

# **SUBMISSION**

To

The Workplace Relations Policy Group  
Department of Education, Employment and Workplace  
Relations

## **NATIONAL EMPLOYMENT STANDARDS EXPOSURE DRAFT**

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**SUBMISSIONS TO DEPARTMENT OF EDUCATION, EMPLOYMENT AND  
WORKPLACE RELATIONS  
ON THE NATIONAL EMPLOYMENT STANDARDS EXPOSURE DRAFT  
4<sup>th</sup> APRIL 2008**

**INTRODUCTION**

1. These submissions are made by the Women Lawyers' Association of New South Wales Incorporated (WLANSW) in response to the request by DEEWR for submissions on the National Employment Standards (NES) Exposure Draft and Discussion Paper, released in February 2008.
2. These submissions do not necessarily reflect the views of all WLANSW members.
3. WLANSW is the peak body representing women lawyers in New South Wales for the advancement of women in the legal profession. It has approximately 500 members (male and female) throughout New South Wales. Members are employed in private practice, corporations, government agencies and in community law centres. A number of members work under a formal flexible working arrangement (FWA). There is also a small but growing number of members who want to return to their legal careers after an extended absence to meet caring responsibilities
4. Two of the NES have significant implications for WLANSW members, namely,
  - Requests for flexible working arrangements (Section 10 of the Draft Provisions); and
  - A right to request the extension of unpaid parental leave for up to a further twelve months (Section 16).

**REQUEST FOR FLEXIBLE WORKING ARRANGEMENTS**

5. In preparing these submissions, WLANSW has reviewed Section 10 (the "RFA Standard") and considered the following:
  - The AIRC's *Family Provisions Test Case*<sup>1</sup>;
  - Provisions in the Equal Opportunity Amendment (Family Responsibilities) Act 2008 (Vic) which amended Victoria's Equal Opportunity Act 1995 (Vic). They are referred to in these submissions as the "Victorian Family Responsibilities Model";
  - Part VIIIA of the United Kingdom's Employment Rights Act 1996 together with the Flexible Working (Procedural Requirements)

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<sup>1</sup> (2005) 143 IR 245.

Regulations 2002 and the Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002;

- New Zealand's recently enacted Employment Relations (Flexible Working Arrangements) Amendment Act 2007 which will come into force in July 2008;
- *Bendable or Expendable? Practices and attitudes towards work flexibility in Victoria's biggest legal employers.*  
Law Institute of Victoria and Victorian Women Lawyers, 2006
- *Women Lawyers and Obstacles to Leadership – A report of the MIT Workplace Center surveys on comparative career decisions and attrition rates of women and men in Massachusetts law firms*  
MIT Workplace Center, 2007

## Summary

6. In summary, WLANSW submits the following:

- 1) It supports the introduction of a legislated right to request flexible working arrangements and believes the legal profession will benefit from it.
- 2) All lawyers employed in New South Wales should have access to the RFWA Standard.
- 3) The RFWA Standard should be extended to cover those who care for dependents, not only young children.
- 4) WLANSW agrees that the RFWA Standard should not be limited to part-time work. Employees should be able to request any form of working arrangement.
- 5) The RFWA Standard should prescribe an exhaustive list of grounds upon which an employer can refuse a request. Grounds (referred to in these submissions as "Refusal Grounds") should comprise:
  - The employee's circumstances and responsibilities;
  - The nature of the role and arrangements required to accommodate those responsibilities;
  - The employer's financial circumstances and size and nature of the workplace;
  - The effect on the workplace of the accommodation in terms of finances, benefit/disadvantage to employees and impact on efficiency, productivity and customer service;
  - The consequences for the employer of making/not making the accommodation for both parties;

- 6) WLANSW agrees that an employer's decision to refuse a request should not be reviewable by a third party if there is an exhaustive list of Refusal Grounds and any failure to follow the prescribed procedure is reviewable (see item 7 below);
- 7) The prescribed procedure should be strengthened and provide that employees have recourse to a third party review of the employer's decision if their employer failed to follow the procedure; and
- 8) The RFWA Standard should be reviewed two years after its enactment.

### **The legal profession will benefit from a legislated right to request flexible work**

7. WLANSW endorses the inclusion of the right to request flexible work in the NES and submits that a right to request mechanism is needed across the legal profession, particularly in private practice. In New South Wales, 70.57% of all practitioners work in private practice. 11.34% work in government and 17.51% work in-house in corporations<sup>2</sup>.

#### *Failure of women lawyers to hold senior positions because of an inability to meet both work and caring responsibilities*

8. Overwhelmingly more men than women hold senior positions in private practice, at the Bar and in the Judiciary. The 2006 *Bendable or Expendable* report found that women comprised 14% of partners and 22% of sole practitioners in Victoria<sup>3</sup>. As at March 2008 75.27% of female solicitors in private practice in New South Wales were “non principals” compared to 38.56% of males<sup>4</sup>. The research suggests that the onset of family responsibilities and the lack of flexible work arrangements play a major role in preventing women attaining senior roles, especially in private practice.
9. In this regard, Justice Mathews recently observed<sup>5</sup>:

I used to postulate, as a solution to ... [the paucity of women in senior positions in law], that we should alter the community expectation that women be the child rearers as well as the child bearers; and that we should all expect men to take an equal role in caring for the kids. But I now realise how naïve and unrealistic this was: the more entrenched the role expectations and the larger the group which holds those expectations, the longer it will take and the more difficult it will be to modify them. So we have to look to the smaller group, the lawyers, and start demanding more flexibility in work practices in order to accommodate to the needs of women who want to keep working after having their children. Some employers already do it: there are some spectacular success stories about job sharing and flexible working hours....But it still remains the exception rather than the rule. And until we get more women into positions of authority in the law, where they can direct the nature of the working environment, how are we going to make it the rule rather than the exception?

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<sup>2</sup> The Law Society of New South Wales Research Update Statistics as at 3 March 2008.

<sup>3</sup> at page 2

<sup>4</sup> The Law Society of New South Wales Research Update, Statistics as at 3<sup>rd</sup> March 2008

<sup>5</sup> Address at the 2007 Women Lawyers Achievement Awards Gala Dinner, 19<sup>th</sup> October 2007

*Taking the off ramp: Leaving private practice or the profession*

10. There is strong anecdotal evidence that women exit the profession, especially private practice, at a disproportionate rate to their male colleagues. This has not yet been the subject of major research in Australia<sup>6</sup> but in the US, the MIT study *Women Lawyers and Obstacles to Leadership* found that women leave private practice at all points along the career at a much higher rate than men. The study found that 22% of the women who left law firms, also left the law altogether. The most often cited reason for their departure was “difficulty integrating work and family/personal life”<sup>7</sup>.

*Paucity of FWAs in the law*

11. Comprehensive, industry-wide statistics are not available. However we do know that eight percent of lawyers at ten of Australia’s largest firms are employed part-time<sup>8</sup>. In the words of the Federal Sex Discrimination Commissioner, Elizabeth Broderick, “If you’re looking at less than one in 10 people working in a flexible working arrangement, you’d have to say it’s embryonic and at that level, still a rarity<sup>9</sup>”. Ms Broderick has suggested that 30 to 35 percent of lawyers should be employed part-time before flexible work practices will become the mainstream<sup>10</sup>.
12. This meagre part-time participation figure exists during a period of unprecedented demand for lawyers as well as continued growth in the number of women entering the profession each year. Clearly, market forces are not delivering the level of flexibility that is needed to retain women lawyers at senior levels in the legal profession. Something more is needed.

*The demands of working in the law*

13. The law is a demanding profession. Work must often be completed within short timeframes in a highly regulated environment (?) where mistakes are not tolerated. These pressures intensify as one approaches partnership and is accompanied by the requirement to “bring in” new business. All of this requires very long hours.
14. It might be argued that a right to request will have little effect in the legal workplace because the demands of practice mean that non-traditional arrangements will seldom work. This is only true in limited parts of private practice and even then, only some of the time. Accordingly, there is great practical value in requiring employers to consider flexible alternatives, assess them against business criteria and give reasons for refusal. Further, the symbolic effect of a legal right to request will be a powerful tool for change.

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<sup>6</sup> LIV and VWL are currently carrying out a study entitled *Women with Children – Where Are They Now?*

<sup>7</sup> At page 12

<sup>8</sup> 2007 Workplace Flexibility Survey conducted by *The Australian*

<sup>9</sup> *The Australian*, November 2<sup>nd</sup> 2007

<sup>10</sup> *The Australian*, November 2<sup>nd</sup> 2007

### *The need for transparency in flexible working practices*

15. Some argue that the existence of FWAs (albeit limited) in NSW law firms is evidence that a mandatory legislative procedure is superfluous and costly. However, the RFWA Standard will deliver some transparency to law firm practices and this will ultimately inform female lawyers' decisions about where they will work. The individual circumstances of each case almost always determine the outcome. If employers are required to provide reasons for refusal in writing, lawyers will be able to compare and discuss them. WLANSW would canvass its members for this sort of information.

### **Coverage**

16. It is anticipated that (as with the Australian Fair Pay and Conditions Standard) the Government will seek to rely on the corporations power in the Australian Constitution to support the NES. However, a substantial number of lawyers in private practice are employed by a partnership and therefore fall outside the (federal) NES as do lawyers employed by the NSW Government. Accordingly, WLANSW urge the Federal and New South Wales Governments to work together to ensure that there is a uniform procedure for all lawyers in New South Wales.

### **The RFWA Standard should also be available to all those who care for dependents other than young children.**

17. As stated in the Exposure Draft, the purpose of the RFWA Standard is to “help all working families balance their work and family responsibilities” as well as to encourage greater workforce participation<sup>11</sup>. However, the care of young children is not the only family responsibility borne by employees. An aging population means that employees are caring for the elderly at an increasing rate and many of them care for disabled children. The RFWA Standard will not meet its policy goal unless it is available to all who care for dependents.
18. Extending the RFWA Standard will bring Australian federal law in line with the Victorian Family Responsibilities Model which is available to those with “parent or carer responsibilities”.<sup>12</sup> It would also follow legislation in the United Kingdom and New Zealand. In New Zealand, eligible employees are those who “care for any person”<sup>13</sup>.
19. Importantly, the RFWA Standard is not limited to employees returning from parental leave (as was the case in the *Family Provisions Test Case* model). This gives employees the flexibility to work full time immediately following parental leave, with the option of requesting part-time work later, if required, when their children are still young. Importantly, the entitlement is not linked to a qualifying period.

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<sup>11</sup> Paragraph 58

<sup>12</sup> Equal Opportunity act 1995 (Vic)

<sup>13</sup> Employment Relations Act 2000; section 69AAB(2)

## **The right to request should not be limited only to part time work**

20. WLANSW supports the extension of the request to a “change in working arrangement” and not just “part-time work”, as was the case in the *Family Provisions Test Case* model. This means that the request accommodate other flexible arrangements such as remote access work or a change from high to lower intensity work.

## **The RFWA Standard should prescribe Refusal Grounds**

21. The RFWA Standard permits the employer to refuse a request if there are “reasonable business grounds” for doing so. WLANSW agrees that employers should bear the onus of establishing reasonable grounds. However, the “business grounds” are not defined. The RFWA Standard should specify an exhaustive list of refusal grounds
22. *The Family Provisions Test Case* provision did provide some guidance, namely:
- “Such grounds might include cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service”<sup>14</sup>
22. Both the UK and New Zealand legislation provide similar, exhaustive, lists of refusal grounds. They are detrimental impact on quality, performance, or ability to meet customer demand, inability to reorganise work among staff or recruit new staff, planned structural changes, insufficiency of work during the periods the employee proposes to work and burden of additional costs. The UK legislation permits the Secretary of State to specify other refusal grounds by regulations<sup>15</sup>. The New Zealand legislation provides that the request must be refused if it would be inconsistent with a collective agreement which binds the employee<sup>16</sup>.
23. Similarly, the Victorian Family Responsibilities Model requires employers to consider “all relevant facts and circumstances” including:
- The employee’s circumstances and caring responsibilities;
  - The nature of the role and arrangements required to accommodate those responsibilities;
  - The employer’s financial circumstances and size and nature of the workplace and business;
  - The effect on the workplace of the accommodation in terms of financial impact, degree of benefit/disadvantage to others and impact on efficiency, productivity and customer service;
  - The consequences for the employer of making the accommodation; and

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<sup>14</sup> Page 398

<sup>15</sup> Employments Rights Act 1996, section 80G(1)(b)(ix)

<sup>16</sup> Employment Relations Act 2000, section 69AAF (3)

- The consequences for the employee of not receiving the accommodation<sup>17</sup>.
24. WLANSW strongly advocates the prescription of Refusal Grounds. First, it will help to reduce compliance costs. Without clear Refusal Grounds employers may spend time and expense determining relevant factors and their weight. Secondly, exhaustive Refusal Grounds will force any employer that does not want to grant a request for ideological reasons, to provide justification for their refusal. Finally, Australian federal discrimination cases suggest that the meaning of the term “reasonable” is often a point of disagreement between the parties. An exhaustive list of Refusal Grounds will reduce such disagreement.
25. It is submitted that the reasons for refusal listed in the Victorian Family Responsibility Model would be appropriate but modified to form an exhaustive list.

**An employer’s decision to refuse a request should not be reviewable by a third party**

26. The RFWA Standard does not give employees a right of review when a request is refused. WLANSW agrees with this position **provided that**:
- the employer is required to justify the refusal against an exhaustive list of refusal grounds; and
  - the employee has recourse to a third party if the employer does not follow the procedure required by the RFWA Standard.
27. A substantive right of review may be appropriate in some contexts, but it may hinder those working in the legal profession. As discussed, there can be legitimate reasons why a FWA is untenable and employers should feel free to discuss them without fear of their decision being reopened by a third party. Indeed, an open exchange may lead the parties to consider other options. The RFWA Standard should encourage requests to be made and discussed but ultimately it should be the employer’s decision.
28. Neither the UK nor the New Zealand legislation provides a substantive right of review.
29. In Victoria, failure, unreasonably, to accommodate an employee’s parental or caring responsibilities may constitute discrimination under the Equal Opportunity Act 1995.

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<sup>17</sup> Equal Opportunity Act 1995, sections 13A, 14A, 15A, 31A

**There prescribed procedure should be strengthened and the employee should have recourse in respect of *procedural* breaches**

30. The RFWA Standard requires a written request that sets out details of the change sought and the reasons for the change. The employer must respond in writing within 21 days and if the request is refused, written refusal reasons must be given.
31. WLANSW supports the requirements in the preceding paragraph and recommends the RFWA Standard also require the parties to meet and discuss the request within a specified time after the request is made (unless the employer has already agreed). The employee should also be entitled to be accompanied at the meeting if that is reasonable.
32. Importantly, the RFWA Standard should also provide the employee with recourse to a third party such as the proposed "*Fair Work Australia*" if the employer fails to follow the procedure. In cases where the employer has breached the procedural requirements, the third party should invite the employee to resubmit the request and then require the employer to follow the procedure in the RFWA Standard, with any specific orders as are necessary to ensure such occurs. If the employer still fails or refuses to do so, sanctions should apply.
33. Process requirements were absent from the determination in the *Family Provisions Test Case*. In this regard, academic, Jill Murray commented:

It is noteworthy that the AIRC decided to establish the strict procedural schedule for workplace negotiation of flexible work. It is arguable that it is this specification in the UK laws which has created real change in the country...<sup>18</sup>
34. In the UK, the employee must make his or her request in writing and then a meeting to discuss the request must be held within 14 days<sup>19</sup>. The employee may be accompanied if that is reasonable.
35. In New Zealand, if the Employment Authority determines that the employer has failed to follow the procedure, it may order the employer to pay a penalty of up to \$2,000, payable to the employee<sup>20</sup>.

**Legislative review**

36. The Minister for Employment and Workplace Relations should require a report to be prepared on the operation and effects of the legislation, two years after its enactment as was done in New Zealand<sup>21</sup>.

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<sup>18</sup> *The AIRCs Test Case on Work and Family Provisions: The End of Dynamic Regulatory Change at Federal Level?* (2005) 18 AJLL 325, 331

<sup>19</sup> Flexible Working (Procedural Requirements) Regulations, regulation 14

<sup>20</sup> Note 14 above, section 69AAJ

<sup>21</sup> Employment Relations Act 2000, section 69AAL

**THE RIGHT TO REQUEST THE EXTENSION OF UNPAID PARENTAL  
LEAVE FOR UP TO A FURTHER TWELVE MONTHS**

34. WLANSW is concerned about the provisions that allow one parent's right to a further 12 months of unpaid parental leave to be traded to the other partner, with an employer able to refuse the request on reasonable business grounds (paragraph 79 of the Discussion Paper).

## Impact of right to request additional 12 months leave for female lawyers

35. Anecdotally many female lawyers do not take the maximum 12 months unpaid leave currently available whereas few male lawyers access their current right to share part of the parental leave entitlement. Accordingly, the take up rate by female lawyers of the proposed extended entitlement is likely to be low.
36. Anecdotally, female lawyers are concerned that taking **any** leave will jeopardise partnership and/or signal a lack of commitment to practice. A woman's child-bearing years typically coincide with the appearance of "partnership" on the agenda. The reality of limited child bearing years is in direct conflict with firm cultures that remain driven by an individual's billable hours and additional non-billable business development, all which promotes the concept of the “*ideal-worker’ who is care-less.*”<sup>22</sup>
37. *Hickie v Hunt and Hunt*<sup>23</sup> demonstrated the practical realities faced by many female lawyers when they take parental leave. Ms Hickie's experience remains common including the loss of practice, the allocation of work to other lawyers, difficulties in claiming it back on return, the allocation of less lucrative client work and/or being directed onto the “mummy track” which means working in areas that are considered incidental to a practice, such as precedent development, staff management or "special projects".
38. Discrimination against women in the legal profession is well documented.<sup>24</sup> Although in 2005, women accounted for 57.4 % of solicitors entering the profession for the first time:
- more than half of male practitioners in NSW (61.9%) were principals of a law firm; and
  - only a quarter of females (24.3%) were law firm principals<sup>25</sup>.
39. The reasons why there are so few senior female lawyers are complex, however commitment to family responsibilities is a factor.<sup>26</sup>
40. For many female lawyers it is not viable to take the current entitlement to 12 months unpaid leave given firm culture (see paragraph 36). This group is therefore unlikely to seek extended leave.
41. For those who request and receive extended leave, it is likely that their workplace connection will become tenuous and any disadvantage they

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<sup>22</sup> Reference taken from Barbara Pocock's book, *The Work/Life Collision*, The Federation Press 2003, p1

<sup>23</sup> *Hickie v Hunt and Hunt* 1998 HREOCA 8 (9 March 1998)

<sup>24</sup> *After Ada, a new precedent for women in law*, 29 October 2002 report commissioned by the Law Society of New South Wales

<sup>25</sup> 2005 Profile of the Solicitors of NSW, Urbis Keys Young report commissioned for the Law Society of New South Wales, February 2006

<sup>26</sup> Note 24 above pages 15 - 16

suffered by taking leave will be further entrenched. Statistically, female solicitors earn less than male solicitors. Even after taking part-time solicitors out of the equation (they are predominantly females), and looking at only those in private practice (women are concentrated in the public sector and community legal sector), full-time private practitioners women earn less at every stage of their career.<sup>27</sup> This difference is likely to be exacerbated by taking enhanced leave.

42. The disadvantage described above, will be intensified for any woman who is pregnant again when she returns from extended leave, and then takes a further period of leave. Such a situation also imposes hardship on an employer, who is obliged to return the employee to her pre-leave position. Accordingly, the proposed provision may prompt employers to discriminate against women in recruitment and restructuring decisions.

### **Steps to encourage male lawyers to take parental leave**

42. Women not men, typically take the parental leave under the current legislative arrangements, and the proposed extended leave may reinforce the idea that women are more likely than male care-givers to require additional leave. Employer fears that women will request an additional 12 months leave may perpetuate discrimination against women of a child-bearing age.
43. If the leave was **non**-transferable it would encourage men to take their share of the leave", rather than pressure their (typically) female partners to do so. This issue was recognised in the HREOC report *It's About Time: Women, men, work and family* which noted that:

...the policy measures that are adopted in relation to...employment based measures will be most effective when men are encouraged to reduce their paid work and participate in caring. Encouraging and supporting equality between men and women, as noted in the Striking the Balance discussion paper, is a key part of this process."<sup>28</sup>
44. If the 12 months leave for each parent is provided on a "use it or lose it" basis, then more men may take their share of the leave.

### **Review of the decision to refuse the request**

45. If the NES model is adopted, then WLANSW repeats the comments made above about the need for an exhaustive list of acceptable refusal grounds, the appropriateness of there **not** being a right of review, third party recourse for procedural breaches, legislative review and coverage.

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<sup>27</sup> Note 25 above, page 35

<sup>28</sup> *It's About Time; Women, men, work and family*, Human Rights and Equal Opportunity Commission 2007, page 43

