

Committee Secretariat
Standing Committee on Education and Employment
Office of the Clerk Assistant (Committees)
House of Representatives
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Secretary

Submission to the House of Representatives Inquiry into the Fair Work Amendment (Better Work/Life Balance) Bill 2012

The Workplace Research Centre (the WRC) welcomes the opportunity to make a brief submission to the House of Representatives Standing Committee on Education and Employment with respect to its inquiry into the Fair Work Amendment (Better Work/Life Balance) Bill 2012 (the Bill).

The WRC is one of Australia's leading research organisations on work and employment. Based in the University of Sydney Business School, the WRC provides high quality research and analysis on all aspects of work and working life. Over 21 years we have successfully completed over 100 major contract research projects and multiple smaller scale studies. The Centre's charter is to "inform, advise and educate". We do this for employers, governments, unions and non-government organisations, providing them with the practical and accurate policy research they need to make decisions.

Given our focus, the WRC is acutely interested in, and has considerable knowledge about, the issue of work/life balance. As you will appreciate, it is not feasible to detail in this submission, the entirety of our research findings of relevance to this topic. Rather, we have decided to limit our submission to commenting on the following five aspects:

1. Defining flexibility
2. Extending the right to request to all employees;
3. Allowing Fair Work Act (the Act) to hear disputes concerning flexibility requests; and
4. Conducting research into the operation of the provisions of the Act relating to requests for flexible working arrangements.

Background

On 1 January 2010, the National Employment Standards (NES) took effect under the Act. The NES includes a provision for parents or carers of a child under school age, or of a child under 18 with a disability, to request a flexible working arrangement to help them balance their work and family responsibilities (subsection 65 (1) of the Act. Whilst such arrangements are not defined formally in the Act, examples are included in the “note” to the section, namely changes in work hours, patterns of work and location. The Standard is designed to provide a platform for a conversation between an employee and employer, and a mechanism for transparent and consistent decision-making

The Bill deals with the right to request flexible working arrangements to help employees to achieve a better work/life balance. The Bill extends the right to flexible working arrangements to all employees and gives additional rights to employees with caring responsibilities. It would also allow Fair Work Australia (FWA) to hear disputes where a request has been refused.

Comments

1. Defining flexibility

Labour market flexibility continues to be at the centre of debate about labour market reform in Australia. Much of the debate about flexibility has concentrated on the types of arrangements firms require to adjust to changing business conditions. Thus, flexibility is frequently couched in terms aimed at facilitating employer needs, i.e. employer-focussed flexibility. However, flexibility in the labour market can also help individuals to better balance their work with other responsibilities, i.e. employee-focussed flexibility.

These two dimensions of labour market flexibility need not be mutually exclusive. The test of good public policy in this area should be an employment regime that provides a platform for both employer- and employee-focussed flexibility. A further test should be that an employment regime helps protect traditionally vulnerable workers (including women, part-time employees, persons from Non-English speaking backgrounds, mature age persons and young persons) from the extremes of managerial prerogative.

Recommendation 1: That labour market policy be developed that does not unduly favour the interests of employers at the expense of employees, or vice-versa.

2. Extending the right to request to all employees

Under section 65(1) of the Act employees who are parents of (or care for) children under-school age, or a child under 18 who has a disability, may request a “*change in working arrangements*”. The provision applies to both permanent and casual employees. In particular an employee must have

completed 12 months continuous service before making this request, or if the employee is employed on a “casual” basis, the employee must be a long term casual and have an expectation of continued employment.

The ‘right to request’ is not a ‘right to flexible work’ and correctly so, as an absolute right to flexible work would most likely be impractical, as some types of work are less suitable than others to being done on a flexible basis. However there is no clear framework to establish what is a reasonable request and what are reasonable grounds to refuse, neither is there a clear logic as to why the current provisions are only applicable to some parents rather than the whole workforce.

Connecting the right to request flexible work solely to employees who care for young or disabled children is arbitrary. Many other employees would also like to have more flexible work arrangements. This may include, but is not limited to:

- parents of school-aged children;
- grandparents of pre-school and school-aged children;
- employees with elder care responsibilities;
- employees combining work with study; and
- employees who want to phase their work into retirement.

All of these employee-focussed reasons for wanting flexible work arrangements can potentially serve the interests of both employees and employers.

Recommendation 2: That the right to request a change in working arrangements in the Act be extended to all employees.

Due to the challenges we face with our ageing population, strengthening the right to request flexible work arrangements to those with caring responsibilities is seen as crucial. A growing number of employees are combining paid employment with caring for elderly family members.

A shrinking labour force to population ratio in the future will reduce the taxation base. These workers with aged caring responsibilities are more likely to remain in the workforce if there are supportive flexible work arrangements.

Recommendation 3: That the right to request a change in working arrangements in the Act be strengthened for employees with caring responsibilities.

3. Allowing Fair Work Australia to hear disputes concerning flexibility requests

While the Act provides that all national system employers must comply with the NES, including the provision that an employer provide reasons for accepting or refusing to grant a request for flexibility, it

does not provide a definition of what constitutes reasonable business grounds for refusing a request. Neither is there the capacity for a review of the reasons provided by an employer to ensure that they meet the “reasonable business grounds” test (this is specifically excluded by section 44(2)).¹ In our view, this largely renders this particular Standard a “toothless tiger”.

The WRC sees an important public policy rationale for allowing FWA to hear disputes concerning flexibility requests. Not only would this provide a mechanism to enforce the Standard but it would provide useful information to policy-makers about the grounds employers are using for refusing requests for flexible working arrangements.

Recommendation 4: That the Act be amended to give FWA power to hear disputes concerning flexibility requests.

4. Conducting research into the operation of the provisions of the Standard relating to requests for flexible working arrangements under subsections 65(1).

Under s653 of Act, FWA is required to conduct research into the operation of the provisions of the NES relating to requests for flexible working arrangements under subsection 65(1).

Understanding of the circumstances in which employees make requests for flexible work arrangements, the outcomes of such requests and the grounds for which such requests are refused are all tremendously important.

To date, there remains little information about the operation of the Standard on the right to request flexible working arrangements. This is not surprising given the relative new-ness of the NES and given there is no requirement for employers to report on the number of requests they have received or the outcomes of such requests.

While it was undertaken just prior to the enactment of the NES, we draw the attention of the Standing Committee to the important research on flexibility and work/life interference undertaken by our academic colleagues at the Centre for Work + Life at the University of South Australia.² In particular, their findings suggest that the right may be particularly beneficial to the third of all workers who have not made requests for flexibility yet are not content with their current arrangements.

¹ Having said this, an aggrieved employee may seek to use an employer’s written response as the basis for a family/carers’ responsibilities discrimination complaint under State or Federal legislation.

² In particular, see Skinner, N and Pocock, B, (2011) “Flexibility and Work-Life Interference in Australia”, *Journal of Industrial Relations*, Volume 53:65 and the Centre’s AWALI project reports.

Other available information, to our knowledge, relates primarily to *awareness* of – as opposed to *usage* of – the right to request in the NES. For example, a survey conducted by Aequus Partners in August 2009 (i.e. before the NES took effect on 1 January 2010) found that over 80 percent of respondents rated employees' and managers' knowledge of the right to request provision as either non-existent or low.³

The proposed amendments to the Act will provide FWA with further insight into the factors influencing the uptake of flexibility requests, the outcomes of such requests and the circumstances which such requests are refused.

Recommendation 5: That FWA strengthen its ability to undertake or commission research into the uptake of flexibility requests and circumstances in which such requests are agreed, partially agreed and refused.

Yours sincerely,

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³ Aequus Partners, (2009), 'Wake Up Call: Few Employers are ready for the R2R and time is running out', September 2009, downloaded from http://www.aequus.com.au/right_to_request_survey_report.html [last accessed 28 March 2011]