

Select Committee on Work and Care
PO Box 6100
Parliament House
Canberra ACT 2600

Lodged online only

8 September 2022

Dear Committee Members

Select Committee on Work and Care Inquiry

Circle Green Community Legal (**Circle Green**) welcomes the opportunity to make a submission to the Select Committee on Work and Care (**the Committee**) on the inquiry into work and care (**the Inquiry**).

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 legal assistance services to the WA community. Within these specialist areas, Circle Green provides state-wide legal 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 or disadvantage in their 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 which has a specialist workplace law practice that provides state-wide workplace law services to vulnerable and disadvantaged non-unionised WA workers. Our workplace law services include legal advice, casework, representation, and education on state and federal workplace law. This means Circle Green has expertise in providing legal assistance to vulnerable WA workers, including workers who have care responsibilities in addition to job responsibilities.

Submission

We support the Committee inquiring into and reporting on the challenges faced by those who work and care for others, with the purpose of investigating ways in which jobs and care responsibilities can be combined to create better outcomes.

Circle Green observes that informal carers tend to be women, tend not to be in the workforce, and tend to have intersectional or overlapping vulnerabilities that affect their access to the workforce.

Our comments, for this stage of the Inquiry, are primarily contained to the adequacy of workplace laws in relation to work and care and proposals for reform (Terms of Reference c.). We would also like to briefly note, that for workplace laws, and any related reforms, to operate effectively, support systems must be accessible to users and adequately funded.

Please see the below table and relevant attachment for details.

Workplace law	Circle Green comments
<p>Introduce minimum statutory entitlements to unpaid carer’s leave</p>	<p>Circle Green is strongly supportive of the introduction of a minimum statutory entitlement to unpaid carer’s leave. For details, please see our recent submission to the Productivity Commission on the Carer Leave Inquiry (Attachment A).</p>
<p>Introduce the right to appeal flexible working arrangements decisions</p>	<p>Circle Green recommends amending the <i>Fair Work Act 2009</i> (Cth) (FW Act) to provide employees who are informal carers with an enforceable right to flexible working arrangements which are reasonable in the circumstances. For details, please see our recent submission to the Productivity Commission on the Carer Leave Inquiry (Attachment A).</p>
<p>Amend definition of casual employee</p>	<p>A person is a casual employee within the definition of the FW Act if:</p> <ul style="list-style-type: none"> • an offer of employment is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person; • the person accepts the offer on that basis; and • the person is an employee as a result of that acceptance.¹ <p>This initial test is not impacted by later conduct by the employer or employee, therefore what is agreed at commencement, or engagement, of the employment relationship determines whether the person is a casual employee or not.</p> <p>Employees with caring responsibilities are more likely to be in insecure or casual employment arrangements. Therefore, this limitation in the definition of a casual employee, without having regard to later conduct in an employment relationship, disproportionately affects those with caring responsibilities.</p> <p>Circle Green recommends that the definition of a casual employee be amended to include consideration of conduct by the employer or employee throughout the employment relationship in determining an employee’s casual status.</p>

¹ *Fair Work Act 2009* (Cth) s 15A(1) (*‘FW Act’*).



Workplace law	Circle Green comments
<p>Remove minimum employment period and casual employee eligibility criteria for making unfair dismissal claims.</p>	<p>An employee may make an application for an unfair dismissal remedy under the FW Act if they have completed a minimum employment period of:</p> <ul style="list-style-type: none"> • six months; or • one year where the employer is a small business within the meaning of s 23 of the FW Act.² <p>Periods of service as a casual employee do not count towards the minimum employment period unless both the following conditions are satisfied:</p> <ul style="list-style-type: none"> • the employee was a regular casual employee; and • the employee had a reasonable expectation of ongoing employment on a regular and systematic basis.³ <p>In Circle Green’s experience, these requirements disproportionately impact those with caring responsibilities as they are more likely to be in insecure or casual employment arrangements.</p> <p>Circle Green recommends:</p> <ul style="list-style-type: none"> • the requirement to complete a minimum employment period be removed from the eligibility criteria for unfair dismissal; and • an employee’s length of service or casual status be a relevant consideration in determining whether a dismissal is harsh, unjust, or unreasonable for the purposes of an unfair dismissal claim.
<p>Extend the time limit for making unfair dismissal applications</p>	<p>Time limits for making unfair dismissal applications are extremely short:</p> <ul style="list-style-type: none"> • 21 days under the FW Act;⁴ and • 28 days under the <i>Industrial Relations Act 1979</i> (WA).⁵

² FW Act (n 1) ss 382-383.

³ Ibid s 384.

⁴ Ibid s 394(2).

⁵ *Industrial Relations Act 1979* (WA) s 29(2) (*‘IR Act’*).



Workplace law	Circle Green comments
	<p>Additionally, unfair dismissal applications that are made out of time are only accepted in exceptional circumstances⁶ or when it would be unfair not to do so.⁷</p> <p>It is Circle Green’s experience that many people struggle to make an application within these short time frames. This can be due to several different factors including, but not limited to:</p> <ul style="list-style-type: none"> • financial strain due to lost income; • time taken trying to find an alternative job; and • a lack of knowledge of the legal avenues available and of the short time frame. <p>There is a compounding effect for those who are also maintaining caring responsibilities during such times in addition to the abovementioned factors. As a result, those with caring responsibilities are disproportionately impacted by the current short time limits for making unfair dismissal applications.</p> <p>Circle Green recommends extending the time limit for making unfair dismissal applications to 90 days consistent with comparable jurisdictions in the United Kingdom,⁸ Canada,⁹ and New Zealand.¹⁰</p>
<p>Enforceable right to request further unpaid parental leave</p>	<p>Employees are currently entitled to 12 months of unpaid parental leave subject to certain requirements under the FW Act.¹¹</p> <p>Employees also have a right to request a further period of unpaid parental leave for up to 12 months by making an extension request to the employer.¹² However, this right is unenforceable and without remedy.</p> <p>Section 76(4) of the FW Act provides that an employer may refuse the request for an extension only on reasonable business grounds. However, no remedies or action is available to an employee who has been unreasonably refused a request to extend their period of unpaid parental leave by an employer in breach of s 76(4) of the FW Act.</p>

⁶ FW Act (n 1) s 394(3).

⁷ IR Act (n 5) s 29(3).

⁸ 3 months: *Employment Rights Act 1996* (UK) s 111(2).

⁹ 90 days: *Canada Labour Code*, RSC 1985 c L-2, s 240(2).

¹⁰ 90 days: *Employment Relations Act 2000* (NZ) s 114(1).

¹¹ FW Act (n 1) s 70.

¹² *Ibid* s 76(1).



Workplace law	Circle Green comments
	<p>This directly impacts those with caring responsibilities because parents, especially those with young children that require significant and ongoing care, are unable to take further time off work to care for their child if their employer unreasonably refuses to allow an extension for a further period of unpaid parental leave. This often leaves carers with no other option but to resign their employment, creates barriers to re-entering the workforce and initiates a cycle of insecure work.</p> <p>Circle Green recommends amending the right to request a further period of unpaid parental leave to be an enforceable right with appropriate sanctions on employers who breach s 76(4) of the FW Act.</p>
<p>Employers to be required to pay employees superannuation when they take paid parental leave</p>	<p>The Paid Parental Leave Scheme does not attract the Superannuation Guarantee. This means that it is not compulsory for any employer to pay superannuation while a new parent (generally the mother) is on paid parental leave. The result is a break in superannuation accumulation due to being on paid parental leave to meet caring responsibilities.</p> <p>This, combined with the gender pay gap and the fact that mothers usually return to work part-time after having children, is one of the major factors contributing to the current situation where Australian women tend to retire with significantly less superannuation savings than men.¹³</p> <p>Circle Green recommends the compulsory payment of superannuation for those on parental leave.</p>

Thank you for taking the time to consider Circle Green’s submission. If we can provide any further information, please contact Elisha Butt, Principal Lawyer, or Kendra Hagan, Senior Lawyer, on (08) 6148 3633.

Yours faithfully

Circle Green Community Legal

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¹³ 2016-17 figures show that for those aged 60-64 years, women’s average superannuation account balances are 17.4% lower than those of men: Workplace Gender Equality Agency, ‘Women’s economic security in retirement’ (February 2020).

