Circle Green
Community Legal

6 March 2026

Ms Susan Booth
c/- Department of Employment and Workplace Relations
GPO Box 9828
Canberra ACT 2601

By online lodgement only

Dear Ms Susan Booth

Submission to the Closing Loopholes Review

Thank you for the opportunity to contribute to the review into the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023, Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024,* and *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (the **Closing Loopholes Review**).

About Circle Green

Circle Green Community Legal (**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. Our services are aimed at assisting people from marginalised communities and who face disadvantage in gaining access to justice. You can find more information about Circle Green's services on our website: https://www.circlegreen.org.au/.

Circle Green is the only community legal centre in WA with a specialist workplace law practice that provides state-wide services to marginalised and disadvantaged non-unionised WA workers. Our workplace law services include legal advice, casework, representation, information, referrals and education on state and national workplace law, including the *Fair Work Act 2009* (Cth) (**FW Act**). We are also a volunteer legal advice provider for the Fair Work Commission's (**FWC**) Workplace Advisory Service.

Further, since late 2024, Circle Green's workplace stream provides the legal services of the Working Women's Centre of WA in partnership with Women's Legal Service WA.

Our client base

Circle Green provides legal assistance services to people who are marginalised or disadvantaged in their access to justice. Our clients include those who experience one or more of the following challenges, among others:

- low income or financial hardship;
- homelessness or risk of homelessness;
- physical or mental disabilities;
- being women or gender-diverse;
- being pregnant;
- having dependents and family or other caring responsibilities, or being the sole income earner in their household;
- being under the age of 21 or over the age of 50;
- being from a culturally and linguistically diverse (**CALD**) background;

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- being of Aboriginal or Torres Strait Islander (**ATSI**) descent;
- working or residing in a regional, rural, and remote area;
- being a newly arrived migrant, refugee, or asylum seeker; and
- being subject to family and domestic violence (**FDV**).

Submission

Circle Green is pleased with and commend the Australian Government's introduction of the Closing Loopholes reform to the FW Act, aimed at closing loopholes in workplace protections under the FW Act for a broad category of workers, including gig workers, casual workers, contractors, and labour hire employees. Further, the amendments also provide strengthened protections against wage theft, discrimination, and other unfair, unlawful and exploitative workplace practices.

However, Circle Green is of the view that there are loopholes that are yet to be addressed in order to protect (or further protect) in particular workers from vulnerable and marginalised backgrounds. We address these loopholes, and proposals for closing these loopholes, of each amending legislation in review:

- *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (**Closing Loopholes 1**):
  - Part 8 – strengthening protections against discrimination;
  - Part 14 – wage theft;

- *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024* (**Closing Loopholes 2**):
  - Part 15 – definition of employment; and

- *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (**Paid FDV leave**):
  - Entitlement to paid FDV leave.

Closing Loopholes 1 – Part 8 – Strengthening protections against discrimination

Circle Green strongly supports the strengthening of the FW Act's anti-discrimination framework to protect employees who have been, or are being, subjected to FDV from discrimination in the workplace. The inclusion of subjection to FDV as a protected characteristic under the FW Act[1] is a significant step forward in recognising the prevalence, and devastating impacts of FDV.

<u>WA workers excluded</u>

For some workers, including all WA workers, the loophole in protection against discrimination based on subjection to FDV still exists.

Neither the state *Equal Opportunity Act 1984* (WA) nor the federal *Sex Discrimination Act 1984* (Cth) makes discrimination based on subjection to FDV unlawful.

[1] *Fair Work Act 2009* (Cth), s 351 (general protections – discrimination); and s 772(f) (unlawful termination grounds).

Workers in most other states and territories in Australia are protected due to their respective state / territory anti-discrimination legislation including subjection to FDV as a protected characteristic or attribute. Only WA, Tasmania, and Victoria remain unprotected.

Where neither the state anti-discrimination legislation nor the federal anti-discrimination legislation protects against discrimination based on subjection to FDV, section 351 of the FW Act does not apply by virtue of section 351(2)(a), which relevantly states that section 351 does not apply to an action that is "not unlawful under any anti-discrimination law in force in the place where the action is taken". This excludes workers in states without state protections against FDV discrimination (in the absence of federal legislation that protects against this), from the protection of section 351.

For ease, we refer to WA workers specifically from this point onwards, as our services are limited to WA workers.

As a result of section 351(2)(a), a WA worker cannot make a general protections claim under section 351 of the FW Act on the basis of subjection to FDV.

If a worker's employment is terminated, a WA worker can make an unlawful termination claim on the basis of subjection to FDV by virtue of sections 723 and 772(1)(f) of the FW Act.

However, this is complicated where a worker's employment is terminated, and the worker believes their dismissal was for a number of reasons which straddle both the general protections and unlawful termination provisions of the FW Act. For example, a WA worker may believe that their employment was terminated:

(a) in breach of their general protections under section 340 of the FW Act (e.g. because they exercised a workplace right like taking FDV leave, personal leave or making a complaint or inquiry); *and also*

(b) in breach of the unlawful termination provisions in s 772(1)(f) of the FW Act (e.g. because they were subjected to FDV).

Under sections 723, and 725 to 731 of the FW Act, a person cannot make an unlawful termination application in relation to conduct if the person is entitled to make a general protections court application in relation to the conduct.

In these circumstances, the worker would be forced to choose between making either a general protections (which protects workplace rights but not subjection to FDV itself) or unlawful termination (which protects on subjection to FDV but not the workplace rights) claim. Neither claim would encompass all the unlawful reasons for the dismissal, so the worker must effectively abandon some protected characteristics in favour of others.[2]. This is inconsistent with the objective of the reforms.

Further, where the discrimination does not involve a dismissal (for example: demotion, disciplinary action, reduction in hours for a casual worker), there are no straightforward claim options for a WA worker who is discriminated against because of subjection to FDV.

[2] Whilst more complex legal arguments could be made around both / all the protected characteristics being encompassed under the relevant "conduct", it is difficult for a self-represented litigant to argue this themselves, even before the FWC. For example, see the decisions of *Dr Daniel Krcho v University of New South Wales* [2021] FWCFB 3908; and *Lattouf v Australian Broadcasting Corporation* [2024] FWC 1441.

Case study 1 – Courtney

Courtney is the sole income earner for her children and had been targeted by FDV by her ex-partner. Courtney worked for a large mining company who initially supported Courtney to manage her FDV situation whilst working, such as by offering her flexible working options to work from home, or to "make up" hours she had to attend FDV-related appointments during work.

This changed when Courtney called the employer in a moment of extreme distress and asked for FDV leave, the employer dismissed her in the same phone call without any warning.

Courtney's decision about choice of legal claim was complicated by the fact that she had to choose between two claims (one which would rely on her right to take, and inquire about, FDV and other leave as a basis of her complaint; and one which would rely on discrimination on the ground of subjection to FDV), and could not make a single claim that covered all of the grounds relevant to her claim, which would have made her claim stronger.

Courtney told us she was confused that even though taking FDV leave is strongly linked to being subjected to FDV, she could not simply make a single claim that could address both grounds as a basis for a dismissal-based claim.

Case study 2 – Amanda

Amanda was targeted by FDV by her ex-partner and is the sole income earner for her children. After an FDV incident, Amanda obtained a violence restraining order against her ex-partner and had to attend FDV-related court events, for which she took FDV leave.

Shortly after returning to work after a week of FDV leave, Amanda's employer called her into a meeting with minimal notice and dismissed her. Amanda was told she was dismissed because of her personal circumstances, implying that it was because of her subjection to FDV and family and carer responsibilities of her children.

Amanda's decision about choice of legal claim was complicated by the fact that she had to choose between two claims: one which would rely on FDV leave and family and carers responsibilities as a basis of her complaint; and one which would rely on discrimination on the ground of subjection to FDV. Amanda could not make a single claim that covered all the grounds relevant to her claim, which would have made her claim stronger.

Although Amanda was grateful for the assistance she received from Circle Green, she expressed confusion and disappointment that there

were limited protections for FDV under the current laws, and she could not simply make a single claim that covers all the grounds relevant to her claim.

Case study 3 – Eliza

Eliza was targeted by FDV by her ex-partner. In violent outbursts, Eliza's partner would at times damage her work property. Eliza's employer was aware of her situation, but provided her little support and made Eliza pay for the damaged items.

Eliza's employer did not inform her about FDV leave, meaning she had to use personal and annual leave. During a period of personal leave, Eliza's employer called her to dismiss her immediately, and later claimed it was due to the damage to work property.

Eliza's ability to make a discrimination claim was limited due to subjection to FDV not being a protected characteristic under both state and federal anti-discrimination legislation. Further, by the time Eliza sought legal advice, she was already out of time to lodge a dismissal-based claim, meaning the lack of anti-discrimination protections left her with very limited claim options.

These case studies demonstrate the difficult decision that WA workers face, where they have been dismissed due to their subjection to FDV.

Circle Green considers this a loophole that needs to be closed urgently, to ensure the FW Act's compliance with its objectives, specifically in relation to 'providing workplace relations laws that are fair to Australians, promote job security and gender equality'….[3] This is particularly important given the known prevalence of FDV in Australia and the disproportionate overrepresentation of women in statistics around experiences of FDV.[4] Women also often face unique challenges in all areas of public life, including in the workplace, due to pregnancy and breastfeeding, which are generally unique to being female. Intersecting marginalising factors, such as being of ATSI descent, having a disability, living in rural and remote Australia, and LGBTQI+ communities, compounds any impact and disadvantage experienced because of experiences of FDV.[5]

More generally in relation to discrimination protections under the FW Act, WA state system employees[6] do not enjoy the full protection offered by the FW Act's general protections framework.

[3] FW Act, s 3(a).
[4] 1 in 4 women (and 1 in 14 men) in Australia have experienced intimate partner violence since the age of 15: Rapid Review Expert Panel, Unlocking the Prevention Potential (August 2024); and in WA in particular, in 2018-2019, WA's FDV Response Teams triaged 47,623 family violence incident reports, and 11,975 family violence restraining orders were lodged in WA Magistrate Courts, equalling 75% of the total restraining orders filed: Path to Safety – Western Australia's strategy to reduce family and domestic violence 2020-2030.
[5] Rapid Review Expert Panel, Unlocking the Prevention Potential (August 2024), page 26.
[6] WA is the only state in Australia which has not referred its law-making powers with respect to workplace relations, and therefore WA employees employed by sole traders, partnership of natural persons, or other non-

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" (including action that does not involve a dismissal) because of being able to make an employment-related inquiry or complaint. However, the protections under the IR Act does not cover "damaging action" taken because of a discriminatory reason, as discrimination is not included in the definition of "damaging action" under the IR Act.[7]

In circumstances where:

(a) WA state system employees can access the unlawful termination protections in the FW Act[8];

(b) there are two separate legal claims that are similar but distinct in crucial ways which creates significant uncertainty and confusion for WA state-system employees who have been dismissed in circumstances that are discriminatory; and

(c) there is an inherent lack of discrimination protections against non-dismissal adverse action by employers in industrial relations legislation for WA state-system employees (noting that a "damaging action" claim can cover non-dismissal adverse action, but does not include discrimination);

serious consideration should be given to legislative reform that reduces any uncertainty and improve protections for WA state system employees in relation to discriminatory action by employers, and to ensure that there is no disparity between WA employees simply based on the nature of their employer.

Circle Green recommends that:

1. Unlawful termination on the grounds of discrimination (section 772(1)(f)) be abolished, and instead the discrimination provisions under section 351 of the FW Act be extended to cover all employees, including non-national system employees; and
2. Extend the discrimination provisions under section 351 of the FW Act to apply to all workers by removing the requirement that the protected characteristics under section 351 be unlawful under state and / or federal anti-discrimination legislation in section 351(2)(a).

These amendments, if implemented, would have the effect of vastly improving the protection of WA state system employees from discrimination, and truly close the loophole for all workers subjected to FDV.

<u>Extending anti-discrimination protections to labour hire workers</u>

Other groups of workers that are not protected under section 351 of the FW Act include labour hire workers, contractors, and employee-like workers. In contrast, section 340 of the FW Act, which protects workers from adverse action taken because they exercised or proposed to exercise a workplace right, applies to a broader group of workers, contained under the definition of adverse

constitutional corporations (referred to in this submission as "state system employees") are covered by the WA industrial relations framework instead of the FW Act (with a few exceptions).

[7] *Industrial Relations Act 1979* (WA), ss 97-97A.

[8] Namely, the grounds under which a termination is unlawful under s 772 are matters that the Commonwealth has constitutional power to legislate on, and which can apply to non-national system employees.

action in section 341. This section sets out circumstances in which a "person" takes adverse action against "another person", including adverse action taken by a host business against a labour hire employee (section 341(a), Items 3 and 4).

However, section 351 states that "*an employer* must not take adverse action against a person *who is an employee, or prospective employee, of the employer*", therefore limiting the scope of this section to employee-employer relationships, and the broader application in section 341 does not extend to section 351.

Circle Green recommends that the wording in section 351 of the FW Act be amended, modelled on section 340, to ensure that a broader group of workers, including labour hire workers, contractors, and employee-like workers, are also afforded the protections under section 351.

Requirement to conciliate in discrimination matters under the FW Act

In closing loopholes for workers targeted by unlawful discrimination at work, Circle Green considers that general protections claims not involving a dismissal, particularly for matters involving discrimination, should be made more accessible to workers. In our experience, non-dismissal adverse action is difficult to address, as conciliation conferences at the first instance generally only proceeds with the consent of all parties.[9] It is rare that an employer will agree to conciliate the matter. If an employee does not agree to conciliate the matter, the applicant is left with no other choice but to stop pursuing the matter entirely, or be prepared to lodge an application to the Federal Court of Australia or the Federal Circuit and Family Court of Australia if they wish to pursue the matter further.

Particularly for our client cohort, pursuing a claim in the federal courts is daunting, and often too technical to navigate. The inability to have a matter resolved at the FWC level may deter applicants from making a claim at all, which we often see in our experience. In the alternative, whilst workers could pursue a discrimination complaint, for example in the federal anti-discrimination framework, the backlog of complaints to the Australian Human Rights Commission means that there are limited timely and informal dispute resolution pathways for workplace discrimination matters not involving dismissal.[10]

To promote the early resolution of claims and provide timely, informal dispute resolution pathways for, in particular, workplace discrimination matters, we consider that the FW Act should be amended to require parties to conciliate discrimination matters under section 351 of the FWC (regardless of whether the adverse action is a dismissal or not). This is particularly important for discrimination matters, as:

- applicants with protected characteristics are more likely to experience difficulties with navigating a claim in the federal courts;
- applicants with protected characteristics may face other setbacks, including a risk of discrimination in job-seeking, making access to timely, cost-efficient and informal dispute resolution particularly important for these cohorts; and

[9] FW Act, s 374.
[10] Per the latest update Circle Green has received from the Australia Human Rights Commission, there is currently a wait time of more than 12 months for a complaint to be allocated to a case officer.

- there is a public interest in encouraging people to make discrimination claims, given discrimination is a public interest issue that affects the whole community, and particularly where unlawful discrimination is, unfortunately, prevalent in Australian workplaces.[11]

Closing Loopholes 1 – Part 14 – Wage theft

Circle Green is supportive of criminalising intentional underpayment. However, we query whether the introduction of criminal offences and higher penalties for wage theft will effectively minimise the risk of exploitation of migrant workers. It is well documented that migrant workers are subjected to systemic and severe exploitation, and that these workers face significant barriers to recovering unpaid wages and other entitlements.

Whilst criminalising wage theft and introducing stronger penalties acts as a deterrent for employers, we are yet to see the full extent of how this will (or not) result in higher recovery rates for migrant workers of their unpaid wages and entitlements, and if migrant workers are not willing or able to pursue underpayment claims against their employers, the effectiveness of this amendment will remain in question.

Circle Green considers that the wage theft amendments should be supplemented with further reform to not only protect migrant workers from exploitation, but also to aid in the recovery of unpaid wages and entitlements by these workers. For example, we refer in this respect to the Migrant Justice Institute Report: *All Work, No Pay*.[12] Circle Green endorses this report in full, and for the purposes of this submission, refer to Recommendation 1 of the report, which recommends as follows:

> ***Recommendation 1: The Government should amend the FW Act to require employers to provide Statement of Working Conditions to workers on commencement***
>
> *The Government should amend the FW Act to require employers to provide each employee with a Statement of Working Conditions at the commencement of their employment, to enable workers to identify their legal entitlements. The Statement should set out the job title, relevant workplace instrument, classification, type of employment, duties and location of work, wage rates, ordinary hours, and applicable overtime and penalty rates. It should also include the employer's legal name, ABN[13] and contact details, including address for service.*
>
> *Like the FW Act provisions relating to the failure to provide pay slips, failure to provide the Statement should lead to a reverse onus of proof in wages and entitlements claims brought by an employee against the employer, and should be a civil remedy provision subject to an infringement notice by the FWO.*
>
> (footnote and emphasis added).

[11] For example: Circle Green Community Legal Annual Report 2024-25, showing we have seen an increase in clients experiencing pregnancy discrimination at work in WA; JobWatch data from Victoria, Queensland, and Tasmania showing that total discrimination calls have more than doubled in a three-year period, including significant and consistent rises in queries about pregnancy, breastfeeding, parental care, and family responsibilities discrimination at work.

[12] Migrant Justice Institute, *All Work, No Pay – Improving the legal system so migrants can get the wages they are owed* (June 2024).

[13] Here, we recommend that the employer's legal and name should include the full legal name/s of the employing entity, including the identity / name, and ABN or ACN of any trustees.

Closing Loopholes 2 – Part 15 – Definition of employment

Circle Green welcomes the inclusion of an "ordinary meaning" definition of employment (section 15AA), as it provides a level of clarity to both employers and employees alike as to the nature of their working relationship. However, for further clarity, Circle Green recommends that a non-exhaustive list of specific factors taken from case law in relation to the multi-factorial test be imported into the FW Act. Currently section 15AA(2) states as follows:

> *(2) For the purposes of ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person:*
>
> > *(a) the totality of the relationship between the individual and the person must be considered; and*
> >
> > *(b) in considering the totality of the relationship between the individual and the person, regard must be had not only to the terms of the contract governing the relationship, but also to other factors relating to the totality of the relationship including, but not limited to, how the contract is performed in practice.* (emphasis added).

We consider that both employers and employees would benefit from a non-exhaustive list of further "other factors" related to the totality of the relationship.[14] For example, the list may include factors such as, but not limited to[15]:

- whether the putative employer exercises, or has the right to exercise, control over the manner in which work is performed, place of work, hours of work and the like;
- whether the worker performs work for others, or has an entitlement to do so;
- whether the worker has a separate place of work and / or advertises his or her services to the world at large;
- whether the worker provides and maintains tools or equipment;
- whether the work can be delegated or subcontracted;
- how the worker is remunerated, such as whether by periodic wages or salary, or by reference to completion of tasks and whether they worker is paid personally or via another entity (e.g. an ABN);
- whether the putative employer has the right to suspend or dismiss the person engaged;
- whether the employer presents the worker to the world at large as a part of the putative employer's business (e.g. uniform with putative employer's logo);
- whether income tax is deducted from the remuneration paid to the worker;
- whether the worker is provided with annual or personal leave.

[14] Section 15A(2)(c) of the FW Act sets out a non-exhaustive list of factors on which 'continuing and indefinite work' for the purposes of the definition of casual employment, is to be assessed. This could be used as a model for a similar list for the purposes of section 15AA.

[15] Taken from caselaw, including: *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu* (2001) 207 CLR 21; and *Jian Shen Cai trading as French Accent v Do Rozario* [2011] FWAFB 8307. The indicia listed in these cases have been applied in FWC decisions more recently in its interpretation of section 15AA of the FW Act: *Murray v 239 Brunswick Pty Ltd and Raffoul* [2025] FWC 978; *Dickerson v Kagura Games Llc* [2025] FWC 2219; *Little v Equal Therapy Pty Ltd* [2026] FWC 603.

Paid FDV leave

Circle Green is pleased with the inclusion of 10 days of paid FDV leave in the FW Act for all employees. However, we consider that the following amendments would better recognise the full extent of the devastating impacts of FDV on WA workers:

1. The entitlement be increased to 20 days of paid FDV leave, as further support is needed, particularly for vulnerable and disadvantaged workers, who may face multiple legal issues and additional barriers when experiencing, and dealing with the impacts of, FDV.

2. Section 106B of the FW Act be amended to expand the circumstances in which an employee may take paid FDV leave, to expressly cover situations where the emotional and physical impacts of FDV render the employee not fit for work. Currently, section 106B does not include these circumstances, and employees would then be required to take personal leave instead. To recognise and address the full extent of the devastating impact of FDV that affects WA workers, it is critical that employees are able to use this additional form of leave to deal with all aspects of the impact of the FDV.

As noted above in this submission, it is a fact that FDV is unfortunately very prevalent in Australia, and women are overrepresented in statistics around experiences of FDV. It is crucial that women and other marginalised workers are adequately supported, to prevent costing the Australian economy and workforce the productivity, skill and diversity that these workers could contribute, should adequate protections be in place to enable them to enter, return to, and remain in, the workforce.

Case study 4 – Barbara

Barbara was a permanent full-time employee who was experiencing ongoing issues with requesting flexible working arrangements and FDV leave from her employer.

When Barbara requested FDV leave, her employer made it difficult for Barbara to do so, such as by requiring specific details of her medical appointments to justify her taking FDV leave. Barbara also wished to take FDV leave when dealing with the emotional impacts of the FDV. For example, Barbara did not feel that she could return to work after a psychologist appointment where she dealt with the impacts of the FDV, as she would feel exhausted and drained.

However, as the current legislation does not specifically provide for the use of FDV leave to deal with the emotional and physical impacts of FDV that render an individual unfit to work, Barbara used her annual leave for this purpose.

<u>Further review of paid FDV leave reform</u>

As recommended in the Final Report of the Review of the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth) (**FDV Review Report**), tabled in Parliament in 2024, Circle Green considers that ongoing evaluation and consultation on the effectiveness of this reform is

necessary,[16] including a further review into the operation of the amending legislation in 2 to 3 years' time.

The FDV Final Report acknowledged that many of the employee-focused stakeholders consulted, namely unions and equivalent associations, had been operating with FDV leave entitlements for some time. Given that the amendments were targeted primarily at workers who had not previously had access to FDV leave, our view is that any further review must seek submissions from a broader range of stakeholders to effectively review the impact and effectiveness of the reform. We request that any further review takes into account the substantial expertise, experiences, statistics, and case studies of community legal centres, who assist the most vulnerable and marginalised members of our community.

Thank you for considering our submission. We would be pleased to discuss any of its contents further. Please contact Fiona Yokohata, Lawyer – Workplace, at fiona.yokohata@circlegreen.org.au if you wish to do so.

Yours faithfully

F. Yokohata

Fiona Yokohata
Lawyer - Workplace
Circle Green Community Legal

[16] Flinders University, *Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009* Report to the Australian Government Department of Employment and Workplace Relations (August 2024).