



13 March 2015

Workplace Relations Inquiry
Productivity Commission
GPO Box 1428
Canberra ACT 2601

KINGSFORD
LEGAL CENTRE

By email: workplace.relations@pc.gov.au

Dear Madam/Sir,

Submission to the Productivity Commission Inquiry into the Workplace Relations Framework

Kingsford Legal Centre (KLC) welcomes the opportunity to provide a submission to the Productivity Commission's Inquiry into the Workplace Relations Framework.

Kingsford Legal Centre

KLC is a community legal centre that has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas in Sydney since 1981. KLC provides general advice on a wide range of legal issues, and undertakes casework for clients, many of whom without our assistance would be unable to afford a lawyer. In 2014, KLC provided 1725 advices and opened 271 new cases.

KLC provides a specialist employment law service within our catchment area as well as a NSW-wide specialist discrimination law service. KLC has acted for a number of clients in unfair dismissal conciliations and arbitrations, general protections complaints (particularly in relation to workplace rights and discrimination) and in relation to unpaid entitlements. KLC regularly acts for clients in discrimination matters at the Australian Human Rights Commission (AHRC) and Anti-Discrimination Board. KLC also provides advice on a wide-range of employment issues such as redundancy, disciplinary action, entitlements, and flexible work arrangements.

In addition to this work, KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

Our clients in 2014

In 2014 KLC provided advice to 445 clients on employment law issues and 237 advices on discrimination matters (a substantial proportion of which related to discrimination in employment).

Of the clients that KLC advised in employment matters in 2014, 55% stated they earned \$40,000 or less annually; 81% of clients stated that they earned less than \$70,000 per annum. Of the 19% of clients earning over \$70,000 the majority were at risk of losing their job or were about to commence a period of unpaid or low paid leave, such as parental leave.

60% of clients were not born in Australia, with many speaking little or no English. 5% of our clients identified as being either Aboriginal or Torres Strait Islander. 14% of clients had a disability.

As seen in the statistics above, KLC's employment clinic services a predominantly low income and vulnerable sector of the community. Our experience suggests that in many cases, the existing workplace relations framework does not adequately protect the most vulnerable members of society.

ISSUES PAPER 2: SAFETY NETS

- What if any, particular features of the NES should be changed?

Right to request flexible working arrangements

KLC supports the right to request flexible work arrangements in the National Employment Standards.

However, KLC does not believe that the right to request flexible working arrangements in section 65 of the *Fair Work Act 2009* (Cth) ('FWA') adequately addresses the needs of employees responsible for the care of others. Section 65 of the FWA provides a reactive mechanism for employers to consider the needs of employees with caring responsibilities and does little to address systemic forms of discrimination or to overall improve the flexibility of workplaces.

Introduction of enforceable right for employees

KLC recommends introducing into the FWA an obligation on all employers to consider opportunities for flexibility within the workplace and opportunities to make reasonable adjustments for employees. This obligation should be complemented by enforceable rights for employees to request flexible working arrangements and reasonable adjustments and challenge an employer's denial where they believe a request could be accommodated but has been declined.

In our experience, the right to request flexible work arrangements has not significantly increased the protection of parents and carers under the law. Most employees do not use

the formal process set out in the FWA to request flexible working arrangements. Rather, employees are more likely to make informal requests to or have ongoing discussions directly with their supervisor or management. Through our advice and casework we have noticed that the process set out in section 65 of the FWA tends to be used only where informal negotiations have failed. At that stage, employees are more likely to make a formal request under section 65 so that they can receive written reasons for a decision they disagree with; they can then use these written reasons as the basis for a discrimination action against the employer.

We also note there are still a number of employees with caring responsibilities who do not benefit from the right to request provisions — namely persons with school age children. We recommend expanding section 65 to apply to all employees and to cover protection for employees with a responsibility of care for school age children. These amendments will not only reduce systemic discrimination against parents but will also cater for the changing needs of the Australian workforce, including older workers wishing to transition to retirement gradually or workers who wish to balance work with study or leisure pursuits.

Recommendation

That a positive duty be placed upon employers to implement flexible working conditions and make reasonable adjustments for employees.

That the right to request flexible working arrangements extend to all employees who seek flexible working arrangements and employees with responsibility for the care of another person are provided with increased protection.

Ensuring that employees can challenge ‘reasonable business grounds’

The FWA does not provide adequate opportunity for employees to challenge a refusal of a request for flexible work arrangements in the Fair Work Commission (FWC), unless the employer has agreed in an enterprise agreement or employment contract to go to the FWC in such a dispute. Even if the employer has agreed to attend a conference at the FWC about refusing a request, the FWC cannot direct the employer to agree to that request.

The failure of the FWA to provide adequate redress for employees who believe that their request has not been properly considered or to challenge the validity of “reasonable business grounds” is a major obstacle to removing systemic discrimination within Australian workplaces. In some cases, it appears that employers do not genuinely consider whether a request could be accommodated. Informal responses, that KLC is aware of, that have been provided to employees include “we don’t do part time work here” or “we have never had anyone work from home before”. While the requirement to give reasons for a decision in writing does prompt employers to consider the request more carefully and elaborate on the reasons for their decision, in our experience this has not prevented employers from maintaining an inflexible approach to working conditions, particularly where inflexibility has tended to be the tradition within the particular workplace. As such, KLC recommends that the exception set out in section 44(2) of the FWA be removed to allow employees to challenge the “reasonable business grounds” provided by an employer.

Recommendation

That the exception set out in section 44(2) of the FWA be removed to allow employees to challenge the “reasonable business grounds” provided by an employer.

That employees have the right to apply to FWC for resolution of disputes in relation to the right to request flexible working arrangement provisions.

Employers are more likely to have knowledge about the reasonableness of any business grounds they rely on to refuse a request, such as the impact on operating costs or existing shift arrangements. KLC recommends that once an employee has demonstrated that they have met the requirements of the FWA in making their request the burden of proving that reasonable business grounds exist to refuse that request should rest on the employer.

Recommendation

That the burden of proof in demonstrating that “reasonable business grounds” exist be on the employer. It should be assumed that flexible working arrangements are able to be implemented unless the burden is met.

Parental leave

KLC supports the ongoing right of employees to a 12 month period of unpaid parental leave. However, we recommend extending the entitlement to unpaid parental leave to all employees, not just those with 12 months of continuous service.

KLC has seen a number of cases where parents, particularly mothers, who intend to take only short amounts of leave following the birth of a child are forced unnecessarily to leave otherwise stable employment because they do not qualify for any unpaid leave. We have even seen some cases where employers are unwilling to grant a pregnant employee enough unpaid leave to give birth and physically recover from labour unless the employee has enough personal or annual leave accrued.

While these employees may be able to make a claim in relation to termination on the basis of temporary absence due to illness or injury, beginning (often protracted) legal action against an employer just prior to or straight after giving birth is rarely an attractive option for new parents. Further, this option is not available to mothers who take more time off after a birth than the period of incapacity associated with labour, the non-delivering parent, or parents who adopt a child.

Case Study

Amy found out she was pregnant 2 months into her role as a receptionist at a large company. She informed her employer of her pregnancy immediately. Amy had a record of high performance in the role.

Amy requested 7 weeks of unpaid leave from work in order to have her baby. Her employer denied this request without providing any reasons, and told Amy that her employment would be terminated when she left to have the baby.

The employer’s inflexible treatment of Amy caused her a lot of distress during her pregnancy,

and Amy was hospitalised as a result.

Amy sought legal advice from KLC and filed a discrimination complaint against her employer. However, it was very difficult for Amy to pursue the complaint while being busy with a new baby.

Recommendation

That the right to 12 months of unpaid parental leave be extended to all employees, not just those with 12 months of continuous service.

Domestic/family violence leave

Domestic/family violence continues to occur in Australia at alarming rates, with 15 % of Australian women experiencing physical or sexual violence from a previous partner and 2.1 per cent from a current partner.¹ Domestic/family violence is the leading preventable cause of death, disability and illness for Australian women under 45 years of age.² Further, it is estimated that violence against women and children will cost the Australian economy \$15.6 billion by 2021–2022 unless the rate and extent of violence is reduced.³

The Australian Domestic and Family Violence Clearinghouse's *National Domestic Violence and the Workplace Survey* found that domestic/family violence impacted on workers by limiting their capacity to get to work; exposing them to violence in the workplace through abusive calls and emails, and the abusive person attending the workplace; and resulting in them being tired, distracted, unwell or late.⁴

It is imperative that the endemic nature of domestic/family violence is recognised and that measures are introduced into the workplace relations framework to institute a system that promotes sustained engagement in the workforce for survivors/victims of domestic/family violence.

We recommend amending the National Employment Standards to provide for an entitlement to domestic/family violence leave. Employees experiencing domestic/family violence, or who are providing care for a family member who is experiencing domestic/family violence, may need to access time off work that would not normally be available through personal or carer's leave. For instance, an employee may need to:

- attend multiple court proceedings in relation to Apprehended Violence Orders, criminal charges against the perpetrator or for family law proceedings;

¹ ABS, *Personal Safety Survey*, 2005.

² This figure includes the costs that result from the impact of domestic/family violence on workforce participation (see VicHealth, *The Health Costs of Violence*, 2004, at 10).

³ National Council to Reduce Violence Against Women and their Children, *The Cost of Violence Against Women and Their Children*, March 2009, at 4.

⁴ McFerran, L, *National Domestic Violence and the Workplace Survey*, Australian Domestic and Family Violence Clearinghouse, October 2011. A short online survey in late 2011, distributed by the Federation of Community Legal Centres (Vic) and Domestic Violence Victoria among Victorian CLCs and domestic/family violence services produced brief case studies consistent with the results of the ADFVC survey. All case studies in this section are from the unpublished Victorian survey.

- take time off to arrange new accommodation or schools for children; or
- attend legal or counselling appointments.

Additionally, employees may be hesitant to attend work when they show physical signs of domestic/family violence such as visible bruising. These reasons would not normally constitute grounds for taking personal or carer's leave.

In our experience, many women do not see domestic/family violence as a community problem. In particular, in our work with women from culturally and linguistically diverse backgrounds, we have seen a hesitance to remain in employment when work is impacted by the domestic/family violence. Many women do not feel that they can share the burden of dealing with domestic/family violence with their employer. We recommend implementing a minimum statutory entitlement under the NES. An entitlement to leave may make it much easier for women who are willing to disclose domestic/family violence to maintain employment (especially full-time and permanent employment) and avoids the need to rely on the "goodwill" of the employer to be flexible in relation to time-off or attempting to access other types of leave.

Case study

Suki works on the checkout at a local fruit and vegetable store. She has just left her husband after a long period of violence towards her. In the past she has called in sick a lot because she has bruises on her face and arms but now she does not have any sick leave left. She is very embarrassed that the customers might see the bruises. She also has to go to Court because she has taken out an AVO against her husband. Suki is ashamed to tell her boss about the domestic/family violence and ask for time off. Because she feels as though it is her problem to deal with, not her boss', Suki asks her boss if she can become a casual worker instead of staying full-time. She does not want to be an unreliable worker or ask for more time off and thinks that as a casual she will have more flexibility, even though it will mean she has less money and job security.

Ensuring that leave is paid recognises that women experiencing domestic/family violence are often in a position of financial hardship. It enables women to maintain their income at a time when they have to deal with many additional expenses such as new housing, furniture, vehicles, professional support such as counselling and legal advice and representation, and previously unknown debt.

Case Study

Meanu's husband always took care of their finances. He made her give him her pay cheque each fortnight and he would give her a small allowance to buy food for the two of them and her bus pass. He took care of all the bills and the rent. He also opened all the mail and would not show Meanu. When Meanu left her husband she had no money to pay a bond and buy furniture for a new unit. After she arranged to get her mail forwarded she started receiving lots of overdue notices for bills she thought her husband had paid. Meanu now realises that she is in thousands of dollars of debt. Meanu needs to take time off work to attend Court but if she takes a day off she will not get paid and right now, she needs to get all the money she can.

Recommendation

That employees experiencing domestic/family violence or supporting a person experiencing domestic/family violence be given the right to a period of paid leave to deal with circumstances arising from the domestic/family violence.

Enterprise Agreements

KLC supports the inclusion of domestic/family violence clauses in enterprise agreements and the ALRC's recommendation that the Fair Work Ombudsman develop a guide in consultation with key stakeholders.

Enterprise Agreement clauses should recognise that evidence of domestic/family violence may vary from woman to woman and as such, clauses should require that evidence need be provided only when specifically required by the employer and that sufficient evidence may take various forms. Examples of evidence might include an AVO, medical or counselling reports, a letter from a caseworker or refuge, or a statutory declaration from the employee. This flexibility recognises that not all women will approach the Police in relation to family violence or may not disclose the origin of any injuries they have sustained to their doctor.

Recommendation

That the Australian Government support the inclusion of domestic/family violence clauses in enterprise agreements. The Fair Work Act should make it clear that Fair Work Commission must ensure, when approving enterprise agreements, that the notice and evidence requirements in such clauses are flexible and adequately accommodate the special circumstances of victims of domestic/family violence and those who support them.

ISSUES PAPER 4: EMPLOYEE PROTECTIONS

Unfair Dismissal

Strong unfair dismissal laws are required to ensure the rights of employees to fair treatment, and to address the power imbalance in the employer-employee relationship. The impact of unfair dismissal on employees is significant. Many of our clients who have been unfairly dismissed suffer financial, psychological and family stress as a result of losing their job. Often the remedies available through unfair dismissal do not adequately reflect the effect of unfair dismissal on employees.

In our experience, the unfair dismissal laws do not impose a high regulatory burden on employers due to the following reasons:

- the 26 week cap on compensation, and the availability of compensation only for economic loss and not damages means that settlement amounts are generally low;
- in many cases, our clients request non-economic remedies to settle unfair dismissal matters, including an apology or statement of service;
- the small business fair dismissal code offers a broad exemption for small businesses from unfair dismissal laws, often to the detriment of employees who would otherwise be successful in an unfair dismissal action;

- the eligibility criteria for making an unfair dismissal application strictly limits the availability of this action to employees; and
- the majority of unfair dismissal matters settle at conciliation at the Fair Work Commission, which is a free process and where employers can appear without legal representation.⁵

Eligibility to make an Application for Unfair Dismissal Remedy

KLC has concerns about the impact the minimum employment period has on restricting access to unfair dismissal applications. Many KLC clients have been dismissed in an unfair manner but have no recourse because their employment lasted less than the minimum employment period. In some of these cases, whilst the employee would have had access to the General Protections provisions, or could make a complaint under a state or territory discrimination law, they are put off by the difficulty of these processes — particularly where these processes eventually lead to claims needing to be litigated in the Federal courts.

Of serious concern is the practice of employees being dismissed just before their minimum employment period is complete. In one case an employee with no prior performance or conduct concerns was dismissed the day before he would have met the 6 month requirement. Through our advice work we have noticed this trend particularly amongst small businesses where, we can only assume, the attitude is that it is more cost effective to employ and train new employees every 12 months than it is to continue to employ workers protected by unfair dismissal laws.

Case Study

John works as an office assistant. John has worked there for 5 months and 3 weeks. When John had his 3 month probationary review, his boss told him that he was very impressed with John's performance in the role. One day when John goes into work, his manager yells at him for not washing the dishes in the kitchen and fires him on the spot. John has never been told that washing dishes is part of his duties and was never directed to do so.

John comes to KLC for advice. KLC advises John that he is not eligible to make an unfair dismissal complaint, as he does not meet the minimum employment period. KLC asks John lots of questions to see whether he can frame his claim as a general protections complaint, but given the circumstances, it becomes clear that this would not be a strong claim.

John decides not to go ahead with any complaint against his employer. He says he is worried he will not be able to find another job, and can't understand why he was dismissed.

KLC notes that in other jurisdictions, including New Zealand, the minimum employment period is 90 days. This period seems more appropriate given that a longer period, as currently exists, is more likely to lead to employers dismissing employees purely to avoid coverage under unfair dismissal laws. KLC sees no reason why employees of small businesses should be afforded fewer rights than those of larger employers. In most cases,

⁵ 79% of unfair dismissal matters settle at conciliation at the Fair Work Commission – see Fair Work Commission, *Annual Report 2013-2014*, accessed at https://www.fwc.gov.au/documents/documents/annual_reports/fwc-ar-2014-web.pdf

due to the size of the workplace and likelihood of closer working relationships, it is more likely that a small business would be able to make a proper assessment of an employee's suitability for a role more quickly than in a larger business.

Recommendation

That the minimum employment period in section 383 of the FWA be reduced to 90 days for all employees.

Time for making an application for unfair dismissal or general protections dismissal and grounds for extensions

The current timeframe for making an Application should be lengthened to allow employees genuine access to a remedy when dismissed. In our experience, it is the most vulnerable employees — young employees, employees with a disability and employees from non-English speaking backgrounds — that are most likely to seek legal assistance in relation to dismissal. These employees rarely know about employment rights and are often unable to find out about their rights on their own. KLC has seen a number of clients who did not know they could challenge their dismissal until a family member, friend or community worker tells them. These employees often need assistance in gaining access to forms and help with filling them out. Many require legal assistance and representation but cannot afford a lawyer.

There is a lack of services providing free employment law advice, which means waits for advice can often be long and may result in employees receiving legal advice after the limitation period has passed. Many of our clients come to us when it is too late to lodge an application. 21 days is insufficient time for clients to seek legal advice and file an application, particularly when the effects of dismissal are taken into account. Many employees who have been unfairly dismissed have to deal with pressing concerns such as finding new employment, financial strain and breakdown of family relationships due to job loss. It can also take time for clients to find a free service to provide them with legal advice.

Case Study

Rebecca worked as a hairdresser in a busy salon for 2 years. One day when she went into work, her manager told her to leave and not come back. Rebecca did not understand why she was being fired, as she had only received positive performance reviews in the past. When Rebecca questioned her manager as to why she was being fired, he became aggressive and told her to leave the premises or he would call security.

Rebecca has two young children and is a single mother. Following the dismissal, she was very busy trying to find another job to pay the rent and the bills. Rebecca knew what had happened to her was not fair, but she didn't know anything about unfair dismissal law or where to seek free legal advice. It wasn't until she found a new job 6 weeks later that a colleague told her she could contact a community legal centre for free legal advice on her options. When Rebecca came to KLC for advice, we advised her that she would have had a strong unfair dismissal case, but she had missed the time limit.

KLC notes that in other jurisdictions, including New Zealand and Canada, the limitation period for making an unfair dismissal application is 90 days, which more accurately reflects

the time needed by an employee to make a dismissal application.⁶

We note that one of the reasons cited for the short time limit to make an Application for unfair dismissal remedy is because the primary remedy in an unfair dismissal case is reinstatement. However, in our experience reinstatement is rarely the desirable outcome for the employee or the employer. Most employees we advise do not seek reinstatement, particularly because they would no longer feel comfortable in a workplace where the working relationship has broken down.

KLC recommends that the time for making an Application for unfair dismissal remedy and general protections dismissal be extended to 90 days to address these concerns.

Recommendation

That the time for making an Application for unfair dismissal remedy and general protections dismissal be extended to 90 days.

Currently, extensions of the time limit for making an application are extremely limited, and fail to reflect the reality of the difficulties faced by dismissed employees in becoming aware of unfair dismissal and general protections processes and accessing legal advice. The FWC has consistently interpreted section 394 of the FWA narrowly, meaning that out of time applications are rarely accepted. We recommend that the grounds for seeking an extension under section 394(3) be amended so that FWC may allow a further period for the application to be made if the FWC is satisfied that there was reasonable cause for the delay in filing.

Recommendation

That section 394(3) be amended so that FWA may allow a further period to make an Application for unfair dismissal remedy or general protections dismissal remedy if FWA is satisfied that there was reasonable cause for the delay in filing.

General Protections

KLC supports the general protections provisions under the FWA. However, we have found that general protections often does not offer adequate protection to employees in discrimination matters.

The courts' interpretation of section 351

The courts have interpreted section 351 of the FWA narrowly and have displayed a reluctance to draw on jurisprudence about the definition of protected attributes under the other Federal anti-discrimination acts. This has resulted in many applicants having their cases dismissed for being unable to establish they had a protected attribute.⁷

⁶ See *Canada Labour Code R.S.C. 1985* (Canada) section 240; *Employment Relations Act 2000* (New Zealand) section 114.

⁷ See for example *Construction, Forestry, Mining and Electrical Union v Leighton Contractors Pty Ltd* (2012) 208 FCR 386; *Corke-Cox v Crocker Builders Pty Ltd* [2012] FMCA 677; *Hodkinson v Commonwealth* (2011) FMCA 171.

The conference process

In our experience, the general protections conference process is not well suited to vulnerable applicants. Many clients who have faced discrimination in employment and have been dismissed are understandably upset about their treatment. The 90 minute conference process often does not provide an appropriate forum for the applicants to hold the employer to account by expressing the effect the discrimination has had on them, which is often the most valued outcome of a conciliation. Additionally, the conduct of the conference largely depends on the Fair Work Commissioner presiding. In our experience, some Commissioners fail to take into account the vulnerability of applicants in conferences.

Case Study

Yifei was working as a dental assistant in a dental practice. When she found out she was pregnant, her doctor gave her a letter to give to her employer explaining that she should not operate the x-ray machine as it could harm her baby. Yifei's employer refused to make adjustments to Yifei's role and continued to force her to perform x-rays even though Yifei repeatedly requested to swap with other available staff. Yifei's boss told her she was causing problems because she was pregnant, and eventually dismissed her from employment.

Yifei lodged a general protections dismissal complaint. At the conciliation, Yifei was 7 months pregnant. She was very intimidated by the process, and was questioned in an aggressive manner by the Commissioner, who put pressure on the parties to come to an agreement within 90 minutes. Yifei had a very strong case but decided to settle the matter for only one week's pay because she did not think she could handle the stress of going to the Federal Circuit Court. Yifei was very unhappy with the conference process as she did not feel she was given the opportunity to express the effect her employer's conduct had had on her.

Recommendation

That conference time in general protections matters involving discrimination be extended beyond 90 minutes to allow the parties to fully discuss the issues and come to an agreement acceptable to both parties.

That the FWC have clear best practice policies in place to deal with vulnerable clients.

Protection against discrimination for domestic/ family violence victims

As discussed above, the incidence of domestic/family violence is prevalent, and has large economic and social cost.

Victims of domestic/family violence are often treated less favourably in the workplace. The ALRC *Inquiry into Family Violence and Commonwealth Laws- Improving Legal Frameworks*

recommended that family violence should be included as a separate ground of discrimination under the *Fair Work Act*.⁸

Case Study

Brenda, a young woman experiencing ongoing violence from her ex-boyfriend, was dismissed from her workplace after he turned up at the office, threatened her and caused a scene in front of clients.

KLC submits that section 351 of the FWA is not sufficient to challenge the barriers to accessing employment for victims/survivors of domestic/family violence. For example, even when discrimination against a victim/survivor of domestic/family violence appears to at least in part concern existing protected attributes, there may not be strong enough arguments for successful discrimination claims.⁹

KLC further submits that there are several other justifications for a separate ground of discrimination relating to domestic/family violence:

- prohibiting discrimination on the basis of status as a victim of domestic/family violence and, specifically, gender-based violence, is consistent with Australia's international human rights obligations;¹⁰
- KLC acknowledges the educative function that prohibiting discrimination on the ground of domestic/family violence could have in the broader community. It would assist in raising awareness in community and business of the impacts of domestic/family violence, and would support victim/survivors to disclose violence without fearing repercussions in other areas of their lives; and
- a separate ground is consistent with other current strategies, such as addressing the impact of domestic/family violence on the workplace via enterprise bargaining agreements.

Recommendation

That the FWA be amended to include status as a victim or survivor of domestic or family violence as a protected attribute.

Protection against discrimination for irrelevant criminal record

People with a criminal record are regularly discriminated against even if their criminal record is very old and no longer relevant.¹¹ Having a criminal record can be a significant

⁸ Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Improving Legal Frameworks* (ALRC Report 117.)

⁹ Smith, B and Orchiston, T, *Domestic Violence Victims at Work: The Role of Anti-Discrimination Laws*, Working Paper (12 December 2011), accessed at http://sydney.edu.au/law/about/staff/BelindaSmith/Smith_Orchiston_DV_and_Anti_Discrimination_Law_Working_Paper_12Dec2011_revised.pdf

¹⁰ See, CEDAW General Recommendations 12 and 19, ICCPR Articles 2, 3, 7 and 26, and ICESCR Articles 3 and 10.

barrier to obtaining meaningful employment in a wide range of fields. The prevalence of this form of discrimination can prevent the rehabilitation of offenders and impede their reintegration into society.¹² Ultimately, by impeding reintegration, this form of discrimination contributes to the increased risk of re-offending, a significant social and economic cost to the broader community.

Research demonstrates that a criminal record is often an unreliable indicator of future behaviour.¹³ Unfortunately, despite the lack of reliability as an indicator of future behaviour, there is an increasing reliance on criminal record vetting processes as a risk management tool in relation to any form of paid or voluntary work. Crim Trac, the government agency responsible for providing national criminal history checks for accredited agencies, processed approximately 2.9 million checks to 100 different accredited agencies over a twelve month period, which is a more than a five-fold increase from the reporting period 2000 to 2001.¹⁴

Case Study

Lucy was out of the workforce for a number of years due to domestic violence. Lucy had a conviction for assault, for which she was placed on a good behaviour bond. The assault charge involved an incident with her abusive partner, who had previously been convicted of assault against Lucy.

Lucy had never reoffended in the 20 years since this conviction. Lucy applied for a job at a nursing home. The nursing home told Lucy they could not give her a job because she would be working with vulnerable persons. Lucy was very upset as she wanted to enter the workforce and not being able to find employment meant that she was experiencing financial difficulty.

Including 'criminal record' as a protected attribute would simplify as well as strengthen the existing legal framework, which provides partial and inconsistent protection from criminal

¹¹ Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the Basis of Criminal Record*, Discussion Paper, 2004, at 6-7; Fitzroy Legal Service and Job Watch, *Criminal Records in Victoria: Proposals for Reform*, 2005, (available at http://www.jobwatch.org.au/uploaded_files/144623crvpr0706.pdf).

¹² For example, research in the UK has shown that employment can reduce re-offending by between a third to a half — see, Home Office, *Breaking the Circle: Report on the Review of the Rehabilitation of Offenders Act*, July 2002, accessed at <http://webarchive.nationalarchives.gov.uk/+/http://www.homeoffice.gov.uk/documents/breaking-the-circle?view=Binary>.

¹³ Federation of Community Legal Centres (Vic), *Submission: Draft Model Spent Convictions Bill*, May 2009, at 6. The Australian Law Reform Commission stated that 'an old conviction, followed by a substantial period of good behaviour, has little if any value as an indicator of how the former offender will behave in the future' (see Australian Law Reform Commission, *Spent Convictions*, ALRC 37, 1987). The Sentencing Advisory Council has similarly stated that 'research has shown that the most serious crimes against the person are committed by offenders who have not previously been convicted of a violent offence, and who will not go on to be convicted for future violence offences' (see Kelb, K, *Recidivism of Sex Offenders*, Sentencing Advisory Council, 2007, at 1). Further, UK research suggests that most people who are found guilty of an offence, only offend once, and the offences are more likely to have been committed when the person was young (see *Criminal careers of those born between 1953 and 1978*, Home Office Statistical Bulletin 4/2001).

¹⁴ Crim Trac Annual Report 2010-11, at 32 (accessed at http://www.crimtrac.gov.au/documents/CT10-11_part3.pdf). For example, bus drivers, supermarket attendants and volunteers at community organisations are routinely required to undergo criminal record checks.

record based discrimination. Federally, complainants who have experienced discrimination on the basis of their criminal record are able to complain to the Australian Human Rights Commission but are unable to enforce their rights through the Federal judicial system. In Victoria, New South Wales, South Australia and Queensland, anti-discrimination laws do not prohibit discrimination on the basis of criminal record. Spent convictions legislation also operates in some Australian states and territories, which, in effect, prevents discrimination on the basis of criminal record by limiting what information can be used by an employer. However, the application of such legislation is limited in that it only has effect after the relevant crime-free period has expired.¹⁵

Case Study

Steve had been convicted of a drink driving offence 8 years ago, and had no other offences on his record. Steve worked as a cleaner for a government agency. The government agency decided to do a criminal record check of all staff. Once they found out that Steve had been convicted of a drink driving offence, they terminated his employment. Steve could not understand why they were taking a drink driving offence into account when it had nothing to do with his job as a cleaner.

Since being fired, Steve has had difficulty finding employment due to his criminal record. A lot of jobs Steve is applying for require him to disclose on the application form whether he has a criminal record. Steve feels that he is not progressing to the interview stage because of this.

Steve sought legal advice, but was told his only option in discrimination law was to lodge a discrimination complaint through the equal opportunity in employment stream with the Australian Human Rights Commission. Steve was told that the AHRC only had the power to make recommendations and table a report in parliament. Steve decided not to pursue this option, as he didn't think it was going to result in him getting the job.

Discrimination on the basis of irrelevant criminal record is also prohibited under international law. Australia has ratified the International Labour Organisation Convention III, the Discrimination (Employment and Occupation) Convention 1958 which requires the Australian Government to pursue policies to ensure criminal record-based discrimination is eliminated.¹⁶ International jurisprudence indicates that discrimination on the grounds of criminal record is likely to be protected under the description 'other status'.¹⁷ The European Court of Human Rights, for example, has interpreted non-discrimination on the grounds of 'other status' to include non-discrimination on the basis of criminal record.¹⁸

¹⁵ In every Australian state and territory, either legislation or police policy dictates that with the passing of a certain length of time, the majority of convictions will be treated as spent. Note, however, that in Victoria and South Australia, the spent convictions regimes are contained only in police policy relating to the circumstances and content of police record disclosure.

¹⁶ ILO 111 was ratified by Australia in 1973 and incorporated into domestic law by virtue of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

¹⁷ Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the Basis of Criminal Record, Discussion Paper*, 2004 at 11; *Thlimmenos v Greece*, 6 April 2000, Application No. 34369/97.

¹⁸ See *Thlimmenos v Greece*, 6 April 2000, Application No. 34369/97.

For the reasons above, and in order to give effect to Australia's international obligations, KLC recommends that prohibition on the basis of irrelevant criminal record be prohibited in section 351 of the FWA.

Recommendation

That section 351 of the Fair Work Act should include irrelevant criminal record as a protected attribute.

Other issues

How well are the institutions working?

KLC recognises the importance of the Fair Work Ombudsman (FWO) in the workplace relations system. However, we are concerned that the FWO is under-resourced, and thus unable to provide complainants with substantive assistance.

In all cases where we have advised clients to complain to the FWO about significant underpayments and not being provided with payslips, and the FWO has conducted an investigation and established that a debt to the employee exists, the FWO has declined to take any enforcement action. Even when numerous clients working for the same employer have complained to the FWO about unlawful practices, the FWO has declined to exercise its prosecution function. The result of this is that some employers continue to flaunt Fair Work laws and Awards as they believe that none of their staff will take them to court.

Case study

Sam worked as a baker, often working night shifts. Sam could only speak a little English so it was difficult for him to find a job. He began working as a baker 8 years ago and was paid only \$14 an hour for the entire period. Sam supervised and trained other staff, but was never paid allowances for this. Sometimes Sam was paid in cash, and sometimes he was paid via transfer to his bank account.

One day, Sam was talking to his friends about his job. They told him he should probably be earning more than \$14 an hour. Sam lodged a complaint with the Fair Work Ombudsman. Preliminary calculations indicated Sam was underpaid by over \$150 000. The Fair Work Ombudsman did not pursue the matter, saying that it was up to Sam to take his employer to court. Sam was unable to do this as he cannot speak English, couldn't understand the court process and couldn't afford a lawyer.

Recommendation

That the FWO be adequately resourced such that it can exercise its enforcement and prosecution functions more frequently.

Please contact us on (02) 9385 9566 if you would like to discuss our submission further.

Yours faithfully,
KINGSFORD LEGAL CENTRE

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