Attachment B

UPDATING THE FAIR WORK ACT 2009 TO PROVIDE STRONGER PROTECTIONS FOR WORKERS AGAINST DISCRIMINATION

Contents

We confirm that all case studies used in this submission have been provided with our client's consent and names of individuals and businesses have been changed to protect their identities.

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

1. Background

We welcome the Department's proposal to align the Fair Work Act 2009's (**FW Act**) anti-discrimination with Commonwealth anti-discrimination laws. We are encouraged to see real steps being considered to bring consistency and coherency to the anti-discrimination provisions within the FW Act.

Our Centres strongly agree that there is a need to simplify the system, clarify and strengthen the protections where appropriate, reduce inconsistencies between the existing piece of anti-discrimination legislation and provide more certainty about rights and responsibilities.

This consultation paper also indicates an interest in keeping the FW Act in alignment with shifting community standards, in particular through the inclusion of family and domestic violence as an attribute under the general protections provisions.

The focus of this consultation paper is an important step towards fixing this part of the FW Act and we are pleased to have the opportunity to contribute our ideas.

2. Summary of recommendations

1	Any anti-discrimination protections provided under the FW Act should be no less favourable than under Commonwealth anti-discrimination laws.
2	The FW Act should expressly prohibit indirect discrimination and should include specific provisions relating to the Respondent's burden of proof.
3	The FW Act should require the employer to make reasonable adjustments for employees with disabilities and reasonable accommodation for employees with family or carer responsibilities.
4	The FW Act should include a characteristics extension for all protected attributes.
5	A new complaints process should be established through the FWC to conciliate discrimination-related claims.
6	FWC conciliators in this new complaints process must be appropriately trained on sensitive responses to claims of discrimination, including trauma informed and culturally-safe practice.
7	The FWC should ensure that conciliators handle discrimination claims in an appropriate and complainant-focused way.
8	Consistent with the federal approach to conciliations through the AHRC, a new complaints process established in the FWC should not attract a filing fee.
9	Vicarious liability in relation to discrimination under the FW Act should be consistent with federal anti-discrimination laws.
10	Family and domestic violence should be included as a protected attribute under the FW Act.
11	Special provisions or a guidance note should be included in section 351 to address common forms of family and domestic violence discrimination.
12	Any reforms must ensure that the FW Act operates broadly enough to provide victim/survivors sufficient legislative protections to enable them to effectively respond to family and domestic violence.
13	Review section 44(2) FW Act and consider whether there is scope for recourse if an employer refuses a request for flexible working arrangements in cases of family and domestic violence.
14	The time limit for bringing general protections involving dismissal should be extended to 24 months to align with federal anti-discrimination laws.
15	Federal anti-discrimination legislation should be amended so that a person is barred from making a claim only if 'the matter has been adequately dealt with by a court or tribunal'.
16	The following additional attributes should be included for protection under section 351 of the FW Act: • Homelessness;

	• Visa status; • Spent conviction; and • Irrelevant criminal records.
17	Increased funding for Community Legal Centres in anticipation of increased demands on our services following reforms to the FW Act.
18	That the Community Legal Centre sector be supported to explore the potential to convert its administrative data into data that could be used for research purposes, for the ongoing evaluation of the existing laws, regulations and policies relevant to these reforms.

3. General comments and recommendations

The multi-jurisdictional nature of discrimination claims is already extremely complex and it is often difficult for applicants to make a choice, particularly if they're not represented.

We therefore make general recommendations that the guiding principle in reforming the anti-discrimination provisions of the FW Act, should be to ensure that the protections be no less favourable than those under Commonwealth anti-discrimination legislation, to ensure that victims of discrimination are not prejudiced by their choice of jurisdiction.

CASE STUDY: CAMILLA

Camilla was sexually harassed and discriminated against at work because of her race and her sex. The sexual harassment and discrimination included sexist slurs, and racist comments made about Camilla speaking English as an additional language. Camilla was dismissed after making a complaint about the sexual harassment and discrimination. At the time of her dismissal Camilla was eligible to make the following anti-discrimination claims in relation to her dismissal:

- *an unfair dismissal claim under the FW Act;*
- *a general protections claim involving dismissal under the FW Act;*
- *a discrimination and sexual harassment claim under the Equal Opportunity Act 2010 (Vic);*
- *a discrimination and sexual harassment claim under Sex Discrimination Act 1984 (Cth); and*
- *a discrimination claim under the Racial Discrimination Act 1975 (Cth).*

At the time of trying to make this decision, Camilla was suffering considerable mental health issues as a result of her treatment at work. Westjustice was able to advise Camilla to make a claim under the Equal Opportunity Act 2010 (Vic). Had Camilla made a General Protections claim, her claim would have been significantly compromised, as she would not have been able to substantiate the sex discrimination claim, or the race discrimination claim given the narrow framing of 'adverse action' under section 342 of the FW Act. Luckily, Camilla sought legal advice, and Westjustice was able to assist Camilla to make a more appropriate claim in the Victorian jurisdiction.

Recommendation 1: Any anti-discrimination protections provided under the FW Act should be no less favourable than the protections under the Commonwealth anti-discrimination laws.

4. Improving consistency and clarity – Measures to align the FW Act with Commonwealth anti-discrimination laws (addressing questions 1 – 4)

Our Centres' position is that there should be a unified test for discrimination across federal legislation that encapsulates the two concepts of direct and indirect discrimination. For this reason, we support a proposition that would expressly prohibit indirect discrimination.

The test for indirect discrimination should be modelled on the *Disability Discrimination Act* (**DDA**) so as to provide that the person who imposes or proposes to impose the requirement, condition or practice has the burden of proving that the requirement, condition or practice is reasonable. This definition should also include a requirement to consider reasonable adjustments.

Additionally, the test should also give greater weight to the 'reasonableness' of the Complainant's proposal as an alternative to the discriminatory requirement, condition or practice.

Recommendation 2 The FW Act should expressly prohibit indirect discrimination and should include specific provisions relating to the Respondent's burden of proof.

Our Centres also note the importance of the definition of disability, as well as all the other protected attributes under section 351 of the FW Act, including a 'characteristics extension'.

In the DDA, the characteristics extension is importantly expressed as follows:

> *To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.*

Our Centres often see clients with disabilities who require absences from work to manage their disabilities. Under the FW Act, these clients might be able to access paid or unpaid personal leave, and there are protections from being dismissed due to being temporarily absent due to illness or injury, however the protections could be more targeted. For example, a casual employee with no access to personal leave might have their hours cut for being 'unreliable' due to taking time off to adjust to medication, and they would have little recourse through the FW Act.

CASE STUDY: MALORY
Malory had been working for 2 years in a small business on a part-time basis. Due to the effects of family and domestic violence, Malory had taken a combination of paid and unpaid personal leave for the last 9 months of her employment. In particularly, Malory had been advised by her doctors to take new medication to handle the psychological effects of her trauma. Malory provided medical certificates to her employer, who directed Malory to get an independent medical examination. Malory was assessed as fit to return to work, despite her treating doctor's recommendation that she take time off work to adjust to the new medication.
Malory's employer notified her that due to her absences, and the fact that she was deemed fit to return to work in the independent medical examination, they would be considering termination if she continued to be absent from work. Malory's relationship with her employer broke down and she wished to resign. JobWatch was instructed by Malory to settle the matter without making an application for general protections dispute not involving termination, due to concerns that the employer could argue that the reason for their adverse action was her absences from work rather than her disability. JobWatch was able to negotiate Malory's resignation with a favourable settlement.

These amendments would ensure that the protections under the FW Act are no less strong than under the disability discrimination laws.
In addition to this, our Centres recommend that the FW Act require employers to make reasonable adjustments for workers who have family or carer responsibilities.

Recommendation 3: The FW Act should require the employer to make reasonable adjustments for employees with disabilities and reasonable accommodation for employees with family or carer responsibilities.

Recommendation 4: The FW Act should include a characteristics extension for all protected attributes.

5. New Fair Work Commission (FWC) complaints process for discrimination claims: (addressing questions 5 and 6)

We agree that a new complaints process should be established to require all complaints of discrimination under the FW Act be handled in the first instance by the FWC via conciliation. To be workable, the complaints process should be available to Applicants who are alleging a breach of section 351 of the FW Act, as well as other general protections provisions, noting that many of our clients allege contraventions of multiple sections of the general protections provisions. For example, many of our

clients who are subject to discriminatory adverse action and dismissed, or otherwise injured in their employment, when they make a complaint about their treatment.

Our clients are often faced with wait times of a few months in the Victorian jurisdiction to have their discrimination complaints handled. In the federal jurisdiction, wait times can be upwards of 8 months.

There is a clear need for faster avenues for victims of discrimination to address their complaints. However, we also note that some of our clients who are victims of discrimination can also be suffering from complex trauma. More often than not, in cases involving discrimination, it is particularly important for our clients' mental wellbeing to have their experiences heard and validated. In our experience, conciliators at VEOHRC, VCAT and AHRC are well-placed to do this, which is why it is a favoured jurisdiction for our Centres' for discrimination complaints. On the other hand, regrettably this has not always been the case for all client experiences of FWC conciliators. In our experience, we have observed instances of FWC conciliators appearing to show inadequate care for our clients' feelings or their mental health. We see there may be a need to ensure conciliators receive more training and support in taking a trauma-informed approach to conciliations (see case study below).

If a new complaints process through the FWC is to be established, which we believe it should, then these discrimination-related applications should not attract a filing fee. This would bring the process in line with the Australian Human Rights Commission ('AHRC') and would ensure that prospective applicants are not dissuaded from pursuing the FWC as an avenue to resolve the dispute.

CASE STUDY: TRANG

Trang was sexually harassed and eventually fired because of his sexual orientation. Trang also had an underpayment claim, so WEstjustice assisted Trang to make a general protections claim involving dismissal in relation to his treatment. Trang's experiences of discrimination took a took a significant toll on his mental health and he highlighted that he was extremely concerned that he wouldn't be believed. During the general protections conciliation, this concern was highlighted to the FWC conciliator and Trang left the room while the respondents presented their side of the story. However, as a result of the conciliation, Trang's mental health worsened significantly, and he was eventually hospitalised for reasons relating to his mental health.

Once Trang recovered, WEstjustice assisted him to lodge a discrimination and sexual harassment complaint with VCAT. At the compulsory conference, the VCAT member was able to sensitively address Trang's complaint and ensure he felt heard and believed, while conveying the realities of the risks of proceeding to final hearing. The matter resolved, and Trang instructed us that he felt empowered by the VCAT compulsory conference process.

Recommendation 5: A new complaints process should be established through the FWC to conciliate discrimination-related claims.

Recommendation 6: FWC conciliators in this new complaints process must be appropriately trained on sensitive responses to claims of discrimination, including trauma informed and culturally-safe practice.

Recommendation 7: The FWC should ensure that conciliators handle discrimination claims in an appropriate and complainant-focused way.

Recommendation 8: Consistent with the federal approach to conciliations through the AHRC, a new complaints process established in the FWC should not attract a filing fee.

6. Vicarious liability (addressing question 7)

Our Centres' position, consistent with our previous statements, is that any discrimination avenue pursued by Applicants under the FW Act should be no less favourable than pursuing their claims using the anti-discrimination legislation.

As such, it is important that vicarious liability (as opposed to the high thresholds required under section 550 for accessorial liability) be the standard used in discrimination-related matters under the FW Act.

Recommendation 9: Vicarious liability in relation to discrimination under the FW Act should be consistent with federal anti-discrimination laws.

7. Modernising the Fair Work Act (addressing question 10)

7.1 Domestic violence as a protected attribute

The Australian Law Reform Commission has highlighted that employment can provide victims of family and domestic violence with financial security, independence and safety, and can be a key factor in enabling victim-survivors to leave a violent relationship.

Unfortunately, it is extremely common for our clients to be discriminated against on the basis of being a victim of family and domestic violence. Commonly, employers unfairly decide that victim-survivors are unable to do their job – and in doing so remove agency from our clients in circumstances where they desperately need it and the financial independence it can provide.

We also see examples of employers denying an employee's entitlement to family and domestic violence leave, terminating an employee or demoting them due to being undermined because of the family and domestic violence they are experiencing (and disclosed to employer).

CASE STUDY: ZOE

Zoe was employed as a permanent full-time accounts manager at a small company for 3 years. At some point in her employment, Zoe was hospitalised with serious physical injuries due to a family and domestic violence incident. Zoe did not intend on disclosing that she had faced family violence to her employer, however the police attended her workplace to investigate a witnesses report of the incident. When Zoe returned to the workplace a week after being hospitalised, Zoe's direct supervisor told Zoe that her colleagues should not have been involved in her personal life in that way. He also said that there were concerns about Zoe's decision-making skills and judgement. Zoe was told that she would need to 'work hard to gain back their respect and trust in [her] competence'.

Zoe sent a letter to her supervisor the next day, complaining about her treatment. Following the complaint, for the first time in Zoe's employment, Zoe was subjected to performance reviews and onerous, unrealistic KPIs. Zoe ended up taking a month of annual leave. When she returned, she was contacted by the supervisor, asking Zoe to provide proof that she had met the KPIs for the month that she was on annual leave.

Zoe attended JobWatch when she was concerned that she was about to lose her job because of her complaint about her supervisor's comments and his changed opinion of her after experiencing family violence. Zoe was extremely anxious in the workplace and wanted to leave her employment before being fired. Zoe wanted to end her employment immediately.

JobWatch contacted Zoe's employer on her behalf and raised concerns about Zoe's treatment. Because experiencing family and domestic violence was not a protected attribute under the general protections provisions of the Fair Work Act, nor was it an attribute under the available anti-discrimination laws available to Zoe, JobWatch was required to argue that Zoe was being adversely treated in her employment because of making a complaint about the CEO's comments.

Unfortunately, Zoe's general protections argument was restricted to the adverse action being 'increased KPIs' due to making a complaint about the CEO's comments. This argument did not accurately reflect the main issue faced by Zoe in her employment, and it could also be potentially defended if the employer could show that the company was financially struggling at the time.

JobWatch was able to negotiate a favourable resignation for Zoe.

Family and domestic violence is a multi-faceted issue with clients often needing legal, financial, psychological and other holistic forms of support. Given family and domestic violence seeps into many aspects of a person's life and is often not simply confined to family violence intervention order (**FVIO**) proceedings, the proposed changes need to identify and acknowledge the other impacts of family

violence and be broad enough to reflect the realities of the time and ongoing duration it can take a victim-survivor to heal from their experiences.

We also often encounter clients who are unable to leave violent relationships for a multitude of reasons, including financial stress, housing instability or the shift of responsibility to raise children alone. These clients are often unsupportive of FVIOs where police are applicants or will later vary or revoke their own application. In these reforms, the FW Act needs to recognise the complex nature of family and domestic violence and provide protection in a wide range of circumstances.

Recommendation 10: Family and domestic violence should be included as a protected attribute under the FW Act

Our Centres also raise that a special provision or a guidance note should be included in section 351 that clarifies that recklessly rejecting a person's request for family and domestic violence leave could constitute a contravention of section 351. Additionally, unreasonably refusing a request for flexible work arrangements under section 65 of the FW Act may constitute a contravention of section 351.

Recommendation 11 Special provisions or a guidance note should be included in section 351 to address common forms of family and domestic violence discrimination.

7.1 Flexible Work Arrangements for victim-survivors of family and domestic violence

We also wish to take this opportunity to note that despite the recent introduction of paid domestic and family violence leave, it may take people more than the 10 allocated days to deal with the necessary matters associated with coping and recovering from family violence. These 10 days are stretched thin if an employee must attend court hearings for an intervention order or engage with external appointments and support as part of their healing journey.

For this reason, we suggest there should be greater protection for victim-survivors who may be denied flexible work arrangements to attend court for family violence matters. Particularly in self-applied family violence intervention order applications, where an applicant faces their application being struck out if they do not appear, it is imperative that victim survivors can attend scheduled hearings and advocate for their safety without fear of repercussions from the workplace. At present, section 65(1A) of the FW Act does recognise an employee experiencing family violence or the need to care and support a family member as a circumstance that allows for a change to working arrangements. However, this should be expanded to ensure the section is broad enough to include court or procedural requirements for family violence matters as a ground to request flexible working arrangements.

It is noted that section 44(2) of the FW Act does not provide protection to an employee where a request for flexible working arrangement is refused. We would also encourage this be changed to provide recourse to victim survivors.

Any reforms must ensure that the FW Act operates broadly enough to provide victim-survivors sufficient legislative protections to enable them to effectively respond to, cope with and or escape from their experience of family violence, which may include enhancing provisions relating to flexible work arrangements. One example would be to broaden the interpretation of section 65 (1A) of the FW Act to recognise court proceedings as a circumstance to request a flexible working arrangement.

Recommendation 12: Any reforms must ensure that the FW Act operates broadly enough to provide victim/survivors sufficient legislative protections to enable them to effectively respond to family and domestic violence.

Recommendation 13: Review section 44(2) of the FW Act and consider whether there is scope for recourse if an employer refuses a request for flexible working arrangements in cases of family and domestic violence.

8. Other Considerations for Reform (addressing question 13)

8.1 Extend the time limits for general protections claims involving dismissal

Given that under the Federal discrimination laws, applicants now have 24 months to bring a claim – general protections provisions should be amended to align with this where they provide for a shorter period of time.

The question of which jurisdiction is an extremely tricky one – where our clients have been the victim of discrimination they are often not in a position to make a decision about whether or not they want to bring a claim (let alone which is the correct jurisdiction). Many of our clients are not in a position where they feel mentally safe to litigate their claims – it can take months for them to be ready.

Recommendation 14: The time limit for bringing general protections involving dismissal should be extended to 24 months to align with federal anti-discrimination laws

8.2 Amend the provisions in Commonwealth discrimination laws relating to the interaction with State or territory laws

Our Centres frequently deal with clients who are assessing their options for addressing discrimination in either the federal or state/territory jurisdictions. If complainants do not have access to legal advice, there is a risk that they will limit their options to pursue their claim in the federal jurisdiction if they have initially complained to the state or territory anti-discrimination bodies.

For example, under section 10(4) of the *Sex Discrimination Act 1984* (Cth) – if a person has 'made a complaint, instituted a proceeding or taken any other action 'under a State or Territory anti discrimination law' they are precluded from making a complaint to the AHRC.

This is manifestly unfair given the complex and multi-jurisdictional nature of discrimination complaints, noting that our clients often have to pick a jurisdiction in circumstances where they are suffering mental health concerns due to their discriminatory behaviour. (See Trang's case study in section 5 above).

Recommendation 15: Federal anti-discrimination legislation should be amended so that a person is barred from making a claim only if ' the matter has been adequately dealt with by a court or tribunal'.

8.3 Other protected attributes

Our Centres consider that a number of additional protected attributes under section 351 of the FW Act could be included in order to increase protections for workers. These include:

- Homelessness;
- Visa status;
- Spent conviction; and
- Irrelevant criminal records

Recommendation 14: the following additional attributes should be included as protected attributes under section 351 of the FW Act:

- Homelessness;
- Visa status;
- Spent convictions; and
- Irrelevant criminal records

9. Funding for Community Legal Centres

Ultimately, the introduction of any new reforms in this space will create added confusion for clients about the best choice of jurisdiction for their complaint. As a result, there will be increased demand on Community Legal Centres (**CLCs**) to be assisting help-seekers. CLCs are often in positions of testing if proposed reforms achieve good outcomes from the complainant's perspective.

Recommendation 17: Increased funding for Community Legal Centres in anticipation of increased demands on our services.

10. Monitoring and evaluation of reforms

The laws, regulations and policies relating to these reforms must be continually monitored and evaluated to ensure that it keeps evolving with contemporary issues and continue to meet the needs of complainants.

CLCs have the potential to contribute to ongoing review of existing laws especially impacting persons with a disability through its administrative data. As outlined by McDonald et al '[a]dministrative data is information collected and stored as part of the everyday functions of organisations.' It is data which is '… not primarily collected for research purposes' but may offer an efficient and cost-effective way to build evidence and gain insights to inform policy.[1] In 2017, the Australian Productivity Commission's Data Availability and Use report recommended increased use of administrative data to improve the delivery of government services and policy.[2]

We highlight that South-East Monash Legal Service (**SMLS**) has completed a research project mapping out the client journey in recovering income from unpaid work based on our administrative data. It may be the case that CLCs like SMLS may use their administrative data for research purposes, which could provide the evidence base to illustrate both the scale and nature of issues with the civil justice system. (See: Digital-File-Empirical-Insights-Recovering-Underpaid-Wages.pdf (smls.com.au).

We consider that administrative data of CLCs may provide greater insight into understanding the experiences of those who mainstream services may otherwise find hard to reach. This may be critical in understanding how those living with disadvantage or vulnerabilities may experience the civil justice system and accordingly give insight into how these reforms may uniquely impact them.

We do highlight that engaging with this rich source of data would be resource intensive for a CLC so would recommend that CLCs be properly supported to do so. As a starting point, resources are available to support CLCs to engage with their administrative data (See: Data-Process-Report-digital-2.pdf (smls.com.au)).

Recommendation 18: That the Community Legal Centre sector be supported to explore the potential to convert its administrative data into data that could be used for research purposes, for the ongoing evaluation of the existing laws, regulations and policies relevant to these reforms.

[1] McDonald H, McRae C, Balmer N L, Hagland T and Kennedy C (2020) *Apples, Oranges and Lemons: The use and utility of administrative data in the Victorian legal assistance sector*. Victoria Law Foundation, p 14
[2] Productivity Commission (2017) *'Data Availability and Use'*, Productivity Commission, Australian Government, Canberra, p 111 and 113