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ELC Employment Law Centre of WA (Inc)
Working for WA Workers
ABN 36 365 876 841

Committee Secretary
House of Representatives Standing Committee on Education and Employment
PO Box 6021
Parliament House
Canberra ACT 2600

By email: ee.reps@aph.gov.au

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To whom it may concern

***Fair Work Amendment Bill 2013* (Cth)**

The Employment Law Centre of Western Australia (Inc) (**ELC**) welcomes the opportunity to make a submission to the House of Representatives Standing Committee on Education and Employment (**Committee**) inquiry in relation to the *Fair Work Amendment Bill 2013* (Cth) (**Bill**).

ELC is a community legal centre which specialises in employment law. It is the only not for profit legal service in Western Australia offering free employment law advice, assistance and representation. Each year ELC provides advice and assistance to over 4,500 non-union employees in Western Australia.

ELC makes the following comments and recommendations in relation to the Bill:

Family-friendly measures

Special maternity leave

Under the Bill, where a female employee takes unpaid special maternity leave (for instance, because she is suffering from a pregnancy-related illness), her entitlement to unpaid parental leave after the child is born is no longer reduced accordingly.

ELC supports this amendment. In our view, it is important for female employees to be able to take a full year off work after the birth of their child. An employee should not be penalised by having her entitlement to unpaid parental leave reduced simply because she has been unwell during the pregnancy.

Further, we note that reducing an employee's entitlement to unpaid parental leave may affect whether that employee is able to return to her pre-parental leave position, since the return to work guarantee only applies where an employee returns to work at the end of the unpaid parental leave period.[1] In other words, if a female employee is unwell during her pregnancy and her entitlement to

[1] Fair Work Act s 84.

unpaid parental leave is reduced accordingly, it may be that she is unable to return to work at the end of the shortened unpaid parental leave period and therefore loses the benefit of the return to work guarantee.

Amending the *Fair Work Act 2009* (Cth) (**Fair Work Act**) so that taking special maternity leave does not affect the unpaid parental leave entitlement thus promotes inclusion of mothers in the workforce.

Parental leave

The Bill provides slighter greater flexibility for parents to take unpaid leave after the birth or adoption of a child in that it:

- increases the maximum amount of concurrent unpaid parental leave from 3 weeks to 8 weeks; and

- allows the period of concurrent leave to be taken in separate periods of at least 2 weeks at any time within the first 12 months of the birth or adoption of a child.

ELC supports this amendment. We believe that it is desirable to provide greater flexibility to parents who wish to take unpaid parental leave in recognition of the challenging circumstances faced by new parents and the potential complications associated with pregnancy and birth, for instance.

In addition to introducing these changes, ELC is of the view that there would be some benefit in simplifying the parental leave provisions of the Fair Work Act. The existing provisions are relatively complex, largely because the entitlements of two members of an "employee couple" are linked together. In our view, it is unnecessary to link two parents' entitlements together because most parents do not work for the same employer. The substance of the parental leave provisions could be retained without linking the two entitlements together.

Right to request flexible working arrangements

ELC supports the proposal in the Bill to extend the right to request flexible working arrangements to include employees in a broader range of circumstances, such as parents of school age children and other employees with caring responsibilities.

ELC has encountered many employees who wish to request flexible working arrangements for good reasons (such as having school age children) who fall outside the existing provisions of the Fair Work Act.

We note, however, that there are some other significant limitations on the right to request flexible arrangements under the Fair Work Act which have not been addressed in the Bill.

For example, the right to request flexible working arrangements is currently of very limited value to employees in the sense that no sanctions apply if the employer refuses the request for reasons other than reasonable business grounds.[2]

This right is also limited in that only employees who have completed 12 months of continuous service with their employer are entitled to make a request for flexible working arrangements.[3]

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[2] Fair Work Act s 44(2).
[3] Fair Work Act s 65(2).

ELC is of the view that the right to request flexible working arrangements should be strengthened by introducing sanctions where the employer refuses the request other than on reasonable business grounds. Further, it should not be necessary for an employee to have completed 12 months' service before being able to request flexible working arrangements.

Consultation about changes to rosters or working hours

ELC supports the proposed amendment in the Bill under which modern awards and enterprise agreement must contain a term requiring employers to consult with employees about changes to regular rosters or ordinary hours or work.

For many employees, particularly those with family or carer's responsibilities, changes to regular rosters or ordinary hours can be a serious issue, to the extent that it may affect whether they are able to continue working in a particular job or not. It is therefore important for employees to be consulted in advance about such changes so that they can make alternative arrangements if need be, such as arranging child-care or looking for alternative employment. It is also important for employees to be involved in any decision-making processes regarding such changes so that employers have a full understanding of any reasons why employees might not be able to change rosters or working hours.

The Bill certainly goes some way towards addressing these issues. Additionally, in our view, it is desirable for the consultation requirement to be strengthened by providing that employers must consult with employees *before* any final decision is made to change regular rosters or ordinary hours of work. The Explanatory Memorandum suggests that the intention behind the Bill was to require employers to consult with employees before any final decision is made,[4] but the drafting of the Bill does not reflect this.

Transfer to a safe job

Under the Bill, the right to transfer to a safe job is extended to all pregnant employees, rather than just being available to employees who are entitled to unpaid parental leave – i.e. employees who have completed at least 12 months of continuous service.

ELC supports this amendment on the basis that it is important to protect the health and safety of all pregnant employees, regardless of their length of service. Further, the extension of the right to transfer to a safe job promotes inclusion of mothers in the workplace.

Modern awards objective

ELC supports the proposed amendment of the modern awards objective such that FWC must take into account the need to provide additional remuneration for:

- employees working overtime;
- employees working unsocial, irregular or unpredictable hours;
- employees working on weekend or public holidays;
- employees working shifts.

In ELC's view, employees who work the types of hours described above need to be compensated for the impact that working these hours has on their personal, family and social lives, as observed

[4] Refer to the top of page 6 of the Explanatory Memorandum.

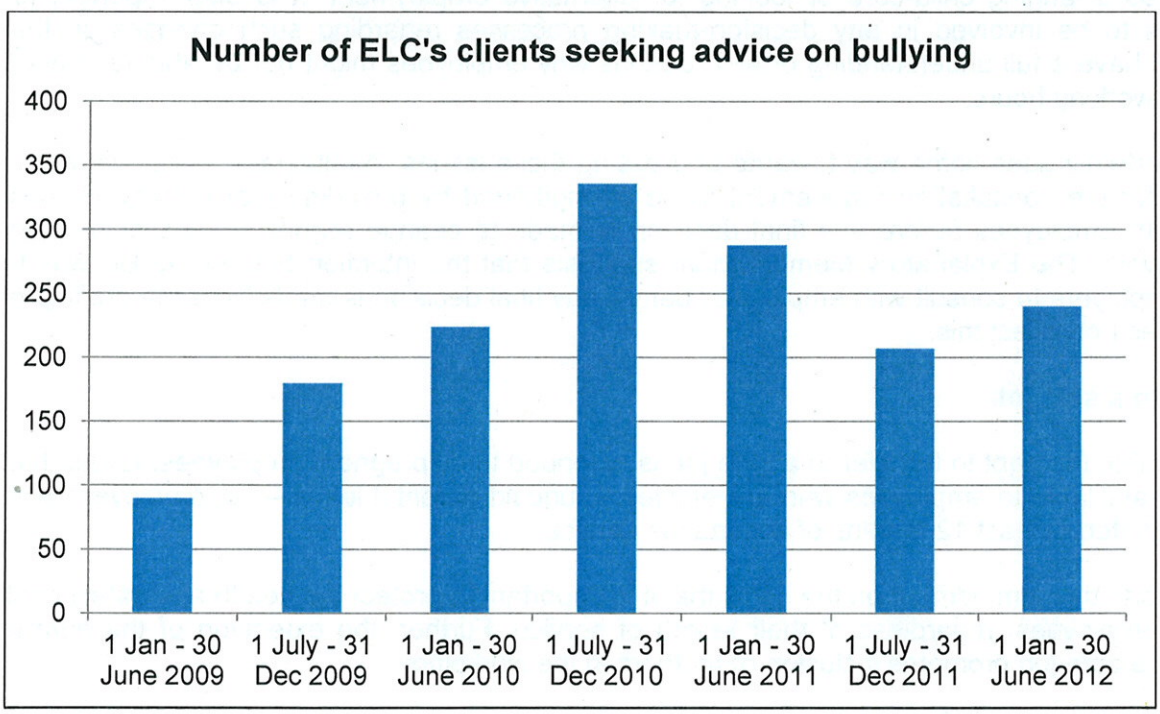
in the recent Fair Work Commission decision in relation to penalty rates.[5] For instance, employees working on weekends and on public holidays miss out on opportunities that other employees have to spend time with their friends and family. Employees who work shift work often report difficulty sleeping and the negative impact that this has on their overall health.

Further, many of the employees that ELC encounters who work unsocial hours are on relatively low incomes. For these employees, the extra penalty rates that they receive can make all the difference to their overall incomes.

Anti-bullying measure

ELC strongly supports the proposed inclusion of anti-bullying provisions in the Fair Work Act.

Bullying is a very serious workplace issue which appears to be becoming more prevalent, based on ELC's statistics, as set out in the chart below.



Bullying can have grave long-term effects on the mental health of the person bullied. Clients suffering from bullying have reported various effects including high levels of stress, anxiety, depression, loss of self-esteem, a loss of the ability to perform work, ill health, and in extreme cases, suicidal tendencies. The case of Brodie Panlock, a Victorian waitress who took her own life due to extreme workplace bullying, is a reminder of how severe the impacts of bullying can be.

Unfortunately, bulling can be difficult to address because it often manifests as repeated conduct over a long period of time. Single incidents of bullying may appear trivial in isolation, yet the repetition of the conduct amplifies its effects.

In ELC's view, the existing occupational safety and health legislative schemes, both within Western Australia and at a national level, offer inadequate protection in relation to workplace bullying.

[5] *Modern Awards Review 2012 – Penalty Rates* [2013] FWCFB 1635.

For instance, in Western Australia, the main action that an employee who is suffering from workplace bullying can take is to contact WorkSafe, who can investigate and make recommendations to the employer to address any bullying that is occurring.

However, we understand that WorkSafe will generally only get involved where the employee is still employed and has exhausted all internal avenues to resolve the issue.[6] In many of the cases that we see, the employee in question has been so badly affected by the bullying that he or she eventually resigns without the issue ever being addressed.

Further, even if Worksafe investigates, finds that bullying has occurred, and makes recommendations to the employer about what changes should be made in the workplace, it has been our experience that employers often ignore such recommendations.

Worksafe also has powers to commence a prosecution for bullying but we understand that WorkSafe has not successfully prosecuted any employers on the basis of workplace bullying.[7]

Empowering the Fair Work Commission to deal with bullying is therefore extremely important in providing employees with other avenues to address bullying.

Under the Bill, the Fair Work Commission can make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the worker from being bullied at work. If a person contravenes a stop bullying order, the victim may seek a civil remedy against them.

While these provisions are certainly a positive first step, in our view it is necessary to provide the Fair Work Commission with broader powers to deal with bullying. For example, as noted above, the Bill does not currently allow the Fair Work Commission to impose a civil penalty on a bully or an employer who has allowed bullying to occur, or to make any orders compensating the victim for any bullying that has already occurred. The rationale for this is described as follows in the Explanatory Memorandum:

> *To reinforce the preventative nature of [the anti-bullying] amendments orders may not include requiring the payment of a pecuniary amount. As such, these amendments will assist in preventing the incidence of workplace bullying at an early enough stage to minimise the risk of physical and mental harm to individuals.*

In ELC's view, by the time that an employee refers a bullying matter to the Fair Work Commission, it is quite likely that serious harm will have already been done. As such, while it is important to prevent the bullying from continuing, it is also appropriate for the Fair Work Commission to be able to make orders imposing civil penalties or compensating victims for bullying in appropriate circumstances.

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[6] Commission for Occupational Safety and Health, *Dealing with bullying at work: A guide for workers*, November 2008, (available at http://www.commerce.wa.gov.au/worksafe/Content/Safety_Topics/Bullying/Dealing_with_bullying_at_the_w.html), p. 12.

[7] Search of Worksafe's prosecutions database using the term "bully", http://prosecutions.commerce.wa.gov.au/, accessed 18 April 2013.

ELC's recommendations

ELC recommends that the amendments proposed in the Bill proceed, subject to the following additional recommendations:

1. The parental leave provisions of the Fair Work Act be simplified in such a way that the entitlements of two members of an employee couple are not linked together.

2. The right to request flexible working arrangements be strengthened by:

    a. introducing sanctions where an employer refuses a request other than on reasonable business grounds; and

    b. extending the right to request such arrangements to all employees, regardless of their length of service.

3. The proposed term in modern awards and enterprise agreements requiring employers to consult with employees about changes to regular rosters or ordinary hours of work be strengthened by requiring employers to do so *before* any final decisions are made with respect to such changes.

4. The proposed powers of the Fair Work Commission to deal with bullying be extended to allow the Fair Work Commission to impose a civil penalty on a bully or an employer who has allowed bullying to occur, or to make orders compensating the victim for bullying that has already occurred.

ELC would be happy to provide further information in relation to the Bill or participate in any public hearings in Western Australia should there be any opportunity to do so.

Yours faithfully

Jessica Smith
Solicitor