THE LAW SOCIETY
OF NEW SOUTH WALES

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15 May 2023

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

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

Dear Dr Popple,

2023 Workplace Reform Consultations

Thank you for the opportunity to provide input for a possible Law Council submission to the Department of Employment and Workplace Relations in relation to four Consultation Papers released as part of its 2023 Workplace Reform Consultations. The Law Society's Employment Law, Human Rights and Criminal Law Committees have contributed to this submission.

We have provided responses to selected discussion questions, set out below.

Consultation Paper 1: Same Job, Same Pay

Overall, the Law Society supports the 'Same Job, Same Pay' principle and considers that the Consultation paper proposes a sensible framework for responding to the increasing use of labour hire arrangements. We agree it is appropriate to expand the jurisdiction of the Fair Work Commission (**FWC**) to resolve disputes in this area, noting however that it will have resourcing implications for the FWC. There will also be cost implications for the FWC and a need for education and guidance on the new measures.

Defining labour hire arrangements within scope

1. *The department seeks to clearly identify the scope and application of legislated Same Job, Same Pay measures.*
   a) *How should different labour hire arrangements be identified or defined?*
   b) *Should any arrangements be excluded from the Same Job, Same Pay measures?*

   We agree the Same Job, Same Pay measures should apply to both contractor management services and recruitment and placement services. Care should be taken to ensure consistency across definitions of those terms in any legislation implementing the scheme.

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

Identifying the 'Same Job'

2. *Would the criteria [set out on pages 7-8 of the Consultation paper] capture when a labour hire worker is performing the 'same job' as a directly engaged employee?*

   Yes, the criteria are appropriate.

3. *Are there scenarios where these criteria would not operate clearly or lead to unintended outcomes? If so, what criteria should be used to identify when a labour hire worker is performing the 'same job' as a directly engaged employee, and why?*

   Care should be taken to define 'same duties' in a way that allows an objective assessment of when the labour hire worker is performing the same job as an employee.

Calculating the 'Same Pay'

4. *Is calculating 'same pay' with reference to 'full rate of pay' appropriate? Are there scenarios where this would not operate clearly or lead to unintended outcomes?*

   Yes, we consider that calculating 'same pay' with reference to 'full rate of pay' is appropriate.

5. *If 'full rate of pay' is not an appropriate definition for calculating 'same pay', why not?*
   a) *What method of calculating 'same pay' should be used instead, and why?*
   b) *Should 'same pay' extend to conditions that fall outside this definition? If so, what conditions should be captured and why?*

   As noted in response to Question 4, we consider that the 'full rate of pay' is appropriate.

Implementing Same Job, Same Pay entitlements and obligations

6. *If an obligation were imposed on labour hire providers and host employers:*
   a) *What guidance should the Fair Work Act include about 'reasonable steps'?*
   b) *To what extent should consultation and information-sharing provisions prescribe the steps to be taken by labour hire providers and host employers to comply?*
   c) *Should any other criteria or thresholds for triggering obligations apply (for example, criteria or thresholds relating to the length of labour hire engagements)?*
   d) *Should Same Job, Same Pay obligations apply differently for small business?*

   The *Fair Work Act 2009* (Cth) (**FWA**) should include an inclusive list of factors which the FWC must take into account in determining whether reasonable steps have been taken by a labour hire provider and/or host. Labour hire operators and hosts should have a general obligation to consult and share information, but the FWA need not be prescriptive as to how that must occur, with what frequency and so on.

7. *Are there alternative mechanisms the department should consider in order to confer entitlements and obligations about Same Job, Same Pay? If so, please provide details.*

   We do not consider that there are any other appropriate alternative mechanisms.

Dispute resolution

8. *What parameters (if any) should be imposed on the Fair Work Commission's jurisdiction to deal with Same Job, Same Pay disputes, and why?*

   The FWC should have the power to conciliate, mediate and arbitrate Same Job, Same Pay disputes.

9. *Would the Fair Work Commission's existing powers be sufficient to deal with Same Job, Same Pay disputes? If not, what powers would be needed, and why?*

   This will depend on the intended scope of the FWC's jurisdiction to hear these disputes and make orders, including, for example, orders against an entity other than the labour hire operator (the employer), such as the host. The Law Society would welcome an opportunity to comment further as more detailed proposals become available.

10. *Should the Fair Work Commission be authorised to arbitrate disputes (within constitutional limitations)? If not, why not?*

    We suggest an effective jurisdiction would require the power to arbitrate disputes.

Enforcement

11. *Should Same Job, Same Pay entitlements and obligations be civil remedy provisions?*

    We agree that civil remedies should be available, and we look forward to commenting further on proposed provisions.

12. *If entitlement and/or obligation in the Fair Work Act were civil remedy provisions:*
    a) Who should be able to commence civil remedy proceedings?

    We suggest the worker or the Fair Work Ombudsman (**FWO**) should be able to commence proceedings.

    Additionally, the Law Society's longstanding position is that s 596 of the FWA, which requires a person to seek leave to be represented by a lawyer or paid agent in a matter before the FWC, should be repealed. The Law Society's experience is that, rather than acting as an impediment to the swift and efficient resolution of employment related claims, legal representation allows for the prompt identification of the relevant facts and legal questions to be determined, which supports the proper administration of justice. Self-represented parties often arrive underprepared and overwhelmed. This can result in delays in pre-trial procedures, increased time spent at hearing discussing irrelevant matters, a greater number of adjournments, and difficulties in advancing settlement discussions. For these reasons, the Law Society suggests that lawyers should not be excluded from proceedings before the FWC, nor have their involvement limited.

    b) How should this enforcement mechanism fit with any dispute resolution powers conferred on the Fair Work Commission about Same Job, Same Pay?

    Dispute resolution powers should be consistent with existing powers to provide civil remedies under the FWA.

13. *If an underpayment of 'same pay' is established, who should be ordered to rectify it?*

    In our view, the FWC should have a broad discretion to make orders appropriate to the circumstances of each case. This should include powers to make orders against labour hire operators and/or hosts.

14. *The Fair Work Ombudsman's remit for enforcing the Fair Work Act would capture Same Job, Same Pay matters. Are there any reasons why this should not be the case?*

    The Law Society supports the FWO's remit including the enforcement of Same Job, Same Pay matters.

Anti-avoidance measures

15. *If a general anti-avoidance provision were introduced to the Fair Work Act:*
    a) *What should the scope of the provision be?*
    b) *What exceptions or defences to the provisions should be incorporated?*

16. *How should the General Protections be enhanced to protect against avoidance behaviours?*

    If the rights of a worker under the Same Job, Same Pay measures are expressly identified as 'workplace rights' under the General Protection provisions,[1] the worker will be protected by those existing anti-avoidance provisions.

17. *Should other anti-avoidance measures be considered? If so, please provide details.*

    In our view there is nothing further required.

Impacts and costs

18. *Please describe the cost impacts of Same Job, Same Pay measures on affected parties and the broader economy. Specifically, what cost impacts would arise in relation to:*
    a) *Identifying whether a labour hire worker is doing the 'same job' as a directly engaged employee*
    b) *Calculating the 'same pay' a labour hire worker is entitled to receive*
    c) *Engaging in Same Job, Same Pay dispute resolution processes in the Fair Work Commission*
    d) *Any other Same Job, Same Pay issues*

    Please include any assumptions, data sources or workings in your assessment of cost impacts.

    While the Law Society is not in a position to quantify the likely costs of the proposed measures, conceptually, we suggest there will be significant cost implications for labour hire operators and hosts in adapting to, and applying, the Same Job, Same Pay measures. Additional costs incurred by labour hire operators will likely be passed through to hosts.

    On that basis, in our view there is a role for the Commonwealth Government in providing guidance and education to labour hire operators and hosts to help minimise these costs, and to minimise the risk of incorrect assessments.

[1] *Fair Work Act 2009* (Cth), Part 3-1.

19. *What other positive and negative consequences of this measure could arise for:*
    a) *labour hire workers and directly engaged employees*
    b) *labour hire providers (including small business)*
    c) *host employers (including small business)*
    d) *specific industries or sectors, as applicable*

    As relevant, please include observations on whether there may be positive or negative consequences in relation to enterprise bargaining.

    It will be important to monitor the impact of the Same Job, Same Pay measures, to assess the extent of any unintended consequences, particularly for vulnerable workers. Labour should be correctly valued, but we note that if the cost of labour rises as a result of the necessary transition, some workers may experience loss of hours of work available, or job losses. We suggest that consideration of cost impacts should include this calculation. There may also be consequences for workers caused by incorrect assessment of the relevant award or agreement. As noted in our response to Question 18 above, providing guidance and education to labour hire operators and hosts will also be important in protecting workers from such risks.

Transition

20. *Should there be a transition period before Same Job, Same Pay measures commence operation, if enacted? If so, how long should the transition period, and why?*

    Allowing a substantial transition period before the new measures commence will be crucial to enabling organisations to adapt their arrangements to become compliant.

Consultation Paper 2: Criminalising wage underpayments and reforming civil penalties in the Fair Work Act 2009

As stated in previous submissions to the Law Council,[2] the Law Society does not have a view on whether underpayments should attract criminal penalties. However, if the Government is minded to introduce criminal penalties, the Law Society's preferred model would be a tiered approach, involving both knowledge-based and recklessness-based offences, where the Court has a broad discretion to apply pecuniary and/or non-pecuniary penalties according to the seriousness of the conduct involved. Such criminal penalties should be one aspect of a multi-faceted approach, including civil penalties and education for employers about their payment obligations.

Criminalising wage underpayments

1. *Which of the following options proposed by the department would be the most effective for introducing a criminal offence for wage underpayment?*
   Option 1: Knowledge-based wage underpayment offence only
   Option 2: Recklessness-based wage underpayment offence only
   Option 3: Tiered approach

    In preferring Option 3 (a tiered approach), our position is that criminal sanctions may be effective in very serious cases where the individual concerned has actual knowledge of the contravention or is reckless as to the contravention. Underpayment is inherently a monetary-based malfeasance and may be adequately and appropriately addressed through monetary compensation in the vast majority of cases, particularly where the underpayment was unintentional. Criminal sanctions may, however, have a further

[2] Law Society of NSW, submission to Law Council of Australia, 14 October 2019.

deterrent effect in serious cases where the companies or persons involved are not concerned about compensatory orders or pecuniary penalties, such as in circumstances where they intend to claim insolvency or bankruptcy in the event of penalties being enforced against them and/or because pecuniary penalties will have no substantial impact on profitability.

We agree with the suggestion that, if criminal penalties were introduced, they should extend to underpayment of workplace entitlements due to be paid or directed to third parties, including superannuation funds.

We support the Law Council's view that criminal sanctions alone will not address the issue of wage underpayment, and that more resources should first be directed to enforcing current laws and the education of workers, particularly migrant workers, and in circumstances where the existing system is inherently complex. In our view, education is also required to help improve the capability of employers to navigate wage entitlements under the relevant awards and/or enterprise agreements, and to minimise the risk of inadvertent breaches. Sustained funding for the regulator and simpler processes at the FWO and the Federal Circuit and Family Court of Australia will also increase access to justice for employees by facilitating outcomes in a timely manner.

2. *Are there additional considerations which the department should examine for the wage underpayment offence, for example from other areas of Commonwealth criminal law or existing state and territory wage underpayment offences?*

   No. We suggest that if a tiered approach were adopted that incorporated established elements of knowledge and recklessness this would provide a clearer model than if elements were drawn from other state and territory based models.

3. *Should offence-specific defences be available for either of the wage underpayment offences in addition to the default defences available in Part 2.3 of the Commonwealth Criminal Code?*

   No, the elements of knowledge and recklessness within a tiered approach would appropriately limit the scope of the offences without the need for defences other than those set out in the Criminal Code.

4. *Should the wage underpayment offence apply to any additional or different entitlements to those proposed below? If so, which entitlements should be covered by the offence?*
   - *An applicable modern award*
   - *An applicable enterprise agreement*
   - *Safety net contractual entitlements*
   - *The Fair Work Act, including the National Employment Standards*
   - *Transitional instruments, where they apply.*

   No. We would not support any extension to other entitlements, such as those solely arising from an employment contract.

5. *What would be appropriate penalties (including a fine and/or a period of imprisonment) for a knowledge-based wage underpayment offence and a recklessness-based wage underpayment offence?*

   As noted above, we suggest criminal penalties would be most appropriate and effective in very serious cases where the employer had knowledge or was reckless as to the

contravention and in circumstances where pecuniary penalties alone may provide little deterrence. In such cases, custodial sentences may be appropriate.

In addition, larger fines should apply to knowledge-based offences when compared to recklessness-based offences, given the higher degree of culpability attached to those knowledge-based offences. In all cases, however, the Court should retain a broad discretion to apply criminal penalties as they consider appropriate to the specific case.

6. *The department proposes that courts would be empowered to order the higher of the maximum penalty units available or up to three times the amount of the underpayment arising in the particular matter if that amount can be calculated.*

   Would it be appropriate to include such a penalty for knowledge-based and recklessness-based offence options?

   As noted above, the Court should retain a broad discretion to apply criminal penalties as they consider appropriate to the specific case, and not necessarily calculated with reference to the amount of underpayment.

7. *Should the department consider an alternative method than the one set out below for "grouping" or "rolling-up" charges for wage underpayment (and any record-keeping) offences?*

   Yes. Our position on 'grouping' criminal penalties is consistent with that previously stated in relation to 'grouping' civil penalties.[3] The purpose of grouping penalties for multiple instances of a single contravention of a provision is to ensure that a single non-compliant decision resulting in a course of conduct is not disproportionately penalised based on the number of breaches that transpire as a result.

   The situation is different where a party is involved in an ongoing breach and decides to continue, or to maintain, that breach. In such cases, a separate decision to continue or maintain the breach should attract further contraventions and further pecuniary penalties.

   Should criminal penalties be introduced, the Law Society supports the consideration of course of conduct charging rules as proposed in the Consultation Paper, but recommends the inclusion of an express provision to clarify the penalty imposed for continuing or maintaining the breach.

8. *Is it appropriate to extend the bar to proving ancillary liability of officers of bodies corporate for the wage underpayments offence beyond the default provisions in the Commonwealth Criminal Code?*

   We consider there is no need for such an extension beyond the default provisions in the Criminal Code. We consider the existing provisions allowing an application against a director of a body corporate are adequate. There are also established common law principles which determine accessorial liability in the context of civil penalties.[4]

[3] Ibid.
[4] *Fair Work Ombudsman v South Jin Pty Ltd* [2015] FCA 1456.

Criminalising record-keeping misconduct

9. *Should criminal offences for record-keeping misconduct be introduced to complement a criminal offence for wage underpayment?*

   Should criminal penalties be introduced, we agree they should include record-keeping offences. In the experience of our members, it is not uncommon for an employer to attempt to mask a contravention through record-keeping misconduct. In the absence of specific record-keeping offences, such misconduct may not be captured by recklessness-based or knowledge-based offences.

Changes to the serious civil contraventions regime

10. *How should the serious civil contraventions regime be adjusted to align with the wage underpayment and any record-keeping offences?*

    In our view, there is no clear need to adjust the serious civil contraventions regime if a new criminal regime is introduced, particularly if both regimes maintain flexibility and discretion as to the penalties available.

Increasing maximum civil penalties

11. *Which of the following options would most effectively implement recommendation 5 of the Migrant Workers' Taskforce?*

    While not expressing a view as to the appropriate maximum penalties that should be imposed for a breach of the provisions listed in the Consultation Paper, we support the proposition that the general level of penalties for breaches of wage exploitation related provisions in the FWA should be increased to be more in line with those applicable in other business regulatory legislation, especially consumer protection legislation.

12. *The department proposes that for all civil contraventions, courts would be empowered to order (at the election of the applicant) either the maximum penalty available or three times the amount of the underpayment arising in the particular matter if that amount can be calculated.*

    Would it be appropriate to include such a penalty for all civil contraventions?

    Should this penalty option be limited to certain types of civil remedy provisions?

    We would not support such an approach. In our view, the current common law principles provide an appropriately flexible approach to determining the quantum of penalty imposed. When determining what penalties to impose, the following factors have been considered by the Court in previous cases:[5]

    a. the nature and extent of the conduct which led to the contraventions;
    b. the circumstances in which that conduct took place;
    c. the nature and extent of any loss or damage sustained as a result of the contraventions;
    d. whether there has been similar previous conduct by the respondent;
    e. whether the contraventions were properly distinct or arose out of the one course of conduct;
    f. the size of the business enterprise involved;
    g. whether or not the contraventions were deliberate;

[5] *Kelly v Fitzpatrick* [2007] FCA 1080.

h. whether senior management was involved in the contraventions;
i. whether the party committing the contraventions has exhibited contrition;
j. whether the party committing the contraventions has taken corrective action;
k. whether the party committing the contraventions has co-operated with the enforcement authorities;
l. the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and
m. the need for specific and general deterrence.

Sham arrangements

13. *The department proposes to amend the defence to a claim of sham contracting in subsection 357(2) of the Fair Work Act to provide that an employer will not be liable for a sham arrangement if, when the employer misrepresented the relationship as a contract for services rather than a contract for employment, the employer reasonably believed that the contract was for services and not for employment.*

    Should the department consider adopting a different test or additional features for the defence to sham contracting?

    In our view, the current provisions respond adequately to instances of sham contracting without the need for further specific or changed provisions.

Consultation Paper 3: 'Employee-like' forms of work and stronger protections for independent contractors

Empowering the Fair Work Commission to set minimum standards for workers in 'employee-like' forms of work, including the gig economy

As a general comment, the Law Society appreciates the need to strengthen protections for independent contractors, including those operating through online platforms in the gig economy. We support the proposed broad approach but look forward to commenting further on a more detailed model.

The Law Society supports the policy of supporting workers across different models of independent contracting who seek to balance flexibility, control over the work undertaken and in some cases the price of services, with fair levels of remuneration and conditions of work. We agree that in some arrangements workers may lack bargaining power and control over their work, and that the arrangement may more closely resemble employment without the protection afforded to employees. In other circumstances, however, gig economy workers have relatively high bargaining power and some freedom to negotiate terms.

We agree that merely expanding the definition of 'employee' to include certain categories of independent contractor may result in minimum standards applying too broadly or too narrowly. In addition, in a dynamic marketplace, it may be difficult to define 'employee' in ways that capture workers in emerging models and that minimise the potential for platform operators or other contractors to adapt their models to avoid the standards.

On that basis, we broadly support the approach of expanding the FWC's jurisdiction to consider unfair contractual terms for independent contractors.

We also broadly support allowing the FWC to develop minimum standards for independent contractors, including those in the road transport industry, to protect contractors and ensure the industries in which they work remain viable. It should be noted, however, that an expansion

in the FWC jurisdiction will add complexity to the employment law system overall, with resourcing implications for the FWC.

In relation to defining the scope of the FWC's new functions, currently there appear to be differences between the circumstances of contractors in 'horizontal' marketplace platforms, who are generally able to negotiate key terms with customers, and those in 'vertical' platforms where more bargaining power and control is exercised by the platform operator. This suggests the need for minimum standards may be more likely in the latter category of platform than in the former.

However, different models and practices will emerge over time. The Law Society considers there is a risk in legislating too prescriptively as regards particular categories of worker or particular industries, and to the functions the FWC should exercise. We suggest that in determining whether it has jurisdiction, the FWC should have a discretion to consider arrangements which appear, or purport, to be contracts for service.

That said, we agree that legislation, an 'objective' set of factors to consider in making decisions, a process for making orders and a work plan are all appropriate instruments for guiding the FWC in the exercise of its functions in this area.

Consultation Paper 4: Updating the *Fair Work Act 2009* to provide stronger protections for workers against discrimination

As a general proposition, the Law Society strongly supports the principles that there needs to be better alignment and consistency between the separate Commonwealth anti-discrimination laws (and with those implemented at state and territory level), and that further consideration should be given to seeking to consolidate those rights and obligations into one piece of Commonwealth legislation.

Improving consistency and clarity

1. *Should the Fair Work Act expressly prohibit indirect discrimination?*

   The Law Society supports the prohibition of indirect discrimination in the workplace.

   However, as a general comment and as noted in previous submissions, our preferred model for simplifying and unifying the laws that apply to discrimination, whether in the workplace or elsewhere, would be to consolidate the existing Commonwealth discrimination laws into a single Act.[6]

   Alternatively, any such provisions in the FWA should cross-reference relevant definitions in other Commonwealth anti-discrimination legislation rather than providing new definitions. This will help to minimise complexity and ensure definitions remain better aligned over time.

2. *Should the Fair Work Act be aligned with the DDA and include a definition of 'disability'?*

   Yes, subject to our general comments under Question 1. In any such provisions, the FWA should reference the *Disability Discrimination Act 1992* (Cth) (**DDA**) definition rather than replicating it.

[6] Law Society of NSW, submission to the Law Council of Australia, 25 October 2019.

3. *Should the inherent requirements exemption in the Fair Work Act be amended to clarify the requirement to consider reasonable adjustments?*

   Yes, subject to our preferred approach of consolidation, as stated under Question 1.

   The experience of our members is that employers can be confused about the interaction between the inherent requirements exemption to the DDA and the reasonable adjustment provisions. Where relevant, reference should be made to the DDA provisions, and consideration should be given to amending the relevant provisions in the DDA to make their operation and intersection more easily understood.

4. *Should attribute extension provisions be included in the Fair Work Act?*

   Yes, subject to our preferred approach of consolidation, as stated under Question 1.

   Again, in our view any amendments to the FWA should reference the definitions of 'discrimination' provided for in relevant anti-discrimination legislation.

5. *As per the broader Commonwealth anti-discrimination framework, should a new complaints process be established to require all complaints of discrimination under the Fair Work Act (i.e. both dismissal and non-dismissal related discrimination disputes) to be handled in the first instance by the FWC via conciliation? What would be the benefits and limitations of establishing such a requirement?*

   Yes. The benefits would include ensuring more expeditious and cost-effective access to the resolution of discrimination complaints. Our members report that current applications before the Australian Human Rights Commission (**AHRC**) can take more than six months to be conciliated. The complexity of the Court system and the delays involved can also be a barrier to making an application in the first instance, in comparison to the FWC.

   Further, we consider it appropriate for complaints in respect of discrimination to be dealt with in a similar manner to complaints of bullying or sexual harassment, which are often based on discriminatory grounds, and to be subject to compulsory conciliation.

   An alternative to this approach may be to increase the capacity of the AHRC to accommodate discrimination complaints through better resourcing.

6. *If a new complaints process were to be established, should it attract a filing fee consistent with other similar dispute applications to the FWC?*

   The Law Society would not object to the introduction of a filing fee, particularly if a fee waiver were available in circumstances of hardship. We suggest the fee should be reasonably modest but sufficient to deter vexatious or frivolous complaints.

7. *Should vicarious liability in relation to discrimination under the Fair Work Act be made consistent with the new sexual harassment jurisdiction and other Commonwealth anti-discrimination laws? Why or why not?*

   Yes, we would support ensuring consistent standards across forums and the context in which discrimination or harassment occurs.

8. *Should the application of the 'not unlawful' exemption be clarified?*

   While we are not aware of any significant confusion arising in relation to the 'not unlawful' exemption, to the extent that clarification is considered necessary, we would support it.

9. *Should the unlawful termination provision in the Fair Work Act dealing with discrimination be repealed, and section 351 of the Act broadened to cover all employees?*

   The Law Society is not aware of the issue arising in practice to any significant degree.

Modernising the Fair Work Act

10. *Should experiencing family and domestic violence be inserted as a protected attribute in the Fair Work Act?*

    The Law Society supports the recent introduction of leave for those experiencing family and domestic violence. However, these are recent developments and the practical application of the new provisions, including evidentiary requirements, have not been fully tested. On that basis, we suggest the insertion of family and domestic violence as a protected attribute should be considered at a subsequent time, perhaps after the two-year statutory review of the leave provisions has been completed.

11. *Should the Fair Work Act be updated to prohibit discrimination on the basis of a combination of attributes? Why or why not?*

    We see no need for any change of this type. There is currently no bar, and no disadvantage, to listing several protected attributes in a single claim. In our view, pleading a combination of attributes should require proof of each attribute, just as pleading several attributes does currently.

Options for reform – Other considerations

13. *Are there any other reforms you would like to see to the Fair Work Act's anti-discrimination and adverse action framework? Why?*

    In the experience of our members, clarification is required of the definition of 'workplace rights' in the General Protections jurisdiction, particularly as it relates to employees being able to make a complaint or inquiry in relation to their employment. The definition is a source of confusion, particularly for self-represented litigants.

    We also suggest introducing an automatic right to legal representation in the FWC. The need to make an application for representation increases costs in the initial stages of a matter. It also results in the solicitor who is instructed by a worker having to assess and prepare the matter as well as preparing their client to conduct the matter if the application regarding legal representation fails. As an alternative, consideration could be given to requiring the FWC to determine issues of legal representation in advance of any conciliation or hearing.

    Consideration could also be given to extending the protected attributes to workers who request, or are subject to, flexible work arrangements, whether or not those arrangements are connected to attributes associated with family responsibility. In this context, flexible work arrangements could include an employee working remotely or from home and/or a hybrid working arrangement.

Please contact Sue Hunt, Senior Policy Lawyer on (02) 9926 0218 or by email: sue.hunt@lawsociety.com.au if you would like to discuss this in more detail.

Yours sincerely,

Cassandra Banks
President