Submission Number: 06
Date Received: 15/04/2013

THE LAW SOCIETY
OF NEW SOUTH WALES

15 April 2013

Committee Secretary
House of Representatives, Standing Committee on Education and Employment
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Dear Secretary

Fair Work Amendment Bill 2013

I am writing to you at the request of the Law Society's Employment Law Committee ("Committee").

The Committee appreciates the opportunity to participate in the Inquiry being conducted by your Committee into the *Fair Work Amendment Bill 2013* ("Bill"). In reviewing the Bill, the Committee has confined its comments to those matters it regards as within its members' areas of expertise. The same comments have also been submitted to the Senate Education, Employment and Workplace Relations Committee's Inquiry into the Bill.

Schedule 1 – Family-friendly measures

There are three key amendments in this Bill that impact on pregnant women and new parents generally:

1. Special maternity leave taken will now not reduce the period of parental leave, allowing women who suffer illness during their pregnancy to access unlimited unpaid leave during pregnancy without there being any impact on their parental leave period;

2. Concurrent parental leave for employee couples is now able to be taken for up to 8 weeks and in "separate periods", rather than a single 3 week period; and

3. Transfer to a safe job is an entitlement for all pregnant employees, regardless of their access to parental leave. Where there is no entitlement to parental leave, then "unpaid no safe job leave" will be provided to those employees.

The Bill contains a series of amendments to the *Fair Work Act 2009* (Act), seeking to implement the three major changes listed above. In the Committee's view, it appears that some consequential adjustments made by the Bill are either unintended or at least not contemplated by the Explanatory Memorandum.

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The Committee also suggests that an opportunity to clarify some of the provisions in the Act with regard to parental leave has been missed.

As a general comment, some consideration should be given to the possible impact on female workers of a reproductive age competing in the job market. Two candidates who differ only on gender will present a different potential cost to the prospective employer, and in order to encourage the objects of the new measures introduced into the Act, some practical efforts such as education and support will be needed so that the consequence of the new measures is not to ultimately make the hiring of female employees of a reproductive age financially or administratively undesirable.

Overall, the changes will impact employers in a significant way. The Committee suggests that resources should be made available for appropriate education and awareness campaigns, so that the objects of the amendments and improvement to the wellbeing of employed parents can be achieved.

Schedule 1, Part 1 – Special maternity leave

The items in this Part amend the Act to remove the current mechanism which reduces the amount of parental leave available by the same amount of special maternity leave taken by the employee.

As a practical matter for employers, this has the effect of providing unlimited unpaid leave for pregnant employees for the duration of their pregnancy. For employers this means there is a reduced ability to budget for the total cost impact of the pregnancy on their business as there is no longer a single maximum period of leave, but rather a combination of special maternity leave and parental leave.

During pregnancy an employee appears to have the option to take special maternity leave or personal/carer's leave. The Committee notes that before taking special maternity leave there is no requirement to first use up all accrued paid personal/carer's leave (as is the case with access to unpaid carer's leave under section 103(3) of the Act).

The Committee also notes that during a period of special maternity leave the employee will not accrue leave requiring adjustments to be made to the accruals register for that period.

The Committee recommends that adequate guidance should be provided for employers so that they can administer special maternity leave for their employees easily and appropriately.

From an employee's perspective this measure should provide greater access to special maternity leave, without impacting on the period of time allowed to be taken as parental leave. This is an enhanced flexibility measure that will assist in the management of an employee's pregnancy where there is an illness and transfer to a safe job is not an option.

Providing increased access to special maternity leave will allow paid personal/carer's leave to be rationed out by the employee at their own election to smooth out the financial implications for that employee where there are a number of anticipated absences during a more complicated pregnancy.

The Committee observes that Items 8 and 11 of this Part insert Notes which specifically clarify a matter which was previously unclear, that is a pregnant employee may elect whether to take special maternity or personal/carer's leave. It is unclear whether this is the case for any illness that a women suffers whilst she is also pregnant, or only for pregnancy-related illness. Further, it is not clear why special maternity leave should be different from unpaid carer's leave in that accrued personal/carer's leave should not first be exhausted to access it, and the merit of leaving the discretion with the employee as to whether the leave be unpaid or paid where there are such accruals.

Schedule 1, Part 2 – Parental leave

The Items in this Part amend the Act to increase the access to concurrent parental leave (both adoption and birth) for employee couples.

As a result of these amendments, the consequences for employers of employee couples are significant:

- There is an increase in the concurrent leave that is allowed to employee couples of more than double the existing amount – from three weeks to eight;

- The periods (other than the initial period) may be taken at any time during the primary carer's parental leave period at the election of the employee who must only provide notice to, rather than seek the agreement and approval of, the employer;

- The notice that periods of concurrent leave will be taken (other than the initial period), if not provided in advance, can be provided as soon as practicable (similarly to personal/carers leave). In the case of concurrent leave there is no guidance as to what sorts of circumstances might make the immediate taking of such leave acceptable. There may not be any appropriate relevant evidence, like a medical certificate, which would assist in establishing the need for immediate leave. This increases the lack of clarity for all parties and reduces the employer's ability to adequately plan for the leave.

- There are between one and four periods of concurrent leave that the employer must make alternative arrangements for, of at least two and at most eight weeks.

Again the Committee recommends that adequate guidance should be provided for employers so that they can administer concurrent parental leave for employee couples easily and appropriately.

These amendments result in significant advantages for employee couples and have the practical effect of assisting in the spreading of responsibility for the care of children. The changes promote the important role played by both parents in raising a child and also support the health of the primary carers during a high risk period.

In the Committee's view there is a missed opportunity to deal with non-employee couples in the Bill. Under the Act as currently drafted, it is unclear what the position is where the employee is, for instance, the partner of a woman who has given birth. What are the obligations of that employer to provide unpaid leave to such an employee on a concurrent basis? Is the employer able to refuse a two week period of parental leave (after the initial period) where the employee provides it with the

relevant notice and it is within the eight week total? If not, what sorts of reasons will be acceptable for the employee in the same circumstance giving no notice (ie, simply informing the employer on the first morning of their two week parental leave period that they have commenced that leave, and it was not practicable to provide notice prior to that point)?

Schedule 1, Part 3 – Right to request flexible working arrangements

The Committee notes that the proposed amendment to section 65 of the Act would expand access to the right to request flexible working arrangements to more groups of employees. It also sets out a partial list of what might constitute "reasonable business grounds" for an employer refusing a request made under the Part.

The Committee previously has supported an amendment to section 65 to extend the right to request flexible working arrangements to all employees who have caring responsibilities; most recently in its contribution to the Law Council of Australia's submission on the Australian Law Reform Commission (ALRC) Discussion Paper "Age Barriers to Work in Commonwealth Laws".

The proposed amendment to section 65(1) provides that if an employee would like to change his or her working arrangements because of any of the circumstances listed at (1A) then that employee may request a change in working arrangements; the reason for the change is because of the circumstances of the employee. The proposed section 65(1A) sets out the circumstances related to a request, being that the employee:

- is the parent, or has responsibility for the care, of a child who is of school age or younger;
- is a carer (within the meaning of the *Carer Recognition Act 2010*);
- has a disability;
- is 55 or older;
- is experiencing violence from a member of the employee's family; or
- provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.

A new subsection (1B) also expressly provides that an employee who is a parent or has responsibility for the care of a child and is returning to work after taking leave in relation to the birth or adoption of the child may request to work part-time to assist the employee to care for the child.

The formal requirements (that the request be in writing and set out details of the change sought and the reasons for the change) remain, as does the requirement on the employer to give the employee a written response within 21 days stating whether the request is granted or refused. Currently, an employer may refuse the request "only on reasonable business grounds" (section 65(5)). The proposed insertion at section 65(5A) sets out a list of what may constitute "reasonable business grounds":

"(5A) Without limiting what are reasonable business grounds for the purposes of subsection (5), reasonable business grounds include the following:

(a) that the new working arrangements requested by the employee would be too costly for the employer;

(b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
(c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
(d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;
(e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service."

The Committee supports the proposed amendment and notes that it will extend a right to request flexible working arrangements to an employee who is a parent of a school age child (at present section 65(1)(a) is limited to care of a child under school age) as well as to those 55 or older, among others. The addition of these two classes significantly widens the scope of this right and the Committee supports this amendment. In doing so, the Committee draws attention to the potential for variation in the requirements of employees who are 55 or older or who are parents or have responsibility for the care of a school age or younger child. In the latter case it is highly likely that those requirements would change over the pre-school and school life of a child. Given typical life experiences (that many employees become parents and grow older) and the duration of pre-school and schooling, it is possible that any single employee could make a number of requests in the course of his or her employment and each such request would be the exercise of a workplace right and be within the general protection afforded by section 340 of the Act.

Employers may refuse a request only on "reasonable business grounds". It is apparent that the proposed list at section 65(5A) is not exhaustive but also that it specifies the kind of grounds by inclusion. There is a qualitative judgment to be made as to whether the circumstances of the kind listed are met; for instance whether the new working arrangements are "too costly" or would result in "a significant loss in efficiency or productivity" or have "a significant negative impact on customer service". In the absence of a general provision providing for "other business grounds" or a temporal element to the grounds (for instance a proposal might be affordable in the very short term but too costly if in place for a longer period), these terms may be restrictive in the standards that will have to be satisfied. The wording of section 65(5A) might need to be considered further.

Schedule 1, Part 5 – Transfer to a safe job

The Items in this Part amend the Act to incorporate the concept of unpaid no safe job leave for those employees who do not otherwise have access to parental leave.

The implications for employers are essentially that now all pregnant employees must be considered for transfer to a safe job, not just those who have an entitlement to parental leave. The only difference is whether or not the employee will be paid whilst on no safe job leave. For employers who traditionally do not have employees who would ordinarily gain access to parental leave, especially those with a reliance on casual, seasonal or fixed-term arrangements, this will increase the compliance burden where employees exercise their rights under these amendments. It could result in an increase in termination or adverse action type claims where proper process is not followed. Education for such employers will assist in compliance.

Pregnant employees in more flexible, casual or short term employment situations will have greater access to opportunities for employment and income during their pregnancy, and increased protection from being removed from a roster or otherwise affected in their employment when their pregnancy makes it inadvisable to perform certain tasks.

However the drafting of the Bill fails to address some existing uncertainty in the legislation, and consideration should be given to clarification of:

- Whether there needs to be a written notice provided to the employer by the employee in order to enliven the access to transfer to a safe job or no safe job leave. Currently, it is only necessary that the employee provide "evidence that would satisfy a reasonable person that she is fit for work, but that it is inadvisable for her to continue in her current position..". This could give rise to a great many circumstances where it may be clear to one party but not the other, either at the time or in hindsight, that such access should have been given. For instance, a pregnant woman could complain about her feet to her employer. If she is in a standing centric role, then this may be sufficient for the provision to apply, however if she is in a desk job then it is unlikely that any further accommodations can be made. In both situations the comment and evidence (pointing to the swollen feet) would have been provided. A requirement for a written request, similar to the request for flexible working arrangements, may assist in resolving this issue.

- The definition of an appropriate safe job. Further detail as to the nature of what an alternative "safe job" might be would assist parties to understand what sorts of measures should be put in place to enable the transfer to take place. For example, whether there are any alternative methods available for performing the employee's work which might reduce or remove the hazard, whether there is a different position in the employer's business that does not require the employee to be exposed to the hazard, etc.

- Whether there should there be a requirement for the employee to define what specifically they are advised would be safe, and not safe, to assist the employer in determining whether there are any appropriate safe jobs within the workplace.

- What would happen to the employee's entitlements if the appropriate safe job was a "higher duty" rather than the assumed lesser role. Whilst there is protection for the employee's wages when placed on lower duties for the risk period, there is no corresponding entitlement to any higher duties pay if the appropriate safe job was a "higher duty" position.

Schedule 3 – Anti-bullying measure

The Committee notes its earlier correspondence to the Committee Secretary of the House of Representatives Standing Committee on Education and Employment Inquiry into workplace bullying on 6 July 2012 and 9 August 2012. The Committee also refers to the evidence given by Ms Petrine Costigan and Mr Giri Sivaraman on behalf of the Committee at the Sydney Public Hearing on 10 July 2012. The Committee notes that in its correspondence it supported the definition contained in the draft Code of Practice titled "Preventing and Responding to Workplace Bullying" issued by Safe Work Australia as current at the time. This definition defined workplace bullying as repeated, unreasonable behavior directed towards a worker or a group of workers, that creates a risk to health and safety. The Committee notes that this is the definition that has been proposed in the Bill and supports the use of this definition. The Committee notes however as submitted in its correspondence that a single instance of unreasonable conduct, if sufficiently severe, could constitute bullying in the workplace.

The Committee notes that the Bill provides for an application to be made and dealt with by the Fair Work Commission within 14 days after the application is made. The Committee notes that its earlier submissions to the House of Representatives Inquiry included the comment that Fair Work Australia (now the Fair Work Commission) was an appropriate forum to deal with complaints about bullying and this is reflected in the Bill.

The Committee also notes that it advocated for an early intervention mechanism and conciliation process. The Bill provides an early intervention mechanism that includes conciliation. The Bill provides for the Fair Work Commission to conduct a conference or to hold a hearing which is consistent with the Committee's preference for an early mediation process and appropriate and common sense measures which empower employees and promotes the early resolution of these matters in the workplace.

The Committee notes that in its earlier correspondence, it stated that some matters in the context of a performance review or a direction to perform a lawful and reasonable task do not necessarily fall within the ambit of workplace bullying. The Committee notes that the Bill excludes reasonable management action carried out in a reasonable manner from the definition of bullying. This accords with the Committee's prior submission and current view.

Schedule 4 – Right of entry

The Committee notes the significant expansion of the right of entry by the Bill. The Committee supports giving the Fair Work Commission the express capacity to deal with disputes arising under the expanded right of entry, including such matters as frequency of visits and accommodation and transport arrangements.

Yours faithfully

John Dobson
President