



Australian  
Human Rights  
Commission

# Post Implementation Review of the *Fair Work Act 2009*

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE DEPARTMENT OF  
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS**

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## Table of Contents

1	Introduction.....	3
2	Summary .....	3
3	Recommendations.....	3
4	Equal Remuneration .....	5
5	Workplace Discrimination .....	6
6	Balancing work and family responsibilities: NES right to request flexible working arrangements .....	8
7.	<i>Procedural Limitations</i> .....	11
7.1	<i>Unfair Dismissal</i> .....	11
7.2	<i>Application to the Federal Court or Federal Magistrates Court</i> .....	13
8.	Domestic/ Family Violence as a workplace issue.....	13
8.1	<i>Right to request and domestic/ family violence</i> .....	14
8.2	<i>Leave provisions and domestic/ family violence under the FWA</i> .....	14
8.3	<i>Domestic/ family violence as a ground of discrimination under the FWA</i> .....	15
	Appendix A: <i>Family Violence and Commonwealth Laws—Improving Legal Frameworks</i> (ALRC Report 117): Recommendations on family violence and employment laws .....	17

## 1 Introduction

1. The Australian Human Rights Commission makes this submission to the Department of Education, Employment and Workplace Relations in its Post Implementation Review of the *Fair Work Act 2009* (FWA Review).

## 2 Summary

2. The Commission welcomes the opportunity to contribute this submission to the FWA Review, which was foreshadowed in the Explanatory Memorandum to the Fair Work Bill 2008. The *Fair Work Act 2009* (FWA)<sup>1</sup> has been in operation for over two years which provides a useful foundation for assessing the operation of the Fair Work legislation<sup>2</sup>.
3. The narrow timeframes of the Review have meant that the Commission is unable to provide a comprehensive submission on the effectiveness of all aspects of the FWA. The Commission restricts its comments in this submission to the following areas:
  - Equal Remuneration
  - Workplace Discrimination
  - Balancing work and family responsibilities: NES right to request flexible working arrangements
  - Procedural Limitations
  - Domestic/ Family violence as a workplace issue

## 3 Recommendations

4. The Australian Human Rights Commission recommends that:

### *Equal remuneration*

Recommendation 1: the FWA be amended to note there is no requirement for a male comparator to be identified in order to make an equal remuneration order.

### *Workplace discrimination*

Recommendation 2: the Review pursue consistency, as far as possible, between the FWA, a consolidated Commonwealth equality law and best practice features of State and Territory anti-discrimination and equal opportunity laws.

Recommendation 3: consideration be given to developing mechanisms for complementary, comprehensive and specialised service delivery across the

Commission and FWA agencies in relation to complaints of workplace discrimination under federal law and that appropriate funding be allocated to enable the effective operation of all aspects of these services.

*Balancing work and family responsibilities: NES right to request flexible working arrangements*

Recommendation 4: extending the right to request flexible working arrangements to employees with children of all ages and to encompass all forms of family and carer responsibilities such as disability and elder care.

Recommendation 5: the qualification requirements that restrict the categories of employees who can make a request for flexible working arrangements be removed.

Recommendation 6: the same rights of redress applicable to the other nine NES be extended to the unreasonable refusal of a request for flexible work arrangements.

Recommendation 7: the right to request flexible working arrangements be extended to employees with a disability.

*Procedural limitations*

Recommendation 8: the 14 day time limit for unfair dismissal claims at s394(2)(a) be extended to 21 days; and the discretion provided to Fair Work Australia to extend the time limit be widened by providing that Fair Work Australia needs only to be satisfied that it is appropriate to allow for a further period in all the circumstances of the case.

Recommendation 9: the minimum employment period to access unfair dismissal protections be reduced to three months for all employees.

Recommendation 10: the 14 day time limit for bringing general protections court applications (s371(2) of the FWA) be extended to 60 days.

*Domestic/ family violence as a workplace issue*

Recommendation 11: s65 of the FWA be amended to provide employees affected by domestic/ family violence with a right to request flexible working arrangements.

Recommendation 12: consideration be given to amending the FWA NES to specifically provide for paid domestic/family violence leave.

Recommendation 13: publication of a guide to negotiating domestic/ family violence leave clauses, which could include existing and model clauses. The drafting of this guide could be undertaken by Fair Work Australia, in consultation with the Australian Council of Trade Unions, peak employer bodies and experts in the field of domestic/ family violence.

Recommendation 14: consideration of the insertion of family violence into sections 351(1) and 772(1)(f) of the FWA as a separate ground of discrimination.

#### 4 Equal Remuneration

5 In recognition that the gender pay gap (based on average weekly ordinary time earnings of full-time adult employees) is still 17.6%,<sup>3</sup> and that women are over-represented in low-paid industries, with high levels of part-time work in retail, hospitality and personal services sectors,<sup>4</sup> the Commission supports the retention of the provisions in the FWA for Fair Work Australia to make equal remuneration orders to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.<sup>5</sup>

6 The recent case of *Australian Municipal, Administrative, Clerical and Services Union and Others v Australian Business Industrial*, demonstrates the value and effectiveness of the equal remuneration powers accorded to Fair Work Australia under the FWA.

7 In the ASU Case Fair Work Australia concluded:

We have found that employees in the SACS industry are predominantly women and are generally remunerated at a level below that of employees of state and local governments who perform similar work.<sup>6</sup>

We agree that it would be wrong to conclude that the gap between pay in the sector with which we are concerned and pay in state and local government employment is attributable entirely to gender, but we are in no doubt that gender has an important influence. In order to give effect to the equal remuneration provisions in these complex circumstances, we consider that the proper approach is to attempt to identify the extent to which gender has inhibited wages growth in the SACS industry and to mould a remedy which addresses that situation.<sup>7</sup>

8 The powers to make equal remuneration orders can have an important impact on rectifying the gender pay gap in female dominated industries that receive comparatively lower levels of pay.

9 The Commission further supports the finding by Fair Work Australia in the ASU case that there was no need to identify a male comparator.<sup>8</sup> To ensure clarity and certainty for future equal remuneration orders under the FWA, there could be value in explicitly reflecting this finding in the FWA.

10 ***Recommendation 1: The Commission recommends that the FWA be amended to note there is no requirement for a male comparator to be identified in order to make an equal remuneration order.***

11 Further measures that could be considered by Fair Work Australia to address the gender pay gap, include:

- Fair Work Australia establishing a specialist unit to develop and monitor pay equity mechanisms

- Fair Work Australia putting measures in place to promote greater transparency in relation to pay rates, including in individual contracts.<sup>9</sup>

## 5 Workplace Discrimination

12 An object of the FWA is:

enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms;<sup>10</sup>

13 Section 351 of the FWA states:

(1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Note: this subsection is a civil remedy provision see Part 4-1.

(2) However, subsection (1) does not apply to action that is:

(a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or

(b) taken because of the inherent requirements of the particular position concerned; or

(c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed—taken:

(i) in good faith; and

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.<sup>11</sup>

14 The Commission welcomes the protections against discrimination contained in the FWA, and considers the Fair Work jurisdiction an important jurisdiction in which workplace protections should be available.

15 The Commission submits that it is appropriate to pursue consistency between Commonwealth discrimination law and the non-discrimination provisions of the *Fair Work Act*, and between Commonwealth discrimination law and areas of best practice in State and Territory anti-discrimination and equal opportunity laws, where this would enhance, or not diminish, the protection provided by Commonwealth discrimination law.

16 ***Recommendation 2: The Commission recommends that the Review pursue consistency, as far as possible, between the FWA, a consolidated Commonwealth equality law and best practice features of State and Territory anti-discrimination and equal opportunity laws.***<sup>12</sup>

17 Since the commencement of the FWA, the Commission has continued to receive a high number of complaints about discrimination in employment which is appropriate in light of its specialised jurisdiction, long standing

experience in this field and its Alternative Dispute Resolution expertise. For example in the 2010-11 reporting year, alleged discrimination in employment constituted 88% of sex discrimination complaints, 66% of age discrimination complaints, 35% of race discrimination complaints and 31% of disability discrimination complaints received by the Commission. In the past year, the Fair Work Ombudsman (FWO) has also entered into a direct referral arrangement with the Commission to transfer complaints about discrimination in employment to the Commission where they are considered to be better served by the Commission's conciliation service. While the Commission has not received any additional funding associated with this referral arrangement, the Commission supports such arrangements which ensure complementary, comprehensive and specialised service delivery with reduced duplication.

18 The Commission notes that there would be value in giving consideration to mechanisms whereby the Commission and FWA agencies can better work to provide complementary, comprehensive and specialised service delivery in relation to complaints of workplace discrimination under federal law. For example, by statutory provisions which provide for transfer arrangements between the FWO and the Commission and appropriate associated funding for the Commission.. It is the Commission's view that such complementary service delivery across agencies maximises accessible, cost effective and efficient service delivery for all Australians.

19 ***Recommendation 3: The Commission recommends that consideration be given to developing mechanisms for complementary, comprehensive and specialised service delivery across the Commission and FWA agencies in relation to complaints of workplace discrimination under federal law and that appropriate funding be allocated to enable the effective operation of all aspects of these services.***

20 The Commission also encourages greater cohesion and collaboration between the Australian Human Rights Commission and Fair Work Australia and the FWO in relation to discrimination complaints in the following ways:

- The Fair Work Australia/ FWO notifying the Equal Opportunity for Women in the Workplace Agency (EOWA) and the Commission if:
  - the FWO commences an application under s 682 of the FWA which relates to adverse action against an existing or prospective covered employee because of a relevant protected attribute, being sex, marital status, family or carer responsibilities and pregnancy;
  - a Fair Work Inspector issues a compliance notice where the Inspector reasonably believes that a person has contravened relevant provisions of the FWA<sup>13</sup> or a Fair Work Instrument, including amongst other things, relevant provisions of the NES,<sup>14</sup> or an equal remuneration order.
- Fair Work Australia and the FWO reporting annually to the Commission disaggregated data and analysis required by the Commission to report on progress to achieve gender equality in Australian workplaces, in

accordance with the National Gender Equality Benchmarks and Indicators.<sup>15</sup>

- 21 The Commission further brings attention to the recommendations made in its submission to the Fair Work Bill 2008 pertaining to workplace discrimination that still remain pertinent to the operation and effectiveness of the FWA. In particular the Commission draws attention to recommendations 8 (extending the prohibition against discrimination to apply to every employee in Australia) and recommendation 9 (that ‘marital status’ be replaced with ‘marital or relationship status’, which includes being the same sex partner of another person).<sup>16</sup>

## **6 Balancing work and family responsibilities: NES right to request flexible working arrangements**

- 22 In a week where 3.2 million employees provided unpaid care to someone, only 15% used flexible working arrangements to help them provide that care.<sup>17</sup>

- 23 An object of the FWA object is:

assisting employees to balance their work and family responsibilities by providing for flexible working arrangements;<sup>18</sup>

- 24 The FWA provides for the right to request a flexible working arrangement as one of the ten minimum standards in the NES<sup>19</sup>:

- 25 In relation to flexible working arrangements the FWA states:

### **65 Requests for flexible working arrangements**

(1) An employee who is a parent, or has responsibility for the care, of a child may request the employer for a change in working arrangements to assist the employee to care for the child if the child:

- (a) is under school age; or
- (b) is under 18 and has a disability.<sup>20</sup>

(4) The employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request a

(5) The employer may refuse the request only on a reasonable business grounds

(6) If the employer refuses the request, the written response under subsection (4) must include details of the reasons for the refusal.<sup>21</sup>

- 26 The NES is a welcome recognition of the reality that many workers need to balance paid employment with their family and caring responsibilities.

- 27 However, the NES in its current form is insufficient to address the needs of workers with family responsibilities in a number of respects.



- 28 First, limiting the right to request flexible working arrangements to employees who are either the parents of or have responsibility for the care of a child under school age or under 18 years of age with a disability, fails to take account of Australia's ageing population and the fact that a significant proportion of the working population have family and carer responsibilities that are not confined to the care of children.<sup>22</sup> It is also inconsistent with government policy that is aimed at strengthening the labour force participation of mature workers as a key priority to better manage the economic challenges presented by an ageing population.
- 29 The Australian Bureau of Statistics has projected that between 2007 and 2026 the proportion of the population aged 65 years and over in Australia will increase from 13% to between 18 – 20%. By 2056 this proportion would have increased to between 23 – 25% of the population.<sup>23</sup>
- 30 In 2009, there were 2.6 million carers who provided assistance to those who needed help because of disability or old age. Just under one third of these (29%) were primary carers; that is, people who provided the majority of the informal help needed by a person aged 60 years or over or with a disability. Overall, 40% of carers were aged 55 years and over.<sup>24</sup>
- 31 The Intergenerational Report cited strengthening the labour force participation of mature workers as a key priority to better manage the policy challenges presented by population ageing. The report also noted that continued improvement in mature age participation rates will require ongoing policy to identify and remove the barriers for those who wish to remain in the workplace.<sup>25</sup> This will become increasingly important as Australia prepares for the economic challenges of an ageing population.<sup>26</sup> At the same time, there will be increasing need for informal care for the elderly as the Australian population ages. Indeed, informal carers are essential for the delivery of elder care and this care is relied upon by government as a method to contain expenditure on elder care.<sup>27</sup>
- 32 That family and carer responsibilities extend beyond the care of children under school age has been recognised in a number of countries. Since 2003, in the United Kingdom, the *Employment Rights Act 1996* (UK) has provided a right to request changes to working arrangements for employees with children under school age, with disabled children up to 18 years, and since 2007, for employees with dependent adults.<sup>28</sup>
- 33 Similarly in New Zealand, amendments to the *Employment Relations Act 2000* (NZ) provided employees with the right to request flexible working arrangements if they have the 'care of any person' and have been employed by their employer for six months prior to making the request.<sup>29</sup>
- 34 As noted above, those with caring responsibilities for elderly people are more likely to be older persons. The Australian Government has indicated that it wishes to remove barriers to older workers who wish to remain in the workforce. If FWA were amended to allow workers with caring responsibilities to request flexible working arrangements, this would better reflect the needs of older workers and would be consistent with meeting the objectives of

current government policy on strengthening the labour force participation of mature workers.

35 ***Recommendation 4: The Commission recommends extending the right to request flexible working arrangements to employees with children of all ages and to encompass all forms of family and carer responsibilities such as disability and elder care.***

36 Second, the right to request flexible working arrangements does not apply to employees unless they have at least 12 months continuous service and also, in the case of casual employees, a reasonable expectation of continuing employment.<sup>30</sup> These qualification requirements disproportionately impact on employment categories dominated by women with family responsibilities.<sup>31</sup> As Sara Charlesworth and Iain Campbell observe:

This qualification requirement will exclude many of the working parents of pre-school 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.<sup>32</sup>

37 ***Recommendation 5: The Commission recommends that the qualification requirements that restrict the categories of employees who can make a request for flexible working arrangements be removed.***<sup>33</sup>

38 Third, the right to request flexible working arrangements does not contain an enforcement mechanism and there is no grievance procedure or process to provide redress when an employee considers a request has been unreasonably refused. The FWA states that Fair Work Australia ‘must not’ deal with a dispute about whether an employer had reasonable business grounds to decline a request for flexible working arrangements unless the clause is replicated in a contract of employment, an enterprise agreement, or other written agreement to Fair Work Australia dealing with the matter.<sup>34</sup>

39 Australia’s international human rights obligations extend to both men and women workers with family responsibilities.<sup>35</sup> Accordingly, including a process to provide redress for both men and women workers who have requests unreasonably refused as part of the NES would ensure compliance with Australia’s international human rights obligations.

40 ***Recommendation 6: The Commission recommends that the same rights of redress applicable to the other nine NES be extended to the unreasonable refusal of a request for flexible work arrangements.***<sup>[36]</sup>

41 Fourth, to ensure that requests for flexible working arrangements are properly accommodated where possible, there would be benefit in amending the NES to place a duty on employers to reasonably accommodate a worker’s family and carer responsibilities, including through the provision of flexible work arrangements.<sup>37</sup>

42 Fifth, the flexibility in working arrangements which assists workers with family and carer responsibilities is often the same as, or similar to, the flexibility

which may be required by people with a disability in the workplace. There is a range of situations in which flexibility is desirable for an employee with a disability. For example, employees with certain disabilities may not be able to work at particular times of the day due to personal care or transport arrangements. Other people with a disability may be assisted by reduced working hours, or the option to work from home.<sup>38</sup>

- 43 Extending the right to request flexible working arrangements to employees with a disability would be consistent with the duty on employers to make reasonable adjustments for a person with a disability contained in the *Disability Discrimination Act 1992* (Cth).
- 44 Including the right to request flexible working arrangements for employees with a disability in the NES would also further the implementation of Australia's international human rights obligations, including the obligation to ensure that reasonable accommodation is provided to persons with disabilities in the workplace.<sup>39</sup>
- 45 ***Recommendation 7: The Commission recommends that the right to request flexible working arrangements be extended to employees with a disability.***<sup>40</sup>

## **7. Procedural Limitations**

### **7.1 Unfair Dismissal**

- 46 The FWA requires unfair dismissal applications to be lodged with Fair Work Australia within 14 days after the dismissal took effect, or within such further period as Fair Work Australia allows.<sup>41</sup> Fair Work Australia may allow a further period for the application if it is satisfied there are exceptional circumstances, taking into account:
- the reason for the delay;
  - whether the person first became aware of the dismissal after it had taken effect;
  - any action taken by the person to dispute the dismissal;
  - prejudice to the employer (including prejudice caused by the delay);
  - the merits of the application; and
  - fairness as between the person and other persons in a similar position.<sup>42</sup>
- 47 The Commission considers the provision of unfair dismissal protections under the FWA to have been a positive development. The Commission is, however, concerned with two aspects of the unfair dismissal protections.
- 48 First, while the Commission acknowledges the intention of these provisions is to 'provide a quick, flexible and informal process for the resolution of unfair dismissal claims'<sup>43</sup>, the Commission submits that the 14 day timeframe is too short.

- 49 Many employees will be unable to seek advice about whether they should make a claim within this time frame. This is particularly the case for employees in rural or remote areas, and for many employees who may be distressed following dismissal. The Commission is concerned that the 14 day time limit may result in employees being unfairly left without a remedy for unfair dismissal.
- 50 The Commission is also concerned that Fair Work Australia is only provided with power to extend the 14 day time limit in ‘exceptional circumstances’.
- 51 The factors set out at s394(3)(a)-(f) of the Act are consistent with the decision of the Industrial Relations Court of Australia in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298. It would be appropriate to retain these factors and additionally provide that Fair Work Australia needs only to be satisfied that it is appropriate to allow for a further period in all the circumstances of the case.
- 52 ***Recommendation 8: The Commission recommends that: the 14 day time limit for unfair dismissal claims at s394(2)(a) be extended to 21 days; and the discretion provided to Fair Work Australia to extend the time limit be widened by providing that Fair Work Australia needs only to be satisfied that it is appropriate to allow for a further period in all the circumstances of the case.***<sup>44</sup>
- 53 Second, the Commission submits that the minimum employment periods for accessing unfair dismissal protections are too long.
- 54 The Act provides unfair dismissal protections to national system employees provided they have completed the minimum employment period. The minimum employment period is one year for employees of a small business<sup>45</sup> and six months for all other employees.<sup>46</sup> The Explanatory Memorandum states:
- A requirement that an employee serve a minimum period before having access to an unfair dismissal remedy enables an employer to have a period of time to assess the capacity and conduct of a new employee without being subject to an unfair dismissal claim if they dismiss the employee during this period.<sup>47</sup>
- 55 The minimum employment periods are too long and will leave many employees without a remedy for unfair dismissal. This is particularly the case for employees of small businesses. The Commission submits that the minimum employment period should be reduced to three months for all employees.<sup>48</sup> The Commission considers that an employer should be able to assess the capacity and conduct of an employee within three months.
- 56 ***Recommendation 9: The Commission recommends that the minimum employment period to access unfair dismissal protections be reduced to three months for all employees.***<sup>49</sup>

## **7.2 Application to the Federal Court or Federal Magistrates Court**

- 57 The Commission submits that the time limit for bringing an application to the Federal Court or Federal Magistrates Court for a contravention of Part 3.1<sup>50</sup> that resulted in dismissal should be extended.
- 58 In cases where an employee has been dismissed in contravention of Part 3.1, the dispute is dealt with at first instance in a conference conducted by Fair Work Australia.<sup>51</sup> An application to Fair Work Australia must be made within 60 days after the dismissal, or within such further time as Fair Work Australia allows.<sup>52</sup>
- 59 If the dispute remains unresolved after the conference, Fair Work Australia issues a certificate and the dismissed employee can proceed to court.<sup>53</sup> A court application must be made within 14 days after the certificate is issued.<sup>54</sup>
- 60 The Commission submits that the time limit for bringing a court application should be extended from 14 days to 60 days. This is because applicants will require time to seek legal advice, and to make arrangements for the preparation of their case. This is particularly the case for employees in rural or remote areas, and for many employees who may be distressed following dismissal and the unsuccessful resolution of their case at Fair Work Australia.
- 61 A 60 day time limit is consistent with the timeframe for making an application alleging unlawful discrimination to the Federal Court or Federal Magistrates Court under the *Australian Human rights Commission Act 1986* (Cth).<sup>55</sup> Consistent timeframes across jurisdictions are desirable to prevent jurisdictional choices being made on the basis that in one forum, but not in another, they will be time-barred.
- 62 ***Recommendation 10: The Commission recommends that the 14 day time limit for bringing general protections court applications (s371(2) of the FWA) be extended to 60 days.***<sup>56</sup>

## **8. Domestic/ Family Violence as a workplace issue**

- 63 Violence against women is a breach of women's human rights. This has been recognised by the UN Committee on the Elimination of All Forms of Discrimination Against Women<sup>57</sup> as well as the Commission on the Status of Women.<sup>58</sup> These bodies recognise that domestic/ family violence is an obstacle to women's full participation in employment.
- 64 Almost two-thirds of women affected by domestic/ family violence in Australia are in paid employment,<sup>59</sup> so the impact of domestic/ family violence on employees and workplaces may be considerable. The impact of domestic/ family violence on organisational productivity and the national economy is also extensive, costing an estimated \$13.6b in 2009.<sup>60</sup> For these reasons, it is important that appropriate mechanisms are in place under the FWA to assist employees affected by domestic/ family violence and to enable employers to assist their employees. Such mechanisms were outlined in the Commission's

submission to the Australian Law Reform Commission's *Inquiry on Family Violence and Commonwealth Laws: Employment and Superannuation* in 2011.<sup>61</sup>

## **8.1 Right to request and domestic/ family violence**

- 65 Employees affected by domestic/ family violence are able to use various forms of leave to enable them to attend to matters arising from experiencing domestic/ family violence. However, current leave available to employees, including personal/carer leave and annual leave, may be inadequate to enable employees to attend court, medical, legal or other appointments necessary for those affected by domestic/ family violence. Employees may not have leave accrued or not accrue leave if they are employed casually. Employees affected by violence may also be financially vulnerable, and not be in a position to take leave if this would result in losing wages.
- 66 Flexible working arrangements may therefore be a useful additional entitlement for employees affected by domestic/ family violence. However, the existing right to request flexible working arrangements in the NES is inadequate to effectively assist employees affected by domestic/ family violence.
- 67 Research based on interviews with women affected by domestic/ family violence has highlighted the need for women to be able to access flexible working arrangements. Some of the female participants in the research preferred to be employed casually as this form of employment offered flexibility; others relied on the goodwill of their managers to access flexible working arrangements.<sup>62</sup> Incorporating domestic/ family violence into the right to request provisions would provide women with a more secure entitlement to access flexible working arrangements, as well as obviate the need to work as a casual employee.
- 68 ***Recommendation 11: The Commission recommends that s65 of the FWA be amended to provide employees affected by domestic/ family violence with a right to request flexible working arrangements.***<sup>63</sup>
- 69 Employees are currently required to fulfill an eligibility criterion of 12 months service before they are eligible to request flexible working arrangements, or for long-term casual employees, be a long-term casual and have a reasonable expectation of continuing employment. Women constitute the majority of those experiencing domestic/ family violence and many have broken labour market participation or work casually.<sup>64</sup> Employees may also need to use leave in an emergency or for unforeseen circumstances. It may therefore be unrealistic to expect an employee in danger to fulfill the eligibility criteria before being formally able to request flexible working arrangements.

## **8.2 Leave provisions and domestic/ family violence under the FWA**

- 70 Existing leave provisions in the FWA may not be adequate for employees affected by domestic/ family violence, as there are no provisions which

specifically aim to assist such employees. As stated earlier, employees affected by domestic/ family violence may require leave to undertake a range of activities associated with their situation, such as attending medical, legal and other appointments. While a right to request flexible working arrangements would assist employees affected by violence, employees may also benefit from an express provision for statutory paid leave. The need for paid leave has been recognised by some unions and employers, who have introduced domestic/ family violence leave through enterprise bargaining, and organisational policies.<sup>65</sup>

71 While the inclusion of domestic/ family violence clauses in enterprise agreements is another avenue by which employees can access flexible working arrangements or domestic/ family violence leave. The Commission considers that FWA amendments to include domestic/ family violence leave as an NES are preferable to this issue being left for parties to negotiate in collective workplace agreements. History has shown that clauses which primarily benefit women are slow to become common bargaining claims and be negotiated into workplace agreements. Academics have examined bargaining outcomes and concluded that the interests of the majority, based on a male, full-time breadwinner ideal, are often negotiated instead of entitlements which meet women's industrial needs.<sup>66</sup>

72 Leaving the provision of domestic/ family violence leave to enterprise bargaining runs the risk that this issue will be slow to be negotiated, and where it is, that only higher paid workforces which have more bargaining power will be able to negotiate this provision.

73 ***Recommendation 12: The Commission recommends that consideration be given to amending the FWA's NES to specifically provide for paid domestic/family violence leave.***<sup>67</sup>

74 ***Recommendation 13: The Commission recommends that a guide to negotiating domestic/ family violence leave clauses, which could include existing and model clauses, be published. The drafting of this guide could be undertaken by Fair Work Australia, in consultation with the Australian Council of Trade Unions, peak employer bodies and experts in the field of domestic/ family violence.***<sup>68</sup>

### **8.3 Domestic/ family violence as a ground of discrimination under the FWA**

75 The Commission notes as a result of s. 351(1) of the FWA, in order for family violence to be included as a separate ground under s. 351(1), it would also need to be incorporated under federal, state or territory discrimination laws.

76 The Commission is aware that different views have been expressed on this question. One view that has been expressed is that s. 351(2)(a) covers action which is covered by federal, state or territory anti-discrimination law but is not unlawful because an exemption or defence applies under that law. On this view, the prohibition on adverse action contained in the FWA will not apply where an action that would otherwise be unlawful under an anti-

discrimination law falls within an existing exemption or defence, making it ‘not unlawful’.

- 77 ***Recommendation 14: The Commission recommends that consideration of the insertion of family violence into sections 351(1) and 772(1)(f) of the FWA as a separate ground of discrimination.***<sup>69</sup> The Commission further brings the Review Board’s attention to the recommendations made by the Australian Law Reform Commission in its recent report *Family Violence and Commonwealth Laws—Improving Legal Frameworks* (ALRC Report 117) (See Appendix A).<sup>70</sup>



## **Appendix A: Family Violence and Commonwealth Laws— Improving Legal Frameworks (ALRC Report 117): Recommendations on family violence and employment laws<sup>71</sup>**

### **15. Employment Law—Overarching Issues and a National Approach**

**Recommendation 15—3** The General Manager of Fair Work Australia, in conducting the review and research required under s 653 of the *Fair Work Act 2009* (Cth), should consider family violence-related developments and the effect of family violence on the employment of those experiencing it, in relation to:

1. enterprise agreements; and
2. individual flexibility arrangements.

**Recommendation 15—4** The Department of Education, Employment and Workplace Relations maintains the Workplace Agreements Database which contains information on federal enterprise agreements that have been lodged with, or approved by, Fair Work Australia. The Department of Education, Employment and Workplace Relations should collect data on the incidence of family violence-related clauses and references in enterprise agreements and include it as part of the Workplace Agreements Database.

**Recommendation 15—5** The Australian Government should support research, monitoring and evaluation of family violence-related developments in the employment law sphere, for example by bodies such as the Australian Domestic and Family Violence Clearinghouse.

### **16. Fair Work Act 2009 (Cth)**

**Recommendation 16—1** The Australian Government should consider family violence-related amendments to the *Fair Work Act 2009* (Cth) in the course of the 2012 Post-Implementation Review of the Act.

**Recommendation 16—2** Fair Work Australia should review its processes, and members and other relevant personnel should be provided with consistent, regular and targeted training to ensure that the existence of family violence is appropriately and adequately considered at relevant times.

**Recommendation 16—3** The Fair Work Ombudsman, in consultation with unions and employer organisations, should include information in Best Practice Guides with respect to negotiating individual flexibility arrangements in circumstances where an employee is experiencing family violence.

**Recommendation 16—4** The Australian Government should support the inclusion of family violence clauses in enterprise agreements. At a minimum, agreements should:

1. include a statement outlining when and what type of verification of family violence may be required;
2. ensure the confidentiality of personal information supplied;

3. establish lines of communication for employees;
4. set out relevant roles and responsibilities of employers and employees;
5. provide for flexible working arrangements; and
6. provide access to paid leave.

**Recommendation 16—5** The Fair Work Ombudsman should develop a guide to negotiating family violence clauses in enterprise agreements, in conjunction with the Australian Domestic and Family Violence Clearinghouse, unions and employer organisations.

**Recommendation 16—6** In the course of the 2012 review of modern awards by Fair Work Australia, the ways in which family violence terms may be incorporated into awards, consistent with the modern award objectives should be considered.

**Recommendation 16—7** In the course of the first four-yearly review of modern awards by Fair Work Australia, beginning in 2014, the inclusion of a model family violence term should be considered.

**Recommendation 16—8** The Australian Human Rights Commission, in the context of the consolidation of Commonwealth anti-discrimination laws, should examine the possible basis upon which status as an actual or perceived victim of family violence could be included as a protected attribute under Commonwealth anti-discrimination law.

## **17. The National Employment Standards**

**Recommendation 17—1** As part of Phase Five of the whole-of-government strategy for phased implementation of reforms contained in Part E of this Report, the Australian Government should consider amending s 65 of the *Fair Work Act 2009* (Cth) to provide that an employee:

1. who is experiencing family violence, or
2. who is providing care or support to another person who is experiencing family violence,

may request the employer for a change in working arrangements to assist the employee to deal with circumstances arising from the family violence.

**Recommendation 17—2** As part of Phase Five of the whole-of-government strategy for phased implementation of reforms contained in Part E of this Report, the Australian Government should consider amending the National Employment Standards with a view to including provision for additional paid family violence leave.

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<sup>1</sup> *Fair Work Act 2009* (Cth).

<sup>2</sup> 'Fair Work legislation' refers to the *Fair Work Act 2009* and the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*. The FWA is, administered by Fair Work Australia and the Fair Work Ombudsman.

<sup>3</sup> ABS, *Average Weekly Earnings, Australia, November 2011* Catalogue No 6302.0 (2012).

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- <sup>4</sup> ABS, *Labour Force, Australia, Detailed, Quarterly, May 2008*, Catalogue No. 6291.0.55.003 (2008).
- <sup>5</sup> *Fair Work Act 2009*, Division 2—Equal remuneration orders, s302 FWA may make an order requiring equal remuneration.
- <sup>6</sup> *Australian Municipal, Administrative, Clerical and Services Union and others Interim Decision* [2011] FWAFB 2700, para 276.
- <sup>7</sup> *Australian Municipal, Administrative, Clerical and Services Union and others v Australian Business Industrial* [2012] FWAFB 1000.
- <sup>8</sup> Australian Human Rights Commission, *Submission to the Application by the Australian Municipal, Administrative, Clerical and Services Union and Others for an Equal Remuneration Order in the Social and Community Services Industry*, 4 August 2010, paras 10-18, Australian Human Rights Commission, *Submission to the Application by the Australian Municipal, Administrative, Clerical and Services Union and Others for an Equal Remuneration Order in the Social and Community Services Industry*, 24 March 2011, paras 50-55 .
- <sup>9</sup> Australian Human Rights Commission, *Gender Equality Blueprint* (2010). At [http://www.humanrights.gov.au/sex\\_discrimination/publication/blueprint/index.html](http://www.humanrights.gov.au/sex_discrimination/publication/blueprint/index.html) (viewed 15 February 2012).
- <sup>10</sup> *Fair Work Act*.
- <sup>11</sup> *Fair Work Act*, s351
- <sup>12</sup> The Commission has previously made this recommendation in Australian Human Rights Commission, *Submission to the Consolidation of Commonwealth Discrimination Law* (2011). At [http://www.hreoc.gov.au/legal/submissions/2011/20111206\\_consolidation.html](http://www.hreoc.gov.au/legal/submissions/2011/20111206_consolidation.html) (viewed 15 February 2012).
- <sup>13</sup> Relevant provisions would be defined to include adverse action on ‘gender equality employment matters’, being sex, marital status, family or carer responsibilities and pregnancy.
- <sup>14</sup> Relevant provisions of the NES would be defined to include the NES on unpaid parental leave, and rights in relation to family and carer leave and responsibilities.
- <sup>15</sup> Australian Human Rights Commission, *Submission on Inquiry into the Equal Opportunity for Women in the Workplace Act 1999 and Equal Opportunity for Women in the Workplace Agency* (2009). At [http://www.hreoc.gov.au/legal/submissions/2009/20091030\\_EOWA.html](http://www.hreoc.gov.au/legal/submissions/2009/20091030_EOWA.html) (viewed 12 February 2012).
- <sup>16</sup> Australian Human Rights Commission, *Submission to the Senate Education, Employment and Workplace Relations Committee Inquiry into the Fair Work Bill 2008* (2009), p 10-11. At [http://www.hreoc.gov.au/legal/submissions/2009/20090123\\_Fair\\_Work.html](http://www.hreoc.gov.au/legal/submissions/2009/20090123_Fair_Work.html) (viewed 15 February 2012)
- <sup>17</sup> ABS, *Employment Arrangements, Retirement and Superannuation, Australia, April to July 2007 (Re-issue)*, Catalogue No. 6361.0 (2009). At [www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/6361.0Main%20Features2Apr%20to%20Jul%202007%20\(Re-issue\)?opendocument&tabname=Summary&prodno=6361.0&issue=Apr%20to%20Jul%202007%20\(Re-issue\)&num=&view](http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/6361.0Main%20Features2Apr%20to%20Jul%202007%20(Re-issue)?opendocument&tabname=Summary&prodno=6361.0&issue=Apr%20to%20Jul%202007%20(Re-issue)&num=&view) (viewed 15 February 2012).
- <sup>18</sup> *Fair Work Act*.
- <sup>19</sup> *Fair Work Act*, s61 (2).
- <sup>20</sup> *Fair Work Act*, s65 (1)
- <sup>21</sup> *Fair Work Act*, s65 (4),(5) and(6)
- <sup>22</sup> See, further, Australian Human Rights Commission, *Submission to the Australian Government Department of Education, Employment and Workplace Relations on the discussion paper, ‘National Employment Standards Exposure Draft’* (2008) pp 8 – 11.
- <sup>23</sup> Australian Bureau of Statistics, *Population Projections, Australia, 2006 to 2101 3222.0 September 2008*. At <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3222.02006%20to%202101?OpenDocument> (viewed 15 February 2012).
- <sup>24</sup> Australian Bureau of Statistics, *Caring in the Community, Australia 4436.0 January 2009*. At <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4436.0Main+Features12009?OpenDocument> (viewed 14 February 2012).
- <sup>25</sup> The Treasury, *Australia to 2050: Future Challenges Intergenerational Report 2010*, p. 26-29. At <http://www.treasury.gov.au/igr/igr2010/> (viewed 15 February 2012).

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- <sup>26</sup> Australian Bureau of Statistics, *4102.0 - Australian Social Trends, 2008: Barriers to work*, July 2008. At <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Chapter7102008#end2> (viewed 14 February 2012).
- <sup>27</sup> A Page, M Baird, A Heron & J Whelan, *Taking Care: Mature Age Workers with Elder Care Responsibilities*, Women and Work Research Group, University of Sydney Background Briefing Paper (2009), p 16-17.
- <sup>28</sup> *Employment Rights Act 1996* (UK).
- <sup>29</sup> *Employment Relations (Flexible Working Arrangements) Amendment Act 2007* (NZ).
- <sup>30</sup> *Fair Work Act* s65(2).
- <sup>31</sup> Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Committee on the Inquiry into the effectiveness of the Sex Discrimination Act 1984 (Cth) in eliminating discrimination and promoting gender equity* (1 September 2008), p 105.
- <sup>32</sup> Sara Charlesworth and Iain Campbell, 'Right to request regulation: Two new Australian models' (2008) 21(2) *Australian Journal of Labour Law* 116, p 5.
- <sup>33</sup> Australian Human Rights Commission, n16, p4.
- <sup>34</sup> *Fair Work Act*, s739.
- <sup>35</sup> *ILO Convention (No 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities*, Opened for signature 23 June 1981, entered into force 11 August 1983, 1991 ATS 7.
- <sup>36</sup> The Commission has previously made this recommendation in Australian Human Rights Commission, *Submission to the Australian Law Reform Commission Inquiry into Family Violence and Commonwealth Laws: Employment and Superannuation* (2011). At [http://www.hreoc.gov.au/legal/submissions/2011/20110421\\_family\\_violence.html](http://www.hreoc.gov.au/legal/submissions/2011/20110421_family_violence.html) (viewed 15 February 2012).
- <sup>37</sup> Australian Human Rights Commission, n9.
- <sup>38</sup> See, further Australian Human Rights Commission, *WORKability 2: Solutions, Final report of the national inquiry into employment and disability*, December 2005.
- <sup>39</sup> *Convention on the Rights of Persons with Disabilities*, (GA Res 61/106 of 13 December 2006) opened for signature 30 March 2007, entered into force on 3 May 2008, Article 27(1)(i).
- <sup>40</sup> The Commission has previously made this recommendation in its *Submission to the Senate Education, Employment and Workplace Relations Committee Inquiry into the Fair Work Bill 2008* see, n16, p6.
- <sup>41</sup> *Fair Work Act*, s394(2).
- <sup>42</sup> *Fair Work Act*, s394(3).
- <sup>43</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth), p240.
- <sup>44</sup> Australian Human Rights Commission, n16, p17.
- <sup>45</sup> A small business employer employs fewer than 15 employees: s23(1).
- <sup>46</sup> *Fair Work Act*, s383.
- <sup>47</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth), p240.
- <sup>48</sup> This is consistent with certain State unfair dismissal regimes: *Industrial Relations Act 1996* (NSW), s83; *Industrial Relations (General) Regulation 2001* reg 6, *Industrial Relations Act 1999* (Qld), s72; *Industrial Relations Act 1979* (WA), s23A.
- <sup>49</sup> The Commission has previously made this recommendation in its *Submission to the Senate Education, Employment and Workplace Relations Committee Inquiry into the Fair Work Bill 2008*, see n16, p16.
- <sup>50</sup> *Fair Work Act*, s351 (Part 3.1)  
*Fair Work Act*, ss365, 368.
- <sup>52</sup> *Fair Work Act*, s366.
- <sup>53</sup> *Fair Work Act*, ss369, 371(1).
- <sup>54</sup> *Fair Work Act*, s371(2).
- <sup>55</sup> Section 46PO(2) *Australian Human Rights Commission Act 1986* (Cth)
- <sup>56</sup> The Commission has previously made this recommendation in its *Submission to the Senate Education, Employment and Workplace Relations Committee Inquiry into the Fair Work Bill 2008*, see n16, p15.
- <sup>57</sup> UN Committee on the Elimination of Discrimination Against Women, *General Recommendations 12 and 19 – Violence Against Women*, 11<sup>th</sup> Session, <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (viewed 15 February 2012)

<sup>58</sup> Commission on the Status of Women *Agreed Conclusions* (2011)

<http://www.un.org/womenwatch/daw/csw/55sess.htm#agreed>, 14 March 2011.

<sup>59</sup> Australian Bureau of Statistics (2006) *Personal Safety, Australia, 2005* (Reissue), Cat. No. 4906.0, 35, at

[www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4906.0Main+Features12005%20\(Reissue\)?OpenDocument](http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4906.0Main+Features12005%20(Reissue)?OpenDocument) (viewed 15 February 2012)

<sup>60</sup> National Council to Reduce Violence Against Women and their Children, *The Cost of Violence Against Women and their Children*, (2009) p4.

<sup>61</sup> Australian Human Rights Commission, n36.

<sup>62</sup> R Braaf and I Barrett Meyering *Seeking Security: Promoting women's economic wellbeing following domestic violence*, Australian Domestic and Family Violence Clearinghouse (2011), p90.

<sup>63</sup> The Commission has previously made this recommendation in its *Submission to the Australian Law Reform Commission Inquiry into Family Violence and Commonwealth Laws: Employment and Superannuation*, see n36

<sup>64</sup> *Fair Work Act*, s65

<sup>65</sup> For example, family violence clauses were incorporated into the enterprise agreement between the Victorian Surf Coast Shire Council and the Australian Services Union Victorian Authorities and Services Branch. As of 2011, employees in the NSW Public Service who experience domestic or family violence are able to access certain leave entitlements and where those entitlements are exhausted the employee shall be granted special leave. See Australian Domestic and Family Violence Clearing House, *Safe at Home, Safe at Work: Domestic Violence Workplace Rights and Entitlements Project*. At <http://www.adfvc.unsw.edu.au/projects.htm> (viewed 15 February 2012).

<sup>66</sup> K Swinton, 'Accommodating Equality in the Unionized Workplace', *Osgoode Hall Law Journal*, (1996) pp704-747; A Blackett and C Sheppard, 'Collective Bargaining and Equality: Making connections', *International Labour Review*, (2003) 142:4, pp419-457.

<sup>67</sup> The Commission has previously made this recommendation in its *Submission to the Australian Law Reform Commission Inquiry into Family Violence and Commonwealth Laws: Employment and Superannuation*, see n36

<sup>68</sup> Australian Human Rights Commission, n36

<sup>69</sup> The Commission has previously made this recommendation in its *Submission to the Australian Law Reform Commission Inquiry into Family Violence and Commonwealth Laws: Employment and Superannuation*, see, n36

<sup>70</sup> Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Improving Legal Frameworks* (ALRC Report 117) (2012), recommendations 20-1 to 20-6. At <http://www.alrc.gov.au/publications/family-violence-and-commonwealth-laws-improving-legal-frameworks-alrc-report-117> (viewed 15 February 2012).

<sup>71</sup> Australian Law Reform Commission, above.