



Submission on the Fair Work Legislation
Amendment (Protecting Worker Entitlements) Bill
2023

April 2023

Thank you for the opportunity to provide a submission on the Fair Work Legislation Amendment (Protecting Working Entitlements) Bill 2023. We are pleased to see proposed increased protections for vulnerable workers and worker entitlements more generally.

Our submission responds to specific sections of the proposed amendments. Additionally, our submission includes references to relevant client case studies. To protect the anonymity of our clients, details are changed and/or omitted however the integrity of the story remains.

NT WORKING WOMEN'S CENTRE BACKGROUND

The NT Working Women's Centre (**NTWWC**) is a community based, not-for-profit organisation that provides free and confidential advice and support services on work-related matters to women and gender diverse people in the NT. Services commenced in 1994, and we operate across the NT from two offices in Darwin and Alice Springs.

The NTWWC works primarily with women who are not represented by a union, lawyer or other advocate. Women who contact our Centre are often economically disadvantaged and work in precarious areas of employment. On average we provide about 3000 client contacts per year. We assist women and gender diverse people; clients who often face particular vulnerabilities. The NTWWC targets its services at NT workers who may fall into a number of categories of workplace vulnerabilities, for instance those who are Aboriginal and Torres Strait Islander which represents approximately 17.6% of our clients, Culturally and Linguistically Diverse (34.5%), workers who reside in regional and remote areas (47.7%) and those who live with a disability (22.5%). The service also provides community education and training on domestic and family violence as a workplace issue, workplace bullying, sexual harassment and general industrial entitlements.

We conduct research and project work on a range of issues that women experience in relation to work. These have included access to childcare, family friendly practices, the needs of Aboriginal and Torres Strait Islander working women, pregnancy and parental status discrimination, work/life balance, pay equity, sexual harassment and the impact of domestic violence on women workers and their workplaces. In conjunction with the National Alliance of Working Women's Centres, we provide expert advice to government on legal and policy reform.

POINTS REQUIRING ELABORATION AND/OR CLARIFICATION

1. Employee Authorised Deductions

NT Working Women's Centre understands the benefit of the proposed changes to *section 324* of the Act relating to deductions from an employee's wage or salary.

It should be noted that *section 326* states that "...if the employee is under 18 and the deduction or payment is not agreed to in writing by a parent or guardian of the employee" the deduction cannot be made. The feedback we receive when we deliver our Basic Rights at Work training to students, is that few young people know that a parent or guardian must consent to the deductions, and additionally that employers appear to also be unaware about this.

So, if the intention of the changes of *section 324* is to ensure that employees do not lose coverage and to reduce the burden on employers, we question whether more adjustments should be made to *section 324* to make the requirement clearer for both employees and employers.

2. Superannuation Contributions and Compensation

NT Working Women's Centre welcomes the inclusion of superannuation contributions into the National Employment Standards. The addition of *section 116E* into the *Fair Work Act* enables a court to make orders which includes for compensation/civil penalties if it determines a contravention has occurred where superannuation has not been paid. This provision should also provide an incentive to employers to pay their employees their superannuation entitlement to avoid liability to pay the superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992*.

However, *section 116E(2)* states that, "The court must have regard to the principle that any component of the compensation payable on account of unpaid superannuation contributions should usually be paid to a superannuation fund for the benefit of the employee." Whilst we understand that the unpaid super amount would usually need to be paid directly into the employee's super fund, except in some circumstances such as those specified in the Explanatory Memorandum ¹, it is unclear as to whether any orders for compensation are also payable into an applicants super account. This is due to the language of this section and note the Explanatory Memorandum states that it is 'the intention... that a court should avoid ordering that compensation amounts be paid directly to an employee as a lump sum, which then might be reduced to meet legal costs, or be taxed less favourably than mandatory employer superannuation contributions.' ² We recommend greater clarify as to how compensation subsequent to

¹ Fair Work Legislation Amendment (Protecting Worker Entitlement) Bill 2023, para.101, page 22

² Fair Work Legislation Amendment (Protecting Worker Entitlement) Bill 2023, para.100, page 22

the unpaid super amount is payable to the applicant. Without limiting the discretion of the Court under *section 545* of the Act, as stated in the Explanatory Memorandum³ further guidance as to what circumstances this may not be required such as those specified in the Explanatory would be beneficial.

3. Protection of Migrant Workers

NT Working Women's Centre assists many migrant workers and we recognise that they are particularly vulnerable to exploitation and abuse.

In our submission to Northern Territory Law Reform Committee responding to their recent wage theft inquiry we explained that we have found that our client's vulnerabilities have a twofold effect in the context of non-payment or underpayments of wages and/or entitlements. Firstly, it is more challenging for these groups to establish what their rights are and where these rights come from. Secondly, we have found that they face additional challenges in exercising their rights and claiming their entitlements due to difficulty accessing services to assist due to lack of confidence, stigma and discrimination.

Case Study 1

Caitlin* approached our service as she was being bullied at work. She had notified management that their employees were being underpaid and that the roster was not allowing them to take the required breaks. Caitlin* was concerned as many employees are migrants with a significant portion having sponsored visas.

NT Working Women's Centre assisted Caitlin to understand her options including workers compensation due to the psychological injury she developed as a result of the bullying behaviour she experienced. We also contacted the Fair Work Ombudsman to see whether we could flag this concern where underpayments existed for multiple vulnerable clients, who we were informed were not prepared to come forward. The Fair Work Ombudsman was unable to assist as the complaint needed to come from an employee and that whilst a representative can "help," the Ombudsman would need to liaise directly with the employee. Further, we were informed that there was not any additional support available to accommodate culturally and linguistically diverse complainants.

Case Study 1 demonstrates the wider problem that many migrants face, which is that many industries and businesses unlawfully withhold employee entitlements as apart of their business model. A review that was conducted in 2020 which found:

"...the number of FWO inspectors fell far short of what is needed to ensure that workers are correctly paid the right wages and other entitlements such as superannuation. We found that the

³ Fair Work Legislation Amendment (Protecting Worker Entitlement) Bill 2023, para.101, page 22

incidence of fair work issues was significantly higher than what we anticipated and agree that the current staffing level is lower than would be expected to deal with this scale of risk...Some stakeholders have argued that, in order to resolve the current enforcement crisis, it is necessary to look beyond the FWO and expand the roles played by trade unions and community groups.”⁴

Furthermore, it’s been our experience that migrants not only are more likely to experience wage theft⁵ but they also have not been afforded the same entitlements due to their immigration status.

In our submission to the Senate Community Affairs Legislation Committee in response to the *Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Bill 2022* and subsequently during the senate committee hearing, we highlighted the disparity in employee entitlements between those on temporary visas and all other employees, with increased protections required to reduce the risk of abuse/exploitation.

Case Study 2

Brittney* is currently pregnant and is experiencing Domestic and Family Violence. In order to escape the violence, she must move to another location. If she stayed with her employer for her parental leave entitlements, the risk of violence to her and her other children would increase significantly. She was extremely fortunate that she had access to the paid parental leave from Services Australia as she is an Australian citizen.

NT Working Women’s Centre supported Brittney by connecting her with other services who would be able to provide her with additional financial and other support. It was also recommended that she speak with her employer to see if she could take some unpaid leave and take her parental leave earlier.

Case Study 3

Sam* has been experiencing severe sexual harassment at work when she found out she was pregnant. As she was experiencing financial abuse by her husband, she was scared that she would not be able to pay her bills when the baby arrived. She wanted to stay at work until she could use her parental leave.

NT Working Women’s Centre explained how to make a complaint about the sexual harassment from her co-workers. We also linked her to services that were able to provide her with financial and other

⁴ Tess Hardy, *Trivial to Troubling: The Evolution of Enforcement under the Fair Work Act (2020)* 33 AJLL 87.

⁵ Eugene Schofield-Georgeson, “Organisational Co-Enforcement in Australia: Trade Unions, Community Legal Centres and the Fair Work Ombudsman” (2022) 35 AJLL 52 via V Narro and J Fine, ‘Labor Unions/Worker Centre Relationships, Joint Efforts’, in J Fine et al (Eds), *No One Size Fits All: Worker Organization, Policy and Movement in a New Economic Age*, Labor and Employment Research Association, Illinois, 2018, p 67 at pp 67-90.

assistance. Due to her visa status she was not eligible for paid parental leave paid by Services Australia.

By inserting section 40B into the *Fair Work Act* we can ensure that all people who live, work and pay tax in Australia have the same entitlements afforded to them as per the National Employment Standards.

4. Paid Parental Leave

NT Working Women's Centre strongly believes that in order to normalise shared parental leave, funding investment in improving policies and providing education is needed in addition to any legislative changes.

Further, we reiterate our position in response to *Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Bill 2022*, namely:

1. Exceptions to the permission requirements to be established in context of Domestic and Family Violence;
2. A system to review, revoke or remedy a 'permission' obtained by coercion;
3. A guideline or rules to establish a framework in which a just and equitable division of paid parental leave may be reached when a parent's separation is not amicable.

With the introduction of *section 40B*, we are glad our concerns regarding the eligibility of migrants on temporary visas accessing paid parental leave.

It is also important to note that none of the proposed changes strengthen a pregnant person's entitlements to use personal leave for their antenatal appointments or for other medical appointments. Currently, section 71(3) of the Act states that "If the employee is not fit for work, she may be entitled to paid personal leave." It should be noted that this particular type of leave is now referred to as 'personal leave' not 'sick leave' and therefore this should be reflected more broadly in how this leave can be used.

Case Study 4

Georgia* approached our service as her employer was demanding that she pay back her paid personal leave that she used to attend an antenatal appointment even though she provided the workplace with a medical certificate. The employer cited the Fair Work Commission website which states that:

“An employee can take sick and carer’s leave: if they are unfit for work because of their own personal illness or injury (including pregnancy-related illness).⁶”

The employer argued that as Georgia* was not technically sick, she was fit for work and therefore was unable to use her paid personal leave. She informs us that the business regularly disregards medical certificates that the employees give them and has decided that they will not apply personal leave to employees for the purpose of attending medical appointments unless they are “actually sick”.

NT Working Women’s Centre considered her employer’s internal policies regarding paid personal leave and medical certificates. With our guidance, Georgia* was able to negotiate with her employer that she did not have to repay the personal leave taken. However, she is concerned she may be expected to take unpaid leave for her remaining appointments.

Case Study 4 demonstrates how weak or unclear legislative language has a negative effect on employees and their entitlements. If you consider the number of medical appointments required just for a normal healthy pregnancy, which increases in frequency as the pregnancy progresses to monitor and care for mother and child, we recommend that it is clear that personal leave is available for these appointments as required, including for a complicated and high-risk pregnancies.

With the lack of free medical care on the rise and the cost of specialist testing, especially to ascertain an underlying medical condition, taking unpaid leave to access medical advice/examination and undergo tests as unpaid leave, once paid annual leave is exhausted is not always an affordable option. Additionally, significant medical appointments including wait times have the ability to erode or extinguish any available annual leave.

CLOSING STATEMENT/REMARKS

Thank you for taking the time to consider our submission. Please do not hesitate to contact us should you have any questions.

⁶ <https://www.fairwork.gov.au/tools-and-resources/fact-sheets/minimum-workplace-entitlements/sick-and-carers-leave-and-compassionate-leave>