



Fair Work Amendment Bill 2013

A Bill for an Act to amend the *Fair Work Act 2009* (Cth) and for related purposes

To: Senate Standing Committee on Education, Employment and Workplace Relations

15 April 2013

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Introduction

Who We Are

The Law Institute of Victoria (LIV) is the peak body for the Victorian legal profession. The LIV represents over 17,000 members. Through its Workplace Relations Section, the LIV currently represents 1,703 members. The 1,703 members represent employers, employees, unions and government bodies. The Workplace Relations Section is overseen by an Executive Committee, Employment and Industrial Relations Sub Committee and Discrimination Law Sub Committee. This submission is based on the experiences of the above members.

What We Do

The LIV actively seeks to advocate justice for all and influence the development and implementation of policy and legislative reform through various submissions to State and Federal Government Ministers and Shadow Ministers, State and Federal Government Parliamentarians, Commonwealth Public Servants, regulatory bodies, statutory bodies, policy advisors and State and Federal agencies.

The LIV has an extensive history of contributing to shaping and developing effective workplace legislation at both Federal and State level. We welcome the opportunity to provide a submission to the Senate Standing Committee on Education, Employment and Workplace Relations *Fair Work Amendment Bill 2013* (Cth) ('the Bill').

Background¹

The *Fair Work Act* was introduced in Australia in 2009. The Fair Work Act Review was carried out by a panel of three independent experts in response to the Government's commitment to commence a post-implementation review of the *Fair Work Act 2009* (Cth) within 2 years of its full implementation. The *Fair Work Amendment Bill 2013* ('the Bill') will make amendments to the following:

- Introduce new family friendly arrangements, including expanding the right for pregnant women to transfer to a safe job, providing further flexibility in relation to

¹ This summary is based on the Explanatory Memorandum that accompanied the Bill, see http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5028_ems_3772bfc1-8666-4a57-9caa-5a65607b5f83/upload_pdf/378650.pdf;fileType=application%2Fpdf

concurrent unpaid parental leave, ensuring that any special maternity leave taken will not reduce an employee's entitlement to unpaid parental leave and expanding access to the right to request flexible working arrangements to more groups of employees;

- Require employers to consult with employees about the impact of changes to regular rosters or hours of work, particularly in relation to family and caring responsibilities;
- Amend the modern awards objective to require that the Fair Work Commission (FWC), when ensuring that modern awards together with the National Employment Standards provide a fair and relevant minimum safety net of terms and conditions, take into account the need to provide additional remuneration for employees working overtime; unsocial, irregular or unpredictable hours; working on weekends or public holidays; or working shifts;
- Give the FWC capacity to deal with disputes about the frequency of visits to premises for discussion purposes;
- Provide for interviews and discussions to be held in rooms or areas agreed to by the occupier and permit holder, or in the absence of agreement, in any room or area in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks and is provided by the occupier for that purpose;
- Facilitate, where agreement cannot be reached, accommodation and transport arrangements for permit holders in remote areas and to provide for limits on the amounts that an occupier can charge a permit holder under such arrangements to cost recovery;
- Give the FWC capacity to deal with disputes in relation to accommodation and transport arrangements and ensure appropriate conduct by permit holders while being accommodated or transported under an accommodation or transport arrangement;
- Expressly confer on the FWC the function of promoting cooperative and productive workplace relations and preventing disputes; and
- Make a number of minor technical amendments.

The Bill will also amend the FW Act to give effect to the Government's response to the House of Representatives Standing Committee on Education and Employment's report *Workplace Bullying —We just want it to stop*. The Bill will:

- Allow a worker who has been bullied at work in a constitutionally-covered business to apply to the FWC for an order to stop the bullying;
- Adopt a definition of 'bullied at work' which is consistent with the definition of 'workplace bullying' recommended by the Committee in its report, and the proposed Safe Work Australia model Code of Practice: *Preventing and Responding to Workplace Bullying*;
- Require the FWC to start dealing with an application for an order to stop bullying within 14 days of the application being made; and
- Enable the FWC to make any order it considers appropriate (other than an order for payment of a pecuniary amount) to stop the bullying.

A more detailed summary of the Bill based on the Explanatory Memorandum is contained in Annex 1.

Previous Submissions

The LIV has undertaken extensive past advocacy relating to flexible work arrangements and workplace bullying, highlighted below in our previous submissions. They are summarised in Annex 2.

LIV Comments on the Bill

For ease of reference, we have maintained the same numbering pattern as the Schedules in the Bill.

Schedule 1 – Family Friendly Measures

The LIV has some concerns about Part 3, which amends the provisions of the Act regarding requests for flexible working arrangements to a wider range of caring and other circumstances and also include a non - exhaustive list of what constitutes 'reasonable business grounds' as a basis for the refusal of a request:

- The LIV has some concerns that a practical effect of the amendments may be to create an incorrect impression in the mind of the employee that employees are

entitled to flexible work, rather than entitled to be considered for flexible work arrangements. The LIV considers that this may largely depend on how these amendments are communicated, as the wording of the amendments themselves do not detract from the current position that this involves a 'right to request'.

- The LIV further submits that:
 - The Act should provide civil remedies for statutory redress in circumstances where an employee's request for flexible work arrangements is refused on bases which may not amount to 'reasonable business grounds', such civil remedies to include potential orders remedying the effect of any contravention, for the imposition of pecuniary penalties and any other order which the Court thinks fit (consistent with the civil remedies available for most contraventions of the Act);
 - Civil remedies for statutory redress provide impetus for employers to not only consider the importance and relevance of flexible workplace arrangements in their workplace but to give proper and thorough consideration to a request for flexible work arrangements through active consultation with the employee; and
 - Rights should be provided to an employee and the Fair Work Ombudsman to issue proceedings seeking civil remedies in circumstances where an employee's request for flexible work arrangements is refused on bases which may not amount to 'reasonable business grounds'.

Schedule 3 – Anti Bullying Measure

The LIV has some concerns about Schedule 3, which gives effect to the Federal Government's response to the House of Representatives Standing Committee on Education and Employment Inquiry report titled, 'Workplace Bullying – We Just Want it to Stop'. In summary, the effect of the amendments is to:

- Enable a worker who reasonably believes that they have been bullied to apply to the Fair Work Commission for an order;
- The Fair Work Commission is required to start dealing with a matter within fourteen days after the application is made;

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- If the Fair Work Commission is satisfied that the worker has been bullied, and there is a risk that the worker will continue to be bullied, it may make an order to prevent the worker being bullied at work, noting that the power of the Fair Work Commission to make an order does not extend to ordering reinstatement of a person or the payment of a compensation or a pecuniary amount; and
 - The Fair Work Commission may refer a matter to a work health and safety regulator where it considers this necessary and appropriate.

Each of these will be addressed in turn.

a) Enable a worker who reasonably believes that they have been bullied to apply to the Fair Work Commission for an order

The LIV appreciates that the Senate Standing Committee on Education, Employment and Workplace Relations has recognised the increasingly serious nature of bullying across workplaces in Australia, its health and wellbeing impact on individuals and on workplace culture. The LIV commends the Committee for responding to the need for guidance for both employees and employers. In particular, the LIV strongly welcomes the creation of a statutory cause of action for workplace bullying. The LIV, however, queries the following:

- The effectiveness of the Fair Work Commission's jurisdiction to make orders in respect of bullying. The LIV notes the comments of Ian Ross, Chief Justice of the Fair Work Commission at a Senate Estimates Committee who advised that the Fair Work Commission does not have the resources to expand its jurisdiction to include workplace bullying matters². As such, the LIV questions whether the Fair Work Commission is the most appropriate forum in which to deal with workplace bullying disputes;
- How an order would be enforced in practice. It is uncertain whether the Bill vests jurisdiction in the Fair Work Commission or a Court to enforce the terms of the order; and
- The practical consequences of the contravention of an order.

Further, the amendments as drafted are limited in scope to 'a worker who has been bullied at work'. In particular, with the advent of social media, workplace bullying is not limited to bullying that occurs during workplace hours. The LIV questions whether a

² <http://www.liberal.org.au/latest-news/2013/02/13/fair-work-commission-can%E2%80%99t-afford-bullying-more-shorten-spin-no-plan>

statutory interpretation of the provisions of the Bill would be applicable to such circumstances and if not, what redress is available to workers who have been bullied in such circumstances.

b) The Fair Work Commission is required to start dealing with a matter within fourteen days after the application is made

The LIV queries the progress that the Fair Work Commission can achieve in a period of fourteen days. Due to the sensitive nature of workplace bullying matters, such matters should be dealt with expeditiously. The LIV appreciates that workplace bullying matters may be difficult to manage judicially. Accordingly, the Fair Work Commission has been afforded a wide discretion to deal with such matters.

c) If the Fair Work Commission is satisfied that the worker has been bullied, and there is a risk that the worker will continue to be bullied, it may make an order to prevent the worker being bullied at work, noting that the power of the Fair Work Commission to make an order does not extend to ordering reinstatement of a person or the payment of a compensation or a pecuniary amount

The LIV queries the following:

- The scope of the types of orders that can be made by the Fair Work Commission. For example, will the orders provide that the bully doesn't bully the applicant? The LIV submits that this may be problematic if this was the case because such an order requires supervision;
- The effectiveness of the types of orders that can be made; and
- How such orders would be implemented in practice.

In addition, Section 789FF(1)(b)(ii) of the Bill inserts a requirement that there must be a 'risk that the worker will continue to be bullied at work by the individual or group'. 'Risk' is not defined. The LIV submits that statutory clarification as to the definition and standard of 'risk' is required to avoid ambiguity.

d) The Fair Work Commission may refer a matter to a work health and safety regulator where it considers this necessary and appropriate

In Victoria, the practical effect of this amendment empowers the Fair Work Commission to refer a workplace bullying matter to Work Safe. The LIV has some concerns about the

effectiveness of this provision. The role, function and responsibilities of Work Safe in respect of workplace bullying claims is limited and does not provide a bullied person with any civil remedies for redress.

Conclusion

The LIV is grateful for the opportunity to provide comment and we would appreciate the opportunity for further input as required.

Annex 1 – Summary of the Bill

Schedule 1 – Family Friendly Measures

Part 1 – Special Maternity Leave

Part 1 amends the unpaid special maternity leave provisions in section 80 the Act to the effect that any period of unpaid special maternity leave taken by an eligible employee will not reduce the employee’s entitlement to unpaid parental leave pursuant to section 70 of the Act.

Part 2 – Parental Leave

Part 2 amends the parental leave provisions in section 72 and 74 of the Act to the effect that:

- Increase in maximum period of concurrent leave available under the unpaid parental leave provisions from three weeks to eight weeks; and
- Enabling the eight weeks leave to be taken in separate periods at any time within the first twelve months of the birth or adoption of a child.

Part 3 – Right to Request Flexible Working Arrangements

Part 3 amends the provisions of the Act regarding requests for flexible working arrangements to a wider range of caring and other circumstances. The amendments also include a non - exhaustive list of what constitutes ‘reasonable business grounds’ as a basis for the refusal of a request.

Part 4 – Consultation about Changes to Rosters or Working Hours

Part 4 inserts content requirements for modern awards and enterprise agreements in relation to employers consulting with employees regarding rosters and work hours.

Part 5 – Transfer to a Safe Job

Part 5 repeals the transfer to a safe job provision in section 81 of the Act to the effect that the entitlement to be transferred to an appropriate safe job applies to any pregnant employee, regardless of the period of service that the employee has worked.

Schedule 2 – Modern Awards Objective

Schedule 2 amends the modern awards objective in section 134 of the Act to the effect that the Fair Work Commission must take into account the need to provide additional remuneration for:

- Employees working overtime;
- Employees working unsocial, irregular or unpredictable hours;
- Employees working on weekends or public holidays; or
- Employees working shifts.

Schedule 3 – Anti Bullying Measure

Schedule 3 amends the Federal Government's response to the House of Representatives Standing Committee on Education and Employment Inquiry report titled, 'Workplace Bullying – We Just Want it to Stop'. In summary, the effect of the amendments is to:

- Enable a worker who reasonably believes that they have been bullied to apply to the Fair Work Commission for an order;
- The Fair Work Commission is required to start dealing with a matter within fourteen days after the application is made;
- If the Fair Work Commission is satisfied that the worker has been bullied, and there is a risk that the worker will continue to be bullied, it may make an order to prevent the worker being bullied at work, noting that the power of the Fair Work Commission to make an order does not extend to ordering reinstatement of a person or the payment of a compensation or a pecuniary amount; and
- The Fair Work Commission may refer a matter to a work health and safety regulator where it considers this necessary and appropriate.

Schedule 4 – Right of Entry

Schedule 4 makes amendments to Part 3 – 4 of the Act to:

- Provide for interviews and discussions to be held in rooms or areas agreed to by the occupier and permit holder, or in the absence of agreement, in any room or

area in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks and is provided by the occupier for that purpose;

- Give the Fair Work Commission the capacity to deal with disputes about the frequency of visits to premises for discussion purposes;
- Facilitate, where agreement cannot be reached, accommodation and transport arrangements for permit holders to remote areas and to provide for limits on the amounts that an occupier can charge a permit holder under such arrangement to cost recovery; and
- Give the Fair Work Commission the capacity to deal with disputes in relation to accommodation and transport arrangements and ensure appropriate conduct by permit holders while being accommodated or transported under an accommodation or transport arrangement.

Schedule 5 – Functions of the Fair Work Commission

Schedule 5 amends section 576 of the Act that sets out the functions of the Fair Work Commission.

Schedule 6 – Technical Amendments

Schedule 6 amends a number of technical issues in the Act and the *Fair Work Amendment Act 2012* (Cth).

Schedule 7 – Application and Transitional Provisions

Schedule 7 provides the application and transitional provisions.

Annex 2 – LIV Past Submissions

Fair Work Bill 2008 (Cth)

On 8 January 2009, the LIV provided a submission to the Senate Education, Employment and Workplace Relations Committee regarding the *Fair Work Bill 2008 (Cth)*. In the submission, the LIV focussed on personal leave, pro rata entitlements, cashing out of personal leave, annual leave, anti - discrimination, creation of an alternative jurisdiction for discrimination matters, further ground of action – irrelevant criminal record, drafting with regard to State / Territory laws authorising particular action, exception relating to religion or creed, unfair dismissal, time for application, discretionary hearings, time for application, appeals, representation by lawyers and costs.

Occupational Health and Safety Obligations relating to Flexible Work Practices

On 4 April 2011, the LIV provided a submission to SafeWork Australia regarding occupational health and safety obligations relating to flexible work practices. In our submission, the LIV noted the following issues of concern:

- Employer’s safety obligations and responsibilities when allowing an employee to work from home or offsite;
- Liability in case of injury;
- Clarification of the definition of “a safe and healthy workplace” under the current Occupational Health and Safety Act, to cover “working from home” scenarios;
- The parameters of “working flexibly”, and whether liability extends to travelling to, and working in a work space outside the designated home office (eg library);
- Risk assessments – whether these will be required for those working from home; and
- Is the current WorkSafe “self-guidance check” publication applicable for employees who work from home or offsite?

Model Work Health and Safety Draft Code of Practice for ‘Preventing and Responding to Workplace Bullying’

On 16 December 2011, the LIV provided a submission to SafeWork Australia regarding the proposed Model Work Health and Safety Draft Code of Practice for ‘Preventing and Responding to Workplace Bullying’. The LIV outlined some reasonable and practical steps to require that employers;

1. Develop a workplace bullying policy consisting of:
 - A statement that the organisation is committed to preventing bullying;
 - The standards of appropriate behaviour;
 - A process to encourage reporting, including contact points;
 - A definition of bullying with examples of bullying behaviour; and
 - The consequences for not complying with the policy.
2. Develop an effective complaints resolution process;
3. Provide information and training on workplace bullying to staff; and
4. Encourage the reporting of workplace bullying incidents.

Review of Fair Work Act

On 20 February 2012, the LIV provided a submission to the Department of Education, Employment and Workplace Relations regarding the review of the *Fair Work Act 2009* (Cth) (‘the Act’). The Fair Work Act review was carried out by a panel of three independent experts in response to the Federal Government’s commitment to commence a post implementation review of the Act within two years of its full implementation³. In the submission, the LIV focussed on key areas including safety net, bargaining and agreement making, transfer of business, general protections, unfair dismissal and non legal representation.

Inquiry into Workplace Bullying

On 29 June 2012, the LIV provided a submission to the House of Representatives Standing Committee on Education and Employment inquiry into workplace bullying. In the submission, the LIV advocated for the following:

“The LIV notes that there is currently no single national anti-bullying statute and no nationally-acceptable legal or legislative definition of what

³ The Parliament of the Commonwealth of Australia House of Representatives, *Fair Work Amendment Bill 2013* Explanatory Memoranda, 1.

constitutes bullying ... The LIV submits that it is vitally important for employers and employees to understand what constitutes bullying, what does not constitute bullying, and who has duties in relation to bullying in the workplace ... The LIV recommends that a workplace complaints procedure should create a safe environment within which a complaint can be made ... It is also useful for employers to provide an external confidential resource to which employees can speak if they wish to discuss how to make a bullying claim within the organisation but are unsure of whom to approach. This may include organisations such as Jobwatch, WorkSafe (or other State equivalent) or a private and confidential counselling service.”

Grey Areas – Age Barriers to Work in Commonwealth Laws

On 7 March 2012, the former Attorney-General of Australia, the Hon Nicola Roxon MP, asked the Australian Law Reform Commission (ALRC) to inquire into and report on Commonwealth legal barriers to older persons participating in the workforce or other productive work. The final Report was to be delivered by 31 March 2013. On 9 May 2012, the Workplace Relations Section, Commercial Law Section and Administrative Law and Human Rights Section were invited by the Law Council of Australia to comment on the ALRC Issues Paper titled, ‘Grey Areas – Age Barriers to Work in Commonwealth Laws’. The LIV’s comments to the Law Council of Australia focussed on the areas of recruitment and employment, insurance and superannuation.