Submission to the Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into the Fair Work Bill 2008

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This is a personal submission. It relates to clause 65 of the Bill: **Requests for flexible working arrangements**, and to clauses 62-64: **Maximum weekly hours**. It is based on my experience working in Europe on discrimination and other workplace matters such as working time. I have recently finished working for a large advice NGO in the UK on equality and diversity issues. My two most relevant publications are:

"Maternity and Parental Rights: a guide to parents' legal rights at work" by Palmer, Wade, Wood and Heron, 2006 (3rd edition, Legal Action Group, currently being updated).[1]

"The Regulation of Working Time as Work-Family Reconciliation Policy: Comparing Europe, Japan, and the United States" Gornick and Heron , *Journal of Comparative Policy Analysis* (2006).

I gratefully acknowledge material prepared by and discussions with Sara Charlesworth and Iain Campbell of CASR, RMIT[2] and Jenni Whelan, independent consultant. The contents of this submission are my sole responsibility.

Summary of proposals

Though the current provision is a small step in the right direction, it is so weak that it is, in my view, unlikely to be the catalyst for a serious move to substantial change in the workplace towards "caring friendly" working hours and practices. I propose:

1.Clause 65 needs to be substantially revised to ensure that meaningful discussion occurs between employer and employee about any request for flexible working and that fair decisions are made. In summary it should include:

- a requirement that the employer hold a face-to-face meeting with the employee requesting flexible work before reaching a decision, a specified time frame within which to do this and communicate a decision, and an effective method of enforcing this statutory timetable;

- more limited grounds for turning down employee requests;

[1] See at: http://www.lag.org.uk/Templates/System/Publications.asp?NodeID=89135&Mode=display
[2] Charlesworth, S. and Campbell, I. (2008) 'Right to Request Regulation: Two New Australian Models', Australian Journal of Labour Law, 21(2), 116-136; NES Exposure Draft Submission, Bamberry, Campbell and Charlesworth at: http://www.workplace.gov.au/NR/rdonlyres/EE82474A-30BB-4DEA-ACBA-E83CD55B5A06/0/108BamberryCampbellCharlesworth.pdf

- provision for independent, accessible and effective review of employer decisions;

- eligibility for all carers from the point they are hired

- that three years after implementation, a review of how the provision is working should be undertaken. This should examine how effective it is proving to be and whether it should be extended to all employees.

2. Clauses 62-64 be overhauled to ensure that employees with caring responsibilities can avoid work patterns such as long or unpredictable hours where these are discriminatory in their effect, without being penalised in their workplaces or careers.

Rationale for a right to request provision

The Bill provides for:

- the employee to request in writing a change in working arrangements to assist the employee to care for their child;
- the employee to set out details of the change sought and the reasons for the change;
- the employer to respond within 21 days, refusing the request only on reasonable business grounds. Details of reasons for refusal must be set out in the refusal letter.

Whilst welcoming this move towards promoting increased employer consideration of flexible working requests, clause 65 is very weak and is likely to be ineffective. The grounds for refusal are very wide and will not be subject to review. This despite the statement in the Explanatory Memorandum that the Bill:

"establishes a simple and stable safety net comprising [inter-alia] – the NES, which will apply to all employees and [my italics] *guarantee*:... a right to request flexible working arrangements. "

Proposals for changes to the right to request national standard

1. A procedure promoting discussion and agreement

The UK right to request legislation was implemented in April 2003. It provides a detailed procedure to guide both employee and employer in making and responding to requests. Central to the procedure is the requirement that employer and employee meet face-to-face to discuss the request. A meeting is seen as more conducive to discussion which in turn facilitates compromises and solution finding.

The recent review of the UK right to request (the Walsh report) in 2008[3] stated:

[3] Flexible working: A review of how to extend the right to request flexible working to parents of older children, prepared by Imelda Walsh, May 2008, BERR (London).

"The [employee's] application … triggers a formal process which is designed to facilitate discussion, enabling both sides to gain a clearer understanding of each other's thinking and needs….. The evidence suggests that the vast majority of requests (91%) or a modified version of them are agreed by the employer following dialogue with the employee." The report comments that the stakeholders consulted about the review made virtually no comment about the current procedure. Many requests are resolved without recourse to it.

A UK government sponsored employee survey of work/life balance arrangements in 2007[4] indicates how meeting and negotiations help achieve positive outcomes to requests for flexible work:

- face-to-face meetings are the preferred way of making requests, bearing in mind most are not made under the statutory procedure. This is demonstrated by the fact that 83% of employees seeking flexible work, did so by way of face-to-face meetings with their employers;

- 78% of the employees surveyed wholly or partly succeeded in their request. Some had to negotiate or appeal to succeed; others originally unsuccessful, successfully appealed. An analysis of these two groups, though involving only a small number of employees, suggests that 'those appealing against an employer decision to turn down a request……..were more than 2 1/2 times as likely to get the decision reversed than to be unsuccessful'.

The view of the leading UK NGO specialising in providing advice on maternity and parental rights, Working Families,[5] is that the employer-employee meeting provided for in the UK right to request legislation, is very important. In their experience, it ensures the employer considers the request seriously thus making the possibility of reaching agreement more likely.

Drawing on UK experience, I would suggest the essential elements for an effective procedure for a right to request are:

- a written request by the employee stating the change sought;
- an employer organised meeting (unless it is happy to agree the request without a meeting);
- the meeting to occur soon after the request is made (28 days in the UK);
- a speedy written response after the meeting (14 days in the UK);
- a refusal must contain a sufficient explanation of the grounds (see below)
- an effective method of enforcing the above statutory timetable

[4] The Work-Life Balance Employee Survey: Main Findings, Hooker, Neathey, Casebourne and Munro, March 2007, DTI (London).
[5] Telephone conversationon 6/01/09 with Stephanie McKeon, solicitor responsible for the Working Families' helpline. See also http://www.workingfamilies.org.uk/asp/home_zone/m_welcome.asp

Recommendation

The above elements be incorporated into clause 65, most importantly a requirement the employer hold a face-to-face meeting with the employee requesting flexible work before reaching a decision, a specified time frame within which to do this and communicate a decision, and an effective method of enforcing this statutory timetable.

Additional note
Amongst matters which the employee must state in the UK procedure, there is no requirement to provide reasons for the change of hours. Stating the nature of the caring relationship is sufficient. It is important the employer is not led into basing a decision upon what they think are reasonable caring arrangements. That is for the parents/carers to decide. Any refusal is limited to reasons relating to their business requirements. Clarification that "reasons for the change" in clause 65(3)(b) means simply stating the nature of the relationship giving rise to the right, would be useful.

2. Grounds for refusing a request

In the UK legislation, the grounds for refusing a request are spelt out. They are extensive and similar to those mentioned in the Explanatory Memorandum to the Bill. The legislative and caselaw requirements are that a refusal on any of these grounds is not objectively reviewed but a refusal:

- must be based on accurate facts; and
- a decision must be arrived at in good faith.

However cases under UK indirect sex discrimination law impose more stringent restrictions on employers to justify refusing flexible working (see Appendix A).

This difference between the tests under the right to request legislation and sex discrimination law for turning down a request can confuse employers and employees alike. Employers may follow the procedure impeccably but remain open to a sex discrimination claim (where the potential compensation is not capped). Women carers[6] may not realise they can seek flexible working at any point in their employment regardless of length of service or the age of their child.

Similar problems may arise in Australia. It would therefore be advisable to pre-empt such conflict by restricting the grounds on which flexible working requests can be refused .

The inherent potential for discrimination linked to refusal of flexible working[7] is a further argument for providing more limited grounds for refusing an application and extending its application. Ultimately, the recommendation in the *It's About Time: Women, men, work and family*, Final paper 2007, prepared by the then Sex Discrimination

[6] And men in some circumstances.
[7] Including disability discrimination, not addressed in this submission but is relevant to the debate about working patterns and the degree of employee control over them.

Commissioner, that a federal Family Responsibilities and Carers' Rights Act be introduced to provide protection from discrimination for employees with family and carer responsibilities and a right to request flexible work arrangements should be implemented.

Recommendation

In determining what are 'reasonable' business grounds on which a request may be refused the following should be the tests:

- the objective capacity of the employer to accommodate the request;
- the consequences for the employee of not accommodating the request

3. Enforcement

The flexible work provision in clause 65 will not be subject to review and enforcement.

There has been much criticism of the lack of effective review and enforcement provisions for the right to request in the UK. Remedies are limited to a sum equivalent to the applicant's wages for eight weeks (to a ceiling) and to an order for the application to be reconsidered if a complaint is upheld.

Nevertheless, limited review of employer decisions and a degree of enforcement, in front of an independent body (the Employment Tribunal) exists. Employees may and do bring claims before them in relation to right to request decisions. These can be based on:

- procedural breaches,[8]
- bad faith decisions, [9]
- refusal of an application on a ground other than those specified,[10]
- refusal of an application on the basis of incorrect facts.[11]

And to reiterate a point made earlier, it is also possible for employees to obtain much more compensation should the refusal of flexible working result in a finding of indirect sex discrimination.

The New Zealand right to request legislation, although its procedure is weak, also provides for an employee whose request is turned down to seek mediation, review and (limited) penalties .[12]

[8] Employment Relations Act (ERA) 1996, s80H(1)(a) and s80G(1)(a).
[9] Clarke v Telewest Comunications plc, ET 1301034/2004.
[10] ERA 1996, s80H(1)(a) and s80G(1)(b).
[11] ERA 1996, s80H(1)(b). Applied in Commotion v Rutty [2006] IRLR 171 where the EAT upheld the applicant's complaint.
[12] Employment Relations (Flexible Working Arrangements) Amendment Act 2007.

No legislated entitlement can carry any weight unless there is an adjudicator external to the workplace which may be appealed to and which has the power to grant effective remedies and deterrent penalties where appropriate.

Men as carers

Working arrangements hostile to caring responsibilities can (as described in Appendix A) amount to discrimination against women. Such discrimination claims in the UK , with their more stringent requirements imposed on employers to justify rejecting requests for flexible working, provide access to an effective review of employer flexible working decisions. The reality, however, is that such arrangements discriminate against male carers too. Yet men taking on significant caring responsibilities, stepping outside their traditional role, are left without a remedy.

One report indicates that men brought 27% of Tribunal claims relating to flexible working between 2003 and 2006, but accounted for 45% of those which were unsuccessful. The authors suggest this is because vastly more women than men can make claims under the Sex Discrimination Act as opposed to only under the right to request provisions.[13]

A weak or non-existent enforcement for the gender neutral right to request sends a strong message to men that they are not intended to benefit from this provision.[14]

A similar situation regarding the inadequate legal tools available to men to assist with recognition of their caring responsibilities exists at Commonwealth level in Australia. This is described in the *It's About Time: Women, men, work and family*, report referred to above.

Providing an effective and enforceable right to request would send a powerful message about gender equality in caring.

Recommendation

Provision for independent, accessible and effective review of employer decisions

4. Coverage

The UK right to request covers

- carers of children under six,

[13] Out of Time: Why Britain needs a new approach to working time flexibility, Fagan, Hegewisch and Pillinger, 2006, TUC (London).

[14] A recent survey of employees shows 14% of men made a request over the previous two years to change how they worked for a sustained period, of which 23% were turned down. For women the figures were 22% and 13% respectively. In the private sector, 24% of men's requests were turned down compared with 10 % of women's, from survey cited in n.4 above. See also *The right to request flexible working: a 'very British' approach to gender (in)equality?* Sue Himmelweit at: http://www.thefreelibrary.com/The+right+to+request+flexible+working%3a+a+%27very+British%27+approach+to...-a0173643848

- carers of children under 18 if the child is disabled and
- carers of adults
- and it should soon be extended to carers of children under 16.

There is a lively debate about its extension to all employees.[15]

Apart from issues canvassed in the literature about the potential of workplaces to benefit from maximising the availability of flexible working in terms of employee retention and workplace morale and minimising conflict between employees, rejection of flexible working requests by job applicants and new employees can lead to sex discrimination claims in the UK. This is similar to Commonwealth sex discrimination provisions. See also above about the wide range of women carers who can claim flexible working under sex discrimination legislation.

Recommendations

Eligibility is extended to all carers from the point they are hired.

5. Evaluation

Reviewing how the procedure operates in practice would be invaluable. The UK has engaged in a series of reviews of the development of flexible working. New Zealand has included a requirement for review in its legislation. That review is to include recommendations as to whether or not the right to request provision should be extended to all employees.[16]

Recommendation

Three years after implementation a review of how the provision is working should be undertaken. This should examine how effective it is proving to be and whether it should be extended to all employees.

Proposals relating to the national standard on working time

Variations in work patterns and arrangements are often hostile to reconciling work and caring responsibilities. This (as described in Appendix A) can amount to indirect discrimination against women and carers generally.

For example the UK courts have held the following to be potentially discriminatory

- full-time hours;
- inflexible or fully flexible hours;
- rotating shifts;

[15] See for example the UK Equality and Human Rights Commission's "Working Better" project at: http://www.equalityhumanrights.com/en/projects/workingbetter/Pages/WorkingBetter.aspx
[16] Op cit n.11.

- long hours and overtime;
- varying hours at short notice.

The general regulation of these matters – the normal working week, overtime, shift working etc is usually dealt with through "industrial" regulation in OECD countries. Yet the arrangement of working hours is both a discrimination issue and a conventional industrial relations one. An effective right to request procedure (and ultimately comprehensive legislation prohibiting discrimination against carers) linked with forms of working time regulation common in Europe are the two levers available to bring about workplace change – and change within families regarding caring responsibilities.

Much research has been done about the difficulties carers' face reconciling their work and family responsibilities. In the article referred to above, Janet Gornick and myself discussed French research[17] on whether the 35 hour week has made family care easier for parents. It found that 58% of those surveyed said it had. But the figure is substantially lower among workers who have non-standard schedules (evenings, nights, weekends), those whose hours are imposed on them rather than chosen by the worker or negotiated, and those whose employers do not respect the notification period in relation to work patterns. These findings are significant as averaged hours are widespread and reference periods of 12 months are not uncommon in France.

We also referred to an OECD study which used data from the Third European Working Conditions Survey to assess factors affecting workers' ratings of their degree of conflict between working and family life. Work/family conflict was higher amongst those with longer total work hours. It was also significantly higher where daily hours, work days a week, and starting and finishing times varied, if schedules changed with no or minimal notice, or if workers had little control over their working hours.[18]

The *It's About Time* report examined the issues relating to discrimination and working hours and the conflict between caring responsibilities and uncertain and long working hours in Australia. It recommended the Australian Government establish a national working hours framework which promotes flexibility and encourages workplaces to limit long hours working.

Employees with caring responsibilities need to be able to avoid work patterns which prevent them fulfilling their caring obligations without being penalised in their workplaces or careers. This issue needs to be acknowledged clearly in this national standard which should be drafted so as to work with and not ignore the (revised and effective) right to request. The aim must be to avoid discriminatory working time. As these clauses stand, there is a danger discriminatory working time arrangements could be imposed on carers. Clause 62(3)(b) refers an employee's personal circumstances, including family responsibilities but only as one of a multitude of factors to be taken into

[17] Work and family life balance: the impact of the 35 hour laws in France, Fagnani and Letablier in Work, Employment, and Society, Vol 10(3) pp551-572.
[18] Recent labour market developments and prospects. Special focus on clocking in (and out): several facets of working time, Chapter 1 in Employment Outlook (Paris: OECD, 2004).

account in deciding whether additional hours are reasonable. Caring responsibilities as a factor needs to be put "centre stage".

Recommendations

- an effective right to request flexible working hours as a described above;

- maxima for weekly hours (with provision for overtime and averaging), daily hours (including rest breaks) applicable also to averaging arrangements, and for aggregate overtime;

- tighter conditions on the imposition of overtime, with a clear right to refuse overtime, (except under certain conditions) including for casual employees;
  .
- minima for both individual periods of engagement and weekly hours for part-time employees to ensure that part-time and casual workers cannot be required to work hours that are so short as to create a disadvantage for the worker;

- reasonable notice of shift rotas and changes;

- that workplace agreements cannot undercut state and industry based provisions in relation to minimum hours of work.

APPENDIX A

The UK Sex Discrimination Act 1975 and caring responsibilities

Refusal of family friendly working patterns can be the basis of an indirect sex discrimination claim by a woman. Where employment practices (e.g. working full-time) particularly disadvantage women (due to their primary role in child care) compared to men, they need to be objectively justifiable to be legitimate.

Simplifying the large body of relevant case law, this means the working arrangement must be:

- reasonably necessary to the business: a tribunal reviewing an employer decision must make its own detailed analysis of the working practices and business considerations involved; and
- where real need for the practice is demonstrated, consideration of the seriousness of the impact on women including the claimant must be made and an evaluation of whether the former is sufficient to outweigh the latter.[19]

[19] Leading cases include: Bilka-Kaufhaus GmbH v Mrs K Weber Von Hartz [1986] IRLR 317; Hardys and Hanson plc v Lax [2005] IRLR 726 ; Allonby v Accrington and Rossendale College [2001]IRLR 364.