

14 September 2022



Law Council

OF AUSTRALIA

Office of the President

Senator Barbara Pocock  
Chair  
Senate Select Committee on Work and Care  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

By email: [workandcare.sen@aph.gov.au](mailto:workandcare.sen@aph.gov.au)

Dear Senator

### **INQUIRY OF THE SELECT COMMITTEE ON WORK AND CARE**

1. The Law Council of Australia (**Law Council**) is pleased to provide this submission to the Senate Select Committee on Work and Care (**Committee**) in response to its Inquiry into matters relating to work and care in Australia (**Inquiry**).
2. The Law Council acknowledges the contributions of its Equal Opportunity Committee, the Industrial Law Committee of its Federal Litigation and Dispute Resolution Section, and the New South Wales Bar Association to this submission.
3. This submission focuses on item (c) of the Committee's Terms of Reference: the adequacy of workplace laws in relation to work and care and proposals for reform.

### **Adequacy of workplace laws in relation to work and care**

#### *Current entitlements and protections provided to carers by the Fair Work Act*

4. Section 96 of the *Fair Work Act 2009* (Cth) (**FW Act**) provides permanent employees with 10 days of paid personal/carer's leave per year. The leave is applied pro-rata for part time employees and is cumulative.
5. When used to provide care or support, the entitlement to take paid carer's leave is limited to care or support required by a member of the employee's immediate family,<sup>1</sup> or a member of the employee's household, because of a personal illness, personal injury or unexpected emergency affecting the member.
6. Section 102 of the FW Act provides casual and permanent employees with two days of unpaid carer's leave per year.
7. Section 104 of the FW Act provides permanent employees with two days of paid leave per year for compassionate leave. The grounds for compassionate leave include

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<sup>1</sup> Immediate family is defined to include: (a) a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or (b) a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee: *Fair Work Act 2009* (Cth) s 12 (definition of 'immediate family').

when a member of the employee's immediate family or a member of the employee's household contracts or develops a personal illness or injury that poses a serious threat to their life or sustains a personal injury that poses a serious threat to their life.

8. Section 65 of the FW Act provides an entitlement for some employees to request flexible working arrangements if they have caring responsibilities within the meaning of the *Carer Recognition Act 2010* (Cth) (**CR Act**). Eligible employees are:
  - permanent employees who have completed at least 12 months of continuous service; and
  - regular casual employees who have been employed for a period of at least 12 months and have a reasonable expectation of continuing employment.

The Law Council notes that employers can refuse requests for flexible working arrangements on reasonable business grounds.<sup>2</sup>

9. Protection against adverse action and termination by an employer because of an employee's caring responsibilities is provided at section 351 and paragraph 772(1)(f) of the FW Act.
10. Section 106A of the FW Act provides casual, fixed term and permanent employees with five days of unpaid family and domestic violence leave per year. The Law Council also notes the Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Cth) will, if passed by the Parliament, replace these existing entitlements by amending the FW Act to provide for 10 days of paid family and domestic violence leave.

## Proposals for reform

### Statutory entitlement to additional unpaid leave for carers of older Australians

11. The Law Council submits that the current provisions in the FW Act provide inadequate entitlements to certain employees to care for older family members or members of the household, and agrees with the finding of the Final Report of the Royal Commission into Aged Care Quality and Safety (**Royal Commission**) that greater flexibility in work arrangements can have the potential to relieve some of the impacts that informal carers experience.<sup>3</sup>
12. The Law Council accordingly supports Recommendation 43 of the Royal Commission that the Australian Government should examine the potential impact of amending the National Employment Standards (**NES**) under Part 2-2 of the FW Act to provide for an additional entitlement to unpaid carer's leave.<sup>4</sup>
13. The Law Council notes that, on 23 February 2022, the then Treasurer, Hon Josh Frydenberg MP, requested that the Productivity Commission conduct an inquiry into carer leave, with particular focus on the potential impact of amending the NES in accordance with the Royal Commission's recommendation. The Productivity Commission's inquiry is ongoing at the time of writing.<sup>5</sup>

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<sup>2</sup> *Fair Work Act 2001* (Cth) s 65(5).

<sup>3</sup> Royal Commission into Aged Care Quality and Safety, Care, Dignity and Respect – Volume 3A: The New System (Final Report, 1 March 2021) 211.

<sup>4</sup> *Ibid*, 212.

<sup>5</sup> Productivity Commission, Carer Leave: Terms of reference (Web page, 23 February 2022) <<https://www.pc.gov.au/inquiries/current/carer-leave/terms-of-reference>>.

14. The Law Council considers that providing additional unpaid leave entitlements for carers has the potential to:
- increase the quantity of informal care provided to older Australians;
  - increase the quality of the care provided to older Australians in some cases; and
  - improve support for informal carers by providing them with certainty and greater protections.
15. Noting the above potential benefits, the Law Council submits that consideration should be given to amending Part 2-2 Division 7 of the FW Act so that:
- (a) there is an entitlement available for unpaid carer's leave for all employees who have completed at least 12 months of continuous service with the employer;
  - (b) the entitlement is to care for and support a member of the employee's immediate family or a member of the employee's household;
  - (c) the reason for the unpaid leave is expanded to include either:
    - (i) aged-based care or support; or
    - (ii) care, support or assistance to another individual who needs it because of disability, mental illness, chronic condition, terminal illness, alcohol or other drug issue, or those who are frail and aged;
  - (d) there is provision for unpaid carer's leave to be taken for up to a 12-month period;
  - (e) a single period of unpaid carer's leave period can be taken within a 12-month period, unless there is agreement between the employee and the employer for more flexible arrangements;
  - (f) there is an opportunity to request a further 12-month period of unpaid carers leave (totalling 24 months), with any refusal to be based on reasonable business grounds;
  - (g) equivalent provisions to current sections 79A (keeping in touch days), 83 (consultation with employee) and 84 (return to work guarantee) of the FW Act are incorporated;
  - (h) the notice and evidence requirements for employees prior to taking unpaid carer's leave are similar to those provided in section 107 of the FW Act; and
  - (i) there is a lead-in period of 12 months.

*Assessing the impact of the proposed reform*

16. While providing additional unpaid leave entitlements to employees may present a cost to employers in terms of recruitment, training and output, the Law Council notes that this may also contribute to a greater percentage of people participating, and remaining, in the labour market and may also improve productivity in some cases. Employees may also be more likely to choose to remain in their existing employment and experience increased job security.

17. Any increase in informal, home-based care arrangements is also likely to take some pressure off the residential aged care system.
18. The Law Council notes that, in 2018, more than 70 per cent of primary carers of older people in Australia were women.<sup>6</sup> As such, women are likely to be the primary beneficiaries of any new carers' leave entitlement.
19. However, there is a possibility that such reforms may give rise to an increase in claims of discrimination where employers make decisions based on the grounds of gender and/or carer responsibilities. Some consideration of how to avoid and address such potential issues may be required. The views of the Australian Human Rights Commission, Fair Work Commission and/or Fair Work Ombudsman, should be sought in this regard, given their respective roles and functions with respect to unlawful discrimination at the federal level.

#### Consistency of definitions of carer and caring responsibility

20. The Law Council considers that it would be beneficial to unify the definition of 'carer' across legislation and across jurisdictions. Currently different Commonwealth, state and territory legislation, including that which provides for carer's leave and that which provides recourse for unlawful discrimination for carers, characterises 'carers' differently, which may be problematic. Consideration could be given to achieving a more standard definition over time, while still giving effect to the respective objects of these laws, and in some cases the constitutional limitations which apply.

#### *Fair Work Act 2001 (Cth)*

21. Eligibility for paid carer's leave at paragraph 97(b) of the FW Act applies to a member of the employee's immediate family or employee's household and applies to a personal illness, injury or an unexpected emergency affecting the member.
22. Under section 12 of the FW Act, 'immediate family' is defined as:
  - a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or
  - a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee.

#### *Carer Recognition Act 2010 (Cth)*

23. Subsection 5(1) of the CR Act defines a 'carer' as an individual who provides personal care, support and assistance to another individual who needs it because they have a disability, medical condition (including a terminal or chronic illness), mental illness, chronic condition, or is frail and aged.
24. Subsection 5(2) states that an individual is not a carer in respect of care, support and assistance provided under a contract of service, in the course of doing voluntary work for a charitable, welfare or community organisation or as part of the requirements of a course of education or training.

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<sup>6</sup> Australian Bureau of Statistics, Disability, Ageing and Carers, Australia: Summary of Findings (24 October 2019) <<https://www.abs.gov.au/statistics/health/disability/disability-ageing-and-carers-australia-summary-findings/latest-release>>.

25. Subsection 5(3) clarifies that an individual is not a carer ‘merely because’ they:
- are the spouse, de facto partner, parent, child or other relative of an individual, or are the guardian of an individual; or
  - lives with an individual who requires care.

*Sex Discrimination Act 1984 (Cth) (SDA)*

26. Under section 4A of the SDA, ‘family responsibilities’ is defined as responsibilities of the person to care for or support:
- a dependent child of the person; or
  - any other immediate family member who is in need of care and support.
27. Subsection 4A(2) provides that ‘immediate family member’ includes a spouse of the person and an adult child, parent, grandparent, grandchild or sibling of the person or their spouse (noting that spouse includes a de facto partner, former spouse and a former de facto partner).

*Disability Discrimination Act 1992 (Cth)*

28. Subsection 7(1) of the *Disability Discrimination Act 1992 (Cth) (DDA)* states that the ‘Act applies in relation to a person who has an associate with a disability in the same way as it applies in relation to a person with the disability’ and provides the following example:

*It is unlawful, under section 15, for an employer to discriminate against an employee on the ground of a disability of any of the employee’s associates.*

29. Associate is then defined in section 4 of the DDA to include associate, in relation to a person, includes:
- a spouse of the person;
  - another person who is living with the person on a genuine domestic basis;
  - a relative of the person;
  - a carer of the person; and
  - another person who is in a business, sporting or recreational relationship with the person.

*State and territory anti-discrimination legislation*

30. State and territory anti-discrimination legislation is also inconsistent with respect to definitions relevant to carer’s leave and whether a person is deemed a ‘carer’.
31. For example, in Victoria, the *Equal Opportunity Act 2010 (Vic)* defines ‘carer’ as:

*a person on whom another person is wholly or substantially dependent for ongoing care and attention, other than a person who provides that care and attention wholly or substantially on a commercial basis.<sup>7</sup>*

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<sup>7</sup> *Equal Opportunity Act 2010 (Vic)* s 4(1).

32. In New South Wales, 'carer' is not defined in the *Anti-Discrimination Act 1977* (NSW), but 'responsibilities as a carer' under section 49S are defined to include responsibilities to care for or support:
- any child or step-child of the person who is substantially dependent or in need of care or support, whether or not under the age of 18;
  - any child or adult who is in need of care or support and of whom the person is a guardian, or has legal parental responsibility for, or is an authorised carer of under the *Children and Young Persons (Care and Protection) Act 1998* (NSW); or
  - any immediate family member of the person, or their spouse, who is in need of care or support, being a grandchild or step-grandchild, a parent or step-parent, a grandparent or step-grandparent or a sibling or step-sibling.
33. In Western Australia, the *Equal Opportunity Act 1984* (WA) does not define 'carer' nor 'responsibilities as a carer', but instead defines 'family responsibility or family status' as:
- having responsibility for the care of another person, whether or not that person is a dependent, other than in the course of paid employment; or
  - the status of being a particular relative; or
  - the status of being a relative of a particular person.<sup>8</sup>

#### Contact

34. Please contact Mr John Farrell, Senior Policy Lawyer, on (02) 6246 3714 or at [john.farrell@lawcouncil.asn.au](mailto:john.farrell@lawcouncil.asn.au) in the first instance if you require further information or clarification.

Yours sincerely



**Mr Tass Liveris**  
**President**

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<sup>8</sup> *Equal Opportunity Act 1984* (WA) s 4(1).