

September 2022

Committee Secretary
Senate Select Committee on Work and Care
By email: workandcare.sen@aph.gov.au

Submission to the Senate Select Committee on Work and Care

JobWatch Inc (**JobWatch**) is pleased to make a submission on Work and Care.

About JobWatch

1. JobWatch is an employment rights, not-for-profit community legal centre. We are committed to improving the lives of workers, particularly the most vulnerable and disadvantaged.
2. JobWatch is funded by the Fair Work Ombudsman, Victoria Legal Aid and the Victorian Government. We are a member of Community Legal Centres Australia and the Federation of Community Legal Centres (Victoria).
3. JobWatch was established in 1980 and is the only service of its type in Victoria, Queensland and Tasmania. Our centre provides the following services:
 - i. Tailored information and referrals to workers from Victoria, Queensland and Tasmania, via a free and confidential telephone information service (**TIS**);
 - ii. Community legal education, through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other relevant stakeholders;
 - iii. Legal advice and representation for vulnerable and disadvantaged workers across all employment law jurisdictions in Victoria; and
 - iv. Law reform work and advocacy aimed at promoting workplace justice and equity for all workers.
4. Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our TIS. To date we have collected more than 240,000 caller records, with each record usually canvassing multiple workplace problems, including contract negotiation, recovery of wages, discrimination, harassment, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available at any given time across State and Federal laws.

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5. JobWatch currently assists approximately 16,000 callers through the TIS per year. The vast majority of our callers are not union members and cannot afford to get legal assistance from a private lawyer. In order to become clients of the legal practice, workers must have an employment law matter that has legal merit and their cases must satisfy the requirements of our funding agreements (which typically focus on client vulnerability and public interest issues).

JobWatch’s views and recommendations to the Select Committee on Work and Care

6. In our experience, many Australian workers, particularly women, still struggle to successfully juggle work and care responsibilities (including care for children, aging relatives or family members with disabilities).
7. Whilst many women in the community are under-employed and/or lack security of employment (which makes it extremely difficult for them to ask for time off work for care needs), many professional women, who are in permanent and often full-time work, feel over-worked and torn between work and family commitments. Women in both of these categories suffer the effects of gender inequality and are in need of special measures to alleviate their situations.
8. Below are some practical suggestions designed to address some of the problems experienced by working women, in particular, but also by working men who need to or want to (or may need to be encouraged to) share in the care responsibilities of their family members.

Improved access to paid carer’s leave

9. The *Fair Work Act 2009* (Cth) (**FW Act**) should provide for a certain amount of paid carer’s leave for all employees, not only for permanent employees. Just as the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022* provides for up to 10 days of paid family and domestic violence leave per year, which can be taken immediately upon commencement of employment and which does not accrue from year to year, there should be a similar entitlement to paid carer’s leave. The entitlement would be conditional on notice and evidence requirements (and the FW Act should make it clear that a statutory declaration from the employee could suffice as evidence).

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Reasonable accommodation for the needs of employees who are carers

10. The *Equal Opportunity Act 2010* (Vic) (**Vic EO Act**) could provide a useful model for how the FW Act might be amended and improved so as to better support the needs of employees who are carers. Section 19 of the Vic EO Act provides that:

An employer must not, in relation to the work arrangements of an employee, unreasonably refuse to accommodate the responsibilities that the employee has as a parent or carer.

11. If a similar obligation were imposed on employers under the FW Act, perhaps as part of section 351 of the FW Act, it would assist all employees, regardless of their status, by allowing them to request unpaid carer's leave and to ask for flexible working arrangements, right from day one of their employment.

Unpaid carer's leave

- a. Such a provision would mean that all employees would be entitled to request a reasonable period of unpaid carer's leave (beyond any paid carer's leave) right from the commencement of their employment. The FW Act would need to specify that an unreasonable refusal to grant the employee's request would be unlawful but that reasonable business grounds would be a defence.
- b. For example: *Belinda has been employed by a large employer on a casual basis for the last six months. Belinda's mother is in her 90s and has been living independently, on her own. Recently, Belinda's mother had a fall and Belinda decided she would need time off work to care for her, instead of placing her in an aged care facility. Belinda made a written request as soon as practicable (after her mother's fall) for 12 months off as unpaid carer's leave. If the FW Act were amended, Belinda's employer would be obliged to grant Belinda's request unless it had reasonable business grounds, which it would need to outline in its response to Belinda.*
- c. Some may argue that an employee in Belinda's scenario above could already ask for flexible working arrangements under the NES. However, the following limitations of the current NES provisions must be noted:
 - i. Only permanent employees who have at least 12 months of employment with the same employer, or regular and systematic casuals with at least 12 months of employment, are eligible to request flexible working arrangements under the NES. In this example, Belinda is a casual with only 6 months of service and so she would be ineligible.
 - ii. The current NES entitlement to request flexible working arrangements is only available to certain employees. The only existing category which Belinda could rely on is that she is a carer under the *Carer Recognition Act 2010* Cth, but Belinda's employer could,

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theoretically, query whether she is in fact a carer under that legislation and Belinda may have difficulty proving that she is.

- iii. It is far from clear, on the present wording of the NES entitlement, whether or not a request for flexible working arrangements might include a request for unpaid leave.
- d. There would need to be a mechanism for employees to formally challenge an employer's refusal to accommodate (eg a refusal to grant unpaid carer's leave). For example, employees should have 28 days within which to apply to the Fair Work Commission (or other statutory body), if they do not agree that the employer had reasonable business grounds for refusing the request for unpaid carer's leave.

Improved provisions regarding flexible working arrangements

- 12. A possible alternative to a stand-alone statutory obligation on employers not to unreasonably refuse to accommodate the responsibilities of worker-carers, would be to focus on and improve the provisions regarding flexible working arrangements in the NES.
- 13. There should not be a minimum period of service before this entitlement kicks in. All worker-carers should be eligible to request flexible working arrangements from day one of their employment.
- 14. Worker-carers should not have to prove that they are a carer under the *Carer Recognition Act 2010*; a statutory declaration from the employee setting out in what way they are a carer and why they need flexible working arrangements should suffice.
- 15. There should be a formal review mechanism, so that an employee whose employer has refused ostensibly on "reasonable business grounds" can get that decision reviewed as part of a quick, informal and inexpensive process, before a termination of employment takes effect.
- 16. The current provisions should also be improved by allowing for pecuniary penalties in situations where employers fail to respond in writing to the employee's request within the 21 day timeframe, or fail to provide reasonable business grounds for the refusal.

Standalone positive obligation on employers to ensure that roles can realistically be performed within the allocated time and to support part-time arrangements

- 17. Given that many jobs these days are no longer clock-on and clock-off roles, but rather require employees to be "on duty" or "switched on" outside of work hours, checking emails and actively engaging with social media accounts etc, many employees feel that they never truly leave work behind and the notion of a "work life balance" is a myth. Employees feel increasingly pressured to be more productive and "do more with less." A positive obligation on employers to ensure that roles can realistically be performed within the allocated time (be it a

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full-time or part-time role) and to support part-time arrangements, is a much needed amendment to the FW Act.

18. One way that employers could comply with such an obligation would be to conduct regular job audits in order to assess whether the role can reasonably be performed in the allocated hours.
19. Currently many employers pay lip service to flexibility but are failing to adequately accommodate their employees' needs because they do not really offer or properly consider part-time roles or job-share arrangements. Part-time jobs are rarely advertised and many women (and perhaps some men too) feel their only real chance of working part-time is to either apply for a position which is advertised as a full-time role and then try to negotiate part-time hours, or to work for a certain amount of time on a full-time basis until they have proved themselves, before they can request part-time hours/flexible arrangements. A standalone positive obligation on employers would certainly make the rhetoric around flexible work arrangements more meaningful.

Other suggestions

20. Male employees need to be offered incentives to take parental leave, work part-time and/or take up flexible arrangements. If we do not offer incentives, many employers and employees will continue to treat care responsibilities as women's work and men will continue to believe that they will suffer professionally if they avail themselves of these benefits.
21. Leave-buying arrangements need to be more readily available and promoted, not just exist as a theoretical possibility in some larger, often public-sector, businesses. Parents of school aged children should be actively encouraged to buy more annual leave so they can spend time with their children during the school holidays. This must be done in recognition of the fact that four weeks of annual leave leaves parents (more often women) feeling stressed, overwhelmed and anxious about how to look after their children the remaining eight weeks per year when their children are on school holidays. If both male and female employees were encouraged to buy more annual leave to care for their children, this would go a long way towards achieving greater gender equality and better supporting the needs of worker-carers.
22. Section 351 of the FW Act should be amended so as to include a "but-for test". That is, a court (or the Fair Work Commission, in the case of arbitrations) would need to be satisfied that had it not been for the particular protected attribute in the FW Act, the applicant would not have been subjected to the adverse action (eg if it hadn't been for the parental or carer responsibilities, the applicant would have been offered the job or their job would not have been made redundant or they would not have been dismissed or they would have been promoted etc). A but-for test would allow more s351 general protections claims to succeed and this would in turn result in meaningful behavioral change across the board.

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Endorsement of Submission 22

23. In addition to our recommendations outlined above, we have read and we endorse the recommendations made by the Work and Family Policy Roundtable: Submission 22 received by this Committee.
24. We particularly agree with the following comments of the Roundtable:
- a. *“Decent work lies at the heart of a robust and equitable work/care regime. This is work that provides job security, predictable working time arrangements, paid leaves and a living wage – all conditions that make it possible for workers to manage their work and care responsibilities. But as set out in more detail in the Roundtable documents noted above, secure, predictable and properly paid work remains a significant challenge for many - particularly those worker-carers employed part-time, many of whom work casually.... We urge the Committee to consider effective approaches to capping long work hours... We also want to highlight the very specific challenges around decent work for migrant care workers – a group not adequately included in research and policy. Many migrants, who have far higher levels of qualifications than their Australian-born counterparts, are funnelled into low-paid care work where they make up an increasing proportion of the workforce both in Early Childhood Education and Care and aged care. Migration settings, which assess ‘skill’ based on the gendered Australian Bureau of Statistics ANZSCO occupational skills classifications, have made it very difficult for those who arrive on temporary visas and who work in so called ‘low-skilled’ frontline care jobs to transition to permanency. Temporary status is linked directly to vulnerability to exploitation by employers. Migrant aged care workers, especially those from non-English speaking countries are also more likely to be in casual jobs and underemployed than their Australian-born counterparts. It is crucial that we ensure that migrant care workers are not relegated to more insecure work.” (Pg 3-4).*
 - b. *“The Roundtable strongly recommends that the federal government build a national system of publicly funded, free early childhood education and care. This universal system should be available for all children regardless of their parents’ workforce participation, where they live or their socioeconomic status.” (Pg 5).*
 - c. The comments about paid parental leave on page 6.
 - d. *“If worker-carers are to enjoy a better quality of working life over the life course, a right to care needs to be enshrined in employment regulation and institutional arrangements. A right to care would require a strong scaffolding of paid leaves and non-negotiable working time rights which are accessible by all worker-carers whatever their employment status.” (Pg 8).*
 - e. *“... stark gender differences remain in the patterns and forms of employment with women continuing to dominate part-time and casual work (68% in 2021). This is primarily due to care responsibilities: Of all those in employment, women with preschool children are 21.1 percentage points more likely to work part-time than women without preschool children (Preston 2022:16). And as women over 50 also increase their participation in paid work those with care responsibilities for*

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aging, ill or disabled family or partners also face challenges around job security, financial security and wellbeing with different experiences across household income-level and type (Austen et al 2015, 2018).” (Pg 9).

- f. *“Migration settings: We welcome the Labor government’s commitment to shift migration settings to support permanent rather than temporary migration. However, we draw the Committee’s attention to the need to implement appropriate work/care policy settings for permanent and temporary migrant workers. This includes support for transnational family life and care practices for established migrant Australians, through access to grandparent support and for Pacific Australia Labour Mobility (PALM) scheme workers who (as yet) have no options for family accompaniment...” (Pg 10).*
- g. The comments about gender pay equality on page 12.
- a. *“...While women bore the brunt of the pandemic experience, research consistently finds Australian women are highly engaged by paid employment but also want to have and care for family. Post-pandemic, women want the good jobs, good flexible working options and good care that will allow them to work and care in a sustainable way (Cooper and Hill 2022)...” (Pg 13).*

Please do not hesitate to contact us with any queries: gabriellem@jobwatch.org.au.

Yours sincerely,



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