



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ELC/HRC:JvdPns071122

7 November 2022

Dr James Popple
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: john.farrell@lawcouncil.asn.au

Dear Dr Popple,

Senate Committee Inquiry into the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022

Thank you for the opportunity to contribute to the Law Council's submission in relation to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 ("the Bill"). The Law Society's Employment Law and Human Rights Committees have contributed to this submission. In this submission the Law Society has focussed on the amendments of most interest to our members.

Abolition of the Registered Organisations Commission – Part 1, Schedule 1

We note that while the proposed amendments under Part 1 of Schedule 1 to the Bill abolish the Registered Organisations Commission ("ROC"), its functions will be retained and transferred to the General Manager of the Fair Work Commission ("Commission"), which reflects the regulatory arrangements prior to the establishment of the ROC. We support the retention of these provisions and note that it is a matter of policy where the functions should sit.

Additional Registered Organisations Enforcement Options – Part 2, Schedule 1

We note that the proposed amendments under Part 2 of Schedule 1 to the Bill provide the regulator with the power to issue infringement notices and to enter into enforceable undertakings. We consider that these provisions, which are common in a range of legislation, are uncontroversial, and may provide appropriate alternatives to civil penalty litigation in relevant cases.

Objects of the Fair Work Act – Part 4, Schedule 1

We support the amendments set out in Part 4 of Schedule 1 to the Bill, which effectively amend the *Fair Work Act 2009* ("FW Act") to introduce job security and gender equity into the objects

THE LAW SOCIETY OF NEW SOUTH WALES

170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966

lawsociety.com.au

T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au


Law Council
OF AUSTRALIA
CONSTITUENT BODY

of the FW Act. The Law Society has long supported pay and opportunity equity, regardless of gender, as vital workplace considerations.¹

Equal remuneration – Part 5, Schedule 1

We support, in principle, the amendments contained in Part 5 of Schedule 1 to the Bill, which, in our view reasonably reflect the policy objective of gender equity in accordance with Part 4, Schedule 1.

However, we note clause 352 of the Bill, which sets out proposed subsection 157(2B) as follows:

2B The FWC’s consideration of work value reasons must:

- (a) be free of assumptions based on gender; and
- (b) include consideration of whether historically the work has been undervalued because of assumptions based on gender.

While proposed subsection 157(2B)(b) is, in our view, consistent with the view expressed by the Full Bench of the Commission,² the consideration of whether historical underpayment is based on gender, itself, appears to require gender-based assumptions. Accordingly, further guidance may be necessary to clarify the nature of the Commission’s consideration under proposed subsection 157(2B)(b). Alternatively, proposed subsection 157(2B)(b) might be clarified by amending it to read “include consideration of whether historically the work has been undervalued for reasons that include gender.”

Expert panels – Part 6, Schedule 1

We support the constitution of the Expert Panels under Part 6 of Schedule 1 to the Bill, to enhance the Commission’s expertise in assessing pay and conditions for workers in the Care and Community sector.

Prohibiting pay secrecy – Part 7, Schedule 1

We support, in principle, the amendments contained in Part 7 of Schedule 1 to the Bill. Clause 383 of the Bill, setting out proposed section 333B, effectively creates a new workplace right allowing employees to disclose, or not disclose, their remuneration and any terms and conditions of their employment reasonably necessary to determine remuneration outcomes (s 333B(1); and to ask any other employee about this information (s 333B(2)). However, there may be, in our view, a risk that employees exercising their rights under proposed section 333B(2) may place undue pressure on individuals to disclose information about their remuneration and other conditions. Under the proposed amendments, individuals in this situation would no longer be able to rely on the confidentiality provisions of their employment contracts to avoid making such disclosures, and thereby reduce the risk of conflict between staff.

We also suggest that further guidance may be necessary to clarify the meaning of “remuneration outcomes” under proposed section 333B, as well as the types of information that may be “reasonably necessary” to determine remuneration, in addition to the number of hours worked.

Proposed section 333C provides that terms of employment contracts or fair work instruments have no effect to the extent they are inconsistent with proposed section 333B. While secrecy

¹ See: The Law Society of New South Wales, ‘Charter for the Advancement of Women’ (webpage), <https://www.lawsociety.com.au/about-us/Law-Society-Initiatives/advancement-of-women/charter>

² *Equal Remuneration Decision 2015* (2015) 256 IR 362, [292].

provisions in new employment contracts and relevant instruments are prohibited under proposed section 333D, we suggest consideration be given to implementing a transitional period of six months following the commencement of this item, to allow employers to bring existing contracts and variations of agreement, entered into on and from the commencement date, in line with the terms of proposed section 333D.

Prohibiting sexual harassment in connection with work – Part 8, Schedule 1

We support the amendments contained in Part 8 of Schedule 1 to the Bill, which effectively prohibit sexual harassment in connection with work under the FW Act, in accordance with recommendation 28 of the *Respect@ Work* Report.³

Anti-discrimination and special measures – Part 9, Schedule 1

We support the inclusion of “breastfeeding”, “gender identity” and “intersex status”, as defined in the Bill, in the anti-discrimination provisions of the FW Act, which promotes harmonisation of the FW Act and other Commonwealth anti-discrimination laws, including the *Sex Discrimination Act 1984*.

Fixed term contracts – Part 10, Schedule 1

Clause 441 sets out proposed section 333E, which effectively limits the use of fixed term contracts, other than for casual employees, in situations where:

- The contract will terminate at the end of an identifiable period of more than two years (s 333E(2));
- The contract can be renewed so that the employee is employed for more than two years (s 333E(3)); or
- In certain circumstances, the employee is employed under consecutive contracts (section s 333E(4)-(5)).

The Law Society supports in principle measures to limit the use of fixed contracts, particularly where employees are subject to consecutive renewals over extended periods in roles that are ongoing or substantially similar. However, the two-year limit under proposed section 333E, is in our view somewhat arbitrary and not adequately justified in the Explanatory Memorandum. In this regard, and by way of example, we note that longer term fixed contracts of between three and five years are common for public sector employees. Accordingly, we suggest consideration be given to increasing the “identifiable period” set out in proposed section 333E.

We also suggest that if a maximum term is to be implemented under proposed section 333E, the ability to renew or extend a contract should be up to the maximum term, regardless of how many times the extension is exercised.

The Law Society supports the exceptions to limitations set out in proposed section 333F, which in our view reasonably protects the use of fixed term contracts where there is a justifiable short-term need. However, we also suggest consideration be given to including an additional exception where fixed term contracts may be required for employees with visas restricting employment rights for four years, including partner visas and skills shortage visas. We also note that, following the expiry of such visas, a bridging visa is typically issued, requiring a further fixed term contract, which is often extended a number of times while the Department of Home Affairs makes a determination to grant a new visa or permanent residency status.

³ Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 46.

In relation to proposed section 333L, the Law Society reiterates its position that section 596 of the FW Act should be repealed or amended so that those who come before the Commission have an automatic right to legal representation, which in our view often assists with the efficiency of proceedings and is consistent with the proper administration of justice.

Flexible work – Part 11, Schedule 1

The Law Society supports measures to enable employees to enforce their rights to flexible work arrangements under the National Employment Standards. We note that this issue underscores the importance of the automatic right to legal representation.

Sunsetting of ‘zombie’ agreements – Part 13, Schedule 1

We support the amendments set out in Part 13 of Schedule 1 to the Bill, which effectively sunset all remaining transitional instruments currently preserved by the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

Enterprise agreement approval – Part 14, Schedule 1

We note the proposed amendments under Part 13 of Schedule 1 to the Bill seek to simplify the procedural requirements for approval of enterprise agreements by the Commission. However, we suggest consideration be given to replacing references to ‘a reasonable time’ in clauses 503 and 504 with specific timeframes, to reduce uncertainty and avoid potential disputation. We also support the development of the proposed ‘statement of principles’ under clause 509 of the Bill setting out proposed section 188.

We hope this input is of assistance. Please contact Nathan Saad, Policy Lawyer, on (02) 9926 0174 or nathan.saad@lawsociety.com.au in the first instance if you have any queries.

Yours sincerely,



Joanne van der Plaats
President