Submission
to

Senate Education, Employment and Workplace Relations Committee

Inquiry into the Fair Work Bill 2008

Prepared by: Linda Tucker, National Association of Community Legal Centres, Employment Network

Address: c/- F8-003 Kingsford Legal Centre, University of NSW, 2052

Phone: 02 93859566 Fax: 02 9385 9583 Email: l.tucker@unsw.edu.au

Organisation: National Association of Community Legal Centres

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This submission is prepared by the NACLC employment network which[1] comprises solicitors and other workers in community legal centres who assist clients with workplace issues. We advise and represent thousands of clients a year from the most vulnerable sectors of our community. We act for workers who suffer distress and dislocation in their personal, social, family and professional lives when things go wrong at work. We trust that the following is of assistance to the inquiry.

Yours faithfully
National Association of Community Legal Centres

Linda Tucker
Convenor, Employment Network

Elizabeth O'Brien
National Convenor
Ph: 02 9264 9595 Email: liz_obrien@clc.net.au

[1] The National Association of Community Legal Centres (NACLC) is the peak body representing the eight state associations of community legal centres (CLCs) and 207 CLCs nationally. CLCs are experts in "Community Law" – the law that affects our daily lives. They provide services to approximately 350,000 clients per year. They are often the first point of contact for people seeking assistance and/or the contact of last resort when all other attempts to seek legal assistance have failed.

NACLC believes the recommendations outlined below will ensure that the proposed amendments to the workplace relations system through the Fair Work Bill 2008 ('FW Bill') would achieve a better balance between the protection of all employees from unfair dismissals and the rights of employers in managing under-performing employees. We are happy to provide further information, including specific case studies, if this will be of assistance. NACLC also endorses the submission to this inquiry of Jobwatch Inc.

1. Qualifying period

We strongly oppose the 12 month exclusion period for businesses with fewer than 15 employees. We do not believe that such a lengthy exclusion period is necessary or desirable in ensuring that small businesses are able to manage under-performing employees. Smaller businesses have greater, not less, interaction between employer and employee, thus providing greater opportunity for the employment relationship to be tested within a shorter period.

Further, any inability or difficulty in managing employees as a result of the nature of small businesses would be more effectively managed by treating the causes of such issues, through education, training and easy access to information about workplace rights and responsibilities for employers and employees. We see no reason why there should be a lengthier exclusion period for small businesses as this may only encourage poor or lax management by small business employers. We also believe that an arbitrary division in access to the unfair dismissal remedy perpetuates the injustice suffered by many dismissed employees under WorkChoices whereby two people doing exactly the same type of job, dismissed for the same reason, could have completely different outcomes because of the number of people in their workplace.

> **Recommendation**: The NACLC calls for a return to the pre-WorkChoices regime in which a three month probation was assumed but no qualifying period applied. In the alternative, if the six month qualifying period remains, it be applicable to all workplaces, regardless of size.

2. Seven day lodgement time frame

We strongly oppose the seven day time limit afforded to employees pursuant to section 394 of the FW Bill given the number of our clients that may be excluded from making unfair dismissal applications.

Most Community Legal Centre (CLC) workers would be able to provide accounts of clients who have taken several weeks (rather than days) to sufficiently overcome the dislocation and distress associated with being dismissed before they could consider seeking assistance.

Further, once clients do seek help, they must contend with frequent delays in obtaining appointments as CLCs deal with increasing demands on their services with

limited resources available. A review of all clients who visited Kingsford Legal Centre[2] seeking legal advice in relation to an unfair dismissal between 1 Feb 2008 and 31 July 2008 found that only 6.25% received advice within seven days of being dismissed.

A 7-day time limit would be particularly difficult for our client base whom, due to factors such as poor education, health issues, disabilities and limited access to resources (as a result of location or financial disadvantage), would be unable to obtain legal advice let alone make an unfair dismissal application within seven days of being dismissed. Our clients are often unable to make unfair dismissal applications until days or even hours before the 21 day limitation period ends. Without the further funding necessary to meet the inevitable increased demand on CLCs for urgent legal advice, our clients are at particular risk of being placed at a further disadvantage.

Such a time limit is unrealistic if dismissed employees are to be given a genuine opportunity to obtain legal advice before making an application. Notwithstanding the role of Fair Work Australia under the proposed system, it will still be desirable for dismissed employees to obtain advice as to their legal rights and the merits of any application. An unrealistic limitation period which eschews a 'cooling down' period and the ability to obtain legal advice will only encourage unmeritorious unfair dismissal claims rather than improve the speed and efficiency of the system.

Fair Work Australia's discretion to allow a further period for applications will not be an adequate remedy in the circumstances. The legitimacy of this approach relies on the assumption that the majority of potential applicants *are* able to make applications within the seven day period; the use of a discretion can to lead to inconsistent outcomes, which is why rights tend to be provided universally then removed by exceptions. Yet our experience indicates the reverse will be true here with the majority having to rely on exercise of a discretion to extend the time limit.

Further, as a vastly greater number of late applications will now be subject to preliminary merits consideration (pursuant to section 394(3)(e) of the Bill), this will only increase the risk that otherwise meritorious applications are excluded because of the shortcomings inherent in limited merits reviews.

These concerns are only exacerbated by the fact that many of our clients would not have the ability or confidence to make a late application and persuasively argue for the discretion to be exercised in their favour. The introduction of a further hurdle for those people for whom the legal system already appears overwhelming, may effectively remove the unfair dismissal remedy.

We also believe the introduction of new legislation provides an opportunity to expressly exclude any consideration of prejudice to a respondent arising from a late application beyond specific issues arising from the lateness itself, for which only limited circumstances should apply, such as extreme lateness compromising the available evidence.

[2] Based at the University of NSW, Sydney, Kingsford Legal Centre has a specialist employment service.

While an outline of the FW Bill was before the electorate prior to the federal election, we strongly believe that there was very little awareness of the 7 day time limit proposal so would question whether there is any mandate for such a provision. We also see no precedent for this time limit in other countries with statutory protection from unfair dismissal. We refer the Committee to the submission by the Employment Law Centre of Western Australia which has provided a useful comparison table of time limits in other jurisdictions. We particularly commend the approach of Sweden which has a two-tiered approach of 14-28 days for reinstatement and four months for damages. Given that encouragement of reinstatement underlies the introduction of the vastly shorter time limit in the FW Bill, we believe this could be a possible response to the government's concerns.

> **Recommendation**: that the 21 day time period remain in addition to the discretion afforded to FWA to accept late applications pursuant to section 394 of the Bill. If the 7 day limit is to remain, we recommend that:
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> - A two-tiered limit is introduced, whereby applicants seeking damages only are still allowed a 21 day time limt;
> - The Bill explicitly provide for a 21 day limitation period for applicants who live in rural or remote areas;
> - A user-friendly template be provided for late applications.

> **Recommendation**: that the provisions of the FW Bill expressly exclude or limit reference to 'prejudice to the respondent' as a consideration in application of the discretion to extend the time limit.

3. Providing Community Legal Centres with an automatic right to appear

Section 596 of the Bill provides that applicants cannot be represented by lawyers and paid agents without the permission of Fair Work Australia ('FWA'). We believe CLC practitioners should have an automatic right to appear, along with unions and employer groups. It is the policy of most CLCs working in this area to represent only clients who do not have access to other legal assistance. These people will have such disadvantage compounded if they are excluded from representation in their application to FWA. Our network represents hundreds of clients in unfair dismissal matters and, we believe, we assist all the parties in resolving applications quickly, efficiently and as amicably as possible as we believe it is in the interests of our clients to do so.

> **Recommendation**: The insertion of a reference to Community Legal Centres in section 596(4) of the Bill to permit CLC solicitors to represent clients without the permission of FWA. In the alternative, we recommend the insertion of a provision creating a presumption for CLCs to obtain permission from FWA to represent our clients.