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Submission

Senate Education and Employment Legislation Committee Inquiry: Fair Work Amendment Bill 2024

Associate Professor Chris F. Wright

Discipline of Work and Organisational Studies,
The University of Sydney

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I appreciate the opportunity to present this submission to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work Amendment Bill 2024.

The Fair Work Amendment Bill 2024, if passed, would amend the Fair Work Act 2009 so that an employer or another relevant party contravening a Fair Work Commission order regarding an employee's right to disconnect would not expose the contravening party to a criminal penalty.

This proposed amendment seems appropriate for ensuring that any orders made by the Fair Work Commission with respect to an employee's right to disconnect are consistent with the regulation of orders made by the Fair Work Commission with respect to the 'stop bullying' and 'stop sexual harassment' jurisdictions.

The proposed amendment, however, should not overshadow the importance of the new 'right to disconnect' provisions of the Fair Work Act, which I wish to highlight in this submission.¹

As the nature of work and employer practices change, it is essential for employment regulations to respond accordingly. Having a right to disconnect to protect workers from employers encroaching upon their non-work time is one necessary such response. Such a right fits with the overarching objectives of other recent amendments to the Fair Work Act that provide much-needed responses to the changing dynamics of work and the labour market including the emergence of gig work, the rise of labour hire and the persistence of casualisation.

In 2023, the Senate Select Committee on Work and Care drew attention to "availability creep" where employees are increasingly expected to complete work outside of work hours.² Smartphones have made it easier for managers to contact workers at any time. The shift to remote working during the COVID pandemic caused the boundaries between work and personal life to disintegrate further. According to Dr Gabrielle Golding from the University of Adelaide, "not disconnecting from work-related communications outside hours (including phone calls, text messages and emails) is making employees miserable, affecting their health, wellbeing, and productivity".³

¹ This submission draws upon the arguments presented in the following article: Chris F. Wright, 2023. Smartphones mean we're always available to our bosses. 'Right to disconnect' laws are a necessary fix. *The Conversation*, 8 February. <https://theconversation.com/smartphones-mean-were-always-available-to-our-bosses-right-to-disconnect-laws-are-a-necessary-fix-222738>

² The Senate, 2023. Select Committee on Work and Care: Final Report. Canberra: Commonwealth of Australia, Chapter 6.

³ Gabrielle Golding, 2023. The right to disconnect in Australia: Creating space for a new term implied by law. *The University of New South Wales Law Journal*, volume 46, number 2, page 734.

According to a 2022 report by the Centre for Future Work, 71% of workers surveyed had worked outside their scheduled work hours often due to overwork or pressure from managers. This led to increased tiredness, stress or anxiety for about one-third of workers surveyed, disrupted relationships and personal lives for more than one-quarter, and lower job motivation and satisfaction for around one-fifth.⁴

The negative impacts of availability creep are especially acute for certain groups of workers. Those on insecure contracts lack the power to resist employer requests to work outside of standard work hours. Those with unpaid care responsibilities are likely to experience intensified work/life balance. A right to disconnect provides a solution to these challenges. The Senate Select Committee on Work and Care found such a right can provide workers with “roster justice” by giving more certainty over their working hours.⁵

There are many precedents for a right to disconnect in Australia and internationally. At least 56 enterprise agreements currently operating in Australia contain such a right. This includes agreements covering teachers, police officers and various banks and financial institutions.⁶ Unions representing these workers report such provisions have had positive impacts.⁷ Many countries in Europe, Asia, North America and South America have established laws or regulations limiting employers from contacting workers outside of work hours.⁸

Employment law experts and human resource specialists also believe there is a strong case for a right to disconnect given the negative impacts of availability creep on worker well-being.⁹

⁴ Eliza Littleton and Lily Raynes, 2022. Call Me Maybe (Not): Working Overtime and a Right to Disconnect in Australia. The Centre for Future Work at the Australia Institute.
<https://australiainstitute.org.au/wp-content/uploads/2022/11/Call-Me-Maybe-Not-2022-WEB.pdf>

⁵ The Senate, 2023. Select Committee on Work and Care: Final Report. Canberra: Commonwealth of Australia, Chapter 6.

⁶ Senate Education and Employment Legislation Committee, 204. Inquiry into the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023. Official Committee Hansard. Canberra, 22 January, page 18.

⁷ Senate Standing Committees on Education and Employment, 2024. Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023 [Provisions]: Report. Canberra: Commonwealth of Australia, Chapter 2.

⁸ Naj Ghosheh, 2022. Telework and The Right to Disconnect: International Experiences. International Labour Organization presentation, 27-28 January. https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-lisbon/documents/genericdocument/wcms_836190.pdf

⁹ Evan Black, 2023. Why there's a growing push for the 'right to disconnect'. Australian Financial Review, 11 August; Gabrielle Golding, 2023. The right to disconnect in Australia: Creating space for a new term implied by law. The University of New South Wales Law Journal, volume 46, number 2, pages 728-757.

Employer associations have been less supportive. For example, Australian Chamber of Commerce and Industry chief executive Andrew McKellar has claimed a right to disconnect would be “the final step in Australia becoming a banana republic”.¹⁰

The research evidence suggests such fears are unfounded. Findings from a November 2023 report by Eurofound highlight the significant benefits of a right to disconnect. In analysing the impact of right to disconnect legislation in European Union member states, the report found that workers in companies with a right to disconnect policy were much more likely to report very high job satisfaction and better work/life balance and were less likely to report health issues including anxiety, stress and headaches than workers in companies without such a policy. The report found that more than 70% of workers in companies with a right to disconnect policy believed its impact was positive.¹¹

Other measures that reinforce or strengthen boundaries between people’s work and non-work lives have been found to deliver similarly positive impacts – both for employees and organisations. For example, a University of Cambridge-led study of companies in the United Kingdom that had trialled a four-day working week found it led to significant declines in employee burnout, stress, sick leave and turnover, and to improvements in employee work/life balance and work/family balance. The study also identified positive impacts of the four-day working week on productivity and company revenue.¹²

While employer groups may complain about a right to disconnect, the research evidence clearly shows that this and similar measures that reinforce employee work/life boundaries are analogous to ‘beneficial constraints’. In other words, while such measures constrain business preferences away from ‘rational choices’ that serve their short-term interests, which may explain employer groups’ resistance to their implementation, ultimately they lead to better long-term outcomes – including for businesses themselves.¹³ While a right to disconnect may involve an adjustment period for businesses during the implementation phase, the research evidence indicates that such a right will likely lead to higher employee satisfaction and commitment and lower turnover, thereby improving productivity and reducing the intensity of staff shortages.

¹⁰ David Marin-Guzman, 2024. Right to disconnect, casual carve-outs part of IR talks. Australian Financial Review, 1 February.

¹¹ Eurofound (2023), Right to Disconnect: Implementation and Impact at Company Level. Luxembourg: Publications Office of the European Union.

<https://www.eurofound.europa.eu/sites/default/files/2023-11/ef23002en.pdf>

¹² Kyle Lewis et al., 2023. The Results are in: The UK’s Four-Day Week Pilot. Cranbourne: Autonomy Research. <https://autonomy.work/wp-content/uploads/2023/02/The-results-are-in-The-UKs-four-day-week-pilot.pdf>

¹³ Wolfgang Streeck, 1997. Beneficial constraints: On the economic limits of rational voluntarism. In Contemporary Capitalism: The Embeddedness of Institutions, edited by J. Rogers Hollingsworth and Robert Boyer. Cambridge: Cambridge University Press, pp. 197–219.

Workers had an implicit right to disconnect before the advent of the smartphone. The Australian Parliament is to be commended for making such a protection explicit now that technology has eroded the once-firm boundaries between work and home. The research evidence indicates that the impact of this protection will be beneficial for workers and employers alike.