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Inquiry into the Fair Work Bill 2008

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Australian Human Rights Commission Submission to the Senate Education, Employment and Workplace Relations Committee

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Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Senate Education, Employment and Workplace Relations Committee in its Inquiry into the Fair Work Bill 2008.
2. The Commission is Australia's national human rights institution.
3. The Commission welcomes many of the changes to the law proposed by the Fair Work Bill including:
    - the restoration of unfair dismissal rights to many employees, and in particular the removal of the exemption for employers with 100 or fewer employees;
    - the facilitated bargaining framework for the low paid;
    - the extended protections against discrimination (and the inclusion of carer's responsibilities as a prohibited ground of discrimination); and
    - the extension of parental leave entitlements to same sex couples.
4. The Commission is nevertheless concerned that certain parts of the Bill are deficient and should be amended to fully implement Australia's international human rights obligations. These include:
    - the right to request flexible working arrangements;
    - unpaid parental leave;
    - the prohibition against adverse action on discriminatory grounds; and
    - unfair dismissal.
5. This submission focuses on those areas that are of principal concern to the Commission, rather than providing a complete review of the Bill.
6. The Commission understands that submissions have been made to the Committee alleging that the Fair Work Bill breaches International Labour Organisation standards in relation to freedom of association and collective bargaining rights. The Commission has not dealt with these issues in its submission, due to the limited time available to prepare a submission. The Commission would be pleased to consider these issues if it would assist the Committee.

The National Employment Standards (Part 2.2)

Requests for flexible working arrangements

7. The Commission welcomes the introduction of a right to request flexible working arrangements as part of the National Employment Standards. However, as presently framed, the right to request is insufficient to address the needs of workers with family responsibilities in a number of respects.

8. First, 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.[1] These qualification requirements disproportionately impact on employment categories dominated by women with family responsibilities.[2] 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 percent of working women of child bearing age (25-44 years) and 44 percent of women employed on a casual basis had less than 12 months service with their current employer.[3]

Recommendation 1: The Commission recommends that the qualification requirements that restrict the categories of employees who can make a request for flexible working arrangements be removed.

9. Second, the right to request flexible work arrangements is confined to employees with the care of children under school age.[4] This restriction fails to take account of the fact that a significant proportion of the working population have family and carer responsibilities that are not confined to the care of pre school age children. For carers of children with a disability in particular the role may not decrease as the child gets older and attends an educational facility.[5] Additionally, older people are a significant source of informal care for older spouses and relatives (including adult children).[6]

10. 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.

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[1] Fair Work Bill 2008 (Cth), cl 65(2).

[2] 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.

[3] Sara Charlesworth and Iain Campbell, 'Right to request regulation: Two new Australian models' (2008) 21(2) *Australian Journal of Labour Law* 116, p 5.

[4] Fair Work Bill (Cth), cl 65(1).

[5] Commonwealth of Australia, *Carer payment (child): A new approach,* Report of the Carer payment (child) review taskforce, 30 November 2007, Chapter 4.

[6] 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.

Similarly in New Zealand, recent amendments to the *Employment Relations Act 2000* (NZ) have 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.[7]

> **Recommendation 2:** The Commission recommends that the right to request flexible working arrangements be extended to all forms of family and caring responsibilities.

11. Third, 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.[8]

12. Extending the right to request flexible working arrangements to employees with a disability would not involve a substantial change to the duties on an employer that exist under the *Disability Discrimination Act 1992* (Cth). The practical effect of the prohibition against indirect discrimination translates into a prohibition against the unreasonable failure to accommodate the needs of an employee with a disability. Moreover, the amendments to the *Disability Discrimination Act* proposed in the Disability Discrimination and other Human Rights Legislation Amendment Bill 2008 (Cth) include making explicit the positive duty on employers to make reasonable adjustments for a person with a disability.[9]

13. Including the right to request flexible working arrangements for employees with a disability in the National Employment Standards would 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.[10]

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[7] *Employment Relations (Flexible Working Arrangements) Amendment Act 2007* (NZ).

[8] See, further Australian Human Rights Commission, *WORKability 2: Solutions, Final report of the national inquiry into employment and disability,* December 2005.

[9] Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, Schedule 2, Item 17.

[10] *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).

> **Recommendation 3:** The Commission recommends that the right to request flexible working arrangements be extended to employees with a disability.

14. Fourth, the right to request flexible working arrangements contains no enforcement mechanism and there is no grievance procedure or process to provide redress where requests are unreasonably refused. The Commission is concerned that without a grievance process, this National Employment Standard will be nothing more than a guideline. As the Victorian Government stated:

    > To be effective, a right must be capable of vindication in a manner appropriate to its nature, otherwise it is not a right at all but a guideline…A minimum is nothing if an employer may depart from it where convenient.[11]

15. Including a process to provide redress where requests are unreasonably refused would supplement the duties on employers that currently exist under the *Sex Discrimination Act 1984* (Cth) (and, as noted above, the *Disability Discrimination Act*). Under the *Sex Discrimination Act,* women may have a cause of action where their requests for flexible work arrangements are unreasonably refused. This is because the practical effect of the prohibition against indirect sex discrimination translates into a prohibition against the unreasonable imposition of barriers that disadvantage women, who overwhelmingly carry the burden of family responsibilities.[12]

16. Regrettably, reliance on the indirect sex provisions of the *Sex Discrimination Act* will not assist men with family responsibilities. This is because indirect discrimination on the basis of family responsibilities is not presently unlawful and the authorities clearly establish that women bear the dominant burden of family responsibilities.[13]

17. Australia's international human rights obligations extend to both men and women workers with family responsibilities.[14] Accordingly, including a process

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[11] Victorian Government, *Victorian Government submission to the Commonwealth of Australia National Employment Standards – Commonwealth Exposure Draft and Discussion Paper,* 2008, p 9.

[12] See, for example, *Hickie v Hunt & Hunt* [1998] HREOCA 8; *Escobar v Rainbow Printing Pty Ltd (No 3)* [2002] FMC 122; *Mayer v ANSTO* [2003] FMCA 209.

[13] *Hickie v Hunt & Hunt* [1998] HREOCA 8; *Escobar v Rainbow Printing Pty Ltd (No 3)* [2002] FMC 122; *Mayer v ANSTO* [2003] FMCA 209. See also 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), pp 104 – 109. The Commission recommended the introduction of a positive obligation on employers to reasonably accommodate the needs of workers in relation to their family and carer responsibilities. Failure to meet this obligation would be an actionable form of discrimination.

[14] *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.

to provide redress for both men and women workers who have requests unreasonably refused as part of the National Employment Standards would ensure compliance with Australia's international human rights obligations.

> **Recommendation 4:** The Commission recommends that the same rights of redress applicable to the other nine National Employment Standards be extended to the unreasonable refusal of a request for flexible work arrangements.

18. The Commission submits that the introduction of the right to request should be accompanied by an extensive public education campaign. This education campaign should provide clear information that employees may have access to the provisions of the *Sex Discrimination Act* (and the *Disability Discrimination Act*[15]) where flexible arrangements are denied. The success and high degree of satisfaction with the United Kingdom right to request legislation has been attributed largely to widespread consultation carried out both before the scheme was introduced and following its introduction.[16] Commentators have noted:

> While it was 'soft touch' legislation it was accompanied by clear warnings that employees may have the capacity to access provisions of the *Sex Discrimination Act 1984* where flexible arrangements were denied.[17]

> **Recommendation 5:** The Commission recommends that the introduction of the right to request be accompanied by an education campaign that includes clear information that employees may have access to the provisions of the *Sex Discrimination Act 1984* (Cth) *Act* (and the *Disability Discrimination Act*) where flexible arrangements are denied.

Parental leave

19. The Commission welcomes the extended unpaid parental leave entitlements within the National Employment Standards.[18] That is, the right for both parents to separate periods of up to 12 months unpaid parental leave.

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[15] If the Committee accepts the Commission's Recommendation No 3: that the right to request flexible working arrangements be extended to employees with a disability.

[16] 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 22 – 26.

[17] D. Whelan, 'Introducing the right to request flexible working arrangements: Differences and similarities between Australia and the UK', Paper presented at the Australian Labour Law Association Fourth Biennial Conference, 14 and 15 November 2008.

[18] Fair Work Bill 2008 (Cth), Part 2.2, Division 5.

Alternatively, if only one parent is taking leave, the right for that employee to request an additional 12 months leave which employers will only be able to refuse on reasonable business grounds. The Commission also welcomes the extension of parental leave entitlements to same sex couples.

20. However, the Commission is concerned that the unpaid parental leave entitlements are deficient in two respects.

21. First, the parental leave entitlements do not apply to employees unless they have at least 12 months continuous service with the employer and also, in the case of casual employees, a reasonable expectation of continuing employment.[19] For the reasons set out in paragraph 8 above, the Commission considers that the qualification requirement as presently drafted will exclude many of the working women who are most likely to require parental leave.

22. The Commission considers that requiring women to have undertaken a certain period of employment in order to be eligible for unpaid parental leave is reasonable. However, the qualification requirement should recognise the concept of portability between employers and also permit short breaks in women's employment history. The qualification requirement should reflect the reality of women's employment, including those in intermittent or casual working relationships, contract workers and the self-employed.

Recommendation 6: The Commission recommends that in order to be eligible for unpaid parental leave an employee must have been in paid work for 40 weeks of the past 52 weeks with any number of employers and/or in any number of positions. Employment should include part time, casual employment, contract work and self-employment.

23. This recommendation is consistent with the Commission's recommendations in relation to the eligibility requirement for paid maternity leave.[20]

24. Second, the right to request an additional 12 months parental leave contains no enforcement mechanism and there is no grievance procedure or process to provide redress where requests are unreasonably refused. As set out above, the Commission is concerned that without a grievance process, this National Employment Standard will be nothing more than a guideline.

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[19] Fair Work Bill 2008 (Cth), cl 67(1), 67(2).

[20] Australian Human Rights Commission, *Submission to the Productivity Commission Inquiry into Paid Maternity, Paternity and Parental Leave,* (2 June 2008). See, further, Australian Human Rights Commission, *It's About Time,* (2007).

Recommendation 7: The Commission recommends that the same rights of redress applicable to the other nine National Employment Standards be extended to the unreasonable refusal of a request for extended parental leave.

25. The Commission notes that the National Employment Standards deal with entitlements to unpaid parental leave. The Commission understands that the Productivity Commission is conducting an inquiry into paid maternity, paternity and parental leave. The Commission has made a submission to the Productivity Commission inquiry calling for the immediate introduction of a paid leave scheme.[21] The Commission supports the Productivity Commission inquiry process (which is due to report on 28 February 2009), and submits that the parental leave National Employment Standard should be brought into line with the proposals for paid parental leave arising out of that inquiry.

General Protections (Part 3.1): Discrimination

26. The Commission welcomes the introduction of clause 351 of the Fair Work Bill that provides as follows:

> (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's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

27. Adverse action includes, amongst other things, injuring the employee in his or her employment, altering the position of the employee to the employee's prejudice, or discriminating between the employee and other employees of the employer.[22]

28. For ease of reference, the prohibition against adverse action on discriminatory grounds at clause 351 of the Bill will be referred to in this submission as the prohibition against discrimination.

29. The Commission submits that the prohibition against discrimination should be extended in the following respects to fully implement Australia's international human rights obligations and to promote social inclusion in the employment context.

30. First, the prohibition against discrimination should be extended to apply to every employee in Australia. The discrimination protections at clause 351 of the Bill give effect, or further effect, to *ILO Convention (No. 111) Concerning*

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[21] Australian Human Rights Commission, *Submission to the Productivity Commission Inquiry into Paid Maternity, Paternity and Parental Leave,* (2 June 2008).

[22] Fair Work Bill 2008 (Cth), cl 342.

Discrimination in respect of Employment and Occupation (ILO 111).[23] To fully implement Australia's international obligations, the protections should apply to every employee in Australia, rather than being subject to the limited application provisions at clauses 337 - 339 of the Bill. The Commission notes that certain protections in the Bill have been extended to all employees in Australia in reliance on ILO 111, including unlawful termination and unpaid parental leave.

Recommendation 8: The Commission recommends that the prohibition against discrimination at clause 351 of the Bill should be extended to apply to every employee in Australia (rather than being subject to the limited application provisions at clauses 337 - 339 of the Bill).

31. Second, the grounds on which adverse action is prohibited should be extended to include criminal record. Criminal record has been identified as a factor that increases the risk of social exclusion, but does not necessarily reduce an individual's capacity to participate.[24]

32. Criminal record is a prohibited ground of discrimination under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act).[25] In recent years there have been a significant number of complaints to the Commission from people alleging discrimination in employment because of criminal record. These complaints indicate that there is a great deal of misunderstanding by employers and people with criminal records about discrimination on the basis of criminal record.[26] The Commission is empowered to make recommendations, including for payment of compensation, where it makes a finding of criminal record discrimination.[27] These recommendations are not, however, enforceable. Moreover, at a State and territory level, only Tasmania and the Northern Territory have laws that specifically prohibit discrimination on the basis of criminal record.[28]

33. In furthering the goal of social inclusion, the Committee may wish to give consideration to not only including criminal record as a protected ground but also including any 'other status'. The *International Covenant on Civil and Political Rights* provides at Article 26(1):[29]

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[23] Adopted in Geneva 25 June 1958, entered into force 15 June 1960, 1974 ATS 12.

[24] *ACT Community Inclusion Board Report 2004-2008*, p 33.

[25] Criminal record has been declared a ground of discrimination for the purposes of the HREOC Act: *Human Rights and Equal Opportunity Commission Regulations 1989*.

[26] Australian Human Rights Commission, *On the Record: Guidelines for the prevention of discrimination in employment on the basis of criminal record,* November 2005.

[27] HREOC Act, s 35(2).

[28] *Anti-Discrimination Act 1992* (NT), s 19(q); *Anti-Discrimination Act 1998* (Tas), s 16(q).

[29] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

> …the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

34. Including 'other status' provides protection against discrimination whenever a difference in treatment amongst groups or categories of individuals does not correspond to objective criteria.[30] Including 'other status' would ensure compliance with Australia's international human rights obligations.

Recommendation 9: The Commission recommends that the grounds on which adverse action is prohibited at clause 351 of the Bill should be extended to include criminal record.

35. Third, 'marital status' as a prohibited ground should be replaced with 'marital or relationship status', which includes being the same sex partner of another person. The purpose of this recommendation is to provide protection to same-sex couples from discrimination on the basis of their relationship status. The Commission notes that the Senate Legal and Constitutional Affairs Committee has made this recommendation in its report on the *Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equity*.[31]

Recommendation 10: The Commission recommends that 'marital status' at clause 351 of the Bill should be replaced with 'marital or relationship status', which includes being the same sex partner of another person.

36. Fourth, the definition of adverse action should be amended to make clear that it includes both direct and indirect discrimination, and these terms should be defined. There are a number of definitions of direct and indirect discrimination across the federal and State anti-discrimination laws. The Commission has made submissions in support of a simplified or best practice test of direct and indirect discrimination in the context of its submissions to recent Senate

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[30] The Human Rights Committee has found the following, amongst others, to constitute 'other statuses': age (*Schmitz-de-Jong v Netherlands* (855/99)); a difference between employed and unemployed persons (*Cavalcanti Araujo-Jongens v Netherlands* (418/90)); a difference between people performing their compulsory service in a military or in a non military capacity (*Jarvinen v Finland* (295/88)).

[31] Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 (Cth) in eliminating discrimination and promoting gender equity,* 12 December 2008, p xiii, Recommendation 4.

Committee inquiries into the *Sex Discrimination Act 1984* (Cth)[32] and the changes proposed to the *Disability Discrimination Act 1992* (Cth).[33]

37. Consistently with these submissions, the Commission recommends that direct and indirect discrimination should be defined as follows:

- Direct discrimination: unfavourable treatment because of a protected attribute.[34]
- Indirect discrimination: a term, condition or requirement that has the effect of disadvantaging persons with a protected attribute, unless the term, condition or requirement is reasonable. The onus of proving that the term, condition or requirement is reasonable should be placed on the respondent.[35]

Recommendation 11: The Commission recommends that the definition of adverse action should be amended to make clear that it includes both direct and indirect discrimination, and these terms should be defined as follows:

- Direct discrimination: unfavourable treatment because of a protected attribute.
- Indirect discrimination: a term, condition or requirement that has the effect of disadvantaging persons with a protected attribute, unless the term, condition or requirement is reasonable. The onus of proving that the term, condition or requirement is reasonable should be placed on the respondent.

38. Fifth, the Bill only prohibits discrimination on the basis of personally having an attribute, but not on the basis of an association or relationship with another person having a protected attribute. For example, a parent is refused a job because the employer assumes he or she will need time off work to look after a child with a disability, or an employee is treated less favourably because he or she advocated for a co-worker with a disability. Protections from discrimination on the basis of an association or relationship with another person having a protected attribute are included in both the *Disability Discrimination Act*[36] and the *Racial Discrimination Act 1975* (Cth).[37]

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[32] 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 62.

[33] Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Committee on the Inquiry into the Disability Discrimination and other Human Rights Legislation Amendment Bill 2008*, (15 January 2009), pp 7 - 11.

[34] This simplified definition is used in the *Discrimination Act 1991* (ACT) s 8(1)(a).

[35] This definition is used in the *Sex Discrimination Act 1984* (Cth), s 5(2).

[36] Sections 15-29.

Recommendation 12: The Commission recommends discrimination be defined to include disadvantage suffered as a result of an association with a person with a protected attribute.

39. Sixth, the Commission notes that the Bill exempts from the prohibitions on discrimination, certain acts of religious institutions:[38]

> …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.

40. This exemption exists at the intersection of two fundamental human rights, namely the right to practice a religion and belief and the right to non discrimination.

41. Similar exemptions exist in the *Sex Discrimination Act* and the *Age Discrimination Act 2004* (Cth).[39] However, the above exemption does not accord with the scope of the exemptions under the *Sex Discrimination Act* (at s 37) and the *Age Discrimination Act* (s 35). In particular, the above provision does not require that the discriminatory act be 'necessary' to avoid injury to the religious susceptibilities of adherents of the religion or creed. The requirement that the act be 'necessary' is an important qualification to ensure that the exemption is at the least no broader than these exemptions under the *Sex Discrimination Act* (s 37) and the *Age Discrimination Act* (s 35).[40]

42. Past inquiries into federal discrimination laws have recommended that certain exemptions regarding religious bodies should be removed or narrowed, particularly as they relate to religious educational institutions.[41] The Commission has now recommended that exemptions for religious institutions under the *Sex Discrimination Act* be made subject to a three year sunset clause. A review to determine whether the religious exemptions should be

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[37] Sections 11-14.

[38] Fair Work Bill 2008 (Cth), cl 351(2)(c).

[39] See *Sex Discrimination Act 1984* (Cth), ss 37, 38; *Age Discrimination Act 2004* (Cth), s 35.

[40] The exemption at s 38 of the *Sex Discrimination Act* in relation to educational institutions established for religious purposes does not include the requirement that the discriminatory act be 'necessary'.

[41] 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 169-173.

removed, or replaced with a more narrowly tailored exemption on strictly human rights grounds should be completed within the three year period.[42]

> **Recommendation 13**: The Commission recommends inserting 'necessary' in clause 351(2)(c)(ii) of the Bill. Further, any amendments to the religious institutions exemption in other federal discrimination laws should be reflected in the Fair Work Bill, in order to ensure the harmonisation of federal anti discrimination legislation.

43. Seventh, 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[43] that resulted in dismissal should be extended.

44. In cases where an employee has been dismissed in contravention of Part 3.1, the dispute will be dealt with at first instance in a conference conducted by Fair Work Australia.[44] 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.[45]

45. If the dispute remains unresolved after the conference, Fair Work Australia issues a certificate and the dismissed employee can proceed to court.[46] A court application must be made within 14 days after the certificate is issued.[47]

46. 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.

47. A 60 day time limit is consistent with the recommendation of the Senate Legal and Constitutional Affairs Committee in its report on the *Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equity*.[48] The Committee recommended the HREOC Act be amended to increase the time limit for lodging an application with the Federal Court or

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[42] 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 173.

[43] Clause 351 falls within Part 3.1 of the Fair Work Bill 2008 (Cth).

[44] Fair Work Bill 2008 (Cth), cl 365, 368.

[45] Fair Work Bill 2008 (Cth), cl 366.

[46] Fair Work Bill 2008 (Cth), cl 369, 371(1).

[47] Fair Work Bill 2008 (Cth), cl 371(2).

[48] Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 (Cth) in eliminating discrimination and promoting gender equity,* 12 December 2008, p xv, Recommendation 21.

Federal Magistrates Court from 28 days after termination of the complaint by the Commission to 60 days.

Recommendation 14: The Commission recommends that the 14 day time limit for bringing general protections court applications (clause 371(2) of the Bill) be extended to 60 days.

48. Finally, the Commission notes that it has previously recommended an inquiry be undertaken into the merits of replacing the federal discrimination Acts with a single, comprehensive Equality Act for Australia.[49] The Standing Committee on Legal and Constitutional Affairs accepted this recommendation in its report on the *Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equity.*[50] Further, the Commonwealth has signalled its intention to consider this issue of an Equality Act as part of the National Human Rights Consultation.[51]

Recommendation 15: The Commission recommends that the new discrimination protections at clause 351 of the Bill be included as part of any inquiry into the merits of a single Equality Act for Australia.

Unfair dismissal (Part 3.2)

49. The Commission considers the restoration of unfair dismissal protections to many national system employees to be a positive development. The Commission is, however, concerned with three aspects of the unfair dismissal protections.

50. First, the Bill restores 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[52] and six months for all other employees.[53] The Explanatory Memorandum states:

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[49] 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 259.

[50] Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 (Cth) in eliminating discrimination and promoting gender equity,* 12 December 2008, p xviii, Recommendation 43.

[51] Commonwealth of Australia, *National Human Rights Consultation, Background paper,* 2008, p12.

[52] A small business employer employs fewer than 15 employees: cl 23(1).

> 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.[54]

51. The Commission submits that 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.[55] The Commission considers that an employer should be able to assess the capacity and conduct of an employee within three months.

Recommendation 16: The Commission recommends that the minimum employment period to access unfair dismissal protections be reduced to three months for all employees.

52. Second, the Bill requires unfair dismissal applications to be lodged with Fair Work Australia within seven days after the dismissal took effect, or within such further period as Fair Work Australia allows.[56] Fair Work Australia may allow a further period for the application if it is satisfied there are exceptional circumstances, taking into account:[57]
    - 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.
53. The Commission acknowledges the intention of these new provisions is to 'provide a quick, flexible and informal process for the resolution of unfair dismissal claims.'[58]

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[53] Fair Work Bill 2008 (Cth), cl 383.

[54] Explanatory Memorandum, Fair Work Bill 2008 (Cth), p 240.

[55] This is consistent with certain State unfair dismissal regimes: *Industrial Relations Act 1996* (NSW), s 83; *Industrial Relations Act 1999* (Qld), s 74; *Industrial Relations Act 1979* (WA), s 23A.

[56] Clause 394(2).

[57] Clause 394(3).

[58] Explanatory Memorandum, Fair Work Bill 2008 (Cth), p 240.

54. However, the Commission submits that the seven day timeframe is too short. 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 seven day time limit may result in employees being unfairly left without a remedy for unfair dismissal.

55. The Commission is also concerned that Fair Work Australia is only provided with power to extend the seven day time limit in 'exceptional circumstances'.

56. The factors set out at clauses 394(3)(a)-(f) of the Bill 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 but instead 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.

Recommendation 17: The Commission recommends:

- the seven day time limit for unfair dismissal claims at clause 394(2)(a) be extended to 21 days;
- 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.

57. Third, the Commission submits that all employees should be entitled to protection against unfair dismissal, regardless of the size of the business at which they work. Clause 388(1) of the Bill enables the Minister to declare a Small Business Fair Dismissal Code by legislative instrument. If a person's dismissal is consistent with the Code and the person's employer was a small business employer,[59] then the dismissal will be considered fair.[60]

58. The Commission submits that the proposed Small Business Fair Dismissal Code does not ensure that employees in small businesses are treated fairly. The Commission recommends that the Small Business Code be removed from the Bill and employees of small businesses be entitled to the same protections from unfair dismissal as all other employees.

59. If the Committee does not accept the Commission's recommendation, the Commission recommends in the alternative that the provisions of the Small Business Fair Dismissal Code should be strengthened. In particular, the Code should be amended to provide additional procedural fairness protections for employees of small businesses.

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[59] A small business employer employs fewer than 15 employees: cl 23(1).

[60] Fair Work Bill 2008 (Cth), cl 385.

60. Examples of procedural fairness protections that should be included in the Code are set out below. Whilst the amendments recommended below would improve the Code, the Code would still fall short of providing employees of small businesses with procedural fairness. To access procedural fairness, employees of small businesses should be entitled to the same protections from unfair dismissal as all other employees (see **Recommendation 18**).

61. The proposed Code sets out the circumstances in which summary dismissal is warranted. That is, where the employer believes on 'reasonable grounds' that the employee was:

    - stealing money or goods;
    - threatening or carrying out violence in the workplace;
    - defrauding the business; or
    - committing a serious breach of occupational health and safety procedures.

62. The Commission recommends that the Code be amended to include a requirement that the employer must:

    - clearly particularise the allegation of serious misconduct against the employee; and
    - provide the employee with the opportunity to respond to the allegation.

    The employee's response should then be provided to Fair Work Australia to assist in its assessment of whether the employer's view of the employees conduct was held on 'reasonable grounds'.

63. The proposed Code also deals with dismissal because of unsatisfactory conduct, performance or capacity to do the job. The Code contains a requirement that the employer warn the employee if the employee is not doing the job properly and must improve his or her performance, or otherwise be dismissed. The Code states that the warning should be either verbal or, preferably, in writing. The Commission recommends that the Code be amended to provide that the warning must be in writing. This is because the warning is of significant importance in terms of the employer's compliance with the Code, and consequently the employee's ability to access the unfair dismissal protections of the Bill. A verbal warning is insufficient and is more likely to be misunderstood.

64. The proposed Code also provides that before an employee is dismissed, the employer must tell the employee the reason for the dismissal and give the employee an opportunity to respond. The Commission recommends that the employee's response should then be provided to Fair Work Australia to assist in its assessment of the employer's compliance with the Code.

Recommendation 18: The Commission recommends that the Small Business Code be removed from the Bill and employees of small businesses be entitled to the same protections from unfair dismissal as all other employees.

In the alternative, the Commission recommends that the provisions of the Small Business Fair Dismissal Code be strengthened and include procedural fairness protections for employees. For example, the Code should be amended to provide that:

- The employer must clearly particularise allegations of serious misconduct.
- The employer must provide the employee with an opportunity to respond to allegations of serious misconduct. The employee's response should then be provided to Fair Work Australia to assist in its assessment of whether the employer's view of the employee's conduct was held on 'reasonable grounds'.
- The employer's warning to the employee in relation to unsatisfactory performance or conduct must be in writing.
- The employer must provide the employee with an opportunity to respond to the reason for the dismissal. The employee's response should be provided to Fair Work Australia to assist in its assessment of the employer's compliance with the Code.

Appendix – List of Recommendations

1. The Commission recommends that the qualification requirements that restrict the categories of employees who can make a request for flexible working arrangements be removed.
2. The Commission recommends that the right to request flexible working arrangements be extended to all forms of family and caring responsibilities.
3. The Commission recommends that the right to request flexible working arrangements be extended to employees with a disability.
4. The Commission recommends that the same rights of redress applicable to the other nine National Employment Standards be extended to the unreasonable refusal of a request for flexible work arrangements.
5. The Commission recommends that the introduction of the right to request be accompanied by an education campaign that includes clear information that employees may have access to the provisions of the *Sex Discrimination Act 1984* (Cth) (and the *Disability Discrimination Act*) where flexible arrangements are denied.
6. The Commission recommends that in order to be eligible for unpaid parental leave an employee must have been in paid work for 40 weeks of the past 52 weeks with any number of employers and/or in any number of positions. Employment should include part time, casual employment, contract work and self-employment.
7. The Commission recommends that the same rights of redress applicable to the other nine National Employment Standards be extended to the unreasonable refusal of a request for extended parental leave.
8. The Commission recommends that the prohibition against discrimination at clause 351 of the Bill should be extended to apply to every employee in Australia (rather than being subject to the limited application provisions at clauses 337 - 339 of the Bill).
9. The Commission recommends that the grounds on which adverse action is prohibited at clause 351 of the Bill should be extended to include criminal record.
10. The Commission recommends that ‘marital status’ at clause 351 of the Bill should be replaced with ‘marital or relationship status’, which includes being the same sex partner of another person.
11. The Commission recommends that the definition of adverse action should be amended to make clear that it includes both direct and indirect discrimination, and these terms should be defined as follows:
    - Direct discrimination: unfavourable treatment because of a protected attribute.

- Indirect discrimination: a term, condition or requirement that has the effect of disadvantaging persons with a protected attribute, unless the term, condition or requirement is reasonable. The onus of proving that the term, condition or requirement is reasonable should be placed on the respondent.

12. The Commission recommends discrimination be defined to include disadvantage suffered as a result of an association with a person with a protected attribute.
13. The Commission recommends inserting 'necessary' in clause 351(2)(c)(ii) of the Bill. Further, any amendments to the religious institutions exemption in other federal discrimination laws should be reflected in the Fair Work Bill, in order to ensure the harmonisation of federal anti discrimination legislation.
14. The Commission recommends that the 14 day time limit for bringing general protections court applications (clause 371(2) of the Bill) be extended to 60 days.
15. The Commission recommends that the new discrimination protections at clause 351 of the Bill be included as part of any inquiry into the merits of a single Equality Act for Australia.
16. The Commission recommends that the minimum employment period to access unfair dismissal protections be reduced to three months for all employees.
17. The Commission recommends:
    - the seven day time limit for unfair dismissal claims at clause 394(2)(a) be extended to 21 days;
    - 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.
18. The Commission recommends that the Small Business Code be removed from the Bill and employees of small businesses be entitled to the same protections from unfair dismissal as all other employees.

    In the alternative, the Commission recommends that the provisions of the Small Business Fair Dismissal Code be strengthened and include procedural fairness protections for employees. For example, the Code should be amended to provide that:

    - The employer must clearly particularise allegations of serious misconduct.
    - The employer must provide the employee with an opportunity to respond to allegations of serious misconduct. The employee's response should then be provided to Fair Work Australia to assist in its assessment of whether the employer's view of the employee's conduct was held on 'reasonable grounds'.

- The employer's warning to the employee in relation to unsatisfactory performance or conduct must be in writing.
- The employer must provide the employee with an opportunity to respond to the reason for the dismissal. The employee's response should be provided to Fair Work Australia to assist in its assessment of the employer's compliance with the Code.