Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

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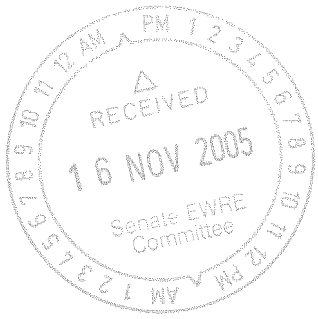

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Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

Thank you for the opportunity to make a submission for the Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005.

Combined Community Legal Centres Group (NSW) Inc. (CCLCG) has 40 member Community Legal Centres (CLCs) that work for the public interest, particularly assisting people who, for a range of reasons, have difficulty in accessing the legal system, including people with disabilities, women, young people, Indigenous people and people from a non-English speaking background, among others. CLCs provide legal services including information, referral and advice, strategic case work, community legal education and law reform campaigns. CCLCG is a not-for-profit organization.

Employment law advice is one of the major areas of work for CLCs. The demand for employment law advice is commonly in connection with unfair dismissals or denial of access to proper wages and entitlements.

We endorse the submissions from the National Association of Community Legal Centres to the Inquiry, which reflects the key concerns of the proposed industrial relations amendments from community legal centres all around Australia. We also endorse the submissions made by individual community legal centres in NSW including, Redfern Legal Centre and Illawarra Legal Centre.

We would like to take this opportunity to further highlight some of the concerns that the proposed amendments raise for our clients in NSW. The basis of these concerns has come from the range of legal issues community legal centres in NSW address through their casework and advice on an on-going basis, so where possible we have provided actual case studies (without personal references) to illustrate how these issues occur in practice.

A principle concern arises from a large proportion of our clients being from marginalised or disadvantaged groups in the community – single mothers, Aboriginal and Torres Strait Islander peoples, people with disabilities etc. These client groups, due to their existing disadvantages, face even greater hurdles in the employment market, where they often have comparatively less bargaining power than potential or actual employers. We are concerned that the proposed reductions in overall standards for employment

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conditions and the reduction of avenues for redress for employees working in small businesses (less than 100 employees) will further disadvantage these groups.

Community legal centres in NSW are concerned to ensure that CLC clients are protected under the industrial relations reforms being introduced in federal parliament. This includes:

1. Having **safeguards** in place to ensure a fair system of workplace relations to guarantee equal bargaining powers for workers and to protect the balance between family and work.

2. Protecting **working conditions and workers rights** as these are a part of the foundations of developing an economically competitive labour market.

3. **Maintaining unfair dismissal laws** for small business to safeguard the rights of our clients particularly marginalised workers such as people from a non-English speaking background, women and people with disabilities. These laws also serve to improve employers' knowledge of rights and responsibilities in the workplace, which can address poor – and sometimes dangerous - employment practices.

4. Making available **a specialist no-cost jurisdiction**, which is necessary to ensure a simple, effective and independent conciliation and arbitration forum is available to everyone.

The recommendations outlined below will provide a balance between employers and employees rights while ensuring a simple, fair and flexible system of industrial relations throughout Australia.

1. Unfair dismissals

While unlawful terminations will still be protected under the law, unfair dismissals laws will no longer be applicable to small businesses (defined as those with up to and including 100 employees) under the new s 170CE(5E). Abolishing unfair dismissal laws will impact on 3.7 million Australians working in these businesses *(ABS May 2004)*. This will exclude the great majority of CLC clients.

Community legal centres represent many vulnerable people, for whom the loss of a job can have extremely serious consequences given their economic situation. Further, our unfair dismissal clients often present with a range of serious employment issues, which only come to light once they seek legal advice for their termination of employment. These issues include serious breaches of occupational health and safety laws, discrimination and underpayment.

The removal of a challenge to termination for 'genuine operational reasons' under the new s 170CE(5C) will also affect many of our clients who have been made redundant in circumstances that are currently open to challenge, for example on grounds of procedural fairness. These include clients made redundant with no notice and/or selected for retrenchment after raising concerns about rates of pay or other workplace conditions.

It is clear that the loss of this remedy will have profound effects on those members of our community who are already marginalised and will allow poor and often dangerous workplace practices to remain undetected. The public policy concerns should be acknowledged as any perceived savings arising from this amendment will surely impose significant social and economic costs elsewhere.

Case Study 1:
A 19 year old male employee was dismissed for losing a key and when a discussion arose he was physically assaulted. He worked for a small business (under 100 employees). He went to the NSW IRC for unfair dismissal. The case was settled prior to arbitration for 6 weeks wages.

If unfair dismissal laws were removed he would have no avenue for redress.

Case Study 2
A 47 year old female employee worked in a clothing factory for more than 8 years. She was given a letter with one week's notice in her payslip. She was advised that there was no longer a position for her in the company. There was no notice or warning nor any attempt to find her another position. She had not received any penalty rates for her overtime.

If the unfair dismissal laws were removed, she would have no remedy for her dismissal. She would be able to claim overtime entitlements but only by taking it to the Local Court.

Case Study 3:
A female employee in her late thirties worked for a security firm (small business), as a permanent part-time employee. She worked 10 hour shifts with no time for breaks. She experienced gastric and stomach upsets which required her to go to the bathroom. As a result she missed an alarm for the first time in her employment history. No one was harmed. She was fired the next day without any consideration to the circumstances or previous work history.

Under the proposed changes workers in small businesses can be summarily dismissed, without recourse to legal redress. This will result in uncertainty and instability in the lives of many workers. She might be able to argue for contractual remedies but this is a comparatively expensive and time-consuming process.

The proposed Industrial Relations changes will make it hard for a person to prove whether or not they were fired for misconduct, as the only legal protection that they will have is if they are fired "unlawfully". Further, many people will not have the financial resources to challenge their sacking in the courts and prove they were not fired for misconduct. This becomes significant when viewed in conjunction with the proposed "welfare to work" changes, under which a person will also face an immediate eight week non payment period if they are "dismissed for misconduct". The intersection of Industrial Relations reform and the "welfare to work" package means there is a very real risk that a person with dependent children or a person with a disability could be left with no income for an eight week period.

Recommendation: Retain unfair dismissal laws and provide better education for small business employers on unfair dismissal laws such as the education campaign when the GST was introduced.

2. Australian Workplace Agreements (AWAs)

Employees and employers have unequal bargaining powers, particularly unskilled/casual employees where the majority are women, young people, people from non-English speaking backgrounds or people with disabilities. The proposed replacement of the award with only 5 minimum conditions will give employees lesser bargaining power and make them more vulnerable to exploitation by employers.

The removal of the *No Disadvantage Test*, will mean there will be less protection for Australian workers and future AWAs could lead to lower rates of pay, and lower working conditions.

Case Study 4:
A 30 year old male employee was disadvantaged under the AWA approved by OEA. Under the AWA: For the same 6 hour shift night span shift on a Saturday night (6-12pm) wages would be $138.44 under the Award and 118.74 under the AWA. For that shift on a Sunday the difference is even greater - $181.92 under the award and only $118.74 under the AWA. Further under the AWA he is only entitled to 7 days sick/carers leave per year, when he would be entitled to 10 days under the award. He is also not paid leave loading under the AWA.

Case Study 5:
AWA Permanent farm employee working on flat hourly wage rate, approved by OEA, states 'The hours paid .....will be limited to.....49.5 hours paid/week' then later states 'The employer agrees to pay the employee at the rate of 37.5 'hours paid' per week of annual leave'. A 46 year old male employee who had been working with the employer for 20 years was given this AWA.

In other cases such as these, the removal of the 'no-disadvantage test' will mean that more of these clauses will be approved where the employee is not able to negotiate effectively on their own behalf.

From the current range of AWAs, there is a clear trend of lower working conditions in AWAs:

- 93% of employees in the private sector on individual contracts have no additional family friendly rights for workers
- 1 in 20 workplaces provide paid paternity leave
- 1 in 25 workplaces provide 'purchased' leave such as extra leave during school holidays[1]

Combined with the removal of the unfair dismissal laws, employees are vulnerable to being forced into a position of either accepting an agreement that does not include adequate conditions, as provided under an award, or losing their job.

[1] www.aph.gov.au/house/committee/fhs/workandfamily/subs/sub053.pdf

2.1 Concerns for Welfare Recipients

Added to this is the concern that, if a person refuses to accept a job on the grounds they disagree with the contents of an AWA, they may face an eight-week suspension of unemployment benefit payments. This will arise because, under the *Social Security Act,* there is a requirement that a person accept a 'reasonable' offer of work or else they can be cut off unemployment benefits (including, newstart allowance and youth allowance). Currently, a person is protected from exploitation as 'reasonable' means 'at award pay and conditions'. However if award pay and conditions are removed, after 1 July 2006, refusing to accept a 'suitable job' could result in an eight week non-payment period. From 1 July 2006 a broader range of people will be adversely affected by these measures as many people who would previously have been on a parenting payment or disability support pension, will be on unemployment benefits.

2.2 Concerns for casual employees

Many CLC clients are casual employees and particularly at risk of exploitation in the workplace. We would like to refer to a paper by industrial barrister Ingmar Taylor[2] who draws attention to the likely effects for casual employees arising from the proposed changes:

i. The WorkChoices Paper states that the Fair Pay Commission cannot set wages which are less than those contained in awards following the AIRC 2005 safety net review case.

ii. There is, however, no similar commitment that casual loadings cannot be reduced by the Fair Pay Commission below that which they were in awards at the time of the 2005 safety net review case.

iii. The WorkChoices Paper[3] states that one of the objectives of the Fair Pay Commission will be to consider "the capacity for the unemployed and low paid to obtain and remain in employment". It is generally accepted that many unemployed persons find work initially in the form of casual jobs, and the low paid are disproportionately employed in casual jobs. In light of the objective, the Fair Pay Commission may well reduce casual loadings in awards thought that would increase the capacity for the unemployed and low paid to obtain employment.

iv. There is nothing in WorkChoices Paper to suggest that the Fair Pay Commission cannot reduce casual loadings below that which currently exists. In light of the objects of the Fair Pay Commission one might reasonably expect that the Fair Pay Commission will indeed reduce those casual loadings. This means that the commitment that award wages "will be locked in and cannot fall below" the rates set by the 2005 safety net wage case[4] is somewhat misleading as casual employees on award wages can be paid less than they currently are paid once the Fair Pay Commission determines that the casual loading in their award should be reduced.

Taylor also notes that the protection available to employees in the requirement for employers to explicitly refer to the removal of 'certain award conditions' in their agreements, will not include casual loading. Agreements which provide for lower casual loading than previously offered would not need to draw

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[2] Ingmar Taylor, 'Some further ramifications of the proposed "WorkChoices" Workplace Relations System', October 2005. Copy of paper available if requested. Extract reproduced with the author's permission. Note that this paper was written prior to the release of the Bill.

[3] WorkChoices Paper at page 14

[4] WorkChoices Paper at page 13

attention to the reduced entitlement.

Recommendation: Retain the awards system.

3. Specialist, No-Cost Jurisdiction

The NSW and Australian Industrial Relations Commissions are specialist and non-cost jurisdictions, which therefore provide a more accessible avenue in which to deal with a dispute. The Commissioners strive to achieve settlement of matters at an early stage of proceedings, as reflected in the high rate of settlement of matters (around 90%).

The removal of such jurisdictions will unfairly disadvantage particular groups of people:

- Low-income people will be disadvantaged as they will be forced to seek redress in a costs jurisdiction.
- Rural people will be unfairly disadvantaged because the Chief Industrial Magistrates Court and Federal Magistrates Court do not sit in many places eg. Dubbo (pop 40 000).

Case Study 6:
A 38 year old female employee was terminated on the date that she was due to go on maternity leave. She had negotiated 12 months leave without pay. She was on a continuing contract but her employer tried to say she had a fixed term employment and that it had expired. The unfair dismissal case settled after the employee made an application to the NSW IRC and before it had gone to conciliation. Under the proposed new laws, the unfair dismissal aspect would have to be dealt with as a breach of contract – through a court, which is a costs jurisdiction and comparatively more time consuming.

While it is proposed for some financial support to be provided for people to bring claims of unlawful termination under the Federal Court, it is unlikely that the suggested allocation of $4000 will be sufficient to meet the actual court costs. Further, the employee will have to prove that they were dismissed for one of the nominated prohibited grounds (i.e. temporary access from work, trade union membership, refusing to sign an AWA, or discrimination) in order to access the financial support.

Recommendation: Retain a specialist no-cost jurisdiction to hear matters.

4. Maintaining Minimum Wages

The Australian Industrial Relations Commission has been independent and effective in establishing minimum wages and awards.

Establishing the Australian Fair Pay Commission will create an additional and unnecessary cost burden to taxpayers.

There are also concerns about how the Australian Fair Pay Commission will ensure that minimum wages will be sustained at an adequate standard to meet the costs of an adequate standard of living.

Recommendation: retain the AIRC and its role in reviewing and maintaining minimum wage standards.

It is important to note that the implementation of the Bill will raise increased demands for the legal services community legal centres as clients will seek advice and support in areas such as: the scope of the new laws and their impact; assistance with negotiating any AWAs they might have to enter into; assistance with making applications for grants to take forward unlawful termination cases, and assistance with making unlawful termination cases. Currently, there is no indication how the increased demand for such services will be resourced.

Finally we would like to note our concerns about the parameter of this inquiry, particularly the extremely short time frames for making submissions and the substantially restricted scope of the inquiry. We note that while some matters may have been previously considered in discussions relevant to other Bills, they were not all necessarily accepted. Further, it is important to examine the combined effect of the different provisions of the Bill, particularly on vulnerable groups, to ensure that the legislation does not serve to further disenfranchise and disadvantage people who are currently facing difficulties. Therefore we note the importance of a Senate inquiry to examine all proposed amendments outlined in the Bill. A comprehensive senate review is essential to ensure a transparent, accountable and democratic process.

We hope that the information provided is useful for your deliberations.

Yours sincerely

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Linda Tucker, Co-Convenor NSW Employment, Human Rights and Discrimination Sub-Committee