection under federal anti-discrimination law is conceptually sound, greatly needed and would provide another means of effecting the *National Plan to Reduce Violence Against Women and their Children*.