



WOMEN'S LEGAL SERVICES NSW

**Incorporating
Domestic Violence Legal Service
Indigenous Women's Legal Program**

13 March 2015

Productivity Commission
GPO Box 1428
Canberra City ACT 2601

By email: workplace.relations@pc.gov.au

Dear Madam / Sir,

Workplace Relations Inquiry

1. Women's Legal Services NSW (WLS NSW) thanks the Productivity Commission for the opportunity to comment on Workplace Relations Inquiry.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.
3. WLS NSW submits that there are a number of provisions of the *Fair Work Act 2009* (Cth) (FWA) that require reform in order to ensure gender equality in the workplace. Our submission will primarily focus on the need for greater protections for women who are experiencing family and domestic violence and for women who require flexible working conditions for reasons such as their carer responsibilities.
4. However, we are also concerned by any suggestion of the removal of penalty rates for casuals and award-based employees. This would have a significant impact on employees in retail, hospitality and nursing, which tend to be industries in which a large number of women work.
5. The gender pay gap is increasing and women continue to have less superannuation



Women's Legal Services NSW PO Box 206 Lidcombe NSW 1825
Administration: (02) 8745 6900 Fax: (02) 9749 4433 Website: www.womenslegalnsw.asn.au
Women's Legal Resources Limited ACN: 002 387 699 ABN: 88 002 387 699

than men.¹ It would be of great concern to see the gender pay gap increase any further. Instead, concerted efforts should be made to reduce the gender pay gap.

Use of language

6. Domestic and/or family violence occurs when one person tries to coerce or control another person in a range of 'domestic relationships' as outlined in section 5 *Crimes (Domestic and Personal Violence) Act 2007* (NSW). Family violence is the preferred term to encompass the complex interaction of kinship structures and extended family relationships in Aboriginal and Torres Strait Islander communities. The definition of 'family violence' in the *Family Law Act 1975 (Cth)* also includes coercive and controlling behaviour.
7. When we use the term 'domestic violence' in this submission it is intended to also include family violence.
8. Domestic violence involves an abuse of power and can take the form of physical violence, sexual abuse, emotional or psychological abuse, verbal abuse, stalking and intimidation, social and geographical isolation, financial abuse, cruelty to pets, or damage to property or threats to be violence in these ways. In the large majority of cases, domestic violence is gendered, that is, it is perpetrated by men against women. However, women can be perpetrators of violence in both heterosexual and same sex relationships.
9. We note that some people who experience violence prefer the term 'victim' and others prefer the term 'survivor'. In this submission we use the term 'victim' which is intended to be inclusive of both victims and survivors.

Recommendations

10. In summary, WLS NSW recommends that National Employment Standards (NES) in the FWA be amended to include:
 - 10.1 an enforceable right to flexible working conditions where a worker is experiencing family or domestic violence. This right should apply to all national system employees regardless of their type or length of employment;
 - 10.2 at least ten days per year of paid family and domestic violence leave to attend legal proceedings, counselling, appointments with a medical or legal practitioner, relocation, the making of safety arrangements and other activities associated with the experience of family and domestic violence;
 - 10.3 up to two days unpaid family and domestic violence leave on each occasion where paid leave would be available;
 - 10.4 family and domestic violence leave in addition to any other existing leave entitlements, which may be taken as consecutive or single days or as a fraction of a day;

¹ The current national gender pay gap is 19.9% calculated on full-time base remuneration and 24.7%

- 10.5 the right to use personal/carer's leave for the purpose of providing support to a person who is experiencing family and domestic violence;
- 10.6 a requirement that personal information provided to an employer about domestic violence be kept confidential;
- 10.7 an obligation on an employer to take reasonable measures to ensure the safety of workers who are experiencing family and domestic violence;
- 10.8 an enforceable right to flexible working conditions. There should be no qualifying period;
- 10.9 the right for employees to revert to their pre-parental leave position, a right available for at least a two year period from the birth of a child, or in the case of adoption, the date of placement of the child.

Domestic violence protections

- 11. WLS NSW submits that it is essential that there are sufficient workplace measures to support women in the workplace who are experiencing domestic violence.
- 12. WLS NSW submits that one of the factors that influences women's decisions to remain with a violent partner is financial independence.² It is very important for women experiencing domestic violence to maintain their employment so they can support themselves and their children. However, in our experience many women find it very difficult to remain employed when they are experiencing domestic violence.

Enforceable right to flexible working conditions

- 13. One of the main difficulties faced by employed women experiencing domestic violence, is the amount of time they may require off work. For example, many of our clients who have experienced domestic violence need time off work to attend urgent appointments with doctors, psychiatrists, psychologists, solicitors and counsellors. Our clients often report that as a result of domestic violence they may urgently need to find housing and often have increased childcare responsibilities.
- 14. It is also common that victims of domestic violence might be simultaneously involved in multiple legal proceeding such as applications for apprehended domestic violence orders (ADVOs) and family court proceedings. This can mean the victim is required to attend numerous days at court.
- 15. Appropriate and timely access to medical services, adequate housing and participation in the various criminal, civil and family court proceedings are all essential in supporting women to leave violent relationships.
- 16. Our clients however often report that they do not access these services or do not want to engage in the court processes for fear of losing their job. Even when clients have supportive employers who will allow them time off work, they are often required to take unpaid leave and many face financial difficulties as a result.

² See: National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children 2009-2021*, (2009) p46.

17. WLS NSW welcomed the amendment to the FWA which saw the introduction of a right to request flexible working conditions if a worker was experiencing domestic violence perpetrated by a family member³ or providing care or support to an immediate family member or member of their household who requires care or support because they are experiencing violence.⁴
18. However we submit that these protections do not go far enough.
19. Subsections 65(2)(a) and 65(2)(b) of the FWA provide that a worker is only entitled to request flexible working conditions if they have been a permanent employee for 12 months or if they are a casual employee who has been employed on a regular and systematic basis and have reasonable expectations of ongoing employment. WLS NSW submits that all workers, regardless of length or type of employment, should be afforded the right to safety and be able to support victims of violence. The domestic violence provisions mean that a worker might be able to change their workplace hours or locations to better protect themselves from a violent partner and to make arrangements to care for children who might have been affected by domestic violence. In this instance any detriment caused to an employer should be outweighed by the need to protect the worker and their family. A worker's employment status should not determine their access to this protection. WLS NSW submits that the qualifying period should be removed.
20. The effectiveness of subsections 65(1A)(e) and 65 (1A)(f) of the FWA and the right to request flexible working conditions is further limited by the fact that this right cannot be enforced if an employer rejects a request without citing reasonable business grounds for rejecting the request. Subsection 44(2) of the FWA explicitly prohibits any enforcement action under this provision. Subsections 65(1A)(e) and 65 (1A)(f) of the FWA only provide workers with a right to request flexible working conditions, they do not afford them a right to flexible working conditions. WLS NSW submits women experiencing domestic violence and those supporting victims of violence should have an enforceable right to flexible working conditions.

Leave and safety mechanisms

21. As outlined above, victims of domestic violence often need time off work and suffer financially if they have used up all of their leave. WLS NSW supports the following proposals put forward by the Australian Council of Trade Unions (ACTU) in their submission to the Fair Work Commission as part of the Modern Award Review:

21.1 ten days per year of paid family and domestic violence leave to attend legal proceedings, counselling, appointments with a medical or legal practitioner, relocation, the making of safety arrangements and other activities associated with the experience of family and domestic violence;

21.2 up to two days unpaid family and domestic violence leave on each occasion where paid leave would be available;

21.3 family and domestic violence leave be in addition to any other existing leave

³ Section 65(1A)(e) *Fair Work Act 2009* (Cth)

⁴ Section 65(1A)(f) *Fair Work Act 2009* (Cth)

entitlements, and may be taken as consecutive or single days or as a fraction of a day;

21.4 the right to use personal/carer's leave for the purpose of providing support to a person who is experiencing family and domestic violence.

22. The ACTU also proposes that any personal information disclosed by an employee to their employer about domestic violence be kept confidential and that employers should be obliged to ensure that all reasonable measures be taken to ensure the safety of workers who may be at risk of harm in the workplace due to family and domestic violence.

23. WLS NSW supports the inclusion of these protections in modern awards however believes that the most appropriate place to include these protections is within the National Employment Standards in the FWA so that all workers are afforded safety, not just those covered by modern awards.

Recommendations

The *Fair Work Act 2009* should be amended to include the following protections in the National Employment Standards:

1. an enforceable right to flexible working conditions where a worker is experiencing family or domestic violence. This right should apply to all national system employees regardless of their type or length of employment;
2. at least ten days per year of paid family and domestic violence leave to attend legal proceedings, counselling, appointments with a medical or legal practitioner, relocation, the making of safety arrangements and other activities associated with the experience of family and domestic violence;
3. up to two days unpaid family and domestic violence leave on each occasion where paid leave would be available;
4. that family and domestic violence leave be in addition to any other existing leave entitlements, and may be taken as consecutive or single days or as a fraction of a day;
5. the right to use personal/carer's leave for the purpose of providing support to a person who is experiencing family and domestic violence;
6. that personal information provided to an employer about domestic violence be kept confidential;
7. an obligation on an employer to take reasonable measures to ensure the safety of workers who are experiencing family and domestic violence.

Enforceable right to request flexible working conditions

24. Subsection 65(1A) of the FWA provides a right to request flexible working arrangements on grounds other than domestic violence. The provision, for example,

includes protection for workers who need flexible working conditions due to their responsibility to care for a school age child.⁵

25. Many of our clients report that in order to maintain their employment they need flexible working conditions. This may mean that upon returning from parental leave for example, working part-time or working some of the time from home. Our clients report that flexible working arrangements mean that they can keep their jobs and their financial independence.
26. Our clients frequently report employers refusing to accommodate requests for flexible working requests. Consequently clients are faced with a conflict between their carer's responsibilities and working responsibilities and number of our clients have felt no option but to resign when their employer has refused a flexible working conditions request.
27. The restriction under subsection 44(2) of the FWA prohibits enforcement action where an employer has unreasonably refused a request. This is a significant obstacle for our clients' participation in the workplace and for gender equality.
28. Additionally, the qualification periods of either 12 months employment for permanent employees or regular and systematic employment for casual employees limits even further women's ability to fully participate in the workforce.
29. WLS NSW submits that women would be able to better participate in the workforce and remain financially independent if there was an enforceable right to flexible working conditions, as opposed to a right to request a change in working conditions. This right should be afforded to all employees.
30. Our clients also report problems even where an employer has accommodated a request for flexible working conditions because agreement to such requests are often conditional upon, for example, accepting a different role or position which is of lower status and/or pay. While the change in position may only be required by the worker for a short period of time, for example, while they are breast feeding or before a child commences attendance at day care, most of our clients report that they are forced to accept permanent changes to their working conditions.
31. The ACTU proposes as part of their submission to the Modern Award Review that workers should have the right to revert to their pre-parental leave position and/or work arrangements within two years from the date of giving birth or, in the case of adoption, from the placement of the child. We support this proposal however submit that this right should sit within the NES in the FWA.

⁵ Section 65(1A)(a) *Fair Work Act 2009*

Recommendations

8. The *Fair Work Act 2009* be amended to include the following protections in the National Employment Standards an enforceable right to flexible working conditions. There should be no qualifying period.
9. The *Fair Work Act 2009* be amended to include the following protections in the National Employment Standards a right to revert to the pre-parental leave position and / or work arrangements, a right available for at least a two year period from the birth of a child, or in the case of adoption, the date of placement of the child.

If you would like to discuss any aspect of this submission, please contact me or Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,
Women's Legal Services NSW

Janet Loughman
Principal Solicitor