Australian Human Rights Commission

Fair Work Amendment Bill 2013

AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE SENATE STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

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1 Introduction

1. The Australian Human Rights Commission welcomes the opportunity to contribute this submission to the Senate Standing Committee on Education, Employment and Workplace Relations in relation to its Inquiry into the Fair Work Amendment Bill 2013 (Bill).

2. The Commission's submission limits its comments to the family-friendly measures.

3. The Commission welcomes and supports the family-friendly amendments in the Bill, in particular the measures that:

   - extend the right for pregnant women to transfer to a safe job to employees who have less than 12 months service;,

   - provide that, where no safe job is available, pregnant employees with less than 12 months service be entitled to take unpaid no safe job leave; and

   - provide further flexibility in relation to concurrent unpaid parental leave, ensuring that any special maternity leave taken will not reduce an employee's entitlement to unpaid parental leave.

4. Such measures will enhance the safety of pregnant workers, regardless of their length of service and provide greater flexibility for parents taking parental leave, respectively.

5. The Commission's submission focuses on two issues raised by the Bill:

   a. the right to request flexible working arrangements

   b. recognition of domestic and family violence as a ground of discrimination.

2 Recommendations

6. In summary, the Commission makes the following recommendations:

   Recommendation 1: The Commission recommends that the proposed expansion of the right to request in clause 17 of the Fair Work Bill be adopted.

7. **Recommendation 2:** The Commission recommends that consideration be given to further amending the right to request flexible work arrangements by way of amendments that:

   a. remove the qualification requirements that restrict the categories of employees who can make a request for flexible working arrangements;

   b. introduce a duty on employers to reasonably accommodate a request for flexible working arrangements; and

c. establish a procedural appeals process through Fair Work Australia for decisions related to the right to request flexible working arrangements.

Recommendation 3: The Commission recommends that consideration be given to amending the Fair Work Bill to include a prohibition in sections 351(1) and 772(1)(f) of the Fair Work Act against adverse action and unfair dismissal due to discrimination on the grounds of domestic and family violence.

Recommendation 4: Subject to the adoption of recommendation 2, the Commission recommends that consideration be given to amending section 351(2) to remove the requirement that adverse action be unlawful under the relevant anti-discrimination law in cases involving discrimination on the ground of domestic and family violence.

3 Right to request flexible working arrangements

8. The Commission welcomes clause 17 of the Bill, which proposes to extend the right to request flexible working arrangements to include employees who are:

   a. parents or have responsibility for the care of a child of school age

   b. carers (within the meaning of the *Carer Recognition Act 2010* (Cth))[1]

   c. persons with disability

   d. 55 years or older

   e. experiencing domestic or family violence or providing care or support for a family or household member experiencing domestic or family violence.

9. The amendments in clause 17 of the Bill are consistent with the Commission's recommendations to the Post Implementation Review of the *Fair Work Act 2009* (Cth) (FWA), that the right to request flexible working arrangements be extended to employees with children of all ages and to encompass all forms of family and carer responsibilities (eg disability and elder care) as well as employees with disability and mature age workers.[2] The Commission has similarly discussed the need for such an extension to the right to request in its report on *Investing in Care: Recognising and Valuing those who Care.*[3]

10. The amendments in clause 17 are also consistent with the Commission's recommendations to the Post Implementation Review of the FWA to extend the right to request flexible working arrangements to employees affected by domestic or family violence.[4]

11. As the Commission has noted in its *Investing in Care* report:

> Right to request legislation provides parents and carers with options to flexibly manage employment and caring responsibilities. It therefore has the potential to improve workforce attachment of carers and reduce the risk of workforce drop out among new parents or at the onset of caring responsibilities.[5]

12. The proposed changes are also consistent with the FWA Review Panel's recommendation to 'extend the right to request flexible working arrangements to a wider range of caring and other circumstances …'.[6]

13. Moreover, as noted in the Bill's Statement of Compatibility with Human Rights, the changes implement a number of Australia's international human rights obligations, including under the *Convention on the Elimination of All Forms of Discrimination against Women*. The changes also implement Australia's international obligations under the International Labour Organization *Convention 156 on Workers with Family Responsibilities*.

14. The proposed changes will provide important recognition of the needs of a broader range of carers and help to improve their workforce attachment.

15. ***Recommendation 1: The Commission recommends that the proposed expansion of the right to request in clause 17 of the Fair Work Bill be adopted.***

16. The Commission notes that the FWA's provisions on the right to request flexible working arrangements could be enhanced further by:

    - removing the qualification requirements in section 65(2) of the FWA (ie the requirements for 12 months continuous service and, in the case of casual employees, long term employment and a reasonable expectation of continuing employment)

    - introducing a duty on employers to reasonably accommodate a request for flexible working arrangements

    - establishing a procedural appeals process through Fair Work Australia for decisions related to the right to request flexible working arrangements.

17. These recommendations were made by the Commission in its submission to the Post Implementation Review of the FWA and discussed in its *Investing in Care* report.

18. The Commission reiterates the concern expressed in its submission to the FWA Review Panel that the qualification requirements, which restrict the categories of employees eligible to make a request for flexible working arrangements, have a disproportionate effect on women.[7] This impact has also been noted with concern by Sara Charlesworth and Iain Campbell, amongst others, who have explained that the requirements:

    > exclude many of the working parents of preschool age children who are most likely to make requests. In 2006 for example, 21% of working women of child bearing age (25-44 years) and 44% of women employed on a casual basis had less than 12 months service with their current employer.[8]

19. The Commission remains concerned that the Bill does not seek to amend the FWA to establish a procedural appeals process through Fair Work Australia. The Commission acknowledges the view of the FWA Review Panel that a

procedural appeals process would not guarantee that requests for flexible working arrangements would succeed.[9] However, the Commission considers that a right of appeal is nevertheless an important due process protection, especially for vulnerable employees, and will help to ensure that employers ad**opt a considered approach to requests for flexible working arrangements.**

20. Recommendation 2: The Commission recommends that consideration be given to further amending the right to request flexible work arrangements by way of amendments that:

a. remove the qualification requirements that restrict the categories of employees who can make a request for flexible working arrangements;

b. introduce a duty on employers to reasonably accommodate a request for flexible working arrangements; and

c. establish a procedural appeals process through Fair Work Australia for decisions related to the right to request flexible working arrangements.

4 Recognition of domestic and family violence as a ground of discrimination

21. Whilst the Commission welcomes the expansion of the right to request flexible working arrangements, including to victims/survivors of domestic and family violence and employers providing care to victims/survivors, it remains concerned that there are inadequate protections under the FWA for workers who are discriminated against due to domestic and family violence.[10]

22. The Commission's concern is based on a growing body of evidence that shows that victims/survivors often experience discrimination resulting from domestic and family violence, especially in the workplace.[11] It is based, also, on evidence that suggests that victims/survivors often face difficulties seeking legal redress under the existing grounds in sections 351(1) and 772(1)(f) of the FWA. The Commission has noted elsewhere, for instance, that '[i]t may not always be possible for an employee to link adverse action or a dismissal which is in truth based on domestic violence to a ground of discrimination covered by [the] FWA'.[12]

23. The Commission therefore submits that the Bill should be amended to include a prohibition in sections 351(1) and 772(1)(f) against adverse action and unfair dismissal due to domestic and family violence. In this connection, it should be noted that the Senate Standing Committee on Legal and Constitutional Affairs supported the introduction of protections against discrimination on the ground of domestic and family violence in the context of its review of the exposure draft of the Human Rights and Anti-Discrimination Bill.[13]

> The committee notes the [Attorney-General's] Department's advice that there is no precedent for protecting victims of domestic violence from discrimination within the existing anti-discrimination Acts. The committee however considers

> that this is an area where the Commonwealth must lead the way, and is encouraged by the Australian Government's recent commitment to amend the Fair Work Act to provide more flexible working conditions for victims of domestic violence in places of employment. The committee considers that this action, together with a further amendment to the Draft Bill, will assist victims of domestic violence to increasingly participate in the workforce and broader community.[14]

24. The Commission supports the Senate Committee's view regarding the importance of the Commonwealth showing leadership in prohibiting discrimination on the ground of domestic and family violence. It also notes that domestic and family violence has long been recognised as a ground of discrimination under international law[15] and there is growing precedent from comparative jurisdictions, which prohibit termination of employment and discrimination based on domestic or family violence.[16] The Commission notes that this recommendation was previously made in its submission to the Post Implementation Review of the FWA.

25. Recommendation 3: The Commission recommends that consideration be given to amending the Fair Work Bill to include a prohibition in sections 351(1) and 772(1)(f) of the Fair Work Act against adverse action and unfair dismissal due to discrimination on the grounds of domestic and family violence.

26. The Commission submits that consideration be given to amending section 351(2) to remove the requirement that adverse action also be unlawful under the relevant anti-discrimination law in cases involving discrimination on the ground of domestic and family violence.

27. ***Recommendation 4: Subject to the adoption of recommendation 2, the Commission recommends that consideration be given to amending section 351(2) to remove the requirement that adverse action be unlawful under the relevant anti-discrimination law in cases involving discrimination on the ground of domestic and family violence.***

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[1] A 'carer' is defined as 'an individual who provides personal care, support and assistance to another individual who needs it because that other individual: (a) has a disability; or (b) has a medical condition (including a terminal or chronic illness); or (c) has a mental illness; or (d) is frail and aged': *Carer Recognition Act 2010* (Cth), s 5(1).

[2] Australian Human Rights Commission, *Submission to the Department of Education, Employment and Workplace Relations on the Post Implementation Review of the Fair Work Act 2009* (12 March 2012), [22]-[35]. At http://humanrights.gov.au/legal/submissions/2012/20120312_fwa.html (viewed 11 April 2013).

[3] Australian Human Rights Commission, *Investing in Care: Recognising and Valuing those who Care*, Volume 1: Research Report (2013) 37-38. At http://www.humanrights.gov.au/publications/investing-care-recognising-and-valuing-those-who-care (viewed 15 April 2013).

[4] Australian Human Rights Commission, note 2, [65]-[68].

[5] Australian Human Rights Commission, note 3, 37.

[6] Fair Work Act Review Panel, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (2012), 99. At http://deewr.gov.au/fair-work-act-review (viewed 11 April 2013).

[7] Australian Human Rights Commission, note 2, [36]-[37].

[8] Sara Charlesworth and Iain Campbell, 'Right to Request Regulation: Two New Australian Models' (2008) 21(2) *Australian Journal of Labour Law* 116, 5.

[9] Fair Work Act Review Panel, note 6, 98.

[10] Australian Human Rights Commission, *Submission to the Attorney-General's Department on the Consolidation of Commonwealth Discrimination Law (Supplementary Submission)* (23 January 2012). At http://humanrights.gov.au/legal/submissions/2012/20120123_consolidation.html (viewed 11 April 2013); Australian Human Rights Commission, *Submission to the Attorney-General's Department on the Consolidation of Commonwealth Discrimination Law* (6 December 2011), [93]-[95]. At http://www.humanrights.gov.au/submissions/consolidation-commonwealth-discrimination-law (viewed 16 April 2013); Australian Human Rights Commission, note 2, [75]-[77]; Australian Human Rights Commission, *Submission to the Australian Law Reform Commission on Family Violence and Commonwealth Laws: Employment and Superannuation* (21 April 2011), [54]-[56]. At http://www.humanrights.gov.au/legal-research-and-resources-1 (viewed 15 April 2013).

[11] See, for example, Commonwealth, *Parliamentary Debates*, Senate, 23 January 2013, 27-36 (Anna Davis, National Alliance of Working Women's Centres; Shabnam Hameed, Australian Domestic and Family Violence Clearinghouse; Gaby Marcus, Australian Domestic and Family Violence Clearinghouse; Fiona McCormack, Domestic Violence Victoria; Ludo McFerran, Australian Domestic and Family Violence Clearinghouse). At http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22committees/commsen/8eb3bdec-c603-4d2d-9564-674c7bd7b5c2/0000%22 (viewed 11 April 2013); Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013) [3.51]-[3.60]. At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2010-13/anti_discrimination_2012/report/index.htm (viewed 11 April 2013).

[12] Australian Human Rights Commission, *Submission to the Australian Law Reform Commission on Family Violence and Commonwealth Laws: Employment and Superannuation*, note 10, [53].

[13] Senate Standing Committee on Legal and Constitutional Affairs, note 11, [7.30].

[14] Above [7.29].

[15] See, for example, CEDAW Committee, *General Recommendation No. 19: Violence against Women*, UN Doc. A/47/38 (1992) [1], [6].

[16] Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, ALRC Report 117 (2011), [16.87]. At http://www.alrc.gov.au/publications/family-violence-and-commonwealth-laws-improving-legal-frameworks-alrc-report-117 (viewed 11 April 2013).