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working women's centres

Committee Secretary
House of Representatives Standing Committee on
Education and Employment
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16 April 2013

Dear Committee Secretary

Submission to the House of Representatives Standing Committee on Education and Employment

Fair Work Amendment Bill 2013

National Working Women's Centres

The National Network of Working Women's Centres (NWWCs) are pleased to provide the following submission.

The NWWCs include the South Australian Working Women's Centre Inc. (WWC SA), the Northern Territory Working Women's Centre Inc. (NTWWC) and the Queensland Working Women's Service Inc. (QWWS). Each are community-based not-for-profit organisations that support women employees whatever their age, ethnicity or work status by providing a free, confidential and specialised service on work-related issues. All three organisations are small agencies that rely on funding from the Commonwealth, State (SA) and Territory (NT) governments.

The WWC SA opened in 1979, and NTWWC and QWWS in 1994, and each is very well known and respected by women across Australia for providing information, advice and education about work issues.

The NWWCs were in direct contact with over 7,000 Australian women in relation to their industrial relations queries or concerns during the year 2011/2012.

The NWWCs also conduct research and project work and are active in contributing to policy in the area of women and employment.

This submission is based on information collected from all three WWCs and we are happy to be contacted to provide further details.

Yours sincerely,

Rachael Uebergang & Anna Davis
Co-Coordinators
Northern Territory

Kerriann Dear
Director
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Sandra Dann
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Summary

NWWCs are very pleased to support many of the provisions of the Fair Work Amendment Bill 2013. NWWCs commend in particular:

- An increase in concurrent parental leave to eight weeks
- The expansion of the right- to request flexible working arrangements
- The introduction of consultation about changes to rosters or working hours
- The extension of the transfer-to-safe job entitlement to employees with less than twelve months service
- New protections for penalty rates for employees working overtime, unsocial, irregular or unpredictable hours, weekends, public holidays and shift work
- A proactive move to begin to tackle workplace harassment as an industrial issue

However, NWWCs are of the view that the Amendment Bill does not go far enough to protect victims of domestic violence by failing to include domestic violence as a ground for making an adverse action application. The Amendment Bill also fails to provide a real and enforceable right to request flexible working arrangements due to a lack of appeal or review process.

Schedule 1 – Part 2: Parental leave

NWWCs applaud the move to increase concurrent parental leave from three to eight weeks. We also welcome the change to allow couple employees to take the leave at any time within the first twelve months and to allow the leave to be taken in separate periods of two or more weeks, or less by agreement. We believe that these changes will cater to the needs of a more diverse group of families and increase the bonding and relationships that are necessary with the birth or adoption of a child.

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

NWWCs also applaud the expansion of the right to request flexible working arrangements to the parents of children who are school age or younger, carers, employees with a disability, employees who are older than 55, employees who are experiencing domestic violence and employees who support or care for a member of the employee's family or household who is experiencing domestic violence.

NWWCs are of the view however that a right to request without a process to appeal the decision of the employer leaves workers with rights on paper only. We find that the 'reasonable business grounds' defence has been used by many employers to refuse requests for flexible working hours, without any elaboration or definition of these specific grounds. In many cases, employers have not put their response in writing. In some cases employers have become hostile when a request is made and refused to recognise the entitlement at all.

Currently under the Fair Work Act an employee who has had their request for flexible work arrangements refused, whether reasonably or unreasonably, has **no** mechanism for appeal unless this has previously been agreed to in a contract or enterprise agreement. This severely limits the accessibility of the provision and has been a serious impediment to achieving greater work/life balance for employees. It also makes the field uneven for employees where employers only partially accommodate the request without providing sufficient response as to why they have done so.

We believe that there is the need for a clear process for both employees and employers to deal with those situations where a request is not assented.

NWWCs are aware of numerous cases where workers with legitimate needs for flexible working arrangements have had their request unreasonably denied or in some circumstances partially granted or "drip fed" with the need to constantly renegotiate conditions. These employees are often faced with being forced to work in ways that are clearly unsuitable in their circumstances such as: working more hours than they have capacity to, working only to the employer's modification, accepting demotion, converting to casual employment or resigning. Many of our clients report high levels of stress at this time.

> **Recommendation:** That the Fair Work Commission is empowered to deal with disputes and make orders where appropriate in relation to requests for flexible working arrangements.

We believe that these amendments are crucially important in addressing the current absence of enforceable provisions for workers seeking flexible work.

Schedule 1 – Part 4: Consultation about changes to rosters or working hours

NWWCs welcome provisions in the Amendment Bill that will ensure modern awards and enterprise agreements include terms that require employers to consult when changing employees' regular roster or ordinary hours of work.

We seek to ensure however that employees who are consulted and seek modifications to proposed roster changes on the basis of family responsibilities but whose requests for modifications are denied are able to lodge a grievance about any such decision by using the dispute resolution process in the enterprise agreement or modern award.

Schedule 1 – Part 5: Transfer to a safe job

We are very pleased that the transfer-to-a-safe-job entitlement has been extended to employees with less than twelve months service and that employees with more than twelve months service retain the entitlement to paid no safe job leave where no safe job is available.

We are concerned however for the vulnerability of employees who have less than twelve months service with their employer and where the employer is unwilling or unable to accommodate their need for a safe job. Such women will be left vulnerable to the early termination of their

employment during pregnancy on the grounds that no safe job is available for them. The commencement of early unpaid no safe job leave is of no effect when the employee does not qualify for, and is not granted, unpaid parental leave. In this instance, the early commencement of unpaid no safe job leave is effectively a premature termination of employment on the basis of the employer's unwillingness or inability to accommodate a pregnant employee.

Schedule 2: Modern awards objective

NWWCs applaud the introduction of new protections for penalty rates for employees working overtime, unsocial, irregular or unpredictable hours, weekends, public holidays and shift work. We believe the express inclusion of these protections into the modern awards objective will assist to ensure that such penalty rates are not eroded from modern awards over time.

NWWCs have become aware that there are modern awards that currently do not make provisions for penalty rates to be paid in circumstances where employees are required to work or are interrupted during their meal break. Such awards include the Hair and Beauty Industry Award 2010 [MA000005] Educational Services (Schools) General Staff Award 2010 [MA000076], and the Fast Food Industry Award 2010 [MA000003].

We are concerned that while other awards provide for penalty rates, some of these awards applying to industries that employ disproportionate numbers of women, and where industry practices typically discourage meal breaks, that there is not only financial disadvantage but workplace health and safety risks for tired workers.

Schedule 3: Anti-bullying measure

The NWWCs congratulate the Commonwealth Government on taking proactive steps to address the issue of workplace harassment.

NWWCs are aware of the persistence and prevalence of the problem of workplace harassment. We have, over more than 30 years, documented complaints of workplace harassment made to our centres by women. At the Queensland Working Women's Service these types of complaints consistently constitute over 25% of all reported types of complaints each year. At the NT Working Women's Centre workplace bullying has been one of the top four issues women seek assistance with for 19 years. Similarly, unacceptably high rates of reporting workplace bullying complaints is the experience of the Working Women's Centre SA, with complaints of this nature in the top four issues most complained of. This makes the issue of workplace harassment almost as common amongst our client group as complaints relating to termination of employment and up to ten times more common than complaints of sexual harassment. While it is difficult to fully comprehend the extent of bullying in the workplace we believe that our figures provide some indication of potential utilisation of this piece of legislation and will require substantial resources from the Fair Work Commission to effectively respond to the complex nature of such complaints.

NWWCs are aware that complaints of workplace harassment made to state and territory-based workplace health and safety offices are also extensive, and many agencies are stretched beyond their capacity to respond.

Some of the said complexities around the issue of workplace harassment exist because it is a multi-faceted, psycho-social phenomenon, which at times is limited to behaviours solely undertaken by individuals. However, it would be naive to believe that single interventions to stop these behaviours would be effective without acknowledging that such behaviours are fostered by hierarchical power relations and are systemic in nature.

Incidents of workplace harassment, along with complaints and investigations into these, can create stress and anxiety for all concerned in the workplace, not only the complainant and the alleged harasser, but co-workers, witnesses, investigators and representatives and can have a domino effect where effective risk assessment and intervention measures are not in place and fully utilised.

While this Bill would give the Fair Work Commission reasonably broad scope to determine how it deals with applications, the NWWCs are concerned that any interventions undertaken must be sensitive to the inherently complex nature of the issue and consider the potential impact on individuals, workplaces and the broader community.

NWWCs also strongly recommend that any process of conciliation or mediation (whether face to face or by phone conferencing) between applicants and the accused (or their employers) be carefully assessed for impact and appropriateness and that the applicant be provided with the right to participate in a conciliation or not. In some circumstances, from our experience in assisting clients, mediation or conciliation may not be appropriate. Brewer and Chase (2008) who both worked as Industrial Officers at Qld Working Women's Service conducted research that bought into question the appropriateness of a 'conciliation' approach in claims of sexual harassment and their paper (while limited to sexual harassment and not workplace bullying) highlighted research that found that many women are uncomfortable in a negotiation process that involves conflict. While recognising that conciliation may provide a forum for self-expression the paper proposed that it might potentially create more distress.[1]

For many clients who bring complaints of workplace harassment to the NWWC s it can be seen that opportunities to easily resolve issues have long passed due to lack of good policies and practices along with systemic poor treatment and neglect of complainants. Many clients have endured poor treatment in their workplaces for substantial periods of time by the time they commit to making a formal complaint.

It is apparent that the strong wish of many complainants (by the time they take formal action or seek intervention outside their workplace) is to remove both the accused harasser and their workplaces from their lives.

Another factor in considering the appropriateness of conciliation is that in our experience, in many cases, it is apparent that employers and managers are already aware of what has been occurring but

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[1] Teresa Chase and Mel Brewer, Sexual Harassment in the Workplace: Conciliated Outcomes, who really benefits from Conciliation? Presented at the 2008 Labour Law Conference Melbourne

have done nothing to prevent the behaviours and complainants have been labelled as trouble makers or as defective in some way.

While NWWCs have collected tens of thousands of complaints of workplace harassment, and while we encourage our clients to document as much evidence as possible, because of the often covert nature of bullying many situations come down to the client's word against the accused with no witnesses and the accused portraying themselves as the victim. In such circumstances more in-depth investigation into workplace practices and culture as well as the interviewing of other employees can provide more clarity as to what is going on.

Consistent with bullying behaviour, when allegations of workplace harassment are made to perpetrators or when confronted they may resort to denial, defensiveness, blaming the victim or use threats and hostility. Conversely, when allegations are proven many bullies continue to behave badly, defying attempts to performance manage them.

NWWCs consider that where the Fair Work Commission is satisfied that bullying has occurred (which may require investigative evidence) and conciliation would not be appropriate that direct sanctions or interventions that do not involve getting the parties together are necessary. However, when considering other interventions, such as orders, our experience is that chronic bullies do not often change their behaviour and maintain their antics over time. Actions such as transferring them often just introduce new targets for their negative conduct.

While countering workplace bullying through adversarial processes such as complaints or disputes is an important way to redress negative and unacceptable workplace behaviours, NWWCs strongly support the development of more proactive mechanisms to prevent these destructive behaviours.

Outside what is already provided by workplace health and safely agencies in the states and territories, we consider there is an educative and work practice enforcement role that the Fair Work Commission can play to create greater understanding in workplaces about what constitutes harassment and to ensure that fairness and consistency, as well as effective risk management strategies, are exercised by employers with shared assumed responsibilities from all persons in the workplace.

> **Recommendation:** NWWCs strongly recommend that the Bill recognises the need for best practice workplace harassment interventions by the Fair Work Commission, which should be drawn from practitioner experience and current research about effective workplace harassment and responses in relation to assessing, investigating, dealing with, conciliating or making orders in relation to complaints of workplace harassment.

Domestic violence

NWWCs congratulate the government on the inclusion of domestic violence in the right to request flexible working arrangements but remain concerned about the vulnerability of a broad range of workers experiencing domestic violence-related discrimination at work.

We welcome the confirmation that the NES right to request flexible working arrangements on the grounds of domestic violence would constitute a workplace right. As such the general protection provisions apply for adverse action against workers who access, or try to access, flexible working conditions. These will however offer only very limited protection to a narrow group of workers who are currently experiencing discrimination on the basis of domestic violence at work. It will remain that there is no protection for workers who experience discrimination and who will not request flexible working conditions.

NWWCs are concerned that the Human Rights and Anti-Discrimination Bill 2012, which has been returned to the Attorney-General's Department for redrafting, will not include the Senate Legal and Constitutional Affairs Committee (February 2013) recommendation to include domestic violence as a protected attribute. NWWCs request that the Minister now contemplate wider protections for victims of domestic violence under the Fair Work Act (2009) by naming the status of victim of domestic violence under Section 351(1) Discrimination of the Fair Work Act (2009).

> **Case study:** Mary—who worked as an attendant at a children's recreation venue. She had moved house following domestic violence, to escape her partner. She was worried that her ex-partner would try to come to work to find her because it was the only address he had for her. She told her boss what had happened and she asked the boss to have a photo of her ex-partner circulated to the staff so that they would be aware of him and could block his entrance. He refused to do this. He said, "I'm not your personal security guard." One day her ex-partner did indeed come to her work. He was let through and he verbally assaulted her in front of quite a lot of children and their parents. She was sacked. The boss said he was sorry, that he did not want to lose her but he had received complaints from parents following the incident and he said that his other staff felt unsafe and he had to protect them and to protect the children who frequented the venue. In this case she had no eligibility to claim unfair dismissal. She had worked there for only four months. Like many women escaping domestic violence, she had had a series of casual and short-term jobs. Even if she could meet the qualification period for unfair dismissal, the employer could mount a pretty strong argument for valid reason for the dismissal.[2]

NWWCs are of the view that Aboriginal women employees are particularly vulnerable to discrimination and termination of their employment because of their experiences as victims of

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[2] Anna Davis of the NT Working Women's Centre speaking to the Legal and Constitutional Affairs Legislation Committee - 23/01/2013 - Human Rights and Anti-Discrimination Bill 2012

domestic violence. Aboriginal women are *35 times* more likely to be victims of domestic violence and 10 times more likely to die due to family violence than non-Indigenous women (ADFVC 2010).[3] Aboriginal women are also approximately three times more likely to be unemployed.[4] It is the view of NWWCs that domestic violence is a significant contributing factor to the unemployment rates of Aboriginal women as domestic violence contributes to the inability of some Aboriginal women to apply for and retain employment. The inclusion of domestic violence in Section 351(1) of the Fair Work Act (2009) will enable NWWC Industrial Liaison Officers to speak with some confidence with our clients about the advantages of disclosing to their employer when domestic violence is impacting their ability to get to work, be safe at work, keep their colleagues safe at work and perform at work. It would be of enormous benefit to explain to Aboriginal women that their status as a victim of domestic violence is a protected attribute under the Fair Work Act (2009).

NWWCs wish to endorse the submission provided by the Australian Domestic and Family Violence Clearinghouse. The Clearinghouse raises a broader range of issues that relate to domestic violence than this submission. NWWCs support those views and recommendations.

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3 ADFVC 2010 Special Collections Indigenous people Viewed 4 October 2011
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