



SUBMISSION TO THE REVIEW OF THE FAIR WORK ACT 2009

1. INTRODUCTION

KLC is a community legal centre and part of the Faculty of Law at the University of New South Wales. KLC is also a member of Community Legal Centres NSW Inc. (CLCNSW) the peak body for community legal centres in the state.

We provide advice and representation to people who live and work in the Botany and Randwick local government areas as well as to staff and students at the University of New South Wales. KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

KLC provides a specialist employment service within our catchment as well as a state-wide specialist discrimination service. KLC has acted for a number of clients in unfair dismissal conciliations and arbitrations, general protections complaints (particularly in relation to workplace rights and discrimination) and in relation to unpaid entitlements. KLC also provides advice on a wide-range of employment issues such as redundancy, disciplinary action, occupational health and safety and workplace rights for parents and carers.

2. EXECUTIVE SUMMARY

Kingsford Legal Centre (KLC) welcomes the opportunity to make a submission to this Review. Overall, KLC believes that the *Fair Work Act 2009* (Cth) (the **FWAct**) provides increased protection for employees and has improved the position of employees in Australia.

We urge the Government to make a stronger commitment to increasing the flexibility of Australian workplaces by creating enforceable rights to flexible working arrangements and placing positive obligations on employer to create flexible workplaces. We believe these measures will benefit all employees and increase work-life/balance, productivity and efficiency.

We commend the extension of protection from unfair dismissal to employees of small and medium size enterprises. We also commend the introduction of the General Protections provisions and believe that these provisions have the potential to provide an accessible remedy for victims of some of the most unscrupulous workplace activity. However, we note that, without further clarity in how these laws will operate, employees are hesitant to make General Protections complaints and prefer to make use of unfair dismissal or anti-discrimination laws, where available. We believe this has impacted on the effectiveness of the General Protections provisions.

We note with disappointment the short timeframe given for submissions to the Review. This has impacted on our ability to provide feedback and recommendations on a number of areas. As such, we have concentrated on what we feel are the most significant changes needed under the Act.

3. OUR CLIENTS

In 2011 KLC provided advice to over 300 clients on employment law issues and almost 200 advices on discrimination matters (a substantial proportion of which relate to discrimination in employment).

Of the clients that KLC's employment clinic advised in 2011, 55% stated they earned \$40,000 or less annually; 92% of clients stated that they earned less than \$60,000p/a. Of the 8% of clients earning over \$60,000 the majority were at risk of losing their job or were about to commence a period of unpaid or low paid leave, such as parental leave.

62% of clients were not born in Australia, with many speaking little or no English. 2% of our clients identified as being either Aboriginal or Torres Strait Islander.

As seen in the statistics above, KLC's employment clinic services a predominantly low income and vulnerable sector of the community. Our experience suggests that in many cases, the FWAct does not adequately protect the most vulnerable members of society.

4. THE FAIR WORK SAFETY NET

Requests for flexible working arrangements

KLC does not believe that the right to request (RTR) provision contained in s65 adequately addresses the needs of employees responsible for the care of others. The RTR provision provides a reactive mechanism for employers to consider the needs of employees with caring responsibilities and does little to address systemic forms of discrimination or to overall improve the flexibility of workplaces.

- **Introduction of enforceable right for employees**

KLC recommends that the FWAct introduce an obligation on all employers to consider opportunities for flexibility within the workplace and opportunities to make reasonable adjustments for employees. This obligation should be complemented by enforceable rights for employees to request flexible working arrangements and reasonable adjustments and challenge an employer's denial where they believe a request could be accommodated but has been declined.

In our experience the RTR provision has not significantly increased the protection of parents and carers under the law. Most employees do not use the formal process set out in the FWAct to request flexible working arrangements, rather, employees are more likely to make informal requests to or have ongoing discussions directly with their supervisor or management. Through our advice and casework we have noticed that the process set out in s65 of the FWAct tends to be used only where informal negotiations have failed. At that stage, employees are more likely to make a formal request under s65 so that they can receive written reasons for a decision they disagree with; they can then use these written reasons as the basis for a discrimination action against the employer.

We also note there are still a number of employees with caring responsibilities who do not benefit from the RTR provisions - namely persons with school age children and those with the care of older family members (such as elderly parents or adult children with disability). The amendments to the FWAct contained in the *Fair Work Amendment (Better Work/Life Balance) Bill 2012* expanding the operation of the RTR provisions to all employees and increasing protection for employees with a responsibility of care for someone should be adopted. These amendments will not only reduce systemic discrimination against parents and carers but will also cater for the changing needs of the Australian workforce, including older workers wishing to transition to retirement gradually or workers who wish to balance work with study or

leisure pursuits.

Recommendation

That a positive duty be placed upon employers to implement flexible working conditions and make reasonable adjustments for employees.

That the Fair Work Amendment (Better Work/Life Balance) Bill 2012 be adopted so that the RTR provisions extend to all employees who seek flexible working arrangements and employees with responsibility for the care of another person are provided with increased protection.

If the Bill is not adopted KLC recommends that other measures be taken to increase the effectiveness of the RTR provisions.

- **How to ensure that employees can challenge “reasonable business grounds”**

The failure of the FWAct to provide any redress for employees who believe that their request has not been properly considered or to challenge the validity of "reasonable business grounds" presents a major obstacle to removing systemic discrimination within workplaces. In some cases, it appears that employers do not genuinely consider whether a request could be accommodated. Informal responses, that KLC is aware of, that have been provided to employees include "we don't do part time work here" or "we have never had anyone work from home before". While the requirement to place reasons for a decision in writing does prompt employers to consider the request more carefully and elaborate on the reasons for their decision, in our experience this has not prevented employers from maintaining an inflexible approach to working conditions, particularly where inflexibility has tended to be the tradition within the particular workplace. As such, KLC recommends that the exception set out in s44(2) of the FWAct be removed to allow employees to challenge the "reasonable business grounds" provided by an employer.

Recommendation

That the exception set out in s44(2) of the FWAct be removed to allow employees to challenge the "reasonable business grounds" provided by an employer.

That employees have the right to apply to FWA for resolution of disputes in relation to the RTR provisions.

Employers are more likely to have knowledge about the reasonableness of any business grounds they rely on to refuse a request (such as the impact on operating costs or existing shift arrangements). KLC recommends that the burden of proving that reasonable business grounds exist should rest on the employer once an employee has demonstrated that they have met the requirements of the FWAct in making their request.

Recommendation

That the burden of proof in demonstrating that "reasonable business grounds" exist be on the employer. It should be assumed that flexible working arrangements are able to be implemented unless the burden is met.

We note that the FWAct does not define "reasonable business grounds" nor does the FWAct give any indication as to what factors may be taken into account by an employer in determining whether to grant a request for flexible working arrangements. KLC recommends that guidance be given to employers and employees around the definition of "reasonable business grounds".

Recommendation

The FWAct should provide guidance as to the factors which employers should, and FWA must, take into account in determining whether "reasonable business grounds" exist.

Parental leave and related employment

KLC supports the ongoing right of employees to a 12 month period of unpaid parental leave however; we recommend that the entitlement to unpaid parental leave be extended to all employees, not just those with 12 months of continuous service.

Recommendation

That the right to 12 months of unpaid parental leave be extended to all employees, not just those with 12 months of continuous service.

If this recommendation is not adopted then KLC recommends that a shorter period of unpaid leave, such as 3 months, be granted to employees who do not have 12 months of service.

KLC has seen a number of cases where parents, particularly mothers, who intend to take only short amounts of leave (6-12 weeks) following the birth of a child are forced unnecessarily to leave otherwise stable employment because they do not qualify for any unpaid leave. We have even seen some cases where employers are unwilling to grant a pregnant employee enough unpaid leave to give birth and physically recover from labour unless the employee has enough personal or annual leave accrued.

While these employees may be able to make a claim in relation to termination on the basis of temporary absence due to illness or injury, embarking on (often protracted) legal action against an employer just prior to or straight after giving birth is rarely an attractive option for new parents. Further, this option is not available to mothers who take more time off after a birth than the period of incapacity associated with labour, the non-delivering parent or parents who adopt a child.

Recommendation

That a new right to 3 months of unpaid parental leave be introduced for employees with less than 12 months of continuous service.

Annual leave

KLC notes with concern FWA's recent approval of the *Hull-Moody Finishes Pty Ltd Enterprise Agreement*¹. In the case FWA approved an Agreement allowing the employer to 'pre-pay' annual leave entitlements in a manner akin to a loading on the ordinary base rate of pay. KLC is particularly concerned that, where such arrangements exist employees will be discouraged from taking annual leave as that period will then be 'unpaid'. KLC recommends that s 90 be amended to specify the time at which annual

¹ Mr Irving Warren; Hull-Moody Finishes Pty Ltd; Mr Romano Fidoth [2011] FWAFB 6709 (29 November 2011)

leave must be paid to an employee.

Recommendation

That s 90 be amended to specify the time at which annual leave must be paid to an employee.

Redundancy pay

Whilst the inclusion of a minimum right to redundancy pay within the National Employment Standards is a positive step, KLC is concerned that the current wording of the provision gives rise to indirect discrimination against parents and carers. Currently, an employee is entitled to redundancy pay at the employee's ordinary base rate of pay for the redundancy pay period.

Case Study

Josephine worked as a credit controller for a medium sized business for 8 years. During her 8th year with the company she fell pregnant and took 3 months off for maternity leave. When she returned to work she asked if she could work 3 days a week instead of full-time and her employer was happy to accommodate her. Six months later the company started to have financial difficulties and Josephine's position was made redundant. Josephine was upset to find out that her redundancy pay would only be based on her part time working hours and not on the full time working hours she had worked for most of her 9 years with the company.

We have recently noticed a number of cases where employees, usually women, who have extensive periods of service (5 – 10 years) as full-time workers have negotiated part time work due to care commitments. If these employees are then made redundant they are only entitled to receive redundancy pay at the lower (part-time) ordinary hours of work despite the fact they have been full-time employees for most of their period of continuous service. As such, KLC recommends that redundancy pay be calculated on a pro rata basis based on the ordinary hours of work worked for each year of continuous service.

Recommendation

That s199(2) be amended to reflect that an employee is entitled to redundancy pay on a pro rata basis based on the ordinary hours of work, worked for each year of continuous service where an employee has reduced their ordinary hours of work to accommodate carer responsibilities.

Family Violence²

KLC notes the recent Commonwealth Law Reform Commission's (ALRC) *Inquiry into Family Violence and Commonwealth Laws*. In response to the Inquiry KLC made a number of recommendations in relation to the recognition of family violence in the Fair Work Safety Net, we repeat these recommendations below. We note the ALRC, in their Report released on 9 February 2012, recommends changes to the safety net as part of a phased approach. Whilst a phased approach is better than no change at all, we would encourage the Government to act quickly to ensure that employees who experience family violence are able to remain in secure employment.

- **Flexible Working Arrangements**

We note that employees experiencing family violence will often need to access flexible working arrangements. These arrangements may include a change of working hours or days, changes of work duties, ability to work from home or relocate closer to home. As such, we support the inclusion of a right to request flexible working arrangements on the basis of family violence in the FWAct.

Case study

Amanda and her two children have just moved out of their home in Botany after experiencing family violence. Amanda and the children are staying with family in Parramatta. Amanda was too afraid to take the family car when she left so she now has to rely on public transport. Amanda has to travel to Botany to take her children to school and then to Kogarah to work. This takes much longer without a car and she can't get to work on time. She also needs to leave earlier so she can pick the children up from school. She

² KLC recognises that men may be victims of family violence; particularly men living in same-sex relationships. However, the majority of KLC's experience in working with victims of family violence is with women. As such, our submission focuses on that experience. Statistically family violence is mostly perpetrated by men against women.

needs to temporarily change her start and finish times at work until she can enrol the children in a school closer to their new house or she can buy a car.

We support removing the requirement that an employee has been employed for 12 months or be a long term casual prior to making the request. Family violence is not something that can be anticipated in advance. The nature of family violence means that a victim is unlikely to know what their needs might be 12 months in advance. Also, dealing with family violence usually requires immediate flexibility or altered working arrangements in order to deal with unforeseen circumstances. We recommend that there be no requirement for a period of 12 months continuous service and that employers be required to respond to a request as soon as practicable rather than within 21 days.

Recommendation

That employees experiencing family violence, or supporting a person experiencing family violence, be given the right to request flexible working arrangements. This right should not be contingent on having served a minimum period of continuous service and there should be an obligation on employers to respond to such a request as soon as practicable.

However, while any amendments would be welcome and may provide assistance for many victims of family violence, our concern (as raised above) is that mere inclusion of a right to request does not create an enforceable entitlement to flexible working arrangements and there is little recourse where a refusal is made unreasonably. As such, changes to Section 65 of the FWA are insufficient as a primary mechanism to address the needs of victims of family violence. As such, we repeat our recommendation that employees be given the right to challenge denial of requests for flexible working arrangements in FWA.

- **Family violence leave**

We recommend that the NES be amended to provide for an entitlement to family violence leave. Employees experiencing family violence, or who are providing care for a family member who is experiencing family violence, may need to access time off work that would not normally be available through personal or carer's leave. For instance, an employee may need to:

- attend multiple court proceedings in relation to Apprehended Violence Orders, criminal charges against the perpetrator or for family law proceedings

- take time off to arrange new accommodation or schools for children
- attend legal or counselling appointments.

Additionally employees may be hesitant to attend work when they show physical signs of family violence such as visible bruising. These reasons would not normally constitute grounds for taking personal or carer's leave.

Recommendation

That employees experiencing family violence or supporting a person experiencing family violence be given the right to a period of paid leave to deal with circumstances arising from the family violence.

In our experience, many women do not see family violence as a community problem. In particular, in our work with women from culturally and linguistically diverse backgrounds, we have seen a hesitance to remain in employment when work is impacted by the family violence. Many women do not feel that they can share the burden of dealing with family violence with their employer. We recommend the implementation of a minimum statutory entitlement under the NES. An entitlement to leave may make it much easier for women who are willing to disclose family violence to maintain employment (especially full-time and permanent employment) and avoids the need to rely on the "goodwill" of the employer to be flexible in relation to time-off or attempting to access other types of leave.

Case study

Suki works on the checkout at a local fruit and vegetable store. She has just left her husband after a long period of violence towards her. In the past she has called in sick a lot because she has bruises on her face and arms but now she does not have any sick leave left. She is very embarrassed that the customers might see the bruises. She also has to go to Court because she has taken out an AVO against her husband. Suki is ashamed to tell her boss about the family violence and ask for time off. Because she feels as though it is her problem to deal with, not her boss's, Suki asks her boss if she can become a casual worker instead of staying full-time. She does not want to be an unreliable worker or ask for more time off and thinks that as a casual she will have more flexibility, even though it will mean she has less money and security.

Ensuring that leave is paid recognises that women experiencing family violence are often in a position of financial hardship. It enables women to maintain their income at a time when they have to deal with many additional expenses such as new housing, furniture or vehicles, professional support such as counselling and legal advice and representation and previously unknown debt.

Case Study

Meanu's husband always took care of their finances. He made her give him her pay cheque each fortnight and he would give her a small allowance to buy food for the two of them and her bus pass. He took care of all the bills and the rent. He also opened all the mail and would not show Meanu. When Meanu left her husband she had no money to pay a bond and buy furniture for a new unit. After she arranged to get her mail forwarded she started receiving lots of overdue notices for bills she thought her husband had paid. Meanu now realises that she is in thousands of dollars of debt. Meanu needs to take time off work to attend Court but if she takes a day off she will not get paid and right now, she needs to get all the money she can.

Enterprise Agreements

KLC supports the inclusion of family violence clauses in enterprise agreements and the ALRC's recommendation that the Fair Work Ombudsman develop a guide in consultation with key stakeholders.

Enterprise Agreement clauses should recognise that evidence of family violence may vary from woman to woman and as such, clauses should require that evidence need be provided only when specifically required by the employer and that sufficient evidence may take various forms. Examples of evidence might include an AVO, medical or counselling reports, a letter from a case worker or refuge or a statutory declaration from the employee. This flexibility recognises that not all women will approach the Police in relation to family violence or may not disclose the origin of any injuries they have sustained to their doctor.

Recommendation

That the Australian Government support the inclusion of family violence clauses in enterprise agreements. The FWAct should make it clear that FWA must ensure, when approving enterprise agreements, that the notice and evidence requirements in such clauses are flexible and adequately accommodate the special circumstances of victims of family violence and those who support them.

Individual flexibility arrangements (IFA)

Negotiation of IFAs may be an appropriate mechanism where a workplace is not covered by an enterprise agreement containing a specific family violence clause. However, KLC does not favour the use of IFAs as the most appropriate mechanism for addressing family violence.

Employees experiencing family violence usually require immediate flexibility or altered working arrangements in order to deal with unforeseen circumstances arising from family violence. The employee's circumstances may change abruptly and frequently. As such, the formality of the IFA process may not be adequate to deal with unforeseen or short term employee needs.

There are also inherent concerns around the bargaining power of employees experiencing family violence. Low paid, low skilled employees or part-time/casual employees (characteristics often related to employment of women) are likely to have less negotiating power. Many employees will also not have the level of confidence, knowledge or skill required to negotiate an effective IFA.

5. GENERAL PROTECTIONS

KLC commends the introduction of the General Protection provisions in the FWAct. We believe that the provisions have the potential to protect employees from some of the most unscrupulous and exploitative employer behaviour. In particular, KLC notes that the ancillary rules in relation to 'multiple reasons' and 'reason for action' at ss360 and 361, as well as the costs provisions at s 570, greatly increase the accessibility of these provisions to employees.

However, KLC has noticed a number of areas where improvements could be made to these provisions to ensure that workplaces remain fair for employees and that employees and employers have clarity over their rights and obligations.

Although aspects of the protection provided under the FWAct may be more favourable to an employee than under other anti-discrimination laws (for example, where the onus is on the employee to prove the reason for behaviour) a number of our clients have chosen to make complaints to their State anti-discrimination body or the Australian Human Rights Commission because the operation of the law under these acts is more certain. Unfortunately, this has led to an under-utilisation of the General Protection provisions amongst CLC clients.

It should be noted that, where recommendations may have equal application in matters involving allegations of unlawful termination, KLC recommends that the FWAct be amended in relation to unlawful termination as well.

Workplace rights

- **Definition to workplace instrument**

A number of clients have approached KLC where they have been dismissed or otherwise adversely affected when they have acted in accordance with or made attempts to enforce provisions of their employment contract. The current provisions do not appear to protect common law contracts as workplace rights and, although an employee may be protected where they have "made a complaint or inquiry in relation to his or her employment" KLC is concerned that some employees may 'fall through the cracks' where they have legitimate concerns in relation to their employment. As such, KLC recommends that the definition of 'workplace instrument' be amended to include common law employment contracts.

Recommendation

That the definition of workplace instrument be amended to include common law employment contracts.

- **Definition of workplace law**

Whilst the current definition of workplace law is reasonably broad in the sense that it includes *'any other law (...) that regulates the relationships between employers and employees (including by dealing with occupational health and safety matters)'* we have recently noticed a number of cases where employees are dismissed or otherwise adversely affected when they have acted in compliance with laws that do not *'regulate the relation between employers and employees'*. For instance, employees who are asked to participate in unlawful acts by their employer may not have redress under the current definition of workplace law.

Case study

Michael works for a packaging plant. He has been there for five months and his job is to pack bottles of cleaning and self care products into boxes. One day, Michael's boss tells him that one of their customers is going to start using a new shape bottle for their bleach. Michael is told to go out to the back of the plant and pour all the filled bottles of bleach down the drain and then throw the bottles out. There are thousands of bottles.

At home that night Michael mentions to his sister that he has to pour the bleach down the drain. Michael's sister, who is an environmental scientist, tells him she is pretty sure that dumping large amounts of chemicals down the drain is illegal under the Protection of the Environment Operations Act 1997. Michael calls the council anonymously to find out and they agree he should not be dumping the bleach.

The next day Michael tells his boss he doesn't feel comfortable dumping the bleach down the drain as he thinks it's illegal. His boss tells him there is no other work for him and that he should go home unless he wants to change his mind. Michael is very upset, it has taken him a long time to get this job as he has an intellectual disability and he's not sure how long it will take to find another job.

Recommendation

That the definition of workplace law be amended to include any other law of the Commonwealth, State or Territory where compliance with that law may impact upon an employee's ability to perform their employment.

- ***Meaning of adverse action***

For many KLC clients, the FWAct General Protections provisions serve as an alternative form of remedy to State or Commonwealth anti-discrimination acts. However, the uncertainty around what acts of an employer will fall under the definition 'adverse action' in comparison to 'discriminate' means that many clients choose not to make a General Protections application. KLC's position is that the actions listed in s342, such as 'injures the employee in his or her employment', should be given as broad and beneficial a definition as possible. KLC believes that the term 'injures in employment' should include any action that would be unlawful under a Commonwealth, State or Territory discrimination law. We note, however, that this is currently a matter of judicial interpretation.

For instance, under the *Disability Discrimination Act 1992* (Cth), it is unlawful for an employer to refuse to make a reasonable adjustment for an employee with a disability, if that refusal would result in the employee being treated less favourably than another employee without that disability. It is not clear, under the current wording, whether an employee in this situation would be protected by the FWAct.

Case Study

Margot has a vision impairment. She works as a paralegal in a large law firm. Margot's job involves a lot of work on the computer. Margot's specialist recommends that she get a larger computer monitor to help her see more clearly at work. Margot asks her boss if they will buy her a bigger screen but her boss says its unfair if she has a better computer than paralegals who have been at the firm longer than she has. Margot feels her request was reasonable and that without the larger monitor she will struggle to do her job.

Margot seeks legal advice from a CLC. The CLC tells her that by law, employers need to make reasonable adjustments for employees who have a disability. They explain that she has three options – a discrimination complaint to the Australian Human Rights Commission or her State Anti-Discrimination Board or a General Protections complaint to Fair Work Australia. They explain that they cannot be sure her type of complaint is covered by the Fair Work Act so she decides to make a complaint to the Australia Human Rights Commission instead.

Similarly, it is not clear whether concepts of indirect discrimination can be imported into the FWAct. For instance, it is uncertain whether adverse action has occurred where an employer introduces a policy that disadvantages employees with a certain attribute.

Case Study

Gareth works for an IT company in the CBD. Gareth has arranged with his supervisor that he can come to work late on Mondays because that is the day he drops his daughter at kindergarten. After a few years of this arrangement working well Gareth gets a new supervisor. The new supervisor implements some policies to improve employee performance. One policy is to ‘counsel’ employees who arrive late to work. Gareth tells the new supervisor about his arrangement but the supervisor tells him that all employees are expected to be at work at 9:00am and if he is late more than 3 times in any month he will get a warning because that is the policy.

When Gareth gets advice from KLC they tell him to make a formal request for flexible working arrangements in writing to his supervisor. When Gareth still gets a ‘no’ they tell him he can make a carer’s responsibility complaint to his State anti-discrimination board. They tell him that, although his complaint might fit under the General Protections provisions of the Fair Work Act they cannot be sure that cases of indirect discrimination are protected under the Act.

KLC believes that, depending on judicial interpretation, protection of employees who request reasonable adjustments or are subject to indirect discrimination may be limited. As such, KLC recommends that the Government consider ways in which the FWAct may be amended to clarify how the FWAct operates to protect employees in this position.

Recommendation

That the Government consider ways in which the FWAct may be amended to clarify how the FWAct operates to protect employees who require reasonable adjustments or are indirectly discriminated against.

Discrimination

We note that the Commonwealth Government is currently conducting the Consolidation of Commonwealth anti-discrimination laws project (the Consolidation Project). The National Association of Community Legal Centre's (NACLC) has made detailed submissions to the Consolidation Project recommending a number of amendments to existing Commonwealth discrimination laws. KLC supports the recommendations in the NACLC submission and notes that in many instances, these recommendation would also be applicable to the FWAct or impact the operation of the FWAct via the exception in s351(2)(b).

Recommendation

That the Government adopt the recommendations made in the NACLC submission to the Commonwealth's Consolidation Project to the extent that these recommendations will be applicable to the Fair Work Act.

While the submission to the Consolidation Project deals with a wide-range of recommendations we highlight some specific concerns below.

- **Protected attributes**

KLC is concerned by the way in which the current list of attributes protected under s351(1) has been characterised. We are concerned that the way in which attributes are described limits the protection afforded to some employees and causes confusion between protections under the FWAct and those under Commonwealth, Territory and State discrimination laws. KLC believes that Commonwealth laws should be the high water mark for discrimination protection in the country.

For example, we note that the current list of attributes includes 'sexual preference' however the Victorian *Equal Opportunity Act 2010* protects 'gender identity, lawful sexual activity and sexual orientation'³, while the NSW *Anti-Discrimination Act 1977* prohibits discrimination on the basis of transgender status or homosexuality.⁴ Inclusive terms such as sexual orientation or sexuality should be used to ensure that the protection has its broadest application. Certainly, the term 'preference', with its implications of 'choice' in sexual identity or orientation, should be avoided.

Similarly, the FWAct refers to 'physical and mental disability' where as the definition of disability under the *Disability Discrimination Act 1992* (Cth) provides a much broader definition encompassing past, present and future disability, disability aids and assistance animals, association with a person with disability and manifestations of disability that may not be traditionally thought of as a 'physical or mental' disability (such as intellectual disability, or the presence of organisms that cause disease or illness, such as HIV).⁵ Under the current wording of the FWAct, some practices that the general community would see as abhorrent, such as refusing to employ someone because they are assisted by a guide dog, may be lawful. It is beneficial for both employees and employers to have clarity in this area.

KLC recommends that the FWAct be amended so that all attributes currently protected under a Commonwealth, State or Territory discrimination acts are protected under the FWAct. Additionally KLC recommends that additional attributes named in the NACLC submission to the Consolidation project be included as protected attributes under the FWAct.

Recommendations

That the FWAct be amended so that all attributes currently protected under a Commonwealth, State or Territory discrimination act are protected under the FWAct.

That additional attributes named in the NACLC submission to the Consolidation Project be included as protected attributes under the FWAct.

³ S 6, *Equal Opportunity Act 2010* (Vic).

⁴ See ss 38B and 49ZC, *Anti-Discrimination Act 1977* (NSW).

⁵ See ss4, 7, 8 and 9, *Disability Discrimination Act 1992* (Cth).

- **Exceptions**

There are currently three exceptions to the protections contained in s351. As noted above, NACLC has made a number of recommendations in relation to exceptions available under Commonwealth laws. We note that the NACLC submission to the Consolidation Project calls for harmonisation of exceptions to discrimination law across State, Territory and Commonwealth anti-discrimination laws. However, the Consolidation Project deals with discrimination in a range of public areas, not just employment. KLC's position is that the only exception that should be maintained under the FWAct is in relation to actions taken because of the inherent requirements of the particular position concerned.⁶ Essentially, KLC's position is that the only legitimate reason to take adverse action against a person, at work, on the ground of a protected attribute, is if that attribute prevents the person from performing the role which they have been employed (or have applied) to do.

Recommendation

That the exceptions contained at s351(2)(a) and (c) be removed.

Implementing this recommendation will also remove inconsistencies between protections of employees from state to state. The FWAct is the primary source of employment law for the vast majority of employees across Australia. It is undesirable for national system employees working in different states to have different levels of protection under the same Act. As the law currently stands, it would be possible for an employee to be protected from adverse action on the basis of a protected attribute in one state and then, if relocated by their employer to another state, find themselves without protection on the basis of that same attribute.

Case study

Raina is a Muslim and wears a hijab. She works in a book store as a shop attendant near the NSW/Victoria border. Raina's boss often comments on her hijab and the fact she is Muslim. One day, Raina's boss tells her she needs to take her hijab off as customers find her unapproachable. Raina seeks advice from a CLC about having to remove her hijab at work. The CLC lawyer tells her it's a shame that she works on the NSW side of the border as there is no protection from discrimination on the basis of religion in NSW. If she worked in Victoria she would be able to make a complaint.

⁶ s 351(2)(b)

KLC is concerned that the exception at s351(2)(c) regarding actions taken against staff members of religious institutions inhibits the human rights of vulnerable groups within the community. We note that the exception is tempered by the need for acts to be taken in good faith and to avoid injury to the religious susceptibilities of adherents of that religion or creed. However, we still have concerns that certain religions which have traditionally marginalised vulnerable groups, such as women or people with a disability, are able to discriminate against these groups under the FWAct. This practise essentially ranks the human right of freedom of religion above that of freedom from discrimination. It is more desirable for a religious institution to be required to consider whether or not it is an inherent requirement of the position to perform the role in accordance with the doctrines, tenets, beliefs or teachings of the particular religion or creed and to then assess whether the person's attribute will impact upon their ability to perform that inherent requirement.

Case Study

Patrick works as an accountant at a religious school. Patrick's role does not involve teaching students or providing pastoral care or religious instruction. He is a diligent and competent worker who, whilst friendly to his colleagues, mainly keeps to himself. His role confines him to his office for most of the day. One weekend another staff member runs into Patrick at the supermarket; Patrick is with his partner. On Monday, Patrick is called to the Principal's office. He is told that the school did not realise he was gay when they employed him and that they cannot have homosexual staff at the school as it is against their religious beliefs. Patrick attempts to explain that his sexuality does not impact upon his ability to do his job but he is dismissed.

- **Extension of the discrimination provisions**

The FWAct currently limits the application of s 351 to employees or prospective employees. In order to maintain consistency with Commonwealth, State and Territory discrimination legislation, as well as the application of s340, KLC recommends that s351 be amended so that coverage extends to independent contractors and persons engaged by independent contractors.

Recommendation

That s351 be amended to replace the words 'employer' and 'employee' with 'a person' so as to extend protection from discrimination to independent contractors and their employees.

Process

- **Time limits**

Currently, a person making an application to FWA to deal with General Protections dispute involving dismissal must do so within 60 days of the dismissal. We note that this is a substantially shorter period of time than an employee who alleges another breach of the General Protections provisions. It is also a much shorter period of time than a person wishing to make an application to the Australian Human Rights Commission⁷ or to State or Territory anti-discrimination bodies⁸.

Considering that the implications of a dispute are likely to be more serious for a person who has been dismissed it seems unfair that they should be given less access to redress than a person who has not been dismissed. Similarly, in our experience, where breach of a workplace right or discrimination has occurred, the employment relationship is likely to have broken down and reinstatement is not sought. As such, there seems no reason why a person who has been dismissed should be denied an opportunity to seek a remedy where they make their application after 60 days. As such, KLC recommends that the requirement for applications involving dismissal to be filed with FWA within 60 days of the dismissal be removed.

Recommendation

That the FWAct be amended to remove the requirement for General Protections disputes involving dismissal to be made to FWA within 60 days of the dismissal.

Alternatively, if this recommendation is not adopted KLC recommends that the Government remove the requirement, under s371, for a certificate to be issued before a General Protections court application can be made. This will allow employees who have been dismissed allegedly in contravention of the General Protection to apply directly to court within the 6 year time frame.

⁷ Under s46PH(1)(b) of the *Australian Human Rights Commission Act 1986* (Cth) the President may terminate a complaint if it was lodged more than 12 months after the alleged unlawful discrimination took place. It should be noted that under s46PO once a complaint is terminated a complainant may still apply to the Federal Court or Federal Magistrates Court alleging unlawful discrimination.

⁸ For example under s89B(2)(b) of the *Anti-Discrimination Act 1977* (NSW) the President may decline a complaint where the whole or part of the conduct complained of occurred more than 12 months before the making of the complaint.

Recommendation

That s371 of the FWAct be removed.

If this recommendation is not adopted then KLC is also concerned about the short period of time that an applicant has to make a General Protections court application once they have received a certificate from FWA under s371(2). 14 days is not an adequate amount of time for applicants to seek legal advice in relation to their claim. As detailed below (in relation to the time limit for Applications for unfair dismissal remedy) employees, especially vulnerable employees, are unlikely to be able to assess the merits of their case or seek legal advice within a 14 day time frame. KLC recommends that the time limit to make a General Protections court application be extended to 60 days. This would bring the FWAct into line with the time limit under s 46PO(2) of the *Australian Human Rights Commission Act*.

Recommendation

That the time limit under s371(2) for making a general protections court application be amended to allow a person 60 days from the date a certificate is issued.

- **Power of Fair Work Australia (FWA) to deal with disputes**

We commend the steps the Government has taken to make the general protections dispute process accessible to employees, in particular, by limiting the circumstances in which costs can be ordered under s570. However, we believe there are additional steps that can be taken to improve access to justice for employees who are adversely affected in contravention of the General Protections provisions.

Currently, FWA must only hold a conference where a dispute does not involve a dismissal, if the parties agree. Considering that an applicant may file an application directly with the Federal Court or Federal Magistrates Court in cases where a dismissal has not occurred, an applicant is only likely to file with FWA where they seek FWAs assistance in resolving the dispute informally. Respondents to such claims should be encouraged to resolve complaints informally without resorting to what may be expensive and protracted litigation in the Federal Courts. KLC recommends that s 374(1)(b) be removed so that FWA must hold a conference where an Application to deal with General Protections dispute is filed with FWA.

Recommendation

That s 374(1)(b) be removed to require FWA to hold a conference where an Application to deal with General Protections dispute is filed with FWA.

6. UNFAIR DISMISSAL

Eligibility to make an Application for Unfair Dismissal Remedy

- **Minimum employment period**

Whilst KLC congratulates the Government on the removal of the "100 employee" requirement for access to unfair dismissal remedies, we have genuine concerns about the impact the introduction of the minimum employment period has had on the 'fair go all round'. Many KLC clients have been dismissed in an unfair manner but have no recourse because their employment lasted less than the minimum employment period. In some of these cases, whilst the employee would have had access to the General Protections provisions, or could make a complaint under a state or territory discrimination law, they are put off by the difficulty of these processes - particularly where these processes eventually lead to claims needing to be litigated in the Federal courts.

Case Study

Juan is a waiter at a Mexican restaurant. He has worked there for 6 months. When he started he was paid a flat-rate of \$14 an hour. His pay went up by \$1/hour after his 'probationary period' ended 3 months ago. Juan approaches KLC for advice about his employment – he is not sure but he thinks he has been underpaid. KLC advises him that he has been underpaid. With KLC's help Juan writes a letter to his employer asking that he be paid the correct amount under the Restaurant Industry Modern Award.

Two weeks later Juan comes back to KLC. He tells the lawyer that since giving his employer the letter he has been told there are no shifts for him at the restaurant. KLC tells Juan that it sounds like he has been dismissed and they explain that, because the restaurant only has 12 employees, he cannot make an unfair dismissal complaint. They tell him he could make a General Protections complaint if he thinks he was dismissed because he gave the restaurant the letter. KLC explains the General Protections process to Juan.

Juan decides not to go ahead with any complaint against his employer. He says he is worried because he does not think his employer will come to a conference and then he will have to go to Court.

Of serious concern is the practice of employees being dismissed just before their minimum employment period is complete. In one case an employee, with no prior performance or conduct concerns was

dismissed the day before he would have met the 6 month requirement. Through our advice work we have noticed this trend particularly amongst small businesses where, we can only assume, the attitude is that it is more cost effective to employ and train new employees every 12 months than it is to continue to employ workers protected by unfair dismissal laws.

KLC notes that in New Zealand, the minimum employment period is 90 days. This period seems more appropriate given that a longer period, as currently exists, is more likely to lead to employers dismissing employees purely to avoid coverage under unfair dismissal laws. KLC sees no reason why employees of small businesses should be afforded less rights than those of larger employers. In most cases, due to the size of the workplace and likelihood of closer working relationships, it is more likely that a small business would be able to make a proper assessment of an employee's suitability for a role more quickly than in a larger business.

Recommendation

That the minimum employment period in s 383 be reduced to 90 days for all employees.

- **Labour hire employees**

KLC has recently noticed a number of cases where labour hire employees who lose work unfairly do not have access to unfair dismissal remedies even though they have, for all intents and purposes, been dismissed.

Case Study

Gary has worked at a courier company for 8 years through a labour-hire arrangement. He is a good worker – he never misses a day and has never had any complaints about his performance or conduct. Each year he takes a short unpaid holiday at Easter and Christmas.

This year Gary's mother-in-law, who lives overseas, has been unwell. His wife has been overseas caring for her. Gary asked permission from the courier company to go see his wife for a week. While Gary is overseas he gets food poisoning and his trip home is delayed by two days.

When he arrives back in Australia he calls the courier company to see when his next shift will be. He is told they have to 'let him go'. He is told that he's a good worker but they just need someone 'more reliable'. The labour hire company tells him they will help him find other work but they won't try to get the courier company to re-employ him.

In these cases, the employee has usually worked with a single host employer for a number of years through a labour hire agency. The employee rarely has any contact with the labour hire agency other than the fact that they are paid by the labour hire agency. The employee usually consults solely with the host employer in relation to absences for personal leave or annual leave and about issues around work performance or conduct. On the face of it these workers are employees of the host employer however, on paper they are engaged by the labor hire agency. KLC has given a number of advices recently where long serving labour hire employees have been 'dismissed' by the host employer for unfair reasons. In these cases the labour hire agency has maintained that they, the 'employer', have not dismissed the employee and will continue to look for new work for the labour hire employee. In all cases the employee has not received any further work through that labour hire agency. KLC recommends that the unfair dismissal provisions of the FWAct contain a deeming provision whereby, for the purposely solely of an Application for unfair dismissal remedy under s394, a labour hire employee is an employee of the host employer.

Recommendation

That the unfair dismissal provisions of the FWAct contain a deeming provision whereby, for the purposely solely of an Application for unfair dismissal remedy under s394, a labour hire employee is an employee of the host employer.

Time for making an application & grounds for extensions

The current timeframe for making an Application should be lengthened to allow employees genuine access to a remedy when unfairly dismissed. In our experience, it is the most vulnerable employees - young employees, employees with a disability and employees from non-English speaking backgrounds - that are most likely to seek legal assistance in relation to dismissal. These employees rarely know about employment rights and are often unable to find out about their rights on their own. KLC has seen a number of clients who did not know they could challenge their dismissal until a family member, friend or community worker tells them. These employees often need assistance in gaining access to forms and help with filling them out. Many require legal assistance and representation but cannot afford a lawyer.

Throughout December 2011 and January 2012, after the Government announced this review, KLC conducted a survey of clients who made an Application for unfair dismissal remedy. We received 10 responses from clients. Of these 50% responded that they had difficulty in filing a claim within 14 days. Almost all clients responded that they did not think 14 days was long enough to file an application unless they had help. This confirmed our anecdotal evidence of client's views on the FWAct.

Responses included:

"It was only by chance that I discovered the 14 day clause. I doubt many workers have any idea and are normally too upset over dismissal and only find out after 14 days when settled down."

"No!! (...) I needed a mental break."

"I had to get too much information. Not enough time."

"Took awhile to find out who I had to deal with."

Due to the lack of funding for specialist employment lawyers within the community legal sector there are often long waits to receive advice about unfair dismissal. At KLC, we often cannot see a client until after their 14 days has run out. To avoid clients with legitimate claims from missing out we tell *every* client, who calls to make an appointment about dismissal, to file an unfair dismissal complaint. Whilst this places an increased burden on FWAs registry and conciliators, it is the only way we can be sure that clients who have good cases but no access to timely legal advice, have access to the unfair dismissal system. KLC recommends that the time for making an Application for unfair dismissal remedy be extended to 60 days.

Recommendation

That the time for making an Application for unfair dismissal remedy be extended to 60 days.

We note that one of the reasons cited for the short time limit to make an Application for unfair dismissal remedy is because the primary remedy in an unfair dismissal case is reinstatement. However, in our experience reinstatement is rarely the desirable outcome for the employee or the employer. With this in mind, if the Government does not adopt our recommendation to extend the time limit to make an Application for unfair dismissal remedy, KLC recommends that the time limit be tiered so that, where an employee seeks reinstatement as a remedy the time limit remain 14 days and that where an employee does not intend to seek reinstatement the time limit be increased to 60 days.

Recommendation

That the time limit be tiered so that, where an employee seeks reinstatement as a remedy, the time limit remain 14 days and that, where an employee does not intend to seek reinstatement, the time limit be increased to 60 days.

Alternately, if the Government does not adopt our recommendation to amend the time limits to make an Application for unfair dismissal remedy, we recommend that the grounds for seeking an extension under s394(3) be amended so that FWA may allow a further period for the application to be made if FWA is satisfied that there was reasonable cause for the delay in filing.

Recommendation

That s394(3) be amended so that FWA may allow a further period to make an Application for unfair dismissal remedy if FWA is satisfied that there was reasonable cause for the delay in filing.

Process

In our survey, we also asked clients how they felt about the unfair dismissal process. Overall, clients were satisfied with the process, however 50% noted that they did not know what to expect from conciliation and 60% said they did not understand what would happen after conciliation. Overwhelmingly, clients responded that they would have liked more help with the process. Once again, this is consistent with our experience of the FWAct over the past two years.

Anecdotally, we have found that the majority of clients settle complaints (including what we have assessed as very strong complaints) because continuing with the process is too hard or confusing, especially when they are not represented. Many clients settle for reasonably small amounts (less than 4 weeks of lost wages) because they are intimidated by the process, feel overwhelmed by other pressures in their life (such as finding a new job and dealing with the financial implications of being dismissed) or do not believe they will have a fair hearing when they are up against a well resourced employer. KLC recommends that FWA develop accessible resources in plain English and community languages that explain in more detail how the conciliation and arbitration process works and what applicants can expect. This might include web resources, such as short videos, or pamphlets and brochures. These resources would also be useful for employers, especially small business employers.

Recommendation

That FWA develop accessible resources in plain English and community languages that explain in more detail how the conciliation and arbitration process works and what applicants can expect.

While some clients believe that the phone conciliation process is useful, because they do not need to come face to face with their employers, other feel that they have not been adequately heard during the conciliation process. For many of our clients the most important outcome in a dispute around their dismissal is the opportunity to explain their side of the story and to receive an apology from their employer. For these clients, compensation is often a secondary consideration. Clients have advised us that they don't feel the time given for conciliation conferences is adequate and that they have felt rushed and lost. Face to face conciliations can overcome this, especially where clients are from non-English speaking backgrounds, have a disability or are for some other reason less likely to be able to represent themselves over the phone. KLC recommends that FWA provide applicants with the opportunity to elect that their conference is held face to face.

Recommendation

That FWA provide applicants with the opportunity to elect that their conference is held face to face.

Enforcement of agreements

We understand that a number of employees who settle unfair dismissal Applications following a conference go on to have difficulty getting their employer to honour the settlement agreement. This has been confirmed in our discussions with other CLC lawyers who act in unfair dismissal matters.

We currently have a client who, following a conference in early November 2011, entered into an in-principal agreement with his employer. Despite KLC contacting the employer numerous times over the past few months, the Settlement Agreement (which was drafted by the employer) still remains unsigned and the client has not been paid the lost wages as agreed. The client is still looking for new permanent work and has suffered financial hardship as a result of the employer's delay. The client currently feels as if they have no choice but to advise FWA that their case is no longer settled and ask for it to be set down for arbitration. KLC recommends that the FWAct include a method of registration of conciliated agreements so that they can be enforced as orders of FWA. We note that some State jurisdictions use this method in tribunals.⁹

⁹ For instance, under s91A of the *Anti-Discrimination Act 1977* (NSW) a party can request within 28 days of a conference that an in-principal agreement be put into writing by the Anti-Discrimination Board. Should a party believe that a written agreement has been breached within 6 months that party may apply to the Administrative Decisions Tribunal for the Agreement to be registered in the Tribunal. In these cases the agreement then becomes an Order of the Tribunal and is enforceable as such.

Recommendation

That written agreements entered into by an employee and employer following a conference under s398 be registrable with Fair Work Australia.

That, in the event that an employer breaches a written agreement, upon application by the employee, Fair Work Australia have the power to issue an Order to the same effect as the registered written agreement.

That s405 of the Act apply to such an Order.