



**Submission to the House of Representatives  
Standing Committee on Education and  
Employment Inquiry into the *Fair Work  
Amendment (Better Work/Life Balance) Bill  
2012***

by

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on behalf of

**The Women and Work Research Group**

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## The Women and Work Research Group

The Women and Work Research Group is part of the University of Sydney Business School. Its aims are:

- To provide a scholarly environment in which a community of inquiry on all aspects of women, work, employment, family and community is created.
- To engage in and support high quality research on women and work.
- To provide a bridge between academic work and policy work and to provide research for the development of evidence based policy in matters pertaining to women, work and family.
- To provide a focal point for collaboration with established and emerging scholars in the field, and with research centres with similar interests in the Asia-Pacific region, the USA, the UK and beyond.

Over the past five years, the Women and Work Research Group (WWRG) has conducted research into flexible working and carers' issues, parental, maternity and paternity leave, as well as other issues relating to women and work, see our website at:

<http://sydney.edu.au/business/research/wwrq>

In 2009, we published a review of the of the literature on mature age workers and eldercare responsibilities, 'Taking Care: Mature age workers with elder care responsibilities'<sup>1</sup> The WWRG has also undertaken other research into the development of the right to request flexible working 2005-2010.<sup>2</sup>

The WWRG welcomes the proposals in the *Fair Work Amendment (Better Work/Life Balance) Bill* 2012. These include:

- enabling *carers* with 'responsibility for the care of another person' to obtain flexible working arrangements 'to assist the[m] to care for the other person',<sup>3</sup> subject to the employer showing 'serious countervailing business reasons'<sup>4</sup> for refusing;
- enabling *employees generally*, to obtain flexible working arrangements, subject to the employer showing reasonable business grounds for refusing;

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<sup>1</sup> Page, A., Baird, M., Heron A. and J. Whelan (2009). *Taking Care: Mature Age Workers with Eldercare Responsibilities*, NSW Industrial Relations, Sydney, available at: [http://www.industrialrelations.nsw.gov.au/Parents\\_and\\_Carers/Mature\\_age\\_workers\\_with\\_elder\\_care\\_responsibilities.html](http://www.industrialrelations.nsw.gov.au/Parents_and_Carers/Mature_age_workers_with_elder_care_responsibilities.html)

<sup>2</sup> Heron, A. and M. Baird (2010). 'Pathways to care and flexibilities at work: Gains and losses since the Family Provisions Test Cases of 2005 and options for reform of the *NSW Anti-Discrimination Act 1977*', unpublished commissioned research paper.

<sup>3</sup> Proposed s306E(1).

<sup>4</sup> Proposed s306E(5).

- in both cases, providing for such a right to be enforceable by Fair Work Australia which will be able to make a flexible working arrangements order as ‘appropriate to ensure that an employer complies’<sup>5</sup> with the above provisions;
- enabling employee organisations and the Age, Disability and Sex Discrimination Commissioners to apply for a flexible working arrangements order.

The WWRG notes that these rights would extend only to permanent employees with 12 months service with their employers and long-term casuals with a reasonable expectation of continuing with their employers.

### **Background information**

Government policy is to encourage the labour force participation of mature age people to counter the decline in overall labour force participation rates over the next 40 years due to the ageing of the population. The Intergenerational Report 2010<sup>6</sup> (IGR) argues that improving participation rates is possible for mature age workers. It identifies the ‘ongoing policy effort [needed] to identify and remove barriers for those who wish to remain in the workplace.’<sup>7</sup>

One such barrier is the provision of informal care by the working age population which inhibits their workplace participation. Informal care is recognised by stakeholders and researchers in this area as essential to enable formal support for older people to remain at home to function effectively.<sup>8</sup> Government policy is to increase the use of ‘care in the community’ for older people. Yet ‘the relative availability of informal carers is expected to decline in the future’<sup>9</sup> and demands on employees to provide informal care are expected to increase.<sup>10</sup> Both participation and care policies target mature age people, especially women. Between the ages of 45-54, 23 per cent of women and 16 per cent of men are involved in caring for adults.<sup>11</sup>

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<sup>5</sup> Proposed s306F (1).

<sup>6</sup> The Intergenerational Report (2010) (IGR). *Australia to 2050: future challenges*, the Treasury, Canberra, available at: [http://www.treasury.gov.au/igr/igr2010/report/pdf/IGR\\_2010.pdf](http://www.treasury.gov.au/igr/igr2010/report/pdf/IGR_2010.pdf)

<sup>7</sup> IGR, 2010, p.29-30.

<sup>8</sup> Australian Institute for Health and Welfare, (2009). *Australia's Welfare 2009*, AIHW cat. no. AUS 117. Canberra, available at: <http://www.aihw.gov.au/publications/index.cfm/title/10872>

Productivity Commission (2010). *Contribution of the Not-for-Profit Sector*, Research Report, Canberra (at 270).

<sup>9</sup> Productivity Commission (2011), *Caring for Older Australians*, Report No. 53, Final Inquiry Report, Canberra (at 325).

<sup>10</sup> Taskforce on Care Costs. (2007). *The hidden face of care: Combining work and caring responsibilities for the aged and people with a disability*. Retrieved from [tocc.org.au](http://tocc.org.au). Its survey identified 23 per cent of responding workers expected to provide elder care in the next five years (Page et al., 2009: 12, see note 1 above)

<sup>11</sup> Australia Bureau of Statistics (2010). *Disability, Ageing and Carers 2009*, Cat. No. 4430.0.

Calls for an extension of the right to request flexible working arrangements to carers other than parents of under school age children or under 18 when a child has a disability have been made by many policymakers and advocates including 'the ACTU, prominent academics, Carers Victoria, government advisory bodies'.<sup>12</sup>

Evidence from overseas, state jurisdictions and our own research indicates that this extension is much needed to facilitate workforce participation of carers of older people. Page et al. describes UK research into informal care for adults and work including Yeandle et al.'s report in 2006 on their research as to 'why some organisations have begun to claim [carer friendly employment practices] yield[s] important business benefits'. Examining three employers, it concludes:

'all organisations, large and small, public and private, can provide a supportive environment for carers' and that 'flexible working benefits carers because it addresses the diversity of individuals' circumstances, rather than stereotyping them as problem employees. It is responsive to individual circumstances.'<sup>13</sup>

The UK and New Zealand right to request laws already include carers. As with the Bill, neither specify that a particular level of care be provided. In New Zealand, providing care (after six months with their employer<sup>14</sup>) to any person triggers the right. This is similar to the Equal Opportunities Act 2010 (Vic). This legislation provides employees (from the start of their employment and as job applicants) with an enforceable right<sup>15</sup> to flexible and other work adjustments to care where they have a substantial caring responsibility for someone. The employer may reasonably refuse to change work arrangements.

No indications in any of these jurisdictions has emerged of significant problems for employers.<sup>16</sup> Indeed where flexible work rights do not exist for all employees, it is increasingly recognized that it is difficult to create quality flexible working for just some jobs/employees in a workplace unless an approach is taken which embeds flexible working

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<sup>12</sup> First Reading Speech to the Bill, 13 February 2012.

<sup>13</sup> See Page et al., fn 1.

<sup>14</sup> This is the same for the UK right.

<sup>15</sup> The UK right is also often effectively enforceable though usually only by women, see Palmer, C., Wade, J., Wood, K. and Heron. A. (2006). *Maternity and parental rights: A guide to parents' legal rights at work*. London, Legal Action Group.

<sup>16</sup> See for example in relation to the UK, Walsh, I. (2008) *Flexible working: A review of how to extend the right to request flexible working to parents of older children*, Department of Business Employment and Regulatory Reform, London.

throughout the organization as the norm. Croucher and Kelliher in their case study of four large UK employers found they all granted the right to seek flexible working to all employees. The authors commented: 'They were concerned about the possibly demotivating and divisive effects on staff of limiting the right to request flexible working [to parents]'.<sup>17</sup> The Walsh review for the UK government of the flexible working law in 2008 noted 'many employers choose to make the right to request available to all employees'.<sup>18</sup> The UK Government has recently conducted a consultation on extending the right to request to all employees.<sup>19</sup>

### **Recent research by the Women and Work Research Group about flexible working and carers**

In 2011, the WWRG undertook in partnership with two major Australian employers, preliminary research into employer responses to employees who assume eldercare responsibilities and the responses of employees to workplace commitments when they do this.

Our partner employers are proactive in assisting employees balance work and care. Despite this, the research demonstrates the unmet need which many employees have to access flexible working, as well as various forms of leave and other work adjustments, in order to undertake eldercare responsibilities. From our interviews with 16 employees and four managers, we make the following points in support of the Bill:

- flexible working is essential to enable employees to work and care especially where care demands arise suddenly or fluctuate over time;
- national policy matters in relation to providing a standard of expectation and as such the amendment would assist employees and employers in understanding the changing norms and requirements of society;
- individual circumstances vary considerably in terms of care provided. Families may divide care of older relatives, particularly between siblings. One employee we interviewed shared care of her grandmother with her employed mother. The support family members give each other is vital. It facilitates care in the community and

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<sup>17</sup> Croucher, R. and Kelliher, C. (2005:15) 'The right to request flexible working in Britain: the law and organizational realities, the International Journal of Comparative Labour Law and Industrial Relations, 21(3): 503-520.

<sup>18</sup> Walsh, I. (2008), fn. 14.

<sup>19</sup> Modern Workplaces consultation, see:

<http://discuss.bis.gov.uk/modernworkplaces/>

working whilst caring. The Bill avoids unhelpful distinctions between primary and secondary carers or of requiring evidence of the degree of care provided, in the context of making a request for flexible work arrangements;

- even with employers who positively promote flexible working as our research partners did, several employees interviewed wanted reduced or flexible hours but felt because of workload or financial reasons they could not seek these;
- occasional flexibility for example to accompany a care recipient to medical appointments needs to be included in the definition of flexible working arrangements. Carers leave does not necessarily cover such commitments, nor is it available to carers working casually;
- line managers are critically important in the implementation of legislation such as this. We suggest that if it is passed, the government promotes its existence widely throughout workplaces and in the community. They should also provide detailed online guidance for small and medium-sized firms without their own human resource specialist function.<sup>20</sup>

### **Part-time discrimination**

We are concerned that the failure to protect workers from discrimination on the basis of working less than full-time hours as a significant gap in the FWA general protections<sup>21</sup> against discrimination.<sup>22</sup> Some 45% of women work part-time (17% of men).<sup>23</sup> It is proposed that such a prohibition be included in this Bill as the new law will facilitate part-time work. This change would make it clear that part-time work is to be valued equally to full-time work and that workers have rights to the same conditions and benefits regardless of hours worked.

Australia has ratified ILO Convention 175 in July 2011. It requires that part-time employees receive the same protection as comparable full-time workers including in relation to discrimination, wages, maternity and employment protection and paid annual, public holiday and sick leave. There should thus be no objection by the Government to prohibiting

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<sup>20</sup> The Fair Work Ombudsman makes factsheets and guides available on flexible working and related issues.

<sup>21</sup> See s.351 Fair Work Act 2009.

<sup>22</sup> Examples of such discrimination are provided in Charlesworth, S. And A. Heron, *New Australian Working Time Minimum Standards: Reproducing the Same Old Gendered Architecture?*, Journal of Industrial Relations, forthcoming.

<sup>23</sup> ABS, *Labour Force Survey*, Cat. No. 6202.0, June 2010.

discrimination against part-time workers. Similar protections exist elsewhere, for example, the EU has implemented a similar provision in the Part-time Workers Directive in 1997.<sup>24</sup>

### **WWRG recommendations**

Based on the submission above, the WWRG:

- supports the extension of the right to request flexible working arrangements under the *Fair Work Act 2009* (FWA) to employees with eldercare and other caring responsibilities and to all employees, proposed in the Bill and making such rights enforceable;
- proposes employees including casuals should be able to make a request after six months service with an employer;
- proposes that the new rights be incorporated in the FWA 2009 as part of the minimum National Employment Standards on which bargaining may build;
- proposes discrimination on the basis of hours worked be prohibited by way of an amendment to the FWA 2009.

We also support the recommendations of the Work + Family Policy Roundtable:

- that the ongoing nature of the employment, regardless of any changing pattern of hours of employment over the required period of employment should be determinative in assessing a casual or labour hire employees type and length of service;
- in relation to labour hire employees, it should be the length of employment with the host employer that is taken into account.

### **Conclusion**

The WWRG welcomes the Bill which is timely given the concerns identified above about the need for greater workforce participation and more informal care provision identified in a range of reports and research. It also will provide the Government with an avenue to act on their recent consultation under the National Carers Strategy to extend the existing right to request flexible working arrangements to carers of older adults and those with a disability or a serious long-term illness. The Bill, if enacted, will represent a significant part of the 'policy

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<sup>24</sup> Council Directive 97/81/EC.

effort' needed as identified by the Intergenerational Report 2010 to promote labour force participation, especially that of mature aged women.

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