Fair Work Australia

General Manager's reporting requirements

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Re: submission to the FWA's General Manager's report into the provisions of the National Employment Standards relating to flexible working arrangements and extensions of unpaid parental leave

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

The Working Women Centres (WWC's) in South Australia and the Northern Territory and the Queensland Working Women's Service are community-based not-for-profit organisations that support women employees whatever their age, ethnicity or work status by providing a free and confidential service on work related issues. All three Centres are small agencies that rely on funding from the Commonwealth (SA and NT), State (SA and Qld) and Territory governments (NT).

The Working Women's Centres opened in 1979 in South Australia and in 1994 in the Northern Territory and Queensland. Since their beginnings, the Centres have worked primarily with women who are not represented by a union, their own lawyer or other advocate. We provide advice, information and support in lodging complaints and claims. We refer women with legal needs to appropriate legal services. Many women who contact our Centres are economically disadvantaged and work in very precarious areas of employment.

WWC's also conduct research and project work on a range of issues that women experience in relation to work. These have included access to child care, Repetitive Strain Injury, outwork, family friendly practices, OHS&W, workplace bullying, the needs of Aboriginal and Torres Strait Island women, pregnancy and parental status discrimination, Community Development Employment Project (CDEP), work/life balance, pay equity and the impact of domestic violence on women workers and their workplaces. Although some of the issues have changed for women since the Centres began operation, the work that we do remains consistent with the philosophy that all women are entitled to respect, to information about their rights and equal opportunity in the workplace.

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

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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1. Were you aware of the right under the National Employment Standards for an employee to request flexible working arrangements to assist the employee in caring for a child?

2. What changes to working arrangements to care for a child have been requested under the provision in the National Employment Standards?

1. Yes

2. The women that have approached the Working Women's centres for assistance have generally requested changes to their working arrangements to care for their children. These requests have included:

    - a transfer from full-time to part-time employment
    - creation of job sharing positions
    - access to flexible hours to enable picking up of children from school or care
    - a gradual increase of hours as a child becomes settled in childcare
    - requests to work on specific days only due to the unavailability of child care places.

Women have also contacted the service while attempting to negotiate a part time return to work after parental leave. In some circumstances this leave is to facilitate breast-feeding and is of a shorter duration while other requests have been for the duration of the entitlement until school age).

We have also had contact with women who are attempting to negotiate an earlier return to work than originally planned in a part time capacity due to a range of issues including miscarriage or still birth.

However, we have also seen many women who have attempted to request changes to their working arrangements in order to provide care for children who are over school age, as well as for other family members, including elderly parents, ill or injured partners, or siblings. The NWWC believe that the current definition of the class of employees that may access this

provision (those who are caring for a child under school age or a child with a disability up to the age of 18) is too limited.

The NWWC has long advocated for the broader definition of "carers" beyond the current limited definition in the Fair Work Act. These narrow parameters fail to recognise the significant caring needs of school age children particularly during school holidays or illnesses, and of course outside of school hours. Further, the definition excludes the thousands of carers who provide care outside of a parenting role, such as those caring for a partner, a sibling, a friend, an elderly parent, or an adult with a disability. We note that women disproportionately take on these roles, and thus it is female employees who often find themselves with no legislative access to the flexible work arrangements required to fulfil their caring responsibilities. We note that the UK prototype legislation for the current right to request provisions (the United Kingdom Employment Act 2002) was extended in 2007 to cover all carers of adults and children under 17 years, rather than just parents.

We also draw attention to the fact that the 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 (biologically) their own. Many Aboriginal women are also carers of other extended family members. The Fair Work Act does not currently offer flexibilities that appropriately accommodate such cultural and family commitments.

The NWWC would like to see this provision extended to all carers. The NWWC supports the definition provided in the Fair Work Amendment (Better Work/Life Balance) Bill 2012 ("an employee who has the responsibility for the care of another person").

3. What have been the reasons given for requests for flexible working arrangements?

See Question 2 above.

4. What have been the outcomes of requests for flexible working arrangements – i.e. have they been granted, granted with variation or refused?

5. For any requests for flexible working arrangements that have been refused, what have been the reasons given for refusal?

6. What have the outcomes of requests for flexible working arrangements been? For firms? For employees?

4. Due to the nature of the service we provide, clients come to us when they are seeking information about the process surrounding their "right to request" or when their request for flexible working arrangements has been refused or granted with variation that is generally not satisfactory.

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.*

Rachel *had worked for 5 years in a supervisory role in the hospitality industry. She took leave to have her first child and 3 months after the birth she requested a return to her full time position. Rachel asked for a flexible work arrangement as she wanted to continue breast feeding her child. She wanted to work during the day, didn't have a problem working on the weekends as her partner could care for the baby but requested shorter shifts of 6 – 7 hours only. The employer responded that they had changed the roster arrangement to a 'fixed roster' that was equal for everyone. This roster required Rachel to work 8.5 – 11 hour*

shifts often finishing at 9pm, 11pm or 1am. Rachel's workmates were happy to work around her needs as none of them had family responsibilities, however the employer refused to negotiate a suitable arrangement for Rachel and she was dismissed. With the help of the WWC SA, Rachel lodged a general protections claim which included the termination and discrimination on the basis of her family responsibilities. The matter settled at conciliation.

***Lily** had worked in a city retail position for 10 years. She took leave to have her first child. Lily lives in a southern suburb. Two thirds of the way through her maternity leave the organisation restructured. Some of the positions were moved to another location in the city and some were moved to a northern suburb. Lily was consulted about this and she highlighted her need for her position to be located in the city, due to the extra travel times it would impose for her to get to and from work if she had to work north of the city. However, Lily's position was transferred to the northern suburb. Lily immediately requested a part time return to work to a city location but this request was refused. Lily was told she had to return full time to her pre maternity leave position which was now located north of the city. During this period Lily was diagnosed with depression and anxiety and notified her employer. She let them know this in November . At first the employer denied that they had been informed of this and then they said that they would set up an appointment for her in May to be assessed at which point they may consider a transfer to the city. Lily felt she had no other option but to resign as she needed to return to work and earn an income. After discussion with WWC SA, Lily's matter has been lodged with the Australian Human Rights Commission. Lily is awaiting a response from the employer and/or a conciliation date.*

***Patty**, a single parent, has worked in an administrative and reception role for a non-government organisation for six years. For three years, Patty has worked part-time, from 9 until 2.30 each day, in order to enable her to take her two children to school and pick them up each day. Reception duties are shared amongst other staff members for the afternoons when Patty is not in the office. Three months ago a new Manager was employed who informed Patty that the organisation could no longer offer her these flexible hours, arguing that the reception burden on other staff was too great. Patty was unable to utilise the NES provisions as her children are both over the age of 6.*

***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. 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.

Daisy *worked as a part-time carer for aged and disabled people in a small regional community. Daisy had recently been obliged to take in her sister and her sister's children, who had fled from an abusive relationship. Daisy requested a change to her working hours so that she could assist her sister with legal and practical arrangements in relation to the domestic violence, and settle her nieces in their new school. She requested reduced hours for a month, and offered to make the time up when her family was settled. The request was denied due to 'business grounds'. No written reasons were given.*

Cassie *had worked as a medical receptionist for 3 years. She took leave to have her 2nd child. Cassie notified her workplace 6 weeks before she intended to return to work, requesting a part time return to work based on the availability of child care. She was able to get child care for Tuesdays, Wednesdays and Thursdays and every 2nd Monday. Her employer emailed to say that Cassie could either come back full time to her pre maternity position or she could resign and apply to be a part time 'floating receptionist' that would involve her having to travel to country clinics. There followed an email exchange between Cassie and her employer which resulted in her request going to the HR Committee. This Committee rejected Cassie's request saying that patients required continuity of service from receptionists and for this reason they believed she had to return full time. In Cassie's workplace receptionists rotate between the front reception desk and the back office where they make and take phone calls. They do deal with high care cases but receptionists are not allocated to one particular doctor or to specific patients so patients may see a different receptionist when they come in to the clinic. With the help of the WWC SA, Cassie has lodged a general protections matter for both sex and pregnancy discrimination. The matter has not yet been conciliated.*

5. The NWWC has found that the “reasonable business grounds” defence has been used by many employers to refuse requests for flexible working hours, without any elaboration or definition of these specific grounds. In many cases, employers have not put their response in writing. In some cases employers have become hostile when a request is made and refused to recognise the entitlement at all.

6. It is reasonable to say that at present, when considering the ability of the Fair Work Act to enforce requests for flexible work arrangements, its bark is worse than its bite.

   Currently under the Fair Work Act an employee who has had their request for flexible work arrangements refused, whether reasonably or unreasonably, has **no** mechanism for appeal unless this has previously been agreed to in a contract or enterprise agreement. This severely limits the enforceability of the provision, leaving many employees seeking flexible work (predominantly women) with rights on paper only. This has been a serious impediment to achieving greater work life balance for employees. It also makes the field uneven for employees where employers only partially accommodate the request without providing sufficient response as to why they have done so.

We believe that there is the need for a clear process for both employees and employers to deal with those situations where a request is not assented.

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 being forced to work full time, to the employers modification, to accept demotion, convert to casual employment or resign. Many women report high levels of stress at this time.

The NWWCs support the amendments proposed by the Fair Work Amendment (Better Work/Life Balance) Bill 2012 which would empower Fair Work Australia to deal with such disputes, including the ability to make flexible working arrangement orders where appropriate. We believe that these amendments are crucially important in addressing the current absence of enforceable provisions for workers seeking flexible work.

7. Were you aware of the right under the National Employment Standards for an employee to request extensions to unpaid parental leave beyond the initial 12 month period?

8. What extensions to unpaid parental leave beyond the initial 12 month period have been requested under the provision in the National Employment Standards?

7. Yes

8. The NWWC have been in contact with women who have requested extensions to their 12 month parental leave period.

9. What have been the reasons given for requests for extensions to unpaid parental leave beyond the initial 12 month period?

9. The requests are various but many women report that the demands of the primary caring role including breastfeeding and direct care are not consistent with a return to work within the 12 month period. Other factors may impact such as the health of the parent or child, availability of alternative care arrangement within the family or the community . The imposition of a 12 month period of leave as an initial maximum is inconsistent with child attachment needs and consistency of care as well as other factors outlined above.

10. What have been the outcomes of requests for extensions of unpaid parental leave – i.e. have they been granted, granted with variation or refused?

11. For any requests for extensions of unpaid parental leave that have been refused, what have been the reasons given for refusal?

12. What have the outcomes of requests for extensions of unpaid parental leave been? For firms? For employees?

10 And 11. Case studies

Tessa *worked as a professional in a remote community. She had taken 12 months parental leave, and had planned that her partner would then take another 12*

months off to look after their baby, who had a mild disability. During this time, however, the relationship dissolved, and Tessa requested an extension to her parental leave. Tessa's request was denied and no reason was given. Tessa was forced to return to work, despite her anxiety about her child's special needs being met by the only childcare place she could find.

***Katrina** was due to return to her position in the hospitality industry after 12 months parental leave. However, she had been unable to secure childcare and requested an additional 3 months at which time she had been told a space would become available. Her employer refused this extension, on the grounds that the person acting in Katrina's position was not able to extend her term and the recruitment to a 3 month position would be too difficult. Katrina felt she had no option but to resign from her position.*

11. As per our response to question 6 above, we lament the fact that under current legislation an employee who has had their request for extended parental leave refused, whether reasonably or unreasonably, has **no** mechanism for appeal unless this has previously been agreed to in a contract or enterprise agreement. We believe that there is the need for a clear process for both employees and employers to deal with those situations where a request is not assented.

NWWC are aware of numerous cases where workers with legitimate needs for extended parental leave have had their request unreasonably denied. These employees are often faced with being forced back to work earlier than planned, or resign.

The NWWCs support the amendments proposed by the Fair Work Amendment (Better Work/Life Balance) Bill 2012 which would empower Fair Work Australia to deal with such disputes, including the ability to make orders where appropriate.

Beyond the legislative hammer, there is also 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 , decisions are discretionary and take-up is low.

12. NWWC acknowledges that an extension beyond 12 months leave up to 24 months leave is a long period for an employee to be absent from the workplace. It may be useful in such

circumstances for mechanisms to be put in place for the employee to remain in contact with the workplace including monthly updates and the opportunity for workplace visits. Larger workplaces may be able to support web based communication that did not distract from caring responsibilities but the facilitated continuity of access to information about significant events or changes. Employers could also consider offering a re-induction program where the absence has been extensive.