

Redfern Legal Centre



5 April 2011

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

Dear Sir/Madam

**Re: Submission from Redfern Legal Centre on Issues Paper 36 –
Family Violence and Commonwealth Laws: Employment and
Superannuation**

Redfern Legal Centre

Redfern Legal Centre (RLC) is an independent, non-profit community legal centre dedicated to promoting social justice and human rights. We offer free legal advice, referral and casework to disadvantaged people and the groups that advocate for them. We also provide community legal education and advocate for the reform of inequalities in laws, the legal system, administrative practices and society as a whole.

Employment law and discrimination law are among the specialist areas for RLC's legal service. RLC also runs the Sydney Women's Domestic Violence Court Advocacy Service and the inner Sydney Yellow Card/DV Pass project that involves direct referrals by the police of victims of family violence for advice and support. RLC is engaged with women experiencing family violence before, during and after police intervene and orders are applied for.

RLC advises people or groups who live or are based in the Botany Bay, City of Sydney and Leichhardt local government areas. RLC also provides services to women seeking Apprehended Violence Orders in the Downing Centre, Newtown, Balmain and Waverley Local Courts.

RLC welcomes this inquiry by the Australian Law Reform Commission. In the 2009/10 financial year our Women's Domestic Violence Court Advocacy Service assisted 1212 women. This is a significant number from only four local courts in Sydney. If these numbers are extrapolated across Australia, tens of thousands of women are involved in court proceedings relating to family violence each year.

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Interviews by appointment: Monday to Thursday 6.30pm – 8pm

We agree with the statement in the Issues Paper that getting or maintaining employment is a key factor to enable women to leave violent relationships and achieve independence and financial security. We also agree with the approach of treating family violence as a systemic rather than an individual, private issue.

RLC acknowledges that family violence can occur within male same sex relationships, and that in rare cases men in heterosexual relationships can be victims of family violence. However, as women are the overwhelming majority of victims of family violence, and as our experience in this area arises from our Women's Domestic Violence Court Advocacy Service and Yellow Card project, our comments will be focussed on the experience of women.

In this submission we have provided case studies, with personal details changed, from among our clients who have experienced family violence.

Victims dealing with family violence

Sydney WDVCAS clients dealing with family violence often report their workplaces are not supportive of their need to take time off work, and that their workplaces have little understanding of the impact of the violence on other aspects of their lives. Typically, Sydney WDVCAS clients dealing with family violence report they need to take time off work to attend medical appointments, provide statements to police, attend court (an average of three occasions), attend appointments to get legal advice, find alternative accommodation, move house, and settle children into new schools. Women also report workplace problems when their abusive partner or ex-partner begins interfering with their employment by making abusive phone calls to the workplace, or making unwelcome contact with work colleagues, or stalking or harassing her at her work.

Barriers to disclosure and privacy protection

Many of the measures flagged in the Issues Paper will involve a victim of family violence disclosing the violence and associated problems to her employer. We agree with the observation in the Issues Paper that victims may be reluctant to disclose for a range of reasons.

We submit that maintaining the confidentiality of information about family violence disclosed to an employer is essential if disclosure is required to access workplace rights. We support the amendment of the *Privacy Act 1988* (Cth) to remove the employee records exemption for private sector employers.

It is vital for the safety of a victim of family violence that her residential address, email address and telephone numbers are not disclosed by her employer to any person. If Commonwealth legislation is amended to provide additional employment rights to victims of family violence, there will need to be guidance and training for employers on the importance of confidentiality.

***Fair Work Act 2009* (Cth)**

We support amendments to the *Fair Work Act 2009* that improve support for victims of family violence and help them to get and maintain employment.

We support the inclusion of experiencing or having recently experienced family violence as a basis upon which an employee is entitled to request flexible working arrangements under National Employment Standards. Although such requests are not enforceable, the inclusion of a specific family violence ground will be educative and normative for employers, employees and the community generally.

We also support amending the National Employment Standards to provide for a statutory entitlement to family violence leave. As discussed above, women who are experiencing or have recently experienced family violence may be attending multiple court appearances and numerous legal, medical and counselling appointments. They may also be looking for alternative accommodation, moving, and making arrangements for children to change schools or childcare centres. An entitlement to leave is likely to make it much easier for women who are willing to disclose family violence to maintain their employment and preserve a good relationship with their employer.

Case study

Jenny is a very experienced accountant whose employment with a large commercial firm was initially undermined when her abusive partner, Paul, began phoning her workplace to speak to her work colleagues about his failing relationship with Jenny. When Jenny was badly assaulted by Paul in front of her two children, she and the children moved into her mother's small unit. Police charged Paul with assault and over the following months, Jenny was required on numerous occasions to take time off work to attend both the local court for the assault charges and related Apprehended Violence Order and the Family Court for parenting orders. Jenny also needed to take time off work to have maxillary surgery as a result of the injuries she sustained in the assault.

During the court process, Jenny described herself as desperate to attend counselling with her children, but was afraid to ask for any more time off work. When Jenny did request a day's leave to organise alternative accommodation, she was called to a formal meeting at her workplace and was accused by colleagues of 'not pulling her weight'. Jenny resigned and now has casual employment as a bookkeeper, and as a result has not been able to afford to move out of her mother's small unit.

We recommend that the entitlement be at least five days paid leave, plus the option of using of other forms of leave such as personal/carer's leave and compassionate leave. An entitlement to paid leave is an indication that dealing with family violence is a community rather than just an individual responsibility. An entitlement to paid leave also recognises that women experiencing family violence are often in a position of financial hardship.

The kind of evidence that an employer can request to substantiate a request for Family Violence leave should be broadly based. It could include a letter from a police officer, court officer, lawyer, doctor, counsellor, domestic violence worker or a refuge worker. It could also be a copy of a court order relating to family violence, including an application for an order, a provisional order or an interim order.

Enterprise agreements and awards

Flexibility clauses in enterprise agreements and awards may be sufficient for some victims of family violence to negotiate flexible working arrangements. However, in our experience a significant minority of mothers returning from maternity leave and seeking flexible

working arrangements meet with resistance from their employers. There appears to be wide variation in the use of flexible working arrangements depending on which industry, the status and role of the employee, and the views of individual managers. Relying on the flexibility provisions alone will not assist all workers dealing with family violence.

We note that victims of violence often have little flexibility about the leave they need to ask for. Victims may not have control over dates set by Courts or when medical appointments or treatment occurs.

Therefore, we support including family violence clauses in enterprise agreements and we support adding a new allowable matter dealing with family violence to modern awards.

Unfair dismissal

The definition of unfair dismissal as “harsh, unjust or unreasonable” is likely to be broad enough to cover the dismissal of an employee experiencing family violence because of things like absence from work to attend court, or legal or counselling appointments.

However, we suggest that some women dealing with family violence may find it difficult to comply with the 14 day time limit for making an application to Fair Work Australia for relief in relation to unfair dismissal. There may be value in including family violence as one of the factors to be taken into account in deciding whether to extend this time limit under section 394(3) *Fair Work Act 2009*.

We also suggest that the potential changes to the *Fair Work Act* discussed in the Issues Paper, such as explicitly recognising family violence as giving an entitlement to leave and an entitlement to request flexible work arrangements, may assist victims of family violence show that their dismissal was harsh, unjust or unreasonable.

Case study

Leanne ended a violent relationship and applied for an Apprehended Violence Order. She also filed a statement of claim to recover money she had lent to her ex-partner. She was employed in a by a labour hire company who placed her with a government agency. Her ex-partner contacted the government agency and made false allegations about her, alleging she was the Defendant rather than the Person in Need of Protection in the AVO application and that she had used their email to request return of her property. Her employment was terminated as a result, apparently on the basis of improper use of email.

General protections/anti discrimination

Similarly, amending the *Fair Work Act* provisions relating to leave and requests for flexible work arrangements would expand the workplace rights on which an adverse action claim under Part 3-1 could be based.

We support including victim of family violence status as a ground of discrimination in the *Fair Work Act* and the consolidated federal discrimination law. It should not be necessary for victims of family violence to engage in complex legal analysis to demonstrate discrimination under the sex, family responsibilities or disability ground in a jurisdiction where many people are unrepresented.

As general protections dismissal applications have a more generous time limit of 60 days, they may be more likely to be used by victims of family violence than unfair dismissal proceedings.

Occupational Health and Safety

RLC is aware of situations where there has been domestic violence between employees and instances where the victim is harassed and stalked at their place of employment.

In some cases where both the victim and the abusive partner or ex-partner share the same workplace, women have reported the employer has placed the needs of the partner or ex-partner above her needs.

Case study

Police applied for an Apprehended Violence Order to protect Sally from the abusive and controlling behaviour of her ex-boyfriend, Michael. Both Sally and Michael work for the same large organisation, Sally in an administrative capacity, and Michael in an executive position. Sally is a young woman and Michael is some years older. Sally reported her relationship with Michael began two years ago, and when she recently tried to end the relationship, Michael became abusive and threatening. One of Michael's threats was that Sally would lose her job if she ended the relationship.

Sally reported that when the restrictions on the provisional AVO were put in place, the organisation expected her to make changes to her normal duties and her hours of work in order to accommodate Michael's work needs, including his use of the workplace gymnasium. The organisation is also making it difficult for Sally to take time off to attend court, with the result that Sally says she is unsure about continuing with the AVO for fear of losing her employment.

In the situation where family violence between co-workers is alleged but not yet determined by a Court, balancing fairness to co-workers may appear difficult for employers. However on a precautionary basis, the interests of the apparent victim should override those of the apparent defendant. Failure to do so risks further injury and trauma to the victim, both by the defendant and also by the employer in requiring the victim to either work with the defendant or to be disadvantaged by shift and other changes.

Arguably employers should have in place policies and procedures that will protect workers from external harassment or intimidation. After all, in any workplace there are security issues. These should be, but possibly often are not, sufficiently robust to prevent and protect from malicious intervention by the perpetrator of family violence. Nevertheless the victim should not be further intimidated or damaged in employment by the employer penalising the worker.

Superannuation

Financial control and abuse is a well recognised feature of relationships where there is family violence. While it would be very difficult for a trustee to identify whether a request to transfer an amount to a spouse under the superannuation contribution splitting regime was the result of coercion, we support the introduction of a "claw-back" provision for spousal superannuation contributions made under duress.

We agree that trustees of self managed superannuation funds who are victims of family violence may not be able to protect their own interests, but we do not have sufficient knowledge of the context and legislation around superannuation to suggest a mechanism.

RLC's clients generally are among the most disadvantaged in the community and mostly do not have self managed superannuation funds. To the extent clients do have such funds, they will usually be referred out to private practitioners for further legal advice on matrimonial property. However, to the extent that the perpetrator of the violence may well be connected with management of the fund, it does suggest a need for external dispute resolution.

We acknowledge the importance of preserving superannuation funds until retirement age, but support amending the *Superannuation Industry (Supervision) Regulations 1994* to provide a specific compassionate ground for the early release of some superannuation benefits to a victim of family violence. Women generally have much less accrued superannuation benefits than men, often so low that it will do little to reduce their reliance on Centrelink payments after retirement. In these cases the money may be far more useful to the woman at the time she is trying to re-establish her life following family violence.

There would appear to be strong arguments that victims leaving family violence should be able to draw down on superannuation benefits, particularly where the draw down is to allow them to separate and re-establish. The long term economic affects of not facilitating re-establishment is likely to be much higher in time out of employment (and hence lower contributions to superannuation), health costs, further family violence, removal of children under Care and Protection legislation, etc.

Case study

Amira was tertiary educated Australian born woman. She was unable to find work in the area for which she had qualification and was currently retraining. Her husband, also tertiary educated was home all the time due to being off work for stress related to issues at work with his boss. He was depressed and slept until late in the day. They lived separately under the one roof. The property they lived in belonged to his family. They owned some furniture and fittings and wedding presents. The car was a gift from his family. He gave her \$100 per week for all her expenses.

She continued to live in fear, isolated by the abusive environment in which she lived and on a drip feed of limited financial support from her husband.

She had underlying post traumatic stress from being physically abused by a parent as a child and could not turn to her family for support. The abusive domestic relationship she now had, had seriously aggravated her post traumatic stress, such that she now had anxiety and depression and this was affecting her ability to resolve the issues to leave the relationship.

She was concerned about how she could afford to leave. Even if she could organise Centrelink payment she did not have enough money to pay bonds, acquire household items. Being able to access superannuation at that stage would have facilitated her relocating and being able to re-establish herself and re-enter the workforce thereby increasing her overall superannuation over time.

Please contact us if you need any further information about this submission.

Yours sincerely
Redfern Legal Centre

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