17 May 2023

Proper Officer

Australian Government Attorney-General's Department

email only: WRConsultations@dewr.gov.au

Dear Proper Officer,

Submission on Consultation Paper

Updating the *Fair Work Act 2009* to provide stronger protections for workers against discrimination (2023)

Kingsford Legal Centre (**KLC**) welcomes the opportunity to make this submission on the Consultation Paper: Updating the *Fair Work Act 2009* to provide stronger protections for workers against discrimination (April 2023) **(the Paper).**

We consent to this submission being published. For all case studies in this submission, names and identifying information have been changed to protect confidentiality.

About Kingsford Legal Centre

KLC is a community legal centre, providing free legal advice, casework, and community legal education to people in south-east Sydney. We have been providing specialist discrimination and employment law advice to people since 1981.

Today we continue to specialise in discrimination law and run a state-wide Discrimination Law Clinic. In 2022, we gave 189 discrimination advices. We provide advice and representation in all discrimination jurisdictions available to NSW workers, including the Fair Work Commission, Australian Human Rights Commission, Federal Court, Federal Circuit Court, Anti-Discrimination NSW, and the NSW Civil and Administrative Tribunal.

KLC has a specialised employment practice and runs a state-wide Employment Rights Legal Service (**ERLS**)[1] and Sexual Harassment Legal Service Clinic (**SHLS**). These clinics provide free legal help and assistance to people experiencing social and economic disadvantage and barriers to justice. In 2022, we gave 602 employment law advices,[2] and represented clients in 36 discrimination matters. KLC is part of the UNSW Sydney Faculty of Law & Justice and provides clinical legal education.

Overview

KLC broadly supports the legislative agenda outlined in the Paper. The move to harmonise *The Fair Work Act 2009* (**FWA**) with anti-discrimination schemes is long overdue. The proposed reforms will reduce the legal complexity faced by our clients and assist them to make decisions about how to best enforce their rights at work.

We also propose several additional measures to support the proposed legislative reforms. The Fair Work Commission (**FWC**) will need to be adequately resourced to take on an increase in anti-discrimination matters. FWC members will require additional training in anti-discrimination law. Time limits for filing discrimination claims in the context of dismissal should also be reviewed. The current 21-day time limit is already a significant barrier to justice for our clients. In the context of

[1] ERLS is a collaborative partnership between KLC, Inner City Legal Centre and Redfern Legal Centre.

[2] Across our general employment practice and ERLS.

discrimination, it is even more challenging for our clients to bring claims within the FWC time limits and is out-of-step with any anti-discrimination jurisdictions.

Recommendations

This submission responds to Questions 1 – 11 and Question 13. It does not address Question 12. For clarity, KLC's response to each question is summarised at Appendix A.

KLC supports the Paper's proposals to clarify the FWA and harmonise its provisions with other anti-discrimination schemes. The current complexity of anti-discrimination laws in Australia poses significant challenges for our clients, who are navigating these systems at stressful time. Many clients are also doing this using their second or third language. The current inconsistency between anti-discrimination schemes is a large reason for complexity for our clients. Without legal assistance, it is difficult for clients to identify the most favourable jurisdiction in which to bring their claim and filing in the wrong jurisdiction can have a serious impact on clients' claims. The issue is only exacerbated by the short time frames to file at the FWC and lack of access to free legal services. We favour a more a more harmonised and accessible system so that people can readily make informed decisions about how to enforce their rights.

Recommendation 1: The Fair Work Act should expressly prohibit indirect discrimination.

Recommendation 2: The inherent requirements exemption in the Fair Work Act should be amended to clarify the requirement to consider reasonable adjustments.

KLC supports the express prohibition of indirect discrimination in the FWA. This is a long overdue reform and a significant current omission in the Act. A huge proportion of discrimination is indirect and does not have coverage or effective remedies under the Act.

This reform will increase consistency across the FWA and discrimination laws and is line with the recommendations of the government's recent *Respect@Work Report*.[3] The clarification will also assist our clients to resolve disputes with their employers more quickly. Greater clarity in the law will assist our clients in early negotiations with employers and assist in early resolution of claims. A significant barrier to clients who want to enforce their rights after experiencing indirect discrimination is the lack of redress through the FWC. There are currently extensive delays at the Australian Human Rights Commission and Anti-Discrimination NSW and so people who experience indirect discrimination do not have access to quick and early resolution of their claims. This can fundamentally prejudice their employment.

An express prohibition against indirect discrimination must be supported by a clear requirement for employers to consider reasonable adjustments. This is because many instances of indirect discrimination experienced by our clients would best be addressed by the implementation of appropriate adjustments.

The *Disability Discrimination Act 1992* (**DDA**) is a potential model for a clear and consistent reasonable adjustments provision. Currently under the FWA, many clients' best recourse to request reasonable adjustments is via s 65 requests for flexible working arrangements. This approach has two main limitations. First, clients must meet minimum service requirements before asking for flexible work. Under s65(2) of the current FWA, employees need to wait 12 months before they are eligible to request flexible work arrangements. There is no similar requirement under the DDA, where workers can ask employers to make reasonable adjustments at any time. Secondly, the DDA places greater weight on the potential benefit to a worker from an adjustment. Under the FWA, a business may refuse a request on the basis of 'reasonable business grounds'.[4] The DDA, however, adopts an

[3] Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report* (January 2020) <https://humanrights.gov.au/sites/default/files/document/publication/ahrc_wsh_report_2020.pdf> 10.
[4] *Fair Work Act 2009* (Cth) s 65(5).

'an unjustifiable hardship' test, which requires decisionmakers to also consider the benefit of a potential adjustment to the employee.[5]

KLC's clients would benefit from a clear prohibition against indirect discrimination in the FWA, backed up by a robust requirement for employers to consider reasonable adjustments.

Case study 1: Kai was a full-time employee in an office role. Kai asked for flexible working arrangements when her child was diagnosed with a chronic health condition. Kai made a flexible working request under the FWA to work reduced hours to take her son to regular medical appointments. Kai's employer refused her request on reasonable business grounds. The employer did not provide detailed reasons. The employer also did not need to consider how granting the adjustment would be immensely beneficial for Kai.*

**Client's name changed*

Recommendation 3: The Fair Work Act should be aligned with the DDA and include a definition of 'disability'.

Recommendation 4: Attribute extension provisions should be included in the Fair Work Act.

The FWA should adopt a definition of 'disability' based on the definition in the DDA. As 'disability' is not defined in the FWA, courts have tended to adopt the ordinary meaning of disability, resulting in a narrower interpretation of disability under the FWA.[6] Under the DDA, clients have clear protection for imputed disabilities and symptoms of disability – currently lacking within the FWA.[7] This inconsistency creates difficulties for our clients in deciding whether to pursue their action under the DDA or under the FWA. It is challenging for clients to navigate whether they would receive better protection against discrimination for their disability under the FWA or other schemes, particularly within 21-day time limit for dismissal applications.

As drafted, s 351 of the FWA uses an outdated concept of 'physical or mental disability'.[8] This creates a binary concept of disability as either physical *or* mental. We often advise clients with complex disabilities affecting both mental and physical health, such as clients with a history of strokes or neurological conditions.

Case study 2: Mary worked as a full-time employee at her local nail salon. Before Mary started working at the salon, she was promised a management role after a certain period. After Mary started the job, she mentioned that she was planning on getting married. Mary's employer told her that it would be difficult for her to perform the more senior role after getting married and having young children. He said that it sounded like she was about to become very busy and that he did not think she would be suitable for the promotion anymore.*

Potential pregnancy is a characteristic often imputed to women. It can be difficult to frame arguments based on sex alone. Greater clarity around attribute extensions could have helped to clarify Mary's section 351 claim.

**Client's name changed*

[5] *Disability Discrimination Act 1992* s 11(1)(a).
[6] Dominique Allen, 'Adverse Effects: Can the Fair Work Act Address Workplace Discrimination for Employees with a Disability? (2018) *University of New South Wales Law Journal* 41(3) 846, 850-851.
[7] Ibid 852.
[8] We also note concerns about outdated language in the DDA, like 'malfunction', 'malformation' and 'disfigurement'. We would support further reform in this area across all federal discrimination and employment laws. See Queensland Human Rights Commission, *Building Belonging: Review of Queensland's* Anti-Discrimination Act 1991 (July 2022) <https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0012/40224/QHRC-Building-Belonging.WCAG.pdf> 265.

The FWA should also clarify that discrimination of the basis of extensions or manifestations of protected characteristics is prohibited. The availability of attribute extension (in the context of disability) has been an area of uncertainty at the FWC which, fortunately, appears to have resolved favourably since the 2011 decision in *Stephens*.[9] A clear legislative reference to the protection of attribute extensions (for disability as well as other protected characteristics), will have an educative function for employers and help workers to more easily understand their rights.

Recommendation 5: Where appropriate, complaints about discrimination under the FWA should be handled in the first instance by conciliation. Conciliators should be supported with additional training in discrimination law and appropriate feedback mechanisms should be implemented.

KLC supports the move towards consistent dispute resolution processes across complaints pathways. Conciliation is often beneficial for our clients and can create the space for clients to share the impact of discrimination on their lives. However, while conciliation should be the norm, it should not be mandatory. KLC recommends that the FWC should follow the lead of the Australian Human Rights Commission (**AHRC**) and direct parties to conciliation 'where appropriate'. This avoids forcing parties to the table in circumstances where conciliation would be unduly traumatic or clearly pointless. This reflects a trauma-informed approach which is necessary in discrimination matters.

It will be important to have consistent standards and processes for conciliations involved in anti-discrimination matters at the FWC. In KLC's research report *Having my Voice Heard: Fair Practices in Discrimination Conciliation*,[10] we advocated for more training for conciliators; early referrals for legal assistance; improved consistency; flexible dispute resolution processes and adjustments; consideration of power imbalances; quick resolutions of disputes; and pathways to provide feedback. There will be a particular need for additional training in discrimination law for conciliators if the FWC takes on more discrimination matters. Greater flexibility in scheduling hearings will also need for be considered, particularly for employees making complaints based on (for example) caring responsibilities or their physical or mental health. In-person conciliations may also be important for some clients, as it can provide a more meaningful way to share their experiences of discrimination. Research from the National Dispute Resolution Advisory Council suggests that participants who feel like they could 'have their say', tend to express greater satisfaction with the mediation process.[11]

Case study 3: Yifei was working as a dental assistant in a dental practice. When she found out she was pregnant, her doctor gave her a letter to give to her employer explaining that she should not operate the x-ray machine as it could harm her baby. Yifei's employer refused to make adjustments to Yifei's role and continued to force her to perform x-rays even though Yifei repeatedly requested to swap with other available staff. Yifei's boss told her she was causing problems because she was pregnant, and eventually dismissed her from employment. Yifei lodged a general protections dismissal complaint. At the conciliation, Yifei was 7 months pregnant. She was very intimidated by the process, and was questioned in an aggressive manner by the Commissioner, who put pressure on the parties to come to an agreement within 90 minutes. Yifei had a very strong case but decided to settle the matter for only one week's pay because she did not think she could handle the stress of going to the Federal Circuit Court. Yifei was very unhappy with the conference process as she did not feel she was given the opportunity to express the effect her employer's conduct had had on her.*

** Client's name changed.*

[9] *Stephens v Australian Postal Corporation* (2011) 207 IR 405, as discussed in Allen, above n 6, 853.
[10] Kingsford Legal Centre, *Having My Voice Heard: Fair Practices in Discrimination Conciliation* (August 2018), <https://www.klc.unsw.edu.au/sites/default/files/documents/2870%20having%20my%20voice%20heard%20report_WEB.pdf>.
[11] National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report, April 2001) 26 <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Framework%20for%20ADR%20Standards%20Body%20of%20Report.pdf>.

Recommendation 6: There should be no filing fees for a discrimination complaint to the FWC, consistent with other anti-discrimination complaint pathways.

There should be no filing fees required for discrimination complaints to the FWC, consistent with complaints to the Australian Human Rights Commission (**AHRC**) or the New South Wales Anti-Discrimination Commission.

Recommendation 7: Employers and principals should be held variously liable for discrimination perpetrated by their employees and agents, consistent with the FWA's new sexual harassment jurisdiction.

Employers and principals should be held variously liable for discrimination perpetrated by their employees and agents. This would create greater consistency within the FWA (given recent amendments provide for vicarious liability for sexual harassment) and across anti-discrimination jurisdictions.

Stronger vicarious liability provisions would encourage proactive elimination of discrimination by employers. The current FWA protections under s 550, which require an employer to be 'involved in' a contravention to be held liable, do not adequately protect our clients. Our clients often report that their bosses failed to take basic steps to prevent discrimination. In other cases where employers have arguably been complicit in discrimination, it has been difficult for our clients to prove the 'involvement' of their bosses. In cases where perpetrators have disappeared or cannot pay, stronger vicarious liability will also allow employees to recover from employers and principals. This helps to prevent employers from exploiting subcontracting arrangements to avoid liability for discrimination.

Recommendation 8: The 'not unlawful' test should be clarified.

The 'not unlawful' test requires urgent reform. Interpretations of the 'not unlawful' test, such as in *McIntyre v SBS*,[12] have created uncertainty in the protections available to our clients. This has created inconsistency in the application of the FWA across Australia. In NSW, it makes it particularly challenging to give advice about workplace discrimination on the basis of religion or political opinion.

Recommendation 9: The unlawful termination provision in the Fair Work Act dealing with discrimination should be repealed, and section 351 of the Act broadened to cover all employees.

Section 351 of the FWA should be broadened to cover all employees. The current distinction between national system and non-national system is inconsistent and creates confusion for our clients. Commonly affected professions include state-employed nurses and teachers.

The reform to s 351 will be beneficial for non-national system employees affected by discrimination. It would allow our non-national system clients to bring a broader range of adverse action claims (like demotions or redeployments), rather than protection only in cases of termination.

Recommendation 10: Experiencing Family and Domestic Violence should be a protected attribute in under the Fair Work Act.

Family and domestic violence (**FDV**) is prevalent in Australia. Many employees experiencing violence find themselves facing discrimination at work, alongside the physical, emotional, and financial impacts of family violence. Recent amendments to allow paid FDV leave are important and necessary. However, it is now even more pressing for FDV status to be a protected attribute as victim / survivors are encouraged to disclose FDV to their employers, and where some employers might be wary of a possible future claim for FDV leave.

Making FDV status a protected attribute would, admittedly, create inconsistency between the FWA and Commonwealth and New South Wales anti-discrimination law. However, given the urgent need to protect victim / survivors from adverse action, KLC recommends that the FWC proceeds with FDV

[12] *McIntyre v SBS* [2015] FWC 6768.

reforms. State and Commonwealth anti-discrimination acts should do the same, following the lead of the Northern Territory[13] and Australian Capital Territory parliaments.[14]

Case study 4: Brenda, a young woman experiencing ongoing violence from her ex-boyfriend, was dismissed from her workplace after he turned up at the office, threatened her and caused a scene in front of clients.*

Client's name changed.

Recommendation 11: The Fair Work Act should prohibit discrimination on the basis of a combination of attributes.

The FWA should prohibit discrimination on the basis of a combination of attributes. This reflects the lived realities of our clients, who often face discrimination on the basis of multiple, intersecting attributes.

KLC acknowledges that this would introduce inconsistency between the FWA and Commonwealth and state anti-discrimination provisions. However, we believe that other jurisdictions should follow the lead of the FWA on this point. There appears to be appetite for this kind of reform – Queensland, for example, is considering this proposal as part of their review of the *Anti-Discrimination Act 1991* (Qld).[15]

Recommendation 12: The 21-day time limit for applications alleging unfair dismissal and general protections termination should be extended.

The 21-day time limit for filing at the FWC for unfair dismissal or general protections terminations limits access to justice for our clients. For many of our clients, particularly those who have experienced discrimination at work, it is challenging to get legal advice, identify the most favourable complaint pathway, and lodge a complaint within the current time frame.

We note that for AHRC complaints the discretionary period to lodge a complaint is 24 months.

If you have any questions about this submission, please contact Emma Golledge at legal@unsw.edu.au or 02 9385 9566.

Yours faithfully,

KINGSFORD LEGAL CENTRE

Emma Golledge - Director

Nina Ubaldi – Law Reform Solicitor

[13] Anti-Discrimination Amendment Bill 2022 (NT), s 10(5)(jb).
[14] *Discrimination Act 1991* (ACT) s 7(1)(x).
[15] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's* Anti-Discrimination Act 1991 (July 2022) <https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0012/40224/QHRC-Building-Belonging.WCAG.pdf> 20.

Appendix A

Consultation Paper Question	KLC response
1. Should the Fair Work Act expressly prohibit indirect discrimination?	Yes – support.
2. Should the Fair Work Act be aligned with the DDA and include a definition of 'disability'?	Yes – support.
3. Should the inherent requirements exemption in the Fair Work Act be amended to clarify the requirement to consider reasonable adjustments?	Yes – support.
4. Should attribute extension provisions be included in the Fair Work Act?	Yes – support.
5. As per the broader Commonwealth anti-discrimination framework, should a new complaints process be established to require all complaints of discrimination under the Fair Work Act (i.e. both dismissal and non-dismissal related discrimination disputes) to be handled in the first instance by the FWC via conciliation? What would be the benefits and limitations of establishing such a requirement?	Where appropriate, discrimination complaints should be referred to conciliation. Appropriate training and feedback mechanisms should be developed.
6. If a new complaints process were to be established, should it attract a filing fee consistent with other similar dispute applications to the FWC?	No – there should be no filing fees required, consistent with complaints to the Australian Human Rights Commission or the New South Wales Anti-Discrimination Commission.
7. Should vicarious liability in relation to discrimination under the Fair Work Act be made consistent with the new sexual harassment jurisdiction and other Commonwealth anti-discrimination laws? Why or why not?	Yes – support.
8. Should the application of the 'not unlawful' exemption be clarified?	Yes – support.
9. Should the unlawful termination provision in the Fair Work Act dealing with discrimination be repealed, and section 351 of the Act broadened to cover all employees?	Yes – support.
10. Should experiencing family and domestic violence be inserted as a protected attribute in the Fair Work Act?	Yes – support.
11. Should the Fair Work Act be updated to prohibit discrimination on the basis of a combination of attributes? Why or why not?	Yes, and a prohibition against discrimination on the basis of a combination of attributes should also be made available under other pieces of anti-discrimination legislation.

12. Are there improvements that could be made to the general protections to clarify protections for a person engaging, or not engaging, in industrial activity?	KLC does not have feedback in response to this question.
13. Are there any other reforms you would like to see to the Fair Work Act's anti-discrimination and adverse action framework? Why?	See Recommendation 5 in relation to additional training for conciliators and conciliation processes. See Recommendation 12 in relation to the 21-day time limit for applications alleging unfair dismissal and general protections terminations.