Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

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11 November 2005

THE WOMEN LAWYERS' ASSOCIATION OF NEW SOUTH WALES

The Women Lawyers' Association of New South Wales (WLA NSW) is the peak representative body of women lawyers in New South Wales. Our membership is diverse and includes members of the judiciary, barristers, solicitors, government bodies, corporations, large and small city and country firms, legal centres, law reform agencies, academics and law students.

Since our establishment in 1952, WLA NSW has been dedicated to improving the status and working conditions of women lawyers in New South Wales. We have been active in advocating for and promoting law reform, frequently making submissions on anti-discrimination law, industrial equity, criminal law, women's health, legal aid, child care and gender bias in the legal profession.

Our dedication to equal opportunities for women in the legal profession is demonstrated through the various networking and mentoring programs we have implemented and/or supported, and through our support for and promotion of equal opportunity policies for women in the profession, such as the National Equality of Opportunity Briefing Policy adopted by the Board of Australian Women Lawyers on 20 September 2003.

The weight of our experience informs our submission.

CONDUCT OF THE INQUIRY INTO THE WORKPLACE RELATIONS AMENDMENT (WORKCHOICES) BILL 2005

While WLA NSW is grateful to the Senate Employment, Workplace Relations and Education Legislation Committee (the Committee) for granting us an extension to make this submission, we hold serious concerns about the manner in which the Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005 (the Inquiry) has been conducted.

We note that the Workplace Relations Amendment (WorkChoices) Bill 2005 (the Bill) was tabled in Parliament last Wednesday, 2 November 2005. The due date for

submissions to the Inquiry was 9 November 2005, a week after the 687 page bill was tabled in Parliament. The Committee is holding up to five days of public hearings at Parliament House, Canberra, in the week commencing 14 November 2005 and will report to the Senate on 22 November 2005.

Submitters to the Inquiry who have not been granted an extension, have had at most week to examine the wording of the Bill and make a submission. WLA NSW has had just on 11 days to make its submission to the Inquiry, and feels that it simply has not been provided with sufficient time to consider the ramifications of the specific wording of the Bill. Some who have been calling on federal government to release the draft Bill since the current proposed reforms to the federal industrial relations system were first announced, may find comfort in the release of the draft Bill. However, WLA NSW is of the view that the timing of the release of the draft Bill, and the timeframe of the Committee's Inquiry, are such that no satisfactory public consideration of the provisions contained in the Bill is allowable.

As a professional organisation of lawyers, WLA NSW notes the importance of ensuring that a complex bill such as the Workplace Relations Amendment (WorkChoices) Bill 2005, which potentially affects the economic and social welfare of as much as 85% of working individuals and their families, is exposed to adequate scrutiny by members of the public and the legal profession. The need for transparency in government's exercise of its legislative functions dictates that this be the case.

CONSTITUTIONAL CONCERNS

Until the mid 20th century federal IR laws were made by reference to the Conciliation and Arbitration power: s.51 (xxxv). The federal government was limited to hearing disputes in IR matters that extended beyond the limits of any one State. In short, the States retained the bulk of IR. In 1983 the High Court of Australia overturned the restrictive or narrow interpretation of the labour power in the Constitution in the Australian Social Welfare case. Prior to this case for nearly 100 years, both Federal and State labour regimes were almost the same; both mostly dealt with disputes between employers and employees and regulation of industries was mostly done by way of industry driven wages and rates.

After 1990, the IR system became more complex and the federal arena needed an "industrial dispute" or a situation that would give rise to one. In the 1956 and 1957 Boiler Makers case the law was settled that under federal labour law arbitral and judicial functions had to be undertaken by separate institutions. Put simply Federal Courts were prohibited from exercising judicial powers if they were arbitrating a dispute.

While the Trade and Commerce power has been used for some decades for laws regulating merchant seamen, waterside workers and airline crews; the constitutional framework was supported because it was regarded that the terms and conditions of employers and employees contained many aspects of interstate and overseas trade and commerce. Nevertheless, resolution of competing group interests through established conciliation and arbitration with mostly resultant award regulation was maintained.

The current proposal outlined by the Government to rely on the Corporations power to enact one national labour system, if it comes to fruition (and is not either passed by the Federal Parliament or ruled unlawful by the High Court), would be a most stark legal and policy change indeed. Whilst there are arguments for developing a more unified and simpler IR model, this does not necessarily have to mean a stand alone federally based model. Where is there evidence that the current system of federal and state models is a major obstacle to diminishing labour productivity? Many incorporated employers choose to operate under state labour laws. It would seem that there is ample room to simplify IR in the existing labour power of the Constitution to develop a co operative national labour system.

Reliance on a unified IR system under the Corporations power would then see the development of labour law in the words of that power; which does not include terms relating to people, (both men and women) or disputes over work or conditions. The Corporations power is not by its nature purposive, it is an object power. Conceivably if such an IR regime were enacted then for employees of multi nationals their rights could be governed in part by the individual policies of such companies with limited scope of reference or accountability to Australian law. WLA NSW would be most concerned at such a development as Australian laws, rights and values in IR to date adequately reflect basic rights and values the community expects.

The Government has made comment over recent months that Australia needs to compete fiscally with China and India and that the overhaul of IR is linked to that process. Whilst remaining robust fiscally is a proper course of action, it should be noted that there would have to be limits to competition with a still totalitarian Communist State such as China. Furthermore, India, whilst a common law country does not have the rights and conditions of employment enjoyed by Australians.

WORK AND LIFE BALANCE AND PAY ISSUES

Work and Family Balance for Women and Maternity Leave

There are many pressing issues facing Australia's labour market at present, including an ageing workforce, skills shortages and a declining birth-rate. Women are a particularly important, yet vulnerable segment of the labour market. What is needed is better and more equitable utilisation of women in the workforce. The barrier is the history of lower pay, fewer entitlements, less job security compared to men, and, further lack of proper support for women combining paid employment and motherhood.

At the beginning of the 20th Century about 20% of women were in paid work, by 1947 it was 22%. The take off of the 1960's bought us to today where some 60% of women are in the paid workforce. Further, some 71% of women in prime childbearing years (25 – 34 years) are in paid work. This is an increase of 31% over the past 20 years. While the Government has argued for an increase in the birth-rate, there are few incentives to allow women to combine work and motherhood. Whilst jobs may be kept for 12 months, paid maternity leave is rare and is more accessible to higher paid workers. Some 65% of managers and 54% of professional women get some form of paid maternity leave, but only 18% of clerical, sales and service workers get paid maternity leave and only 0.4% of casual workers get paid

maternity leave. And it is women who make up the bulk of the casual workforce, but less than 1% are entitled to paid maternity leave.

Should the federal government's proposals be adopted, it is envisaged that there will be an increase in the casual workforce generally with an even greater swell in the number of women casuals. This projection, together with the increase in AWA's, it can been seen, will not improve maternity or paternity leave entitlements.

Australia is behind both the UK and New Zealand which have extensive periods of paid maternity leave. Should only 4 matters be allowed in awards and should the removal of maternity leave from allowable award matters happen, then such entitlements become undermined as the individual has to negotiate with their employer and the matter will fall on company policy and managerial discretion. Finally, there is no paid paternity leave in Australia to encourage fathers to parent, despite obvious social shifts occurring in Australia.

WLA NSW continues to advocate for paid parental leave for men and women. As we stated at page 7 of our submission, dated 14 April 2005, to the Inquiry into Work and Family Balance conducted by the House of Representatives Standing Committee on Family and Human Services:

> In December 2002 Australian Women Lawyers (AWL) made a submission in response to the Options for Paid Maternity Leave Interim Paper 2002 of the Human Rights and Equal Opportunity Commission. WLA NSW continues to support the view submitted by AWL that paid maternity leave should be paid parental leave so that it is available to both men and women who are in the paid workplace and who are self-employed. Paid parental leave should be government funded, it should not be subject to means-testing, and it should be available for 14 weeks in accordance with the International Labour Organisation (ILO) standard, which has been internationally recognised as the appropriate period under Articles 4 and 6 of the ILO 183 Maternity Protection Convention 2000.
>
> Australia has not ratified ILO 183, but all OECD countries apart from Australia and the USA provide paid maternity leave: The Law Society of New South Wales, *After Ada: A New Precedent for Women in Law*, 29 October 2002, at 25. In Denmark employees are entitled to 30 weeks maternity leave at full pay; in Norway, 42 weeks at full pay; in Finland, 52 weeks at 70% pay; and in Sweden, 64 weeks at 63% pay: The Law Society of New South Wales, *After Ada: A New Precedent for Women in Law*, 29 October 2002, at 25. Since 1 July 2002 paid parental leave has been introduced in New Zealand providing for 12 weeks paid leave: The Law Society of New South Wales, *After Ada: A New Precedent for Women in Law*, 29 October 2002, at 25.
>
> The 14 weeks ILO standard should be set as the universal minimum standard for parental leave in appropriate federal, state and territory legislation, such as Division 5 and Schedule 14 of the *Workplace Relations Act* 1996 (Cth), and Part 4 of the *Industrial Relations Act* 1996 (NSW). We recommend that paid parental leave be paid at the rate of the minimum wage level to all parents who are the primary carers of their child, and who have spent the previous 12 months in the labour force. This should be paid pro rata for those earning less than the minimum wage. Employers should be free to "top-up" the payment if they wish.

Accordingly, **WLA NSW recommends** that necessary amendments be made to Division 6 of the Bill to:

- remove the distinction between paid maternity and paternity leave; and
- set the 14 weeks ILO standard as the minimum standard for paid parental leave under the Workplace Relations Act 1996 (Cth) (WRA).

Carer's Leave

The Federal Government maintains the family unit as the most important social structure, yet it provides little incentive to enable women and men to combine work and family and it would seem that it is about to get harder for single mothers.

Women are the primary care givers and paid work needs to be worth their while. The proposals do nothing to address the pressing labour-management problem today – labour shortages and the need to better utilize existing human resources here in Australia. These proposals appear to be focused on employer demand – reduce wages to make certain groups more attractive to employers. And it will be women who form the bulk of those groups.

WLA NSW notes that anti-discrimination legislation, such as the Anti-discrimination Act 1977 (NSW) (ADA), which promotes equal opportunity for employees in the workplace, recognises step-children, step-parents, step-grandparents, step-grandchildren and step-siblings in the definition of "immediate family member" for the purposes of anti-discrimination employment law.

The definition of "immediate family" under the Bill includes step-children but does not include step-parents, step-grandparents, step-grandchildren and step-siblings. In order for:

- the diversity of family types in the contemporary context to be recognised,
- consistency in employment legislation to be maintained, and
- the WRA to reflect legislation maintaining equal opportunity in the workplace,

WLA NSW recommends that the definition of "immediate family" in the Bill be amended to include step-parents, step-grandparents, step-grandchildren and step-siblings.

Some employers have gone beyond the list of relationships recognised under the ADA definition of "responsibilities as a carer": Ant-discrimination Board of New South Wales, "Carer's Responsibilities and Flexible Work Practices," [Internet – http://www.lawlink.nsw.gov.au/adb.nsf/pages/carersflex. (Accessed 28 March 2005.)].They have been willing to take into account an employee's responsibilities to care for:

- a niece or nephew;
- aunt or uncle;
- cousin; or
- a friend who is not related to them who they don't have a legal guardianship arrangement for but who, for example, needs their care or support because they are old and frail with no-one else to care for them, or because they have a disability and have no-one else to care for them: Ant-discrimination Board of New South Wales, "Carer's Responsibilities and Flexible Work Practices," [Internet – http://www.lawlink.nsw.gov.au/adb.nsf/pages/carersflex. (Accessed 28 March 2005.)].

WLA NSW submits that if the WRA is to be responsive to modern circumstances in which there is a growing imposition of responsibilities involving elder and disabled care on employees, consideration must be given to expanding the types of relationships of care recognised under the act. For this reason, **WLA NSW**

recommends that consideration be given to amending Division 5 of the Bill so that the categories of relationships of care recognised under the WRA are expanded, and that the above list of relationships of care be considered in doing so.

LOW PAY

The position of the lowest paid has deteriorated through the 1990s and into the 2000s with the gap between the bottom and top groups of wage earners increasing: ABS Household Income and Income Distribution, Australia 6523.0. Furthermore, women, indigenous, migrant and young workers and those employed in small businesses, non-unionised workers, are more likely to be low paid. Women are more likely to be low paid; the average weekly earnings for males in November 2004 were $1032 while for women it was $875. Research shows that 3/4 of low paid employees were women, with a 1/5 to ¾ also from non-English speaking backgrounds: Buchanan J and Watson I A Profile of Low Wage Employees, Sydney University, Australian Centre for Industrial relations and Research. Women in blue collar occupations were particularly likely to be low paid. Low pay produces an income distribution that is inherently unjust, is very hard on working families and hinders economic development.

It is noted that low pay is not necessarily linked to the employer's ability to pay. Many of the industries where low pay is found are heavily monopolised and owned by transnationals companies; this is the case in contract cleaning, retailing and catering - industries, predominately where women are employed already in more often than not, in casual, low paid jobs.

Further, where superannuation is based on past earnings, low pay continues into retirement.

AUSTRALIAN FAIR PAY COMMISSION

Under international law, Australia, as a member of the United Nations International Labour Organisation is obliged to ensure that workers are adequately paid for their labour. Therefore Australia is obliged to provide machinery for setting minimum wages.

The proposals to change how the minimum wage is to be set and the likelihood that adjustments may not be as frequent or as reasonable as current arrangements, will make the relative costs of child care more problematic both for parents and for child care workers. It seems there are many mothers choosing not to return to work because it is not worth their while and so their skills and experience and the potential economic independence of women in society are being lost.

The replacement of the Australian Industrial Relations Commission to set minimum wages with the Fair Pay Commission and to set a new benchmark of the minimum standard for a No Disadvantage Test for individual agreements points to lower wage outcomes for women workers. In the most recent decision the federal government advocated a mere $11.00 per week increase, whereas the IRC set an increase of $17.00 per week.

The Australian Fair Pay Commission is based on the UK Low Pay Commission. The minimum wage in the UK is 48% of full time median earnings while in Australia, at present, it is closer to 60%. Where the minimum wage is set by the state or state appointed tribunal, rather than an independent tribunal (to date the Australian IRC) the state set minimum wage has not kept pace with inflation. This has been the case in NZ and in the US, the federal minimum wage is $5.15 per hour and it has not been adjusted for years.

It seems that the federal government has adopted an OECD report which recommended that Australia cut its minimum wages to make certain groups more attractive to employers: the Economic Policy reforms: Going for Growth. In essence, women and other low paid workers can expect lower increases in the minimum wage in future so the minimum wage will decrease relative to the average wage.

INCREASED USE OF INDIVIDUAL CONTRACTS

Women will be worse off than men under individual agreements. In 2004 in the federal system, women on registered individual agreements were earning an average if $20.00 per hour compared to their male counterparts who were earning an average of $25.10: ABS 6306.0. Further, that gap in men's and women's average hourly earnings under individual agreements, increased from 12.7 % in 2002 to 20.3 % in 2004, while men's average hourly rates had increased from $23.70 to $25.10; over this time women's average decreased from $20.70 to $20.00.

PAY EQUITY

While the federal government says its policies are about equity, the policy it is advocating will only exacerbate the gender wage gap with the encouragement of individual agreements and diminish the significance of awards. At present women receive approximately 85% of male wage and the government's proposals to change wage determination will exacerbate this.

The federal government's proposals make no mention of ways to redress the gender wage gap as they encourage individual agreements and diminish the significance of awards. The effective implementation of minimum wage protection is critically important for gender pay equity. The potential abolition of state tribunals will be a further loss in this respect. Historically State industrial jurisdictions in NSW, Queensland WA and Victoria have all played an important role in addressing the very never-ending problem of pay equity by conducting reviews of gender pay inequity. In NSW the State Librarians in 2003 saw a redefinition of pay equity in a traditionally "women's" profession; the main thrust of the argument was a comparative analysis of the wages of (government employee award) for scientists – a predominately "male" profession.

Wage Gaps within the Legal Profession

(i) The Gender Gap in Pay

WLA NSW has stated at page 4-5 of its submission to the Inquiry into Work and Family Balance that:

- The number of bright young women graduating from law schools is greater than ever, yet the gender gap in pay remains. In many instances this serves as a disincentive to women having children earlier in their career life while they build an income base for the years when they expect to have a family. In the income year 2001-2002 male and female solicitors reported significantly different income levels irrespective of type of practitioner, location of practice and years in practice: The Law Society of New South Wales, *After Ada: A New Precedent for Women in Law*, 29 October 2002, at 8. The average income for female solicitors was $75 700 compared to $92 000 for male solicitors in that financial year.

  In 2004, 18% of practicing barristers across Australia were women, but they received only 6% of fees from government panel briefs: statistic published by Victorian Attorney-General Rob Hulls, referred to in "How to Rip Through the 'Silk Ceiling'", *Lawyers Weekly*, 15 October 2004, at 18. The number of promotions which secure larger pay dollars continue to serve as a statistic disproportionately against women: in 2001 7.2% of female solicitors were partners while 27% of male solicitors were partners: The Law Society of New South Wales, *After Ada: A New Precedent for Women in Law*, 29 October 2002, at 35. Generally across the profession, there is a fall in the percentage of solicitors practicing as partners, with the percentage of men practicing as partners steadily declining: The Law Society of New South Wales, *After Ada: A New Precedent for Women in Law*, 29 October 2002, at 35.

  Female solicitors do not share the same career aspirations as their male colleagues when it comes to partnerships. 50% of female respondents to the Law Society of New South Wales 2002 Remuneration and Work Conditions Survey identified commitment to family/personal responsibilities, compared to 23% of men, as a reason why they thought it was unlikely or very unlikely that they would become partners: The Law Society of New South Wales, *After Ada: A New Precedent for Women in Law*, 29 October 2002, at 15-16.

(ii) Wage Gaps Across Sectors within the Legal Profession

WLA NSW has further stated at page 5 of its submission to the Inquiry into Work and Family Balance that:

- Many women lawyers are segregated in areas of law traditionally seen as "female", such as constitutional/administrative law and family law: Australian Law Reform Commission, ALRC 69 Part II Equality Before the Law: Womens Equality, 1 October 1994, [Internet – http://www.austlii.edu.au/au/other/alrc/publications/reports/69/vol2/ALRC69.html. (Accessed 8 April 2005).], at [9.23]. The experience of women lawyers reflects the experience of women in the workforce generally, with the areas of employment dominated by women characterised by lower status and pay: Australian Law Reform Commission, ALRC 69 Part II Equality Before the Law:

Womens Equality, 1 October 1994, [Internet – http://www.austlii.edu.au/au/other/alrc/publications/reports/69/vol2/ALRC69.html. (Accessed 8 April 2005).], at [9.23].

On 1 August 2002, 66% of practicing women solicitors were in private practice, 14% practiced in the Government sector and 17% in the corporate sector The Law Society of New South Wales, *After Ada: A New Precedent for Women in Law*, 29 October 2002, at 7. For the taxable income year ending 20 June 2001, the mean income for each sector was: $67 000 in the private sector, $70 000 in the Government sector and $ 102 000 in the corporate sector: Law Society Report: Remuneration and Work Conditions", *Law Society Journal* (NSW Australia), March 2002, [Internet – http://www.lawsociety.com.au. (Accessed 31 March 2005).].

The effects of segregation are more pronounced when the later entry of women into the profession and their consequent accumulation in the lower ranks of the profession are taken into account.

Conclusion

WLA NSW submits that the Bill does not introduce reforms that will address issues of pay equity faced by women in the legal profession, or by women in other professions or trades. In addition to this, the introduction of a federal system of AWAs will enforce standards within particular sectors and will not address issues of pay equity across the range of sectors in which the legal profession provides its services.

UNFAIR DISMISSAL

WLA NSW notes that specific terms of reference were not provided for the Inquiry, but that paragraph 2 of the amended motion for the reference of the Bill specifies that:

> The inquiry not consider those elements of the bill which reflect government bills previously referred to, examined and reported on by the committee; namely those elements which relate to … reform of unfair dismissal arrangements [amongst other things].

In spite of this, WLA NSW wishes to highlight in any case our strong concerns as regards the proposed changes to the unfair dismissal laws.

Although termination on the grounds of sex and pregnancy are both still covered by the unlawful termination provisions, it is notoriously expensive and legalistic to pursue an unlawful termination claim. The Government's plan to offer $4000 to eligible applicants does not go far enough to provide a user-friendly means for redress for such terminations - many woman will be excluded from receiving the assistance, and in any event, significant expense will still need to be incurred even if assistance is received.

The unfair dismissal regime has provided a much more accessible form of redress, and it is for this reason that women have often opted to frame claims as unfair

dismissals rather than bring them under unlawful termination provisions. Unfair dismissal laws also cover a wide variety of dismissals which would fall short of being provable as dismissal on the ground of sex, but which are nevertheless harsh, unjust or unreasonable and which the average Australian would condemn. To give an example: dismissing a woman in order to replace her with a male friend or relative of the employer, because of their relationship with the employer but not their sex per se, would be unfair dismissal under the existing laws, but may be difficult to argue as an unlawful termination (putting aside the cost and time consuming nature also involved in pursuing such a claim).

Under the proposed changes, if the woman was not employed by an employer with more than one hundred employees and/or had not been employed for 6 months or more, she will essentially be left with little recourse. The existence of unfair dismissal laws which apply to employees across the board encourages employers to use transparent, merit based principles in firing decisions, and the proposals regarding unfair dismissal will significantly erode this incentive.