



Ms Sabina Wynn
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Via email: cwlth_family_violence@alrc.gov.au


Dear Ms Wynn

Submission to the Inquiry into Family Violence and Commonwealth Laws

Please find enclosed Kingsford Legal Centre's submission to the Inquiry. We welcome the opportunity to provide feedback on the impacts that family violence has on employment.

If you would like to discuss any aspect of the submission please contact the Centre on (02) 9385 9566.

Yours Faithfully



Elizabeth Meyer
Solicitor

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Kingsford Legal Centre

Submission to the Inquiry into Family Violence and Commonwealth Laws

Part E – Employment

Kingsford Legal Centre (KLC) welcomes the opportunity to make submissions to this Inquiry. KLC is a community legal centre and part of the Faculty of Law at the University of New South Wales. We provide advice and representation to people who live or 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 conducts specialist services in discrimination and employment law and provides advice on a number of legal areas related to family violence, such as victim's compensation and AVOs. KLC also runs a specialist community legal education program on family violence. In the 2010/2011 reporting period KLC provided advice on employment and discrimination to over 500 individuals.

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 will focus on that experience.

Chapter 16 - The *Fair Work Act 2009* (Cth)

Applying for a fee waiver and demonstrating serious hardship

KLC recognises that many women who experience family violence will undergo financial hardship. Many may need to leave their homes and deal with the expense of relocating and

undertaking legal proceedings. Many women work part-time or casually and rely on their partner's income to support them. When they leave the relationship this support is no longer available.

Where dismissal coincides with the need to leave a relationship, a woman may not, at the time of her application, appreciate all of the expenses she will now incur. The form provided by FWA focuses on *current* income and expenditure and, apart from the "other comments" section, does not provide for an applicant to disclose factors that may affect their future financial circumstances.

KLC recommends that FWA amend the current Fee Waiver Application Form to include the question "*Are there any factors that may affect your financial situation in the near future (e.g. experiencing family violence)?*" This may benefit other vulnerable workers who are likely to experience financial hardship due to future expenses e.g. upcoming medical costs.

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 FWA.

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. Whilst one might argue that an employee who started work for an employer less than 12 months ago may have foreseen the need for flexible arrangements on the basis of their carer responsibilities, the unpredictable nature of family violence means that a victim is unlikely to know what their needs might be 12 months in advance.

As acknowledged by the Commission, the unpredictable nature of family violence usually requires immediate flexibility or altered working arrangements in order to deal with unforeseen circumstances. As such, we would support as short a time frame as possible for employers to respond to any request.

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 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.

However, while any amendments would be welcome and may provide assistance for many victims of family violence, our concern is that the proposal does not create an enforceable entitlement to flexible working arrangement 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.

The proposed change allows an employee to make a *request* but does not place an obligation on the employer to *grant* the request. Whilst a request should only be refused on 'reasonable business grounds', as noted in the Explanatory Memorandum to the *Fair Work Bill 2008* (Cth), the scope of 'reasonable business grounds' is fairly wide. An employer may refuse because of their inability to organise work among existing staff and their inability to recruit a replacement employee.

Our experience in advising clients under the current section 65 is that, often where there is any inconvenience or cost to the employer associated with the request, a request is likely to be declined. Section 44 of the Act prevents an employee from seeking a review of the employer's decision to refuse a request. As such, there is little enforcement of the right to request provisions built into the Act. Currently, a parent or carer who has made a request for flexible working arrangements might challenge a refusal by claiming they have been discriminated against. However, current discrimination laws do not protect victims of family violence.

There are currently calls for the inclusion of domestic violence as a protected trait under discrimination laws.¹ KLC recommends that, in order to create a potentially enforceable right to flexible working arrangements for people experiencing family violence, s351 of the FWA be amended to include experience of family violence as a protected trait. In order to overcome the exemption in s351(2)(a) of the Act, the Commonwealth should also seek to create a protection for discrimination on the basis of family violence either in new or existing discrimination legislation. We note that the Commonwealth Government's current Consolidation of Commonwealth Anti-Discrimination Laws project may also highlight this issue.

A right to request would encourage employers to consider the needs of their employees and may provide a platform for employers and employees to negotiate suitable arrangements. An amendment to the Act would also have an educative effect on employers and employees generally.

¹ Alana Heffernan & Lee Matahaere, *Domestic Violence discrimination in the workplace: Is Statutory protection necessary?* (paper presented to the Our Work, Our Lives Conference 2010)

National Employment Standards

We support Proposal 16-2 to amend the NES 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 of 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 or 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.

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 support 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.

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 bosses, 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.

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.

We note that the provisions refer to an 'employee' who requires leave for 'purposes arising from their experience of family violence'. We are concerned that the proposal does not distinguish between the rights of the victim or the perpetrator of the family violence. KLC is of the view that perpetrators of family violence should not benefit from their actions. They are usually not the ones who have to take time off work to receive medical attention, care for their children and arrange schooling arrangements or relocation of housing. We would recommend that the Proposal make it clear that paid leave is accessible to victims of family violence.

Chapter 17 - The *Fair Work Act 2009* (Cth) Continued

Individual flexibility arrangements (IFA)

KLC does not favour the use of IFAs as the most appropriate mechanism through which to address 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.

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.

Nevertheless, negotiation of IFAs may be an appropriate mechanism where a workplace is not covered by an enterprise agreement containing a specific family violence clause and where the employee is able to conduct effective negotiation. It may afford some protection to family violence victims to access shorter working hours or have the ability to work from home.

Enterprise Agreements

KLC supports the inclusion of family violence clauses in enterprise agreements and the proposal 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.

Review of Modern Awards

KLC support the inclusion of a model family violence clause in modern awards. Modern awards cover a significant proportion of the Australian workforce and in particular, are likely to provide coverage to already vulnerable employees in low paid or casual employment. Many employees would benefit from clauses such as that currently found in the *Crown Employees (Public Service Conditions of Employment) Award 2009 (NSW)*.

Extensions of time for applications for unfair dismissal

In KLC's experience, most applicant's experience difficulty in filing a Application for Unfair Dismissal Remedy within the 14 day time limit. This is compounded when a client is experiencing other difficulties in their personal circumstances such as health issues, homelessness and where they are dealing with other legal problems at the same time.

A victim of family violence is likely to be experiencing all many difficulties in their personal circumstances, including those listed above. As such, it can be exceptionally hard for them to also seek information and legal advice on unfair dismissal and deal with their application in such a short time frame. Additionally, factors such their own or their children's safety will often take precedence over pursuing a legal remedy for an employment dispute.

As we have previously noted though, employment and continuing income can be essential for women experiencing family violence. Secure employment is often one of the factors that allow a woman to leave a violent relationship in the first place. As such, it is important that woman experiencing family violence have full access to legal remedies if they are dismissed from employment. Whilst it is hoped that FWA would consider the impacts of family violence as an exceptional circumstance that would permit them to grant an extension under s394 of the Act we agree that providing training to FWA members would benefit victims of family violence and ensure that their circumstances are adequately recognised.

Temporary absence due to family violence

As noted above, people experiencing family violence will often be absent from work and often their absences will not be due to 'illness or injury' but because of other issues such as relocation, homelessness, court appearances, child care responsibilities, professional counselling appointments or the embarrassment of attending work when they have visible bruises or injuries.

KLC recommends that the FWA be amended to include a provision protecting employees who are victims of domestic violence from being dismissed due to temporary absence due to experience of family violence. KLC envisages that the meaning of 'temporary' would mirror the current definition in the regulations. We recommend that the evidence requirement reflect our recommendations for the NES entitlement to leave, that is, an AVO, medical or counselling reports, a letter from a case worker or refuge or a statutory declaration from the employee.