Circle Green Community Legal

12 May 2023

Consultation on updating Fair Work Act anti-discrimination laws
Department of Employment and Workplace Relations
GPO Box 9828
Canberra ACT 2601

By email only: WRDSubmissions@dewr.gov.au

Dear Department of Employment and Workplace Relations

Consultation on updating Fair Work Act anti-discrimination laws

Circle Green Community Legal (**Circle Green**) welcomes the opportunity to make a submission to the Department of Employment and Workplace Relations (**Department**) consultation on updating the *Fair Work Act 2009* (Cth) (**FW Act**) to provide stronger protections for workers against discrimination (**Consultation**).

About Circle Green

Circle Green is a community legal centre in WA providing state-wide specialist legal services in the areas of workplace, tenancy, humanitarian, and family and domestic violence to the WA community. Within these specialist areas, Circle Green provides services including legal advice, casework, representation, duty lawyer services, outreach, community legal education, information, referrals, advocacy, and law reform. Our services are aimed at assisting people who face vulnerability and disadvantage in gaining access to justice. You can find more information about Circle Green's services on our website: https://www.circlegreen.org.au/.

Workplace law services

Circle Green is the only community legal centre in WA that has a specialist workplace law practice that provides state-wide services to vulnerable and disadvantaged non-unionised WA workers on state and national workplace law. This means Circle Green has expertise in providing legal assistance to marginalised WA workers, including in advising and representing people who have been targeted by discrimination in the workplace.

Submission

Circle Green strongly supports the implementation of stronger protections for workers against adverse action, discrimination, and harassment in the FW Act. Our responses to the questions in the consultation paper are outlined in the table below.

In this submission, we foreground the beneficial purpose of anti-discrimination law to protect the human rights of people with disabilities, and to fulfil Australia's obligations under international human rights and labour law.

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In our responses dealing with disability discrimination, we apply the lens of the social model of disability, which conceptualises disability as a product of the interaction of a medical condition with an inaccessible environment and systemic ableism.

Cost Protection Model	Circle Green comments
Question 1: Should the FW Act expressly prohibit indirect discrimination?	**Yes**. We consider that it is desirable to expressly prohibit indirect discrimination in the FW Act to bring the FW Act's anti-discrimination provisions in line with the four primary Commonwealth anti-discrimination statutes. We consider that this change is desirable even though courts have generally held that "discrimination" includes indirect discrimination. Firstly, inserting an express prohibition into the FW Act will remove the need for an applicant to refer to case law to establish that they are protected from indirect discrimination. Being able to refer to an express prohibition in the FW Act will simplify the FW Act's discrimination protections and make them more accessible for applicants, who may have intersecting vulnerabilities and may be unrepresented in proceedings. Secondly, we consider that an express prohibition is desirable to ensure protection of workers from indirect discrimination in the long term. Although it may be generally settled now, in the past courts have interpreted the meaning of discrimination in the FW Act not to include indirect discrimination. The interpretation of this aspect of the FW Act is vulnerable to change depending on the prevailing judicial approach to its interpretation. This means that the beneficial, broad interpretation of discrimination including indirect discrimination is not guaranteed, unless it is expressly stated.
Question 2: Should the FW Act be aligned with the *Disability Discrimination Act 1992* (Cth) and include a definition of 'disability'?	**Yes**. We consider that the FW Act should align with the *Disability Discrimination Act 1992* (Cth) (**DDA**) to include a definition of "disability". As stated above, we consider that it is desirable to align the discrimination provisions of the FW Act with the primary Commonwealth discrimination statutes, in this case the DDA, as much as possible to achieve consistency and reduce the complexity of discrimination law. As the DDA covers discrimination more comprehensively, we consider that it should be matched by the FW Act. Further, absent a definition in the FW Act, orthodox statutory interpretation principles may lead the courts to give the word "disability" its ordinary meaning. Using the ordinary meaning of disability risks the courts adopting an unduly narrow interpretation of the word, which may in turn frustrate the beneficial purpose of the

	FW Act's discrimination provisions, and potentially hinder Australia's compliance with its obligations under international law. Of all the protected characteristics, disability particularly benefits from a wide interpretation. Disability has a meaning that can gradually evolve as people who have been marginalised by disability discrimination share their lived experience. A broader definition will better capture chronic and temporary illnesses, physical and mental health conditions, intellectual disabilities, and disabling effects arising from social and environmental inaccessibility. An additional benefit is that aligning the definition of disability under the FW Act with the DDA will make case law dealing with claims made under the DDA relevant to claims made under the FW Act. A greater volume of relevant precedent would be beneficial to parties, conciliators, and decision-makers to resolve disability discrimination claims at both the Fair Work Commission and federal courts levels. In adopting the definition of disability under the DDA, we consider that care should be taken not to jettison any breadth afforded the current interpretation of the word in the FW Act.
Question 3: Should the inherent requirements exemption in the Fair Work Act be amended to clarify the requirement to consider reasonable adjustments?	**Yes.** We consider that the inherent requirements exemption in the FW Act should be subject to a requirement to consider reasonable adjustments. This change would achieve consistency with the DDA, which is desirable for the reasons stated above. Further, an express limitation on lawful disability discrimination under the FW Act is necessary to ensure that its protections continue to function as intended. Inserting an obligation to make reasonable accommodations also recognises that disability stems from the interaction of a medical condition and an inaccessible environment. It shares responsibility for eliminating discrimination between the person with a disability and their employer. In our experience, employers generally take substantial liberty in identifying inherent requirements that an employee is unable to meet because of a disability. An express limitation would help curtail this tendency and encourage employers to consider whether a requirement is inherent or whether there is anything they can do to make the workplace more accessible. In circumstances where an employer has failed to accommodate a person with a disability, the limitation on the exemption will help the person obtain an effective remedy.

Question 4: Should attribute extension provisions be included in the Fair Work Act?	**Yes.** Including attribute extension provisions would bring the FW Act in line with primary Commonwealth discrimination legislation. Attribute extension provisions help ensure that anti-discrimination legislation addresses manifestations and imputed or anticipated characteristics related to the protected ground. Without attribute extensions, the anti-discrimination provisions risk failing to achieve their intended purpose. At present, it is left up to the individual decision maker whether to extend the protection of the FW Act discrimination provisions to imputed or anticipated attributes. This puts the effectiveness of the legislation at risk of judicial bias. Instead, the FW Act should make it clear that attributes related to a protected characteristic are covered.
Question 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.** In our experience, non-dismissal adverse action is difficult to address. In such claims, conciliation at the first instance only proceeds with the consent of all parties. If the claim is not conciliated, the applicant must be prepared to take the matter to the federal courts, which can be expensive and daunting as an unrepresented litigant who may have intersecting vulnerabilities. An inability to have a matter resolved at the FWC level may deter applicants from making a claim at all. For these reasons, it is desirable to require parties to conciliate at the FWC level, to avoid claims progressing to the federal courts. Further, being able to conciliate non-dismissal general protections claim may be particularly valuable for applicants making discrimination-based claims. Applicants with protected characteristics may face discrimination in job seeking, meaning that they may benefit more from conciliation at the FWC level. Finally, the lack of a conciliation option at the FWC level for non-dismissal general protections claims may function as a natural deterrent for unmeritorious claims. We consider that this deterrent should not apply to discrimination-based claims. Discrimination is a public interest issue that affects the whole community, rather than a purely private problem, and it is underreported. This means that there is public interest in encouraging people to make discrimination claims, rather than deterring them.
Question 6: If a new complaints process were to be established, should it attract a filing fee consistent with other similar dispute	**No.** We consider that a discrimination application should be free or should be lower cost than similar FWC applications. As stated above, discrimination is not a purely private issue, it is a social issue whose effects impact the community at large. It is therefore appropriate for the public to bear the whole or part of the cost of a person bringing a claim, because they are making a claim

applications to the FWC?	to rectify a private wrong and to address the extent of discrimination in the community. Further, we consider that the public interest in discrimination claims being made means that barriers to making claims should be removed to the greatest possible extent. The traumatising impacts of discrimination and the belief that a complaint will not be taken seriously if it is made are deterrents that may be exacerbated by an expensive filing fee. Therefore, it is appropriate that the filing fee is removed or reduced for discrimination claims.
Question 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.** As stated in other responses, we consider that it is desirable for the anti-discrimination provisions in the FW Act to align with the primary Commonwealth anti-discrimination statutes for the sake of consistency and to ensure that those provisions achieve their intended purpose of protecting workers from discrimination. It would therefore be appropriate for the FW Act to create vicarious liability provisions that go beyond the existing provisions, extending liability to those who are involved in the contraventions. Further, vicarious liability provisions recognise the systemic nature of discrimination, and the social interest in preventing discrimination. They would extend the responsibility for preventing discrimination to the employer, who is in a better position to address the systemic issues that lead to discrimination because of their control over the workplace.
Question 8: Should the application of the 'not unlawful' exemption be clarified?	**Yes.** We consider that the "not unlawful" exemption should be clarified to ensure that it refers to exemptions from protection against discrimination in anti-discrimination legislation, rather than excluding the protected ground entirely in jurisdictions where it is otherwise not unlawful to discriminate because of that ground. This change would promote consistency in the application of the FW Act and not frustrate its intended purpose.
Question 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?	**Yes.** This reform is particularly important for workers in WA, the only state to retain its state system of employment law. In WA, state system employees do not enjoy the full protection offered by the FW Act's general protections framework. Instead, under the FW Act they are protected from unlawful termination, including termination for a discriminatory reason, and under the *Industrial Relations Act 1979* (WA) (**IR Act**) they are protected from "damaging action" because of being able to make an employment-related inquiry or complaint.

	"Damaging action" is defined in the IR Act to mean dismissal, altering the employee's position to their disadvantage, refusing to promote or transfer the employee, injuring the employee in relation to their employment, refusing to employ a prospective employee, discriminating against a prospective employee in their terms and conditions of employment, or threatening to do any of the above. This means that WA workers are not protected from damaging action for a discriminatory reason, and discrimination is not included in the definition of damaging action under the IR Act. Broadening the discrimination provisions under section 351 of the FW Act to cover all employees will have the effect of vastly improving the protection of WA state system employees from discrimination. We consider that the remainder of the general protections framework should be broadened to cover all employees, to the greatest extent possible.
Question 10: Should experiencing family and domestic violence be inserted as a protected attribute in the Fair Work Act?	**Yes.** We consider that family and domestic violence (**FDV**) should be included as a protected attribute under the FW Act. FDV is a gendered violence with 1 out of 6 women experiencing FDV compared to 1 out of 16 men. If the FW Act retains its more limited meaning of discrimination, FDV may not be covered by the discrimination provisions that are related to gender. For this reason, FDV should be explicitly inserted as a protected attribute. Such a change would be consistent with other gendered activities being protected under the FW Act, such as breastfeeding. Further, workers who are culturally and racially marginalised, or who are on visas, may be more vulnerable to FDV and may face difficulty in reporting it. This can be because of cultural or religious beliefs about gender roles and behaviours, particularly within marriage. The impacts of FDV may be worsened by the migration experience generally and the precarity of their visa status. These same workers may be more vulnerable to adverse action in their employment for the same reasons. This means that the workers most vulnerable to FDV are the most likely to face discrimination in their employment because of it. Making experiencing FDV a protected characteristic would provide protection to the workers who most need it.
Question 11: Should the Fair Work Act be	**Yes.** We consider that prohibiting discrimination because of a combination of attributes is desirable to simplify the claim process for

updated to prohibit discrimination on the basis of a combination of attributes? Why or why not?	applicants with intersecting protected characteristics. As stated above, such a change helps remove barriers to making discrimination claims for applicants who may be self-represented and whose intersecting protected characteristics may make it difficult for them to institute and pursue a legal claim.

Thank you for taking the time to consider Circle Green's submission. If we can provide any further information, please contact Matthew Giles, Lawyer – Workplace, on (08) 6148 3681 or at workplace.admin@circlegreen.org.au.

Yours faithfully

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