



St Vincent de Paul Society
NATIONAL COUNCIL *good works*

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Submission on the Fair Work Amendment (Tackling Job Insecurity) Bill 2012

Background

The St Vincent de Paul Society (the Society) is a respected lay Catholic charitable organisation operating in 148 countries around the world. In Australia, we operate in every state and territory, with more than 50,000 members and volunteers committed to our work of social assistance and social justice. The National Council is charged with representing the Society on a national basis. The Society is accountable to the people in our community who are marginalised by structures of exclusion and injustice.

On 17 December 2012, the Society was invited to make a submission to the Standing Committee on Education and Employment into the Fair Work Amendment (Tackling Job Insecurity) Bill 2012 (“the Bill”). The Society welcomes the opportunity to contribute to this submission.

General

The Society supports the purpose of the Bill: to “provide a process for ‘insecure’ workers to move to ongoing employment on a part-time or full-time basis”.¹ This new process reflects a

¹ Explanatory Memorandum, Fair Work Amendment (Tackling Job Insecurity) Bill 2012 2.

recommendation of the report of the Independent Inquiry into Insecure Work in Australia that ‘Fair Work Australia be granted jurisdiction to ... [make] “secure employment orders.”’²

It is widely accepted that positive employment is a determinant of health and wellbeing. Sadly, only 60% of Australian workers are currently employed in permanent, ongoing work.³ As such, Australia outranks almost all other OECD countries in our high rates of workers engaged in insecure employment.⁴

Through our work and mission helping the poor, the Society has long witnessed the multiple disadvantage faced by the many Australians who are in insecure work. Unpredictable pay, lack of security, no entitlements, and irregular hours all exacerbate the financial hardship and poverty, the poor mental and physical health outcomes, and ultimately the social exclusion caused by long-term barriers to stable employment. In addition to insecure work being a cause of exclusion, it is also a result of it: those with low occupational mobility and higher economic insecurity seem more likely to find themselves in insecure work,⁵ creating a vicious cycle of disadvantage and hopelessness.

On the other hand, as recognised in the Explanatory Memorandum to this Bill, permanent and reliable work has innumerable positive benefits, both for individuals and for society. As the World Health Organization has put it, “improved working conditions lead to a healthier workforce, improved productivity, and hence to the opportunity to create a still healthier, more productive workforce.”⁶ Moreover, secure working conditions for employees do not risk of compromising the Australian economy.⁷

Given the suffering it can cause, it is clear that insecure work is a human rights issue. Indeed, the *International Covenant on Economic, Social and Cultural Rights* (“the Covenant”) recognises “the right of everyone to the enjoyment of just and favourable conditions of work”.⁸ The Society believes that “just and favourable” conditions of work means terms of employment that both employer *and employee* have an ability both to negotiate, and to subsequently seek amendment of.

Finally, it is notable that the burden of insecure work falls on women more severely and in greater numbers than men,⁹ as recognised by the Explanatory Memorandum to this Bill. The Covenant also establishes for women the right to enjoy conditions of work not inferior to those enjoyed by men, and we believe that the fulfilment of this right in Australia includes helping women in permanent, flexible work, if that is what they want.

For these reasons, we support this Bill.

² Brian Howe (Chair), Independent Inquiry into Insecure Work in Australia, *Lives on Hold: Unlocking the Potential of Australia’s Work Force* (2012) 10.

³ Australian Council of Trade Unions, *Insecure Work, Anxious Lives: The Growing Crisis of Insecure Work in Australia* (September 2011) 6.

⁴ *Ibid* 9.

⁵ G Cheng and D Chan, ‘Who suffers more from Job Insecurity? A Meta-Analytic Review’ *Applied Psychology* (2008) 57(2).

⁶ World Health Organisation; Richard Wilkinson and Michael Marmot (eds), *The Social Determinants of Health: The Solid Facts* (2nd ed, 2003) 18.

⁷ Brian Howe (Chair), above n 2, 23.

⁸ Article 7. The Covenant was ratified by Australia in 1975, and is one of the treaties mentioned in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

⁹ Maria Ménéndez et al, ‘Is precarious employment more damaging to women’s health than men’s?’ *Social Science and Medicine* (2007) 64 (4); Leah Vosko, Martha Macdonald, Iain Campbell (eds), *Gender and the Contours of Precarious Employment* (2009) Routledge. USA and Canada.

Section 306K

We are concerned that only national system employees will be able to take advantage of the new scheme.¹⁰ It will therefore cover workers engaged by constitutional corporations, employees of the Commonwealth, those working for a body corporate incorporated in a Territory of Australia, and finally employees in particular – Federal – areas, such as air travel.¹¹ States can refer parts of their employment-regulation powers to the Commonwealth,¹² and under this process all workers in Victoria,¹³ and all private-sector workers in New South Wales, South Australia, Queensland, and Tasmania,¹⁴ will also have access to the new scheme.

However, this leaves excluded from the new regime many workers in Western Australia, and state and local government workers in New South Wales, South Australia, Queensland, and Tasmania.¹⁵

The Society thinks it is important that Western Australia receive encouragement to refer that state's powers to the Commonwealth. Insecure workers in Western Australian should have the same rights as workers in other states to apply to their employer, and to Fair Work Australia, for secure work. We also encourage ongoing discussions between the Commonwealth and all States regarding the harmonisation of state and federal laws so that insecure government employees at the state level can also receive the benefit of this reform.

Sub Paragraphs 306N(2)(a)(iii), (iv), (v)

Under subparagraphs 306N(2)(a)(iii), (iv) and (v), orders made by Fair Work Australia may relate to prospective casual or rolling contract employees, an employee who already has a secure employment arrangement, or a prospective employee who would have a rolling employment arrangement.

First, the Society notes that the definition of a “prospective employee” is not clear to us. The term is defined variously throughout the Act,¹⁶ and it seems it may mean either of the following:

- 1) A particular individual who is undergoing a recruitment process, but it not yet an employee; or
- 2) Anyone who may one day become an employee of the company (presumably, this would extend to almost anyone).

¹⁰ Draft section 306K.

¹¹ Definition in section 14, *Fair Work Act 2009* (Cth).

¹² Presumably referrals were made under Part 1-3 of the *Fair Work Act*, either Division 2A or 2B.

¹³ Fair Work Ombudsman, *Who is Affected* (17 September 2010) Fair Work Ombudsman (accessed fairwork.gov.au/employment/national-employment-standards/pages/who-is-affected.aspx on 01 February 2013).

¹⁴ Fair Work Ombudsman, *The Fair Work System* (29 May 2012) Fair Work Ombudsman (accessed fairwork.gov.au/faqs/the-fair-work-system/pages/default.aspx on 01 February 2012); Fair Work Ombudsman, *Workplace Laws Go National Factsheet* (4 January 2013) Fair Work Ombudsman (accessed fairwork.gov.au/resources/fact-sheets/conditions-of-employment/pages/workplace-laws-go-national-fact-sheet.aspx on 01 February 2013).

¹⁵ Fair Work Ombudsman, above n 14, *The Fair Work System*.

¹⁶ For example: section 193(5), in relation to “prospective award covered employees”; section 256, in relation to a greenfields agreement: “a reference to an employer, or an employee ... includes a reference to a person who may become an employee”; section 333A, in relation to guarantees of annual earnings, appears to apply to a person who has been offered a position already; section 341 (3): “A prospective employee is taken to have the workplace rights he or she would have if he or she were employed in the prospective employment by the prospective employer.”; section 342, in relation to adverse action taken by a prospective employer against a prospective employee.

The courts, in considering the definition of “prospective” in other sections of the Act, have favoured the first interpretation: a “prospective employee” is a person who an employer is actively considering for employment, or is currently being offered an employment contract (after applying and interview for a job).¹⁷

On the other hand, the power given to Fair Work Australia under proposed paragraph 306R (1)(f) of the Bill may favour the latter meaning: the power is intended to cover not particular prospective employees, but rather the entire class of anyone who may later become a prospective employee.

We believe this could be clarified.

Who can make a request/application?

It is unclear to us why “[c]asuals are eligible to make a request *regardless of length of service*” (emphasis added),¹⁸ but insecure employees on a contract are only able to make a request once that contract becomes a rolling contract (that is, once it has been renewed at least once).¹⁹ We believe that this discriminates against contract workers.

The same criterion should apply to both casuals and contract workers: the right to make a request to the employer, and then application to Fair Work Australia, regardless of length of employment relationship.

Increased resources to Fair Work Australia

We anticipate that the creation of a new right to apply to Fair Work Australia for a secure employment order will lead to an increase in the workload of Fair Work Australia. As such, we call for the Federal Government to heed the call of the Independent Inquiry into Insecure Work in Australia,²⁰ and provide extra funds to Fair Work Australia to help with enforcement and compliance of the new regime.

¹⁷ See, for example, *Vij v Cordina Chicken Farms Pty Ltd* [2012] FMCA 483 at [66]; *Rhodes and others & Jj Richards & Sons Pty Ltd* [2001] NSWIRComm 1063; *Burnie Port Corporation Pty Ltd v Maritime Union of Australia* [2000] FCA 1768; *Raytheon Australia P/L & Ors* [2008] SAEOT 3.

¹⁸ Explanatory Memorandum, Fair Work Amendment (Tackling Job Insecurity) Bill 2012 2.

¹⁹ Draft paragraph 21A (2)(b).

²⁰ Brian Howe (Chair), above n 2, 39.