

Submission to the Productivity Commission

Inquiry into the Workplace Relations Framework

March 2015

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About Victoria legal Aid

Victoria Legal Aid (VLA) is a major provider of legal services to socially and economically disadvantaged Victorians. We assist people with their legal problems at locations such as courts, tribunals, prisons, and psychiatric hospitals as well as in our 14 offices across Victoria. We assist almost 100,000 people each year through Legal Help, our free phone assistance service. We are also proactive in delivering community legal education to disadvantaged Victorians.

Our specialist practice expertise

Under our Civil Justice portfolio we have a dedicated Equality team which holds weekly anti-discrimination law clinics and regularly provides advice and representation to clients who suffer adverse action in employment on the grounds of a protected attribute and/or the exercise or proposed exercise of a workplace right. In 2013-2014 the discrimination law services provided by VLA, which includes assistance with general protections claims under the *Fair Work Act 2009 (FW Act)*, included 1,200 legal advices, 140 cases, 50 substantive matters with a grant of legal aid for ongoing representation and 55 duty lawyer services. Our recent achievements include representing a client in a successful general protections claim at the Federal Circuit Court. (This client has asked us not to disclose her name.)

We assist clients with complaints of discrimination in various jurisdictions, including the Federal Court and the Federal Magistrates Court, using state and federal anti-discrimination legislation, including the *Fair Work Act 2009 (Cth)*, *Sex Discrimination Act 1984 (Cth)*, *Racial Discrimination Act 1975 (Cth)*, *Age Discrimination Act 2004 (Cth)*, *Disability Discrimination Act 1992 (Cth)* and the *Equal Opportunity Act 2010 (Vic)*.

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Executive Summary

This submission is a response to the Productivity Commission's Inquiry into the Workplace Relations Framework released in January 2015 (the **Inquiry**), specifically Issues Paper Two, Four and Five.

Victoria Legal Aid welcomes the Commission's commitment to improve the existing workplace protections in a way that balances the rights of employees against the needs of businesses to grow and prosper.

Our submission does not respond to every question listed in the Issues Paper Two and Four. Instead, it and our proposed recommendations are based on our practical experience from our legal practice.

Where possible, our suggestions for improvement are supported by case examples illustrating how the current deficiencies and gaps in the workplace relations framework operate to disadvantage our clients and others in similar circumstances to our clients.

One striking observation that stands out from our submission is that there are a number of gaps and features of the FW Act that disproportionately disadvantage women in the workforce, whether they are women who have experienced sexual harassment, women who require accommodation of their family or caring responsibilities, or women who need minor adjustments to their role during pregnancy. It is hoped that the Inquiry will encourage a framework that rectifies these issues and better promotes workforce participation by women.

The case studies used in this submission are real. Where names have been used, they have been changed to protect the client's privacy.

Summary of recommendations

In our view, addressing the problems identified in our submission will improve the operation of the legislation and achieve greater fairness for employees and clarify employers' legal obligations.

Recommendation 1: That the *Fair Work Act 2009* (Cth) be amended to impose an enforceable obligation on employers to make reasonable adjustments that employees require because of their family responsibilities, disability, pregnancy, breastfeeding and other circumstances listed in s 65(1A) of the *Fair Work Act 2009*, and provide guidance on the factors to be considered as to whether the adjustment is 'reasonable' consistent with employer obligations under the *Equal Opportunity Act 2010* (Vic).

Recommendation 2: The return to work guarantee within s 84 of the *Fair Work Act 2009* (Cth) be amended to include an enforceable right to return to the employee's pre-parental leave position on a part time basis, qualified by a test similar to that provided for in s 19 of the *Equal Opportunity Act 2010* (Vic) which prohibits unreasonable refusal to accommodate parental or carer's responsibilities and lists factors relevant to a determination of whether that refusal is unreasonable.

Recommendation 3: That the *Fair Work Act 2009* (Cth) be amended to provide a right to unpaid parental leave that is consistent with employers' obligations under the *Equal Opportunity Act 2010* (Vic) and the *Sex Discrimination Act 1984* (Cth).

Recommendation 4: That the *Fair Work Act 2009* (Cth) be amended to include an enforceable obligation on employers to make reasonable adjustments for persons (including employees and prospective employees) who are pregnant.

Recommendation 5: That the *Fair Work Act 2009* (Cth) be amended to provide a definition of 'discrimination' that is consistent with the definitions of direct and indirect discrimination under the *Equal Opportunity Act 2010* (Vic).

Recommendation 6: That the *Fair Work Act 2009* (Cth) be amended to provide a separate prohibition of sexual harassment.

Recommendation 7: The *Fair Work Act 2009* be amended to include definitions of attributes, consistent with State and Federal anti-discrimination laws, as well as protection from characteristics of a disability consistent with s 7(2) of the *Equal Opportunity Act 2010* (Cth).

Recommendation 8: that s 351 of the *Fair Work Act 2009* be amended to prohibit discriminatory conduct on the basis of the following attributes:

- breastfeeding
- gender identity
- physical features
- lawful sexual activity
- status as a parent or carer
- religious belief or activity (as distinct from religion)
- political belief or activity (as distinct from political opinion)
- industrial activity
- ethnicity

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- irrelevant criminal record
 - being a victim of violent crime
 - being a victim of family violence
 - homelessness
 - socio-economic status.

Recommendation 9: The *Fair Work Act 2009* (Cth) should be amended so that discrimination against an associate of a person with an attribute is prohibited, and the coverage of this protection should extend to all protected attributes consistent with *Equal Opportunity Act 2010* (Vic), *Disability Discrimination Act 1992* (Cth) and the *Racial Discrimination Act 1975* (Cth).

Recommendation 10: That section 342 and s 351 of the *Fair Work Act 2009* (Cth) be amended to include provisions to protect persons engaged or employed by independent contractors from unlawful adverse action by principals.

Recommendation 11: That the time limit for filing general protections claims involving dismissal from employment be extended to 12 months, consistent with the time limits in State and Federal anti-discrimination laws.

Recommendation 12: The Fair Work Commission engage conciliators who are trained in the facilitative (interest-based) or transformative model of conciliation to facilitate the effective resolution of general protections disputes.

Recommendation 13: Section 596(2) of the *Fair Work Act 2009* (Cth) be amended to specify the factors that may be taken into account to determine issues of fairness and effective representation, including whether the application is being made by the employee or the employer, the nature of the dispute, and the ability of the individual to clearly articulate their claims.

Scope of the submission

This submission is confined to Issues Paper Two, Four and Five, with a focus on how the Inquiry relates to general protections under the FW Act.

Issues Paper Two

1. What, if any, particular features of the National Employment Standards (NES) should be changed?

1.1 Requests for flexible working arrangements

VLA strongly supports a right to request flexible working arrangements.¹ This protection has helped to facilitate flexible working arrangements to assist employees to better balance their work and family responsibilities.

However, the right to request flexible working arrangements in Division 4 is not enforceable, and is only available to employees who have worked for 12 months or more, which significantly undermines its effectiveness. The Division also imposes strict procedural requirements which are not well understood. Numerous clients have reported that when they request flexible working arrangements on returning to work under these provisions, their employer simply provided a cursory refusal, as described below by our client, 'Miranda', or offered them a part-time or casual role in a position with less pay and less seniority.

The ability of an employer to refuse on 'reasonable business grounds' (without any definitive guidance in the FW Act as to what constitutes 'reasonable business grounds') and the lack of enforcement rights² means that in practice, an employer is not required to genuinely consider a request for flexible working arrangements or can make a decision based on unreasonable grounds. These issues effectively render the right to request flexible working arrangements under the FW Act meaningless.

Further, the concept of "flexible working arrangements" appears to be narrower than the obligation to reasonably accommodate an employee's family responsibilities or make reasonable adjustments for an employee's disability, which is protected under State and Federal anti-discrimination legislation.³ In Victoria it is unlawful for an employer to indirectly discriminate against a parent or carer, or unreasonably refuse to accommodate an employee's family responsibilities.⁴ 'Reasonable accommodation' may include, for example, working from home one morning a week, flexibility in start and finish times, returning to work on a part time basis or taking a period of unpaid leave after the birth of the child.⁵

The Victorian EO Act model appropriately balances the needs of both employees and employers. However, in our experience these legal obligations are often ignored or overlooked by employers, whose main point of legal reference is the FW Act. Despite this, or perhaps because of the lack of community awareness about these legal entitlements, there has not been a flood of claims under the Victorian EO Act for failure to accommodate family responsibilities; there were only 172 enquiries

¹ *Fair Work Act 2009* (Cth), s 65.

² Section 65 of the *Fair Work Act 2009* (Cth) is not a civil remedy provision.

³ *Equal Opportunity Act 2010* (Vic), s 20; *Disability Discrimination Act 1992* (Cth), s 5 and 6.

⁴ *Sex Discrimination Act 1984* (Cth), s 7A; *Equal Opportunity Act 2010* (Vic), s 18 and 19.

⁵ *Equal Opportunity Act 2010* (Vic), s 19.

made of the VEOHRC between 2011/12 to 2013/14 about the right to have one's family responsibilities accommodated at work.⁶

In order to strengthen the FW Act provisions on flexible working arrangements, and bring the protection offered in line with anti-discrimination legislation, we recommend that the FW Act be amended to impose an enforceable obligation on employers to make reasonable adjustments for employees that may be required because of their family responsibilities, disability, pregnancy, breastfeeding and other circumstances listed in s 65(1A) of the FW Act,⁷ and provide guidance on the factors to be considered as to whether the adjustment is 'reasonable' consistent with employer obligations under the Victorian EO Act.

Miranda's story

“I worked as a full-time business analyst for 15 months before taking 12 months of maternity leave. Four months before I was due to return to work I contacted my manager to negotiate flexible working arrangements. I had hoped to work part-time and slightly reduced hours so that I could take my son to and from childcare, or else work from home one-two days a week. My husband also works and we don't have anyone nearby who can help look after our son. Our nearest family live an hour away. Also, I am still breastfeeding, so I wanted a private place at work where I could lactate.

My manager refused to explore part-time work and said no to my other requests, except the private room for lactation. He said that my requests weren't workable, even though an industry recruiter has told me that my role is commonly done on a part-time basis at other companies. My boss also says that if I return to work I will be required to travel regionally and overseas at short notice and for two weeks or more, even though I didn't do this before I went on maternity leave. He said that if I don't agree to work full time and travel with a moment's notice then I have to tender my resignation.

I have been so nervous, and knowing that I didn't have many business days left before I was meant to return to work really stressed me out. I wanted to resign but we need the money now. To keep the peace and obtain a reference, I will do as my boss wishes. Unfortunately, this is such a small industry and everyone knows everyone. If I were to make a formal complaint I would lose my credibility and make myself unemployable.”

Recommendation 1: That the *Fair Work Act 2009* (Cth) be amended to impose an enforceable obligation on employers to make reasonable adjustments that employees require because of their family responsibilities, disability, pregnancy, breastfeeding and other circumstances listed in s 65(1A) of the *Fair Work Act 2009*, and provide guidance on the factors to be considered as to whether the adjustment is 'reasonable' consistent with employer obligations under the *Equal Opportunity Act 2010* (Vic).

1.2 Part time return to work

Our clients often report that their employer is prepared to give them their pre-parental leave position when they return from parental leave, but only if they return to work full time. The negative impact of

⁶ Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2013/14*, (October 2014), 20.

⁷ *Fair Work Act 2009* (Cth), s65(1A).

this ultimatum is illustrated by the stories of Caroline and Anna below. While the return to work guarantee in s 84 of the FW Act is enforceable, that section does not provide an enforceable right to return to work on a part time basis.

This significantly weakens the usefulness of the entitlement, especially since full time work is often not possible after the birth of a child. The failure to accommodate family responsibilities and allow an employee to work part time has the practical effect of forcing many women out of the workforce. The Australian Human Rights Commission's National Prevalence Survey on pregnancy and return to work indicates that one in two mothers experience discrimination in the workplace, of which 34 percent experience discrimination in the form of failure to reasonably accommodate family responsibilities.⁸ This data reflects the experience of our clients who are often out of work for extended periods following termination of their employment during pregnancy or upon returning from maternity leave.

Enshrining a guaranteed right to return to work part time with stronger safeguards would address this concern.

There may be circumstances in which an employer is justified in not offering an employee part-time work following parental leave, as may be the case with requests for flexible work arrangements. VLA submits that a right to request part time work should be qualified by a test similar to that provided in s 19 of the Victorian EO Act which prohibits the unreasonable refusal of an employee's request to accommodate their family responsibilities and lists factors relevant to a determination of whether that refusal is unreasonable. The factors taken into account include the circumstances of the employer, the nature of the employee's role, and the consequences of accommodating or not accommodating the employee's needs and responsibilities. A part time return to work guarantee which requires an employer to consider competing factors would be more meaningful than one which adopted the "reasonable business grounds" approach.

If the Productivity Commission does not accept our recommendation that the reasonableness of refusing part time return to work should be assessed with reference to the factors outlined in s 19 of the Victorian EO Act, we submit that a part time return to work guarantee should be introduced subject to "reasonable business grounds".

Caroline's story

“Prior to returning from maternity leave my experience had, on the whole, been positive. Over the course of my tenure, my commitment had been rewarded with a significant promotion. I had been selected to attend a well respected and expensive management training course and just prior to maternity leave, I received my full performance bonus and a glowing review.

When I left to go on maternity leave, I had reached the level of middle management in my area. It would have been expected, having recently completed the management course, that I would be considered for promotion as opportunities arose upon my return. Instead, as discussions regarding my return progressed, it became clear, that unless I was able to commit to returning full time to the business, I was going to be demoted and have my package adjusted to suit. I was subjected to deliberate stalling during my return negotiations and then a systematic undermining and what I would now label a bullying campaign once I started to question this practice upon my return.

⁸ [Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work Report 2014*, 26.](#)

After six confidence eroding months and despite what appeared to be a genuine, if belated attempt by HR to address some of the issues, I decided to accept an external offer and resigned. My current role provides the flexibility I need to juggle work and family life. In order to achieve this though, I have taken a role in a small business with very limited growth potential. It is not a role that I enjoy, but it's a necessity.

On a personal level, I am shattered by this experience. Last year, at the same time as I attended a conciliation session with my former employer at the Victorian Equal Opportunity & Human Commission, I commenced weekly therapy due to anxiety attacks I had started having during my brief return to work. My hope had been that I would regain my confidence and composure once I left the toxic environment behind. Instead, on the contrary, I now feel very anxious and nervous about my performance and job security. This manifests itself in anxiety attacks which rarely even register with my new colleagues because I can hide in the back stalls now, but to me, the person who used to chair meetings and negotiate high level contracts, it's devastating.”

Anna's story

“I worked as a full time manager in a large call centre for over ten years. I love my job and wanted to return after maternity leave. I told my manager that I wanted to return to work three or four days per week. I couldn't arrange full time child care, and I also just wanted to spend time with my children as they are growing up. We have part time managers so I assumed it would be fine. He said it would depend on what's available but assured me that job share was possible.

One month later, my boss told me that there was no position available for me because the person that they hired to replace me wanted to continue working in the role. He told me that my role was full-time and that it would be too hard for me to do it part-time, even with a job share arrangement. I tried to discuss how it could work, but he'd already made up his mind.

He then offered me a role as an operator with less pay, less seniority, less responsibility and less challenging work. The role would have involved a pay cut of approximately \$40,000. Although the role was almost entry level and would have been a huge step back, he urged me to think about it if flexibility was important to me. He said that if I took the lesser part time or casual role, then we could reassess my role when my replacement resigned, although there was no guarantee that this would happen.

After getting legal advice from VLA, I reminded my employer about its obligations to accommodate my family responsibilities, comply with the return to work guarantee and not discriminate. My manager reluctantly offered me a part time project management role and a team leader role in six months when my 'maternity cover' resigns. I accepted the offer even though it involves less pay, less seniority and no bonuses because there was simply too much at stake. I know it's not good enough but I felt like I had no choice. My partner still works there so I can't make waves. He's already paying for the fact that I've tried to assert my rights.”

Recommendation 2: The return to work guarantee within s 84 of the *Fair Work Act 2009* (Cth) be amended to include an enforceable right to return to the employee's pre-parental leave position on a part time basis, qualified by a test similar to that provided for in s 19 of the

Equal Opportunity Act 2010 (Vic) which prohibits unreasonable refusal to accommodate parental or carer's responsibilities and lists factors relevant to a determination of whether that refusal is unreasonable.

1.3 Technical requirements for leave without pay

The FW Act limits eligibility for unpaid parental leave to employees who have been in their role for 12 months and have complied with certain strict procedural requirements. Employees are required to provide their employer with 10 weeks' notice in writing before starting unpaid parental leave, or if that is not practicable, as soon as practicable.⁹ Our experience is that employers refuse unpaid parental leave where strict procedural requirements were not met, such as where an employee provides verbal notice of their intention to take unpaid parental leave.

For example, a client was recently denied parental leave and dismissed after failing to comply with the requirement to give written notice of his intention to take parental leave, even though his employer had known for six months that the employee's wife was pregnant and that he intended to take parental leave. This dismissal and refusal to allow two weeks' parental leave was likely unlawful under the anti-discrimination provisions of the Victorian EO Act and the SD Act. In our experience however, employers often look to the FW Act rather than state or federal anti-discrimination legislation to determine their obligations. To avoid confusion, the FW Act should be amended to remove the time restriction and strict procedural requirements for leave without pay. This would ensure that the obligation to allow unpaid parental leave under the FW Act is consistent with the co-existing obligations to reasonably accommodate parental responsibilities, and not to indirectly discriminate based on pregnancy and parental status under the EO Act and the SD Act.

In the alternative, the consequences for an employee who fails to comply with the procedural requirements should not be the severe 'all or nothing' situation that currently exists.

Cassandra's story

“I was working part time as a receptionist for a business I had been employed with for nearly 10 years and I was due to go on maternity leave for the second time. I had told my boss that I was pregnant early on and when the time came closer to start my leave, I gave him written notice of my intention to return to work after 12 months and thought everything was fine. After a few months of leave I was told by my boss that business had slowed down and that there would not be a position for me to return to. I explained to him that I needed to return to work after my maternity leave and he didn't sound positive at all. About a week later I received a letter from him stating that as I had not given the required notice of intention to go on maternity leave that they considered my last day prior to my leave as my last day of employment and they terminated my position with them. They included a brochure from Fair Work to show that I had not given them the correct notice.

I was so shocked, I just couldn't believe what had happened. I had always had a good working relationship with everyone in the office and I just felt like it was a big slap in the face that after nearly 10 years, that was it! I thought that I had no choice but to just accept what had happened and start looking for a new job when the time came. I couldn't stop thinking

⁹ *Fair Work Act 2009* (Cth), s 74. Although s 74 provides that if notice 10 weeks prior to the start date was not reasonably practicable, then as soon as reasonably practicable.

about what had happened for at least a week, my mind was racing with thoughts of "What was I going to do?" We live in a rural area with seasonal employment. Jobs, especially part time positions, are very limited and when they do come up, you are competing with lots of people. I was thinking about studying but found it was too hard at this point of my life with two young children at home."

Recommendation 3: That the *Fair Work Act 2009* (Cth) be amended to provide a right to unpaid parental leave that is consistent with employers' obligations under the *Equal Opportunity Act 2010* (Vic) and the *Sex Discrimination Act 1984* (Cth).

1.4 Adjustments during pregnancy

In order to continue working during their pregnancy many pregnant workers require some adjustments to their working conditions or arrangements because of the physical symptoms of pregnancy. For example a woman may need to take more regular bathroom breaks, to sit rather than stand, or to avoid heavy lifting incidental to her role during her pregnancy. While the Victorian EO Act requires reasonable adjustments to be made for parents and carers as well as those with a disability, there is currently no positive obligation on employers to make reasonable adjustments for a woman during her pregnancy under Victorian or federal law. Section 65 of the FW Act provides a right to request flexible working arrangements for some employees, such as parents, carers and employees with a disability. However, this obligation does not extend to pregnant employees.

Instead, the woman has to make a complaint of indirect discrimination, or try to define her normal pregnancy symptoms as a disability so that she can access the reasonable adjustment provisions for persons with a disability. Because such claims can be complex, they rarely settle quickly. While the FW Act provides for transfer to a safe job or paid 'no safe job leave' if the employee is fit to work but unable to perform her role for health and safety reasons, this solution is generally too extreme. More commonly, there will simply be some minor aspects of the employee's role that require adjustment, or the employee requires flexibility to accommodate her morning sickness. The impact of failing to make adjustments for a pregnant employee can be significant, as illustrated by Julie's story below.

Julie's story:

"I worked as a full time sales consultant for about three years. I told my manager that I was pregnant early on because I was so sick that I thought he needed to know. When I told him I was pregnant, he asked me in a disparaging way if I would keep it. I replied 'of course'.

My pregnancy was very rough. I was sick from day one with nausea, dizziness, hot flushes and vomiting. My 'morning sickness' actually lasted all day. Sometimes I was vomiting 10 times a day. My boss got angry because I took frequent toilet breaks. Even though he knew I had morning sickness, he'd text me while I was vomiting and tell me to get back onto the floor immediately. I had bad back and leg pain, but I wasn't allowed to sit down. If I did, he'd click his fingers at me like I was a dog and tell me to stand up.

My doctor gave me a medical certificate saying that I should reduce my hours. My boss refused. He said that I was employed full time so they didn't have to accommodate my request for part time work. I said 'I've got no choice do I?' He said 'not really'. I was left with an ultimatum: resign or work full time hours, which I couldn't keep doing because I was so sick and uncomfortable. He left me with no choice but to resign.

I'm not on Centrelink, and after I pay rent I've got no money for food let alone stuff for the baby. I can't afford to pay my bills and I've maxed out my credit cards. I'm on the verge of having my car repossessed and my utilities cut off. I've got nobody who can loan me money so I could even lose the roof over my head. I'm so stressed I can hardly breathe.”

Recommendation 4: That the *Fair Work Act 2009* (Cth) be amended to include an enforceable obligation on employers to make reasonable adjustments for persons (including employees and prospective employees) who are pregnant.

Issues Paper Four

2. Do the general protections within the FW Act afford adequate protections while also providing certainty and clarity to all parties?

2.1 Inadequate protection from discrimination

The FW Act does not prohibit discrimination as such, but rather adverse action taken because of a protected attribute. Adverse action includes dismissing an employee, injuring an employee in employment, altering an employee's position to their prejudice, and 'discrimination between the employee and other employees of the employer'.

The absence of a definition of discrimination in the FW Act has led to an inconsistent and often confusing approach by courts to the interpretation of s 342 and s 351. Courts have found that there is no term in the FW Act whose proper construction may be understood by reference to Federal anti-discrimination laws, and that conduct which breaches anti-discrimination legislation may not necessarily breach s 351.¹⁰ This appears to be somewhat inconsistent with *Wolfe v Australia & New Zealand Banking Group Limited*, which found that the protection from adverse action on the basis of a protected attribute under s 342 encompasses indirect discrimination,¹¹ despite no explicit reference to indirect discrimination in the ordinary definition.

These inconsistencies lead to uncertainty for individuals and businesses seeking to understand their obligations. As a result of the complexity and uncertainty around what constitutes 'discrimination' under the FW Act, and the inconsistency of these provisions with other legal options under Federal and State anti-discrimination laws, legal advice is often lengthy, resource-intensive and unsatisfyingly inconclusive.

We have set out a proposed definition of discrimination below. This definition is based on the definition proposed by the Discrimination Law Experts' Group in its submission on the Consolidation of Commonwealth Anti-discrimination Laws.¹²

Discrimination includes:

a) *treating a person unfavourably on the basis of a protected attribute;*

¹⁰ *Hodkinson v The Commonwealth* [2011] FMCA 171 (31 March 2011), [138]-[143].

¹¹ *Wolfe v Australia & New Zealand Banking Group Limited* [2013] FMCA 65 (7 February 2013), [83].

¹² Discrimination Law Experts Group, *Submission on the Consolidation of Commonwealth Anti-discrimination Laws*, 13 November 2011.

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- b) *imposing a condition, requirement or practice that has the effect of disadvantaging persons of the same protected attribute as the aggrieved person; or*
 - c) *failing to make reasonable adjustments if the effect is that the aggrieved person experiences less favourable treatment under (a) or is disadvantaged under (b).*

Recommendation 5: That the *Fair Work Act 2009* (Cth) be amended to provide a definition of ‘discrimination’ that is consistent with the definitions of direct and indirect discrimination under the *Equal Opportunity Act 2010* (Vic).

2.2 Inadequate protection from sexual harassment

Despite being outlawed for over 25 years under State and Federal laws, sexual harassment remains a serious problem in Australia. Sexual harassment disproportionately affects women with 1 in 5 experiencing sexual harassment in the workplace at some time. However, 1 in 20 men also report experiencing sexual harassment in the workplace.¹³

The FW Act does not explicitly prohibit sexual harassment in employment. Case law suggests that sexual harassment can constitute sex discrimination,¹⁴ and that sexual harassment *may* constitute adverse action against a person by reason of the person’s sex. Our experience is that the absence of clear legislative protection from sexual harassment under the FW Act has the effect of discouraging employees from lodging an otherwise meritorious claim under the general protections provisions. Explicit protection from sexual harassment is required to clarify the case law.

We submit that there is significant educative value in having a separate stand-alone sexual harassment provision, regardless of whether the conduct may be covered by protections from adverse action on the basis of a person’s sex. The prohibition of sexual harassment under State and Federal anti-discrimination laws reflects the unique nature and history of this form of harassment as compared with harassment based on other attributes.

The FW Act should be amended to explicitly recognise that sexual harassment is a form of discrimination on the basis of sex, and that sexual harassment may constitute adverse action by a person by reason of the person’s sex.

Recommendation 6: That the *Fair Work Act 2009* (Cth) be amended to provide a separate prohibition of sexual harassment.

2.3 Undefined terms lead to uncertainty

2.3.1 Discrimination

A key barrier to equality is that discrimination law is often narrowly understood and narrowly interpreted. Our experience in providing community legal education about discrimination suggests that while many people are familiar with the concept of formal equality, there is limited

¹³ Sexual harassment: Serious business - Results of the AHRC 2008 Sexual Harassment National Telephone Survey.

¹⁴ *Birch v Westco Electrics* (1966) Pty Ltd (2012) 218 IR 67; citing *Aldridge v Booth* (1988) ALR 1 [16]-[17]; *Hall v A & A Shieban Pty Ltd* (1989) 20 FCR 217, 274-276; *Elliot v Nanda & Commonwealth* (2001) 111 FCR 240, 278-282.

understanding about substantive equality, particularly with regard to indirect discrimination caused by treating people the same way regardless of their inherent needs.

The FW Act does not define ‘discrimination’ or draw any distinction between the various types of discrimination to which other jurisdictions generally refer: primarily, direct discrimination, indirect discrimination, but also the failure to make reasonable adjustments for a person with a disability, and the failure to accommodate responsibilities of a parent or carer.

The FW Act adopts the ordinary meaning of ‘discrimination’, which conflates these complex and nuanced types of discrimination in a way that is inconsistent with modern developments in state and federal anti-discrimination laws and creates uncertainty for employees and employers. Although the Federal Circuit Court has interpreted discrimination under the FW Act as encompassing direct and indirect discrimination, judicial approaches are inconsistent.¹⁵

State and Federal anti-discrimination laws expressly recognise that discrimination may be ‘direct’ or ‘indirect’. Further, the protection from ‘discrimination’ extends to the failure to make reasonable adjustments for a person with a disability. Under the Victorian EO Act, unreasonable failure to accommodate family responsibilities can also constitute discrimination.

VLA supports the introduction of a definition of ‘discrimination’ which recognises all forms of discrimination. Clarifying the meaning of discrimination will help businesses to better understand their legal obligations and promote greater compliance with the FW Act. It is our experience that discrimination disputes can resolve fairly swiftly once the parties have a clearer understanding of their rights and obligations and the power imbalance between the parties is somewhat corrected.

To this end, we reiterate Recommendation 5, outlined above.

2.3.2 Attributes

The FW Act does not define the attributes in s 351(1); they are given their ordinary meaning. The Federal Magistrates Court (as it was known then) held that definitions in State and Federal anti-discrimination laws only assist interpretation of an attribute listed in s 351(1) of the FW Act where that definition is consistent with the ordinary meaning of the word.¹⁶

This has led courts to adopt narrow, dictionary definitions of attributes that are inconsistent with developments in State and Federal anti-discrimination laws. For example, by adopting the ordinary definition of ‘disability’, the FW Act requires a technical and artificial interpretation that prohibits discrimination on the basis of the physical and mental limitations of a disability, but not the practical consequences of that disability, such as absence from work due to illness or injury, or the use of an assistance aid. This distinction is significant when a party is required to identify the disability said to be the reason of adverse action alleged to have been taken against them.

A case study on characteristics of a disability¹⁷

Gillian worked as a retail shop assistant at a shopping centre for two years. Occasionally she would be required to work on her own. Gillian’s boss told her that she was not allowed to close the shop for any reason.

Gillian cut her hand at work while opening a box and was bleeding heavily. She closed the shop for 30 minutes to go to the chemist in the shopping centre and have her hand

¹⁵ See for example *Wolfe v Australia & New Zealand Banking Group Limited* [2013] FMCA 65 (7 February 2013), [83]; *Hodkinson v The Commonwealth* (2011) 207 IR 129, [138]-[145].

¹⁶ *Hodkinson v The Commonwealth* (2011) 207 IR 129, [138]-[145].

¹⁷ This is a fictional case study based on our practice experience.

bandaged. She knew that she wasn't meant to leave the shop unattended but she felt she had no choice. There was nobody there to cover her.

The next day, Gillian's boss told her that she was fired because she left the shop unattended. Gillian explained that it was an emergency and she needed to bandage her hand. Her boss said that her decision to fire Gillian had nothing to do with her disability; it was simply because she left the shop unattended without permission or calling somebody to cover her.

Gillian lodged a claim of adverse action against her former employer, and argued that her temporary injury was a 'disability' for the purpose of the FW Act, as the term 'disability' under State and Federal anti-discrimination legislation includes a temporary illness or injury. However, her employer said her injury wasn't a 'disability' because it wasn't permanent, and that that she was fired because she left the shop unattended, not because of her disability. In the absence of a clear definition of 'disability', Gillian decided not to pursue her claim.

Recommendation 7: The *Fair Work Act 2009* be amended to include definitions of attributes, consistent with State and Federal anti-discrimination laws, as well as protection from characteristics of a disability consistent with s 7(2) of the *Equal Opportunity Act 2010* (Cth).

2.4 Gaps in the protection from discrimination

The FW Act fails to protect, or adequately protect, against discrimination on many grounds that are covered by State and Territory anti-discrimination laws. For example, the current Victorian EO Act prohibits discrimination on the grounds of breastfeeding, gender identity, physical features, lawful sexual activity, status as a parent or carer, religious belief or activity (as distinct from religion), political belief or activity (as distinct from political opinion), industrial activity, and ethnicity. We have assisted and provided advice to a number of clients with complaints of discrimination stemming from these attributes.

The lack of protection of these grounds under the FW Act results in protection against discrimination being inconsistent and dependant on the geographical location of the discrimination and the jurisdiction of the relevant State or Territory tribunal.¹⁸ This patchwork type response has been criticised by the UN Human Rights Committee¹⁹, the UN Committee on Economic, Social and Cultural Rights,²⁰ the UN Committee on the Elimination of Racial Discrimination²¹ and the UN Committee on the Elimination of Discrimination Against Women.²²

The lack of consistent protection against discrimination under the FW Act and anti-discrimination laws often means that individuals must commence proceedings in multiple jurisdictions in order to enforce all of their employment rights, which is generally too expensive and impractical to justify the

¹⁸ *Commonwealth of Australia v Anti-Discrimination Tribunal (Tasmania) and Rodney John Nichols* [2008] FCAFC 104.

¹⁹ Human Rights Committee, Concluding Observations of the Human Rights Committee: Australia, Ninety-fifth Session, 16 March - 3 April 2009, CCPR/C/AUS/CO/5.

²⁰ Committee on Economic, Social and Cultural Rights (CESCR), Concluding observations of the Committee on Economic, Social and Cultural Rights: Australia, Forty-second session, 4 - 22 May 2009, /C.12/AUS/CO/4.

²¹ Committee on the Elimination of Racial Discrimination, Concluding Observations: Australia, CERD/C/AUS/CO/15-17, 27 August 2010 [10].

²² Committee on the Elimination of Discrimination Against Women, Concluding Observations: Australia, CEDAW/C/AUS/CO/7, 30 July 2010 [25].

trouble, or are left with no remedy at all. It is our experience that the lack of a legal remedy in such situations reinforces the client's experience of marginalisation, and leaves clients feeling powerless and hopeless about the discrimination.

Chris' story

“A job-network provider discriminated against Chris, a receptionist at a gay venue, based on his sexual orientation and association with persons engaged in lawful sexual activity, by failing to provide him with standard job related supports. The job-network provider told Chris that it could not act differently due to a stipulation in its funding agreement with the relevant Commonwealth government department. There is no protection against discrimination based on lawful sexual activity and sexual orientation under Commonwealth law, and it is unlikely that proceedings can be brought against a Commonwealth department in the Victorian Civil and Administrative Tribunal under the Victorian *EO Act*, because the Tribunal is not invested with federal jurisdiction over the Commonwealth. Chris was therefore left without a legal remedy.”

We recommend that the FW Act be broadened to cover the attributes listed above that are currently covered by the Victorian EO Act to promote legislative consistency and better protection.

Moreover, we recommend broadening the range of attributes to include irrelevant criminal record, being a victim of a violent crime, being a victim of family violence, socio-economic status and homelessness.

As noted above, VLA is the largest provider of legal assistance in Victoria. Many of our clients have had contact with the criminal justice system and have a criminal record as a consequence. Our experience has been that these clients find it difficult to rehabilitate or reintegrate after serving a prison sentence. In particular, they report discrimination in employment, housing and other services on the basis of their criminal record. This discrimination regularly occurs even where the past criminal activity has no relevance to the job or service sought.

Similarly, we have acted for clients who have been victims of rape. Upon disclosure of these incidents to employers and education providers they have been branded as 'overly sensitive', 'troublesome' and requiring 'special treatment'. Likewise, our discrimination lawyers and family law practitioners report that people who experience family violence are indirectly discriminated against by employers who fail to provide flexible work conditions. Moreover, clients have reported a reluctance to report family violence to their employers for fear of embarrassment or being treated differently.

Over 90 per cent of VLA clients are in receipt of some form of social security entitlement. We often hear complaints from clients that they are deemed ineligible for rental properties because they receive Centrelink benefits, even where they can afford the rent. Discrimination in rental accommodation is even more acute where an individual has had a period of homelessness and is unable to account for periods where they were not in stable accommodation.

Recommendation 8: that s 351 of the *Fair Work Act 2009* (Cth) be amended to prohibit discriminatory conduct on the basis of the following attributes:

- breastfeeding
- gender identity
- physical features
- lawful sexual activity
- status as a parent or carer
- religious belief or activity (as distinct from religion)
- political belief or activity (as distinct from political opinion)
- industrial activity
- ethnicity
- irrelevant criminal record
- being a victim of violent crime
- being a victim of family violence
- homelessness
- socio-economic status.

Discrimination against an associate of a person with an attribute should also be prohibited, and the coverage of this protection should extend to all protected attributes. This is currently the case under the Victorian EO Act and is a feature of the *Disability Discrimination Act 1992* (Cth) and the *Racial Discrimination Act 1975* (Cth). This will create consistency and clarity in FW Act.

Recommendation 9: The *Fair Work Act 2009* (Cth) should be amended so that discrimination against an associate of a person with an attribute is prohibited, and the coverage of this protection should extend to all protected attributes consistent with *Equal Opportunity Act 2010* (Vic), *Disability Discrimination Act 1992* (Cth) and the *Racial Discrimination Act 1975* (Cth).

2.5 Inadequate protection of employees of independent contractors

The FW Act does not clearly or adequately protect employees of independent contractors from adverse action resulting from a contravention of the general protections provisions. We have acted for a number of labour hire workers who are highly vulnerable due to their precarious employment conditions, as indicated further below by the story of our client, Alec. It is often extremely difficult to seek a remedy under the general protections provisions due to the employment arrangement that exists, and the option of joining a respondent to a general protection application under s 550 of the FW Act (for involvement in the contravention) is complex and unfamiliar to lay-persons.

While the definition of adverse action in s 342, includes discrimination by a principal against an independent contractor or employee of an independent contractor,²³ this is of limited benefit because

²³ *Fair Work Act 2009* (Cth), s 342(3)

the protection from discrimination under s 351 is limited to adverse action by an employer against an employee. Further, the types of prohibited conduct listed under column 3 of s 342 are limited to termination of the contract with the independent contractor and refusing to make use of the services offered by the independent contractor, and do not include ceasing to use an employee of the contractor.

This anomaly highlights the difficulty that labour hire employees experience in establishing adverse action in employment where that action is taken at the initiative of a host organisation, such as where the principal terminates an employee's contract because of their disability or pregnancy.

In our experience, the prevalent approach by the Commission is to treat the employment relationship between the labour-hire firm and the labour-hire employee as on-going if the employee remains 'on the books' of the firm. This approach puts labour-hire employees in the objectionable position of having lost access to their livelihood and yet being denied the usual protections attached to such a loss.

In our view, the general protections provisions of the FW Act should clearly state that principal contractors that engage labour hire workers owe the same obligations to those workers as employers owe to employees, thereby protecting labour hire workers are protected from adverse action by a host organisation.

This would align with the obligations of principals under State and Commonwealth anti-discrimination legislation to ensure that employees of independent contractors working in their workplaces are not subjected to discrimination or sexual harassment.²⁴

We propose that s 342(3) be amended as follows:

- (a) terminates the contract or ceases to use the services of a person employed or engaged by the independent contractor;
- (b) injures the independent contractor or a person employed or engaged by the independent contractor in relation to the terms and conditions of the contract;
- (c) alters the position of the independent contractor or a person employed or engaged by the independent contractor to their prejudice;
- (d) refuses to make use of, or agree to make use of, the services offered by the independent contractor or a person employed or engaged by the independent contractor;
- (e) refuses to supply, or agree to supply, goods or services to the independent contractor or a person employed or engaged by the independent contractor;
- (f) discriminates against the independent contractor or a person employed or engaged by the independent contractor.

Recommendation 10: That section 342 and s 351 of the *Fair Work Act 2009* (Cth) be amended to include provisions to protect persons engaged or employed by independent contractors from unlawful adverse action by principals.

²⁴ See for example, *Equal Opportunity Act 2010* (Vic); s 21, s4 (see the definition of 'contract worker' and 'principal'); and the *Sex Discrimination Act 1984* (Cth), s 16, s 4 (in particular, see the definition of 'employment', 'contract worker', 'principal', and 'employment agency', which extend to labour hire arrangements).

3. Are the discrimination provisions within the general protections effective, and are they consistent with other anti-discrimination regulations that currently apply in Australia?

The effectiveness of the discrimination provisions within the general protections provisions is considered at 2 above. VLA refers to and repeats the recommendations contained therein.

As indicated above, the failure of the FW Act to provide the same level of protection that has long been provided by State and Federal anti-discrimination legislation results in inefficiency and unfairness. The consequences are as follows.

- Often individuals must commence proceedings in multiple jurisdictions to enforce all of their employment rights, which is generally so expensive, complex and impractical that employees do not pursue their all or any of their entitlements. For example, an employee who has experienced sexual harassment as well as general breaches of the NES, such as underpayment of wages, would need to bring actions under both the FW Act and anti-discrimination legislation, or risk an unsuccessful sexual harassment claim on the grounds of sex under s351 of the FW Act. Alternatively, some employees are left with no remedy at all, as Chris's story illustrates above.
- Employers and employees are confused about their rights and obligations, and often assume that the FW Act covers all rights and obligations that apply to situations of workplace discrimination and sexual harassment, when this is clearly incorrect.
- The confusion about legal obligations leads to lack of compliance with anti-discrimination laws and greater difficulty for employees seeking to recover their entitlements informally. This results in the legal escalation of disputes that could otherwise be resolved promptly, had the FW Act mirrored obligations under anti-discrimination laws.
- The cost of seeking and providing legal advice is high, as lawyers require significant expertise in multiple jurisdictions and there is no 'best jurisdiction' for all complaints, or even any one type of complaints. Each client situation must be assessed according to the facts by reference to three jurisdictions, with the general protections provisions under the FW Act being singular and requiring quite separate analysis, as discussed further below.

4. To what extent has the recent harmonisation of the time limits for lodgements of general protection dismissal disputes and unfair dismissal claims increased certainty for all parties involved and reduced the 'gaming' of such processes?

The 21 day time limit for commencing legal proceedings for dismissal from employment does not allow sufficient time for a person to access legal advice and assistance. Our experience is that many clients are barred from bringing a general protections claim in relation to their dismissal because they are outside the 21 day limitation period. Extending the timeframe would lead to a reduction in extension of time/jurisdictional hearings.

Due to the complexity of anti-discrimination law and the various options for legal redress that are available, it is common for clients to make a complaint under legislation that is not the most appropriate to the subject matter of their complaint. For example, a client with a complaint of workplace discrimination will generally have the option of making a complaint to the State agency (e.g. the Victorian Equal Opportunity and Human Rights Commission) or the AHRC or an adverse

action application to the Fair Work Commission. Clients may also have claims at common law, and under workers' compensation law.

Choosing the best jurisdiction to seek redress for unlawful conduct is difficult for lawyers, let alone unrepresented individuals, and involves weighing up the prospects of success under each option, the remedies that are available, the processes and limitations in each jurisdiction, the risk of an adverse costs order, and the availability of free legal assistance.

In 2013-14 we provided 1,200 advices in discrimination matters. A number of our clients were obstructed from pursuing the most beneficial course of action because they had already lodged a complaint in one jurisdiction and were statutorily barred from initiating a complaint in the more appropriate forum, or the statutory limitation period had passed by the time that they received legal advice.

The 21 day timeframe also places significant pressure on VLA and community legal centres to provide complex advice to dismissed employees and ensure that they are not prevented from making claims simply due to the limitation period. In practice, very few claims are accepted outside the 21 days.

In our experience, many employees are not aware of their rights, do not know how to lodge a claim, or even who to go to for advice or assistance. Some employees are in such a state of shock at having been dismissed that they do not seek redress for an unfair dismissal for days, weeks and sometimes months after the dismissal. When dismissed employees finally do seek assistance, it may not be possible for them to obtain legal advice straight away. These problems are further exacerbated where the employee is from a non-English speaking background, has literacy issues or a disability, is unfamiliar with the laws or the legal system, or is geographically isolated.

Alec's story

“Alec worked at a plant for four years under a labour hire arrangement. He speaks limited English and requires an interpreter. Alec sustained an injury at work and required a month of personal leave to recover from his injury. When he returned to work, he provided his host employer with a medical certificate and said that he needed modified duties for a further four weeks. The host organisation sent him home and said that there was no more work for him. His employer, the labour hire company, later said that things were quiet and that there were no other roles for him.

Alec had no friends or family in Australia and did not know who to call for advice. Two weeks after his employment was terminated, Alec spoke to his local doctor who referred him to VLA. Alec wanted legal advice in relation to all of his legal claims, including worker's compensation, discrimination, adverse action and unfair dismissal. With the assistance of an interpreter, VLA provided Alec with legal advice in relation to his claims of adverse action and discrimination under State and Federal anti-discrimination laws, and referred Alec to other legal service providers to get advice in relation to his potential claim of unfair dismissal and workers' compensation so that he could assess which jurisdiction/s would provide him with the best protection.

Alec was not able to get legal advice on his claims until 31 days after he was dismissed because it was difficult to find an interpreter. Alec became confused about the advice that he

received and lodged complaints in multiple jurisdictions. He applied for an extension of time to file his complaint to the FWC, however his application was refused on the basis that there was no exceptional circumstances.”

Recommendation 11: That the time limit for filing general protections claims involving dismissal from employment be extended to 12 months, consistent with the time limits in State and Federal anti-discrimination laws.

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5. How effective are the FWO and FWC in dispute resolution between parties? What, if any, changes should they make to their processes and roles in this area?

Overall, there remain significant barriers for many vulnerable workers to access and navigate the FWO and FWC regimes. A substantial proportion of VLA's clients have little or no awareness of their employment rights. Even those who can adequately frame their complaint may be overwhelmed by the sheer complexity of systems and options. The complexity of the systems contributes to delays in lodging disputes within the statutory timeframe.

5.1 Fair Work Commission

5.1.1 What works well

VLA notes that matters are listed quickly and often proactively managed by the FWC, which is positive. Our experience has been that face-to-face conciliation conferences are an efficient way to resolve general protections disputes.

5.1.2 What could be improved: accessibility and interest-based approaches

In our experience Commissioners at the FWC take an evaluative/settlement approach to general protections conciliation conferences, and therefore focus on finding fault and getting the parties to agree to a financial outcome with minimal if any attention given to addressing relationship issues or any other considerations that are not financial or strictly legal.

The absence of an interest-based approach, which is adopted by the State and Federal anti-discrimination commissions, has led to unsatisfactory experiences and results for our clients, and probably for respondents as well. It fails to meet the key concerns of people who experience discrimination.

VLA surveyed 61 clients who we assisted with a discrimination complaint during 2013-14. The main concern and reason for taking action stated by respondents to the survey was fairness (43%), to stop it happening to them (39%), to continue working or to get another job (25%), to stop it happening to others (18%), to punish the wrongdoer (15%), for financial need (11%) and to protect their reputation or to access education (7%). Therefore, the approach currently taken by the FWC to conciliation conferences helps to achieve the main goal of just a small percentage of complainants, while potentially entrenching the sense of unfairness that prompted the complaint in the first place.

Some Commissioners also take a very strict approach to the question of granting the lawyer leave to appear in the conciliation conference under s 596(2), with little regard to the power imbalance between the parties, such as where the respondent is a large company with in-house specialist human resources or legal expertise, or where the employee feels incapable of representing themselves due to the distressing circumstances of the allegations or their limited education.

Recommendation 12: The Fair Work Commission engage conciliators who are trained in the facilitative (interest-based) or transformative model of conciliation to facilitate the effective resolution of general protections disputes.

Recommendation 13: Section 596(2) of the *Fair Work Act 2009* (Cth) be amended to specify the factors that may be taken into account to determine issues of fairness and effective representation, including whether the application is being made by the employee or the employer, the nature of the dispute, and the ability of the individual to clearly articulate their claims.