To the Fair Work Act Review

The National Network of Working Women's Centres (NWWC) are pleased to have the opportunity to provide this submission.

Our submission includes a number of relevant case studies. Names and other identifying details have been changed to ensure confidentiality.

Please note that we have not included responses to all questions, just those where the experiences of our staff and clients can be adequately represented.

We are happy to be contacted about this submission.

Yours sincerely

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General

Has the Fair Work Act created a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians? If so, how? If not, why not?

The Fair Work Act is a significant improvement on the Workchoices legislation. However a number of workers, and particularly those represented in the groups of women who are NWWC clients, still experience disadvantage.

The majority of our clients are award-based women in the administrative/clerical, retail/hospitality and health/community services sectors. In the latter two industries there has been an increased reporting of redundancies, unfair dismissals (particularly just before the attainment of long service leave pro-rata entitlements) and job insecurity most likely due to the financial downturn and lack of funding.

Many jobs that are predominantly performed by women remain casualised and underpaid in terms of the skill levels required. Precarious employment and lack of flexibility to accommodate parenting and caring responsibilities remain obstacles for women's progression to hold equal status to men in the workforce.

Does the Fair Work Act adequately take account of Australia's international labour obligations?

We note the Fair Work Act does not specify a minimum age of employment as per ILO conventions. This is something that needs to be addressed to ensure that we are meeting our international labour obligations.

Has the Fair Work Act facilitated flexible working arrangements to assist employees to balance their work and family responsibilities?

While the Act has provided an increased framework for realizing this, there remains an absence of enforceable provisions for workers (disproportionately women) to have their needs met. The predominance of women in part-time work may reflect to some degree flexible arrangements; however, the fact remains that part-time pay is not the only penalty of part-time work and there are very limited opportunities for promotion and career

development. Few employers have embraced job-share arrangements, particularly in senior positions and few senior positions have the flexibility built in to enable workers to undertake full-time work in a way that accommodates family responsibility.

Beyond the legislative hammer, there is an outstanding need for education and workplace culture change. While public service employment to some degree has led the way with initiatives such as flexitime, it is often reported to NWWC that in practice arrangements are not flexible and take-up is low.

Employees whose requests for flexible working conditions are refused after parental leave must be provided with an opportunity to appeal for the Act to be able to assist employees balance their work and family responsibilities.

WWC SA notes the resource produced by the Work Life Balance Team at SafeWork SA on quality part-time work in the retail sector, along with other work undertaken to run Master classes for employers working to implement flexible arrangements. This work is undertaken under the guidance of the Ministerial Advisory Group for Work Life Balance. Similar initiatives provide information and advice for employers and employees to meet their needs in a fair and equitable way. Greater awareness, and uptake, of these will greatly enhance employment practices and deliver benefits to both employers and employees.

NWWC are aware that family and cultural obligations of Aboriginal workers often exceed flexible working arrangements available under the Act. It is not uncommon for Aboriginal workers, especially those in regional and remote locations, to require extended periods of leave to attend to cultural obligations, including sorry business. Additionally, family responsibilities of Aboriginal women are such that it is commonplace for Aunties, Sisters and Grandmothers to be primary carers for children who are not their own and who are not returning to work after a period of parental leave. Many Aboriginal women are also carers of other extended family members. The Fair Work Act does not offer flexibilities that appropriately accommodate such cultural and family commitments.

What has been the impact of the creation of a national workplace relations system for the private sector? What has been the impact of the system being constitutionally

underpinned by referrals of subject matters/powers from the states as well as the corporations power of the Constitution?

The unification of industrial laws has served to simplify private sector employment to some degree particularly for multi-state operations. However, the removal of the powers from the States removes an important check and balance that has served historically to balance the laws across Australia particularly when there is a mix of conservative and Labor governments in place. The risk remains that industrial laws are subject to change with changes of government. This creates uncertainty for both employers and employees alike.

Safety net

Is the safety net established under the Fair Work Act fair and relevant?

The 10 National Employment Standards are an improvement on the Workchoices legislation in terms of recognising minimum enforceable workplace entitlements. However, there is scope to broaden these standards.

There is still ambiguity around notice periods for regular and systematic casuals: are they considered to have the same rights as permanent employees and does this then mean they are entitled to notice as are other permanent employees? We recommend that they be treated as such and afforded the same rights to notice as other permanent employees.

There are also issues with the conversion of 'casual' to 'permanent' status across many of the awards covering NWWC clients. We recommend that casual conversion be automatic and the onus be on the employer to convert their staff, rather than the employee to negotiate this.

The weekly minimum hours are suitable; however, it is unclear what the reasonable additional hours specified in the NES actually are. We recommend that a cap be put on reasonable hours and that specific instructions be given as to what constitutes reasonable requests to work more hours than the 38-hour maximum.

Is the safety net simpler, more streamlined and easier to read and apply than the previous arrangements?

Yes.

What are the advantages and disadvantages of the Fair Work Act providing a safety net of employment conditions on a national basis through the National Employment Standards and modern awards rather than a state by state basis?

NWWC believe that a national standard is appropriate. It makes the system easier to navigate, and we are finding that whilst there is still confusion around what awards workers are covered by, having access to a central system has made it easier.

Are employees responsible for the care of young children using the right to request provisions under the National Employment Standards to negotiate flexible working arrangements or request additional unpaid parental leave in order to care for children? If not, why not?

Under the right-to-request provisions, parents returning to work after parental leave who are requesting flexible working arrangements are only able to do so whilst their child is under school age or under 18 (if the child has a disability). This provision fails to recognise the significant role undertaken by workers (disproportionately women) as providers of care for family members beyond these parameters such as elderly people, adults with a disability or illness and school-age children during school holidays or times of illness.

The impediment to realising the provisions to request flexible working arrangements for workers in effect, is that requests rejected by employers cannot be appealed to Fair Work Australia (unless provided for in an Enterprise Agreement or Award). NWWC are aware of numerous cases where workers with legitimate needs for flexible working arrangements have had their request unreasonably denied. These employees are often faced with choosing to work full time against their wishes, convert to casual employment or resign.

Case study:

Jody was a Manager in a non-government organisation. She had worked for the organisation for 6 years prior to taking parental leave and had been promoted 3 times during her employment. Upon her return to work after parental leave she was granted the flexibility to work from home for a period of 6 months. After a period of 6 months she was told she either had to return to her pre-parental leave management position in a full-time capacity or accept a demotion into a

less senior part-time job. She agreed to accept the demotion, as she did not wish to put her baby into care at such a young age.

Case Study:

Shelly was to return from parental leave with her second child at end of October. Shelly works as a draftsperson and is paid $50,000 per year. At the beginning of October, toward the end of her leave, she requested to return to work 3 days per week on the basis of family responsibilities and breastfeeding (under NES).

Her employer resisted then offered 4 days per week and will not move from that and has offered a contract for 4 days until the 31st of January, at which time he insists that Shelly is to return to 5 days (on take it or leave it basis). The employer has said they will only consider 3 days after this if medical evidence for breast feeding is provided. The employer has cited business grounds and has been very uncooperative in his responses. Shelly is considering a family responsibilities discrimination claim and has ongoing contact with QWWS.

Recommendation:

- *To introduce provisions that enable workers whose requests for flexible working arrangements are rejected to make an appeal to Fair Work Australia. Appeals should be conciliated in the first instance with the option of progressing to hearing if they are not settled*.

- *That the 'right to request' provision for employees be amended in the Fair Work Act to be 'an obligation to provide' for employers.*

Do Individual Flexibility Arrangements, as provided for in modern awards, allow employers and employees to individually tailor modern award conditions to meet their genuine personal needs? If so, how? In not, why not?

Women with higher paid duties and positions (status) have had some success in negotiating this arrangement, as well as those women who are represented by a union. It is the experience of the NWWC that not many of our clients are aware of the Individual Flexibility Arrangements. Most of our clients are low status, low skilled and low paid workers, who are

not aware of the provisions, are unrepresented and lack advocacy to be able to negotiate these provisions with an employer who is in a greater position of power and authority compared to the worker.

Are employees appropriately protected when making Individual Flexibility Arrangements? Is the safety net of minimum employment conditions appropriately guaranteed and protected from being undermined?

In the experience of NWWC, many of our clients are unaware of their obligations or entitlements under these provisions in Modern Awards. The initiation of negotiation with their employers outside of Award or Agreement provisions remains an obstacle and initiation of such arrangements by employers is typically only in the employer's favour.

Furthermore, NWWC have found clients who have accessed this right are often the victims of workplace bullying and harassment as a result of this request. Workplace bullying and harassment have adverse effects on our clients, on top of the stress they experience from having their initial requests rejected. Neither of these issues are provided with appropriate remedies in the Fair Work Act 2009.

How could the operation of the safety net be improved, consistent with the objects of the Fair Work Act and the Government's policy objective to provide a fair and enforceable set of minimum entitlements?

Whilst the safety net provides for some positive outcomes for our clients, NWWC see that there is room for improvement in the safety net. The biggest problem clients of the NWWC face is that if they try to assert the entitlements in the safety net and they are rejected, there is no remedy to deal with the rejections. Also, many of the entitlements in the safety net are not enforceable, which pose the problems stated earlier: what can workers do when their requests are rejected?

While breaches of NES entitlements may occur on their own, a consequence of attempting to address these (for example underpayment of wages), often results in victimisation of the employee by way of bullying discrimination and harassment in an attempt to punish the employee or force them out of the workplace. This indicates to us that there besides abject disregard for safety net and other legislative protections some employers and some line managers promote a culture of zero tolerance to the making of complaints.

General Protections provisions attempt to prevent the above situations; however, many vulnerable workers are reluctant to bring this level of complaint forward for fear of losing their employment receiving poor references or being bad-mouthed in their local communities. The lack of mandatory conciliation and the need to pursue the matter at the Federal Court stands as an effective bulwark to resolving these matters in a cost-effective and employment-preserving manner.

Numerous breaches of legislative provisions are brought to the attention of the NWWC each week, and our centres perform an active role in advising and assisting women to better understand their rights and understand what particular courses of action may be available to them. However, the onus remains on the employee (on their own or with the support of an advocate) to raise the matter (both within and outside of their workplaces).

Recommendation:

A reporting mechanism to ensure that employers are aware of and upholding the NES with checks and balances as well as random audits is recommended to ensure compliance. Additionally, the prevalence of discrimination and harassment calls for stronger measures of compliance (preferably by way of entrenchment as a minimum entitlement) in preventing and responding to the damage that these can cause within workplaces.

What has been the impact of requiring FWA to implement minimum wage adjustments from 1 July each year, rather than at a time of the tribunal's choosing?

Consistency and regularity for workers and employers. Wage adjustments from 1 July each year provides for a simpler and more predictable system, which is easier to understand. This is especially helpful in small businesses and for Aboriginal and CALD employees and employers.

Without examining particular content in modern awards (which is a matter to be dealt with in FWA's review of modern awards), what has been the impact on employers, employees and regulators of consolidating the large number of state and federal awards and transitional instruments that applied before the Fair Work Act and replacing them with significantly fewer modern awards made on a national basis?

Many NWWC clients and their employers remain confused as to the correct industrial instrument covering their employment. At times conflicting information is provided by the Fair Work Ombudsman as to correct Awards and interpretations. This may be an issue that will resolve itself in time but greater awareness of employees about where to seek the appropriate information is needed.

In the process of creating the Modern Awards, casual conversion clauses have been removed from many Awards. As a result, many Award-based casual workers have lost the right to request permanent employment after completing 12 months of casual work. The right to request a casual conversion remains in the Hospitality Industry (General) Award 2010 but does not in the Children's Services Award 2010, Clerks Private Sector Award 2010 or Social, Community, Home Care and Disability Services Industry Award 2010. These are all female-dominated industries with high rates of women in insecure employment who make up a large percentage of NWWC clients.

Many NWWC clients are long-term casual employees. NWWC have assisted casual employees to claim long service leave and have been found to have been continuously employed on a casual basis for up to 18 years[1].

Recommendation:

- *Casual workers would be assisted by the re-introduction of casual conversion clauses into all Modern Awards that allow casual employees to convert to permanent employment after 12 months. The following clause provides an example:*

  A regular casual employee who has been engaged by a particular employer for at least 12 months may elect (subject to the provisions of this clause) to have their contract of employment converted to full-time or part-time employment.[2]

What has been the impact of providing an award system which includes modern awards that cannot be varied (except in limited circumstances) other than during four-yearly reviews by FWA, or in the initial FWA interim review in 2012?

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1 The NTWWC supported a casual employee of 18 years to make a claim for unfair dismissal.

2 Hospitality Industry (General) Award 2010.

Bargaining and agreement making.

Have enterprise agreements helped employees to better balance work and family responsibilities?

NWWC notes that in some male-dominated workplaces entitlements such as work life balance clauses, employer paid maternity leave and clauses ensuring rights to quality part time work have been traded away.

NWWC recommend that research be undertaken to ascertain the extent of this.

Equal remuneration

Have FWA's powers in relation to equal remuneration helped to ensure equal remuneration between men and women workers for work of equal or comparable value?

NWWC welcomed the introduction of new equal remuneration provisions into the Act and are very pleased with the result of the community service equal pay case.

General protections

Do the general protections provisions provide adequate protection of employees' workplace rights, including the right to freedom of association and against workplace discrimination?

Since the introduction of the General Protections Dispute provisions, NWWC have assisted clients to address adverse action, including discrimination by employers in accessing these provisions. While adverse action claims may present a disincentive to employers for breaches of general protections against employees, the incidence of reports of such breaches to the NWWC has not decreased. For example, reports of allegations of discrimination by workers at the QWWS have remained consistently between 14-16% of queries made by clients each year since 1 January 2008.

While access to redress dismissals existed previously under unlawful dismissal provisions (in both state and federal jurisdictions), the increase of the scope to include workplace rights has seen an increase in complaints in that area and has provided employees with the means

to reddress such complaints. However, while the conciliation process is successful in the majority of cases many clients state that the feel they have settled for smaller sums of compensation than they deserved or were dissuaded from pursuing their case through the Federal Magistrates Court because of the expense involved.

There remains much uncertainty around the issue of workplace rights with very few case precedents to rely upon as yet.

NWWC note some variation in the interpretation of the meaning of a workplace right. Some attest that a workplace right is only as it is covered by the Fair Work Act; others accept that making a complaint about workplace bullying or other issues outside of the scope of the Fair Work Act fits the definition of a workplace right.

General Protections provisions provide no protection against discrimination for victim survivors of domestic or family violence. The NWWC make special mention of this issue at the end of this submission.

Do the provisions provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of the general protections?

It is difficult to access the level of relief that the legislation actually provides in terms of cases that have reached an outcome via a formal tribunal decision because of the generally small number of precedents in case law to date.

As most claims are conciliated by way of conference and subject to deeds enforcing confidentiality it becomes generally difficult to access information about whether relief is sufficient or not.

In the experience of the NWWC, most settlements are small (up to $5000), and many do not contain monetary compensation beyond outstanding entitlements. Many clients feel that they have settled for sums lower than expected, given the suffering they believe they experienced but are generally pleased to have the matter behind them.

General Protections claims for unfair dismissal do provide a possible avenue of redress for workers who have not qualified for unfair dismissal or who are out of time for lodging their

complaints and seek to settle their matters via this process; however, many complaints that are addressed this way would be more suited to the unfair dismissal provisions.

In the case of non-termination, General Protections applications conciliation cannot be forced. This means that if the employer is unwilling to conciliate relief can only be sought by bringing the matter to trial. Many NWWC clients do not proceed to take their matters forward under these circumstances.

We believe that there needs to be a broader definition of workplace rights to cover issues such as the right to refuse to engage in illegal activities as instructed by employers, the right not to be bullied and the right to take action against this through provisions in the Fair Work Act 2009.

Case Study

Marlene worked as a carer in a residential care facility. There had been a leak in one of the resident's rooms causing a fair bit of water damage. Some of the resident's belongings had been water damaged and were starting to smell and go mouldy. The Director of the facility told Marlene to throw out anything that was soiled and mouldy.

It was near the end of Marlene's shift. She didn't feel ok about just throwing out the resident's belongings without checking with her first. She bagged up the soiled belongings and went to speak to the resident who was very upset about her things being thrown away. Marlene left the bag of soiled items and went to speak to the Director, who was at a meeting and not due back at the facility for another hour. Marlene let the Director's secretary know (also the Director's daughter) what she had done and that the resident didn't want her things thrown out.

Two days later Marlene received a dismissal notice saying that she had refused to follow directions. This will be lodged as an adverse action complaint as Marlene had only been working there for 3 months.

In a similar case some time ago an office worker , Claire, had been directed to change records of services and incorrectly invoice clients for more than they owed as the business was experiencing a cash-flow problem. She refused as she felt it was unethical and her employment was terminated. When the matter went to conciliation it was deemed that the employer was justified in terminating the worker, as she had not followed directions, albeit that the directions meant that the worker was being asked to do something that she felt was illegal.

In another matter just conciliated, Liz, a worker in a small deli had been ordered by her employer to serve food that was 'old'. Our client, the worker, felt that this would contravene health standards for food handling and raised this with her boss. He however insisted that she serve the food to customers. That night she could not sleep as she was worried that customers may get ill from eating the food.

Our client had only worked casually for 5 days. Her employment was terminated for not following the employer's direction. At conciliation there was a debate about whether our client had asserted a 'workplace right' as it is defined in the Act. It does not seem clear anywhere in the Act that being directed to do something illegal or unethical is covered or clearly explained.

Recommendation:

- *NWWC's recommend that this be addressed by clarifying the definition of a 'workplace right' to include the right to refuse directions that mean a worker will commit an unlawful act.*

Should dismissed employees be able to invoke the general protection provisions to challenge their termination without any time limit on making an application? If so, why, and if not, why not?

The time limit at 60 days is generally adequate but special circumstances for out-of-time applications need to be given consideration.

Has the consolidation and streamlining of workplace protections into the general protections provisions made it easier for employers and employees to understand their rights and obligations? What impact has this had?

While streamlining has assisted the NWWC with general guidelines for assisting our clients, in our experience most workers remain fairly uncertain about how the provisions apply to them or how to access them. The NWWC play an important role in assisting women to better understand and uphold their rights to remedies under human rights and/or equal opportunity and/or discrimination laws in other jurisdictions.

Section 351 of the Fair Work Act proscribes discrimination "because of the person's" race, sex, etc. This provision appears in Part 3-1 Division 5. This Division is headed "Other Protections". Would section 351 and any related provisions be better placed in a Division dealing solely with discrimination?

Yes, more clarity can only assist with interpretation.

NWWC note that the Australian Law Reform Commission recommends that domestic violence be included as a ground in human rights legislation. We suggest that wording about domestic and family violence also be added in the 'General Protections'.

Recommendation:

- *We would also like to see a specific provision in section 351 relating directly to protection from workplace bullying, offering remedies to conciliate and resolve matters of workplace bullying at a jurisdictional level. Being able to do this is crucial for many of our clients who have experienced workplace bullying. We see that women are often rendered powerless in bullying situations at work. When they call to find there is nothing else that can be done (at a formal level) for workplace bullying, this further re-enforces the powerlessness they are feeling. Being able to resolve bullying complaints at formal proceedings will not only provide for a remedy to this persistent and serious workplace issue, it will also allow many victims of bullying to reclaim some of the power they have lost and deal with the issue at hand directly so they are able to return to a safe working environment.*

Unfair dismissal

Do the unfair dismissal provisions balance the needs of business and employees' right to protection from unfair dismissal?

Whilst the NWWC are unable to comment on business needs, we note that the experience of many of our casual clients in relation to unfair dismissal protection has been negative. Many of our casual clients have had issues accessing unfair dismissal provisions. Casual employees of small businesses have less protections from unfair dismissals, than permanent employees and the qualifying period placed on casuals in small businesses precludes them from accessing the right to unfair dismissal proceedings, even when they have been unfairly dismissed. We note access to these laws is most important for casual workers, as most of our clients in small businesses are low status and low paid and are heavily reliant on the small income they get. When they are dismissed they are left with no recourse to reclaim any loss, and this often puts them in very difficult financial situations.

Recommendation:

- *NWWC recommend that the qualifying period for casual employees be changed to reflect the same requirements as permanent workers so that it is equitable and accessible for workers in precarious employment.*

Consistent with the Government policy objectives, does the Fair Work Act provide genuine unfair dismissal protection? If so, how, if not, why not?

NWWC are of the view that recent changes to unfair dismissal laws are a significant improvement for vulnerable women workers. It is certainly the case that more NWWC clients qualify for unfair dismissal claims and more applicants reach a satisfactory settlement due to the removal of the 'genuine operational reasons' defence. However, significant concerns remain for workers who do not meet the qualifying period and who are victims/ survivors of domestic violence. More information about the needs of these workers is provided in responding to the questions below.

It is the experience of the NWWC that clients who come to us for advice and assistance have been unfairly terminated. There is often very little evidence of fair and reasonable action and procedures leading up to the termination. In our view, there is an over use of the term 'redundancy' when in fact there has been an dismissal. These redundancies are not genuine, and prove to be difficult to assert as unfair dismissal in conciliations.

Are the procedures for dealing with unfair dismissal quick, flexible and informal and do they meet the needs of employers and employees? What is the impact of the changed processes upon the costs incurred by employers and employees?

Procedures for unfair dismissals are certainly quicker since the introduction of the Fair Work Act. However, the emphasis on speed can act as a disadvantage for some NWWC clients. NWWC as employers promote genuine flexible working conditions including part-time work. Our centres are small, and as a result staff are not always available on every work day to represent clients in unfair dismissal proceedings. FWA is in some instances flexible in their scheduling of conciliation conferences to ensure that a NWWC staff member is available to represent; in some instances the FWA is inflexible. Consequently, some NWWC clients who are vulnerable and in need of NWWC support and representation attend their conciliation conference unrepresented and some clients choose to withdraw their applications and lodge an alternative complaint on the basis that their NWWC might otherwise be unavailable to support and represent them.

Case study:

Minh is a Vietnamese woman who provides support services to children at risk in a community-based organisation. The WWC assisting her with her case identified that she had a very strong unfair dismissal application and lodged a claim on her behalf. FWA scheduled her conciliation at a time that clashed with the conciliation of another WWC client who was represented by the same WWC staff member. When the WWC staff member asked for Minh's case to be re-scheduled because she was double-booked and there were no other staff available to represent Minh she was informed that representative availability is not an appropriate reason to change the date of conciliation. When Minh was informed that she would have to attend the unfair dismissal conference unrepresented she decided to withdraw the unfair dismissal and lodge a General Protections dispute instead.

NWWC advocates often feel that conciliators still do not exercise enough power, influence or sway in the resolution of cases, particularly when respondents fail to provide payments and documents agreed to in a conciliation, in a timely manner. It is the recommendation of the NWWC that conciliators are given more power to enforce certain settlement outcomes on employers.

Has the ability of FWA to deal with unfair dismissal claims in a more informal manner improved the experience for participants?

Inconsistent Responses to Requests for Adjournments

NWWC have received inconsistent responses from FWA when requesting an adjournment of a conciliation conference for an unfair dismissal matter. We understand the logistical difficulties of getting a number of parties available at the one time and are not in the practice of lightly requesting conference adjournments. There are, however, times when it is not possible for clients to reasonably proceed with their matters, for example when their representative must attend a listing in another jurisdiction for another matter or when a client is approaching the birth of a child, is having difficulties with a pregnancy or has other relevant health issues.

Our centres have low staff numbers, part-time job-share arrangements and high case loads, and it is not always possible for a client representative to be available or for that client to be represented by another staff member.

Conversely, it has been our experience that on a number of occasions adjournments have been granted to employers or their representatives on the basis of more trivial reasons.

Method of Conciliation

While our organisations have mixed views on the benefits of telephone conferences vis-à-vis face-to-face conciliations, we offer the following observations:

1. In some telephone conferences we have attended, respondents have demonstrated a lack of respect for the process. We have been in conferences with respondents who were clearly washing dishes whilst they spoke, attending to crying or upset children in the background or in the presence of others who are not involved in the matter.

2. During conciliations we have had some difficulty dealing with clients experiencing mental health issues. We seek some clarity around when, given our professional judgment, it would be preferable to hold a face-to-face conciliation rather than a telephone conference and how to go about requesting this. On occasion we have represented clients with mental health issues who have become extremely agitated during a telephone conciliation conference. Obviously the need to call a break can not be assessed by a conciliator who cannot see what is happening, and it is not always easy for the client's representative to seek a break in the conference whilst also maintaining the dignity of the client, particularly when the respondent is also on the line. The name of the conciliator is only known when they phone to start the telephone conference, so there is no capacity for an advocate to privately notify the conciliator that there may be a need for extra consideration of a client's mental health needs.

Notification of Availability of Advocates

We have experienced problems seeking adjournments when conferences have been allocated to advocates at times they are unavailable and have clearly indicated this either directly to FWA or on client applications. There appears to have been some problems communicating this information to the relevant staff to prevent us from having to seek

adjournments, which have been denied. We encourage and support flexible working arrangements for staff, especially those who have family, caring or other responsibilities. In our view there should not be a presumption by FWA that advocates are always available, or that we have back-up staff on hand at all times.

Provision of the Respondent's Response prior to Conference

Whilst we acknowledge that there is no requirement under the Fair Work Act 2009 for respondents to provide their response to the client and/or their representative before a conciliation conference there has been a long standing tradition of making material available to the other party in the interests of fairness, natural justice and good faith. When a response is conciliatory it obviously assists the conciliation to proceed more smoothly. When a response is adversarial it allows an advocate to properly prepare the client for the conciliation and again address some of the emotional reactions, which may get in the way of a smooth conference. The provision of a response at least 3 – 5 days before a conciliation is preferable in our view.

Conciliation safety

NWWC seek to make mention of the importance of the safety of all attendees at FWA conciliation conferences that occur via telephone or video conference.

Case study:

A WWC staff member represented a client at conciliation at FWA. The conciliation was via video conference in the FWA office. A FWA staff member set up the video-conferencing facilities and brought the applicant, WWC representative, the respondent and respondent's representative into the room where the conciliation took place. The FWA staff member then left the room. The parties waited in that room without a staff member present until the conciliation commenced. During the conciliation the representative of the respondent gave highly inappropriate threatening and intimidating glares to the applicant. As there was no FWA staff member present in the room this behaviour was not noticed and continued throughout the conciliation. The inappropriate behaviour of the respondent's representative continued at the conclusion of the conciliation as the parties left the room.

Recommendation:

- *That a FWA staff member be present when conciliating parties are in a room together for conciliation.*

What has been the impact of the introduction of qualifying employment periods before an employee is eligible to make a claim for unfair dismissal? Has the 12 month (small businesses) and 6 month (larger businesses) qualifying period provided clearer guidance to employers and sufficient time for employers to assess the suitability of an employee for a role?

The small business qualifying provisions for unfair dismissal exclude many workers from making claims against termination of their employment that have been done in a harsh unjust or unreasonable manner.

Case study:

Mandy is a 19 year old woman who lives in a small rural community. She has been working in the local shop for four months. Last week, Mandy's boss accused her of giving a free chocolate bar to her friend. Mandy denied this. Mandy's boss then sacked her. As Mandy had not worked for the requisite 12-month qualifying period applicable to small businesses, she was unable to make an unfair dismissal claim. There are very few alternative employment options available to her in her small community, and Mandy worries that her former employer will be spreading rumours amongst the other small business owners that she is a thief. Mandy is a sole parent of two children to support, aged 2 and 9 months.

Case study:

Gen contacted QWWS 15 days after she was dismissed from her employment and exactly 6 months after she commenced her employment. It had taken Gen 2 weeks to recover from the shock of her termination before she began enquiries into her rights. Gen's employer had told her there were performance issues but Gen believed she had been dismissed because she requested time off during the school holidays. Gen was disappointed that she was out of time and considered an adverse action complaint but obtained alternative employment a couple of weeks later so decided not to take action against her employer.

Additionally, the fourteen-day limit on lodging applications has proven too short for many of our clients, particularly those in regional areas or from disadvantaged backgrounds. Some clients are choosing to make adverse action claims that should really have been unfair dismissal claims when they discover that they are out of time for the claim.

Recommendation:

- *Reconsider the fourteen-day time requirement for lodgment of the unfair dismissal application and reinstate the 21-day time limit that previously existed.*

Is FWA's emphasis on telephone conciliation in unfair dismissal matters desirable? If so, why, if not, why not?

This is covered in the section on Procedures.

Are the remedies available in the case of an unfair dismissal appropriate?

Is the Small Business Fair Dismissal Code an effective tool in helping small business to understand their obligations and fairly dismiss employees?

In our experience small business employers have little awareness of the code, nor is there generally evidence when a dismissal has occurred that the code has provided guidance to the employer. Greater promotion and education about the code and to which workplaces it applies is needed.

What has been the impact of removing the genuine operational reasons defence to an unfair dismissal claim and replacing it with the requirements for genuine redundancy?

NWWC feel that the impact has been positive: cases of non-genuine redundancy have been clearer. However, we are seeing that some employers are still opting to use 'redundancies' as an excuse because they believe it will protect them from unfair dismissal proceedings. However, it is apparent in many conciliation conferences that employers are not prepared to provide effective evidence of the genuity of redundancies. Because the nature of these conferences is to achieve an outcome, and often with a small amount of compensation, there is insufficient incentive for employers to refrain from implementing non-genuine

redundancies nor to follow Award or Agreement requirements for consultation in these circumstances.

Have the unfair dismissal provisions under the Fair Work Act had an impact on the ability and willingness of business to take on new employees?

We believe the process of fairly terminating employees who are unwilling or unable to perform the inherent requirements of the job are well documented and the process provides for natural justice to all parties.

Institutional framework

Does the consolidation of workplace relations institutions provide more easily accessible services and information to users of the national workplace relations system?

NWWC report no significant improvements in the accessibility of the national workplace relations system since the consolidation of institutions. NWWC welcomed the policy announcement of FWA being an accessible 'one-stop-shop' where employees and employers could gain information about the workplace relations system, but the reality is that many barriers to vulnerable workers seeking information remain, especially for CALD and Aboriginal workers. Telephone services with long waiting times and confusing telephone keypad options and office locations in high-rise government buildings deem them inaccessible to many NWWC clients.

In addition, the Northern Territory FWA office no longer has a resident Registrar or Commissioner and relies on these services being provided from interstate. The FWO office in the NT also no longer has a senior Manager.

A survey of NTWWC clients in the January – December 2011 period shows that 40% of women did not know about the existence of the FWO before their contact with the NTWWC.

Do the enhanced powers of Fair Work Ombudsman (FWO) inspectors assist in the expeditious resolution of matters under investigation?

The NWWC are aware of the enhanced role of the FWO; however, because referral to the FWO effectively means clients hand over to an investigator, most clients opt for a dispute conference under General Protections because of the more prompt timeframe. Wage investigations are often managed through dispute resolution for smaller claims and many clients report that they have been forced to settle for less than their entitlements or an "offer" from their employer to finalise the matter. Enforcement of claims under $5000 should be mandatory.

In comparison to the previous arrangements, does the increased educative role for the FWO help employers and employees to better understand their rights and obligations under the Fair Work Act?

NWWC support an increased educative role for the FWO but wish to ensure that a focus on education is not at the cost of reasonable enforcement and a lack of education is not used unreasonably as a defence against non-compliance.

Case study:

Kim is a 19-year old Aboriginal woman who worked for a well-known multinational fast food outlet. She had 3 years service when she became pregnant. The pregnancy had an impact on her health and she required some modifications to her working hours to ensure her physical safety. Kim presented a medical certificate to her employer, which required her shifts to be during 7am and 5pm. Her employer told her that they were unable to comply with the request to work normal business hours and continued to roster her onto shifts that started before 7am and were completed at 10pm. Upon the advice of the WWC she made a complaint of discrimination to the FWO. The FWO investigation found that the employer did not realise that they had an obligation to comply with the requirements of the medical certificate to ensure Kim's physical safety at work. The FWO provided education to the employer about their obligations. The FWO reported to Kim that they could take the matter no further as prior to their education the employer was not aware of the duties to protect pregnant employees.

Furthermore, NWWC regularly receive feedback from clients advising us that they get different information from the FWO telephone operators as compared with the information we provide. Clients have also instructed us that if they call twice they get

two different lots of information from the FWO telephone operators. We raise these instances directly with FWO where we can but often women do not have the name of the person they have spoken with.

What has been the impact of the new ability for the FWO to accept enforceable undertakings as an alternative to prosecution?

Because FWO is an individual complaint-based agency, unless a client of our service has instructed FWO to keep us informed of the progress of enforceable undertakings, we do not often hear about outcomes in these matters. There have been occasions when clients have contacted us for information, advice and advocacy in these matters.

These enforceable undertakings seem to be more applicable to larger business and high amounts of wages underpayments whereby many of our clients have small wages claims that are not always successful in the alternative dispute resolution process offered by FWO, or they report settling for amounts that are significantly less than they believe their claim to be.

Additional submission from NWWC

Responding to the impact of domestic and family violence on women

NWWC wish to make special mention of the impact of domestic and family violence on women's abilities to find and retain secure work. NWWC have been working closely with the Domestic Violence Workplace Rights and Entitlements Project (Safe at Home Safe at Work Initiative) of the Australian Domestic and Family Violence Clearinghouse (ADFVC) and pay particular regard to this work in our discussion. We also make reference to the work of Franzway, S, Zufferey, C & Chung, D 2007 'Domestic violence and women's employment.' WWC SA were community partners in this research.

The statistics of the numbers of women affected by domestic and family violence in Australia are sobering. Two-thirds of women who have experienced domestic violence with their current partner are in paid employment (ADFVC Resource). At a time when a woman's personal life may be in crisis, what she most needs to do is to keep her job and her income.

It is the experience of NWWC however that it is most likely that if domestic or family violence is impacting on the workplace, particularly if both partners work at the same worksite, then it is most likely that it is the woman who loses her job.

Many women who experience domestic or family violence report that they are reluctant to sign up for full-time permanent positions. For a woman to manage the effects of abuse and violence it is often seen by her to be better to 'go casual' so that if she needs days off to recover (or for her injuries to not be seen), or because it is not safe for her to go to work on a day when she is offered a shift, then she can 'knock back a few shifts' until she can work again. Obviously there is an economic cost to her of doing this. This is not to suggest that casual work per se is the best option for women experiencing domestic or family violence and therefore we should not interfere with the high rates of casual work. Casual work will always be a reasonable option for some jobs in some workplaces and for some workers. It is far preferable that as a workers' movement, we address the systemic impact of domestic or family violence on workers, employers and their workplaces, rather than expecting individual women to simply cobble together the best arrangements they can in an effort to deal with domestic or family violence.

Women experiencing domestic or family violence live with high levels of fear – fear of their partner or family member not letting them get to work or causing them to be late for work, fear of their partner coming in to or phoning the workplace, fear of getting too close to workmates who may discover that violence and abuse is happening, fear of getting too involved in social activities at work or after hours and fear of losing their jobs.

Women report that they are often punished if they appear to 'love their job and their colleagues more than their partner'. Women also report that their capacity to access and complete appropriate education and training whilst experiencing domestic or family violence is severely compromised. Abusive partners often feel threatened and escalate levels of control over women who are seeking to improve their chances of securing or retaining better work by retraining. Women have reported to us that abusive partners have destroyed their course notes, textbooks and computers, denied them use of the car to get to classes or refused to assist with child care. An inability to undertake activities to improve economic stability and security entrenches women experiencing domestic or family violence in insecure and precarious work.

In most instances reported to us by our clients it is the partner who is abusive, although there have been some circumstances where a son or a father or mother may be perpetrating violence. (In the case involving the mother it was clear that she was experiencing mental health issues. She would constantly attend the daughter's workplace and cause problems that impacted on other customers, rather than being a situation where she was abusive and violent towards her daughter or other workers.)

From time to time we are contacted by workplaces seeking help with a situation where one of their workers is experiencing threats of violence at the workplace. Employer responses to these situations are patchy – on the whole women are advised to leave their jobs (for their own or their colleagues' safety), are sacked or bullied out of their jobs. Sometimes women are told that it would be best if they worked at home but safety plans are rarely put in place, making the woman even more vulnerable. On only a few occasions have workplaces reported that they have put in place a safety plan to assist their worker to maintain safe employment.

Women report a range of impacts of domestic and family violence – feeling uneasy, edgy or anxious, feeling too ashamed of injuries to turn up to work, feeling they have to take days off because they fear for the safety of their children or because the abusive partner refuses to assist with child care, feeling like they have to look over their shoulder all the time, feeling that their work performance is not up to scratch, or feeling exhausted from the need to be vigilant or to cover up violent and abusive acts all the time. Women who experience the impacts of domestic or family violence in their workplaces also often talk about the shame that goes with having their situation exposed. For many women it is not safe nor is there a level of trust high enough for her to disclose to her employer or anyone else at the workplace that she is experiencing domestic or family violence.

The following cases display a range of impacts of domestic and family violence on women workers. All cases have been de-identified.

Case study – Lucille:

WWC SA was contacted by Lucille's father who was referred by a SafeWork SA Inspector. He encouraged Lucille to phone us. Lucille's husband had found a text message from a co-worker, which said 'I'm sitting at your desk.' This co-

worker was from interstate and had been flown in for the day. He sent the text to Lucille as a courtesy. She worked part time and wasn't at work that day. The husband flipped when he saw the text message, rang the workplace and told them, 'The last person who had a crush on my wife spent 6 months in hospital.' Lucille then fled, taking the children with her. Her husband and 2 of his mates then spent the day outside the workplace in the city and watched everyone who left to see if they could identify the person who may have sent the text. The interstate worker had already been flown back to his home due to the threat. This all happened on a day when Lucille did not work anyway. When she got back to work the employer summoned Lucille to his office. Lucille let him know that she had left her husband. The employer said, 'I can't believe you have the audacity to think you can have your job back.' The husband had told her to 'pack her shit and get out' which she had done. Lucille felt she was not at risk but would be once her husband learnt that this was final. She made it quite clear to the employer that she had no intention of resigning, that she was the victim and not responsible for her husband's behaviour, that she loved her job, that she'd left him, that she had 2 children to support and now had no home and that there had never been any performance issues in the past.

Case study – Mary:

Mary had worked for 2 months and in that time had been promoted to manager. Her husband had come in to the workplace one day and caused problems. After another incident at home she rang her boss to say she would be in a bit late as she was at the police station reporting a domestic violence incident and had been delayed. He sacked her as he said she was just too difficult.

Case study – Anna:

Anna had worked for her sister-in-law for 15 years. Anna divorced her husband following domestic violence. When she spoke about the DV to her sister-in-law (also the boss) she was sacked.

Case study – Donna:

Donna disclosed to her boss that she was experiencing domestic violence. Donna had been head-hunted for this position but once she revealed the DV she was systematically bullied out of her position.

Case study – Kelly:

Kelly worked for a short time in a small boutique in a regional town. Her husband came in to the store and went 'nuts'. The store owner lives in Victoria so didn't know about the incident but other women who worked there rang and told him. Kelly had to go to have a CAT scan because her husband had hit her so hard. She let the owner know about this. He then told her she had to choose between her job and the CAT scan – he said 'you can't have both.' Kelly was then dismissed for very vague reasons – 'it's not working out, etc.'. Kelly rang HR who told her she would be paid a week's notice but the payment never appeared. When she rang to enquire again, HR told her that she wouldn't be getting it as she'd been dismissed for gross and willful misconduct. When she asked what this meant she was told there was an accusation of stealing but they couldn't give any details of what or when she had allegedly stolen something. Kelly asked if she had stolen something why hadn't she been told and why hadn't it been reported to the police. She was given no reason. Kelly now works in the shop next door.

Case study – Sylvia:

Sylvia worked as a community support worker. She was experiencing domestic violence from her husband who was also coming in to Sylvia's workplace. She was often late for work and the violence was impacting on her performance generally. Sylvia was terminated for performance issues (lateness).

Sylvia then left the relationship. She has a domestic violence order against her husband which covers her in her workplace.

Sylvia applied to work at another organisation. She did very well at the interview and was sure they would offer her work which they did. The new employer then rang the former employer for a reference. He told them that she'd had heaps of personal and family problems, that there'd been issues with attendance and that the abusive husband had been coming on to work premises causing problems.

The new workplace has not withdrawn the offer of work but has requested a statutory declaration (they are emailing her what they want her to sign) from her saying that she has nothing to do with her ex-husband. They also want a copy of the order as they say it covers them.

Her question to us was 'Can they do this?'

She has no children. There are no issues that indicate this could be a case of disability discrimination. At the time Sylvia was advised that the Australian Human Rights Commission was keen to run a test case where domestic violence is seen as the reason for possible discriminatory treatment. Sylvia was not keen to be a test case and did not proceed with an AHRC complaint.

Case study – Bev:

Bev rang 2 different Industrial Officers at the Working Women's Centre on 2 different days. We realised later that her husband had also rung 'on behalf of a friend'. He was extremely patronising and arrogant.

Bev was advised by our 2 Industrial Officers that she had no jurisdiction for an unfair dismissal. She had been employed for less than 6 months and her complaint was out of time. She said she had been terminated for assaulting someone at work and reported that 3 colleagues had told this to the boss. She said she'd been given no chance to defend herself. Bev said she'd been extremely frustrated during a meeting at her unreasonable workloads and had thrown a box of tissues down and left the room to go to the toilet to compose herself.

Unbeknown to us, Bev's husband also contacted the Employee Ombudsman and was sent papers to lodge an unfair dismissal claim at the South Australian Industrial Relations Commission. The SAIRC advised that the matter was federal and sent them forms to lodge there which they did, along with an extension of time. The husband was nominated as the advocate.

We got a phone call saying Bev was confirming her meeting with our Industrial Officer, but no meeting had been made. Bev's husband then rang us. He was very demanding, insisting that they be seen. We rang the AIRC to see if they knew anything about the matter and were told that Bev had rung the Registrar and instructed them not to send any more correspondence to her husband as they'd separated. The Registrar told Bev that she would have to remove him as her advocate.

Bev came in for the meeting that had been arranged at short notice. Her husband accompanied her, despite us having been informed of her call to the Registrar indicating they had separated. We organised for both Industrial Officers who had spoken with Bev to be in the meeting. We tried to see her on her own but were aware we didn't want to make the situation worse for her.

She said she wanted him in the meeting as her advocate. The lack of jurisdiction was explained to them – he was trying to insist she had rights but under law she didn't. His behaviour in the meeting was very arrogant and he refused to grasp the information given to him. He was very domineering and manipulative in his behaviour.

Whilst no disclosure was made by Bev of domestic violence, our industrial staff had major concerns about her husband's behaviour and his role in trying to resolve her industrial issue. Our Industrial Officers explained that it is our policy not to advocate where someone else has already been nominated.

Awareness of the impact of domestic and family violence in an unfair dismissal matter is low amongst employers and possibly even FWA and FWO. We recommend that a major body of work be undertaken in this regard and point to www.dvandwork.unsw.edu.au for appropriate resources and tools for employers, employees and others.

Recommendations around domestic and family violence:

- *The National Employment Standards should be amended to provide for a new minimum statutory entitlement to 10 days paid family violence leave. An employee should be entitled to access such leave for purposes arising from the employee's experience of family violence, or to provide care or support to a member of the employee's immediate family or household who is experiencing family violence.*

- *The Australian Government should encourage the inclusion of family violence clauses in Enterprise Agreements.*

- *In its review of Modern Awards, Fair Work Australia should consider the ways in which assistance for women experiencing family violence may be incorporated into awards in keeping with the modern award objectives.*

- *Sections 351(1) and 772 (1)(f) of the Fair Work Act should be amended so that discrimination on the grounds of domestic violence is a ground for an adverse action and unlawful termination application to Fair Work Australia.*