IRS

Industrial Relations Society of South Australia Inc

NEWSLETTER

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PRESIDENT'S MESSAGE

Dear members,

2013 is in full swing and if yours is like mine, it's a busy year. Recently, officers from the constituent State and Territory Committees of Management ratified new rules for the Australian Labour and Employment Relations Association (ALERA) - formerly the Industrial Relations Society of Australia. This was a significant achievement and the result of a lot of hard work by people from the various State and Territory bodies, including our Peter Hampton. Some of our sister bodies have changed their name to reflect that of the new peak national organisation. I expect this Society will consider a change to its name at this year's Annual General Meeting.

As it has done in the past, the Committee hopes this year to facilitate a number of seminars on topical issues of interest to you. It has already been busy with the first seminar of the year scheduled for Tuesday 26 March 2013: 'Unpaid Work Experience Arrangements'. Once again, we have been fortunate to secure top class presenters in Professors Andrew Stewart and Rosemary Owens from the University of Adelaide and Steve Ronson from the Fair Work Ombudsman.

I sincerely hope 2013 is everything you hope it might be and look forward to seeing you at Society events during the year.

Best wishes,

Craig Stevens
President IRSSA

SAFEWORK SA IS NOW ON

For updates and general information about the new work health and safety laws in South Australia and state and national industrial relations, including wages and conditions, visit SafeWork SA's new Facebook page using the following web address: www.facebook.com/safeworksa.

DID YOU KNOW?????

The South Australian Law Society has confirmed that all IRSSA seminars are recognised as CPD activities for the purposes of Practising Certificate requirements in South Australia. Legal practitioners in South Australia can claim 1 CPD unit for an active hour at an IRSSA seminar.

REFRESHED WEBSITE FOR IRSSA!!!!!!

IRSSA now has a refreshed website - www.irssa.asn.au. Most notably the refreshed website provides:

- information about upcoming IRSSA events;
- access to past IRSSA newsletters; and
- an IRSSA membership application section, including the ability to lodge online an IRSSA membership application.

JOURNAL ARTICLE ABSTRACT ON WORKPLACE BULLYING

SAGE (the US based publishers of the Journal of Industrial Relations) featured an article from the current issue of the Journal of Industrial Relations on the SAGE Management INK blog, as part of a special feature on workplace bullying ahead of the CNN premiere of the documentary "The Bully Effect".

An abstract of the article is provided below:

"Rethinking workplace bullying as an employment relations problem" - J Hutchinson

Journal of Industrial Relations 54(5): 637–652

Over the past three decades, a growing body of international literature points to a relationship between workplace bullying and certain changes to organizational and employment policies. Some of these changes include an increase in precarious employment, greater workloads, restructuring and downsizing, and the reduction in third-party intervention in workplace relations. However, while governments and many organizations have introduced policies in response to workplace bullying, there is little evidence that they have been successful in either the prevention or resolution of the problem. This article explores reasons for this apparent policy failure by reviewing workplace bullying literature and using data collected from interviews with policy actors in Australian public sector organizations. What emerges from these analyses is that prevailing theorizations and policy definitions emphasize the individual aspects of bullying and overlook the significance of organizational, employment and cultural factors. The article argues that narrow explanations of workplace bullying limit the capacity of policies to prevent or resolve the problem. Finally, the article concludes by suggesting that a multidisciplinary approach to understanding workplace bullying as a work and employment relations issue is a fundamental step in its prevention.

The following is a teaser on a journal article to be features an upcoming edition of the Journal of Industrial Relations (JIR):

Healy J and Kidd MP

Gender-based undervaluation and the equal remuneration powers of Fair Work Australia

Forthcoming publication – JIR, Volume 55(5), November 2013

This important and innovative paper investigates gender-based wage undervaluation in light of Fair Work Australia's major recent decision for social and community service workers. The paper demonstrates that wages for employees in female-dominated occupations are significantly lower than for comparable employees in male-dominated and integrated occupations. This undervaluation is present for both male and female employees, and persists after controlling for industry of employment. The authors then estimate the undervaluation within industry and juxtapose the results with evidence on the industry distribution of award reliance, a proxy for Fair Work Australia's equal remuneration powers. There is not a strong relationship within industry between the extent of gender-based undervaluation and award reliance. The evidence suggests that 'equal remuneration for work of equal or comparable value' is unlikely to be achieved universally by Fair Work Australia without substantial spillovers between awards and non-award agreements.

THE "NEW" ANTI-DISCRIMINATION LEGISLATION - DO WE NEED A NEW TEST?

BY SORNA NACHIAPPAN, VICE PRESIDENT, IRSSA

By now you will have heard, in the media if nowhere else, of the new test contained in the proposed new Commonwealth anti-discrimination legislation, the *Human Rights and Anti-Discrimination Bill 2012* (the Bill).

The Bill not only unifies the various Commonwealth Acts (the *Sex Discrimination Act 1984* (SD Act), the *Racial Discrimination Act 1975* (RD Act), the *Age Discrimination Act 2004*, the *Disability Discrimination Act 1992* and the *Australian Human Rights Commission Act 1986*) and rounds out the heads of discrimination to include religion, industrial history, and others; the Bill, if passed in its current form, will apply a new test to whether behaviour is discriminatory.

The test specified in the Bill, is focused on actual or proposed unfavourable treatment by one person towards another person. Under subclause 19(2) of the Bill, unfavourable treatment includes conduct that harasses, offends, insults or intimidates that person. This unfavourable treatment is unlawful if it occurs in any area of public life (subclause 19(2) and clause 22). As the proposed Act is a melting pot of existing legislation, so is this test - the public life aspect is taken from the RD Act and the concept of offending conduct closely mirrors the standard put forward by the SD Act. The Bill also names "work and work-related areas" (clause 22 (2)) as one of the areas of public life where unlawful discrimination can occur, subject to exemptions further laid out.

The question posed by the media is whether this test is too broad. But is this true in the context of the workplace?

Consider these examples, taken from the Australian Human Rights Commission's Conciliation Register:

1 - "*The complainant alleged that the director of the company, the individual respondent, sexually harassed her by actions including making comments about her appearance and touching her inappropriately. The complainant said the respondent company terminated her employment after she made a complaint about the alleged conduct*." (Sex Discrimination Register, Jan-Jun 2011).

The conduct mentioned in example 1 is clearly sexual harassment under clause 49 of the Bill, as the director is "*engage[ing] in ... unwelcome conduct of a sexual nature*". However, considering the ordinary meaning of the words "offends" and "intimidates" we can see how this, or similar but non-sexual conduct could be considered as unfavourable treatment and discriminatory under the Bill - commenting on someone's appearance could offend that person, and it could be actionable if the comment related to skin colour or a characteristic related to a medical condition. Unwelcome touching can also be intimidating. In this case, the test does not seem to cause any significant expansion - if it is not sexual, it would need to relate to another head of discrimination to be actionable.

Continues over

2 - "*The complainant has ankle and knee injuries which were sustained in the workplace a number of years prior to the complaint. The complainant claimed the respondent government department did not provide her with a specific piece of equipment that she required to assist her with her duties*." (Disability Discrimination Register Jan-Jun 2011).

The key part of the test under the Bill when considering disability discrimination is whether there has been "unfavourable" treatment. It would quite likely be considered reaching to consider complaints of this nature, while perfectly valid, to be offensive on their own. However, workers in this position are being treated unfavourably, and the Bill outlines a concept of 'reasonable adjustment' (clause 25) which is measured by hardship to the would-be respondent. In the case of example 2, providing the equipment is unlikely to have caused an "unjustifiable hardship" and as such, this would still pass the test under the Bill.

While the structure of disability discrimination may be somewhat altered (in part due to the introduction of 'disability standards' to be set by the Minister), it is not affected by the expansion of the test.

3 - *"The complainant, who is of Aboriginal origin, was employed as a manager with a state administered rural health service. The complainant alleged that an Aboriginal employee she supervised called her a 'white ct', threw rocks at her house and threatened to kill her. The complainant alleged that her employer did not adequately address this and allowed this employee to remain in the workplace. The complainant claimed that she was forced to leave her employment as a result of these incidents."* (Race Discrimination Register, Jan-Jun 2011).**

Clearly the conduct in example 3 is conduct designed to intimidate the complainant and would be unlikely to fail the test. However, the concept of racial vilification would also need to be considered - whether the action was in public and designed to offend someone with the knowledge or belief that they were of a certain race (clause 51). The facts aren't clear enough to decide in this case, but it would appear that least some of the acts were performed in public.

It would appear that the media's concerns are perhaps unfounded in the workplace context. What is apparent, however, is that the Bill provides multiple grounds for a claim under many of the heads of discrimination, and that care will need to be taken to adequately prepare complaints so as to address all possible grounds where available.

The Bill is currently in the draft phase and has just finished public consultation.

SIGNIFICANT CHANGES PROPOSED TO THE *FAIR WORK ACT 2009* (CTH)
BY KAYE SMITH, COMMITTEE MEMBER, IRSSA

The Government has recently introduced into Parliament the *Fair Work Amendment Bill 2013* ('the Bill') proposing a number of important changes to the *Fair Work Act 2009* ('the Act') most of which have been the subject of recent but generalised announcements by the Labor Government. On March 21, 2013 Parliament referred the Bill to the House Standing Committee on Education and Employment.

This article will provide a summary of those changes introduced by the Bill.

1. Expansions to the right to request flexible work arrangements

The Act currently provides employees with a right to request flexible work arrangements for employees who are parents or who have responsibility for the care of a child where the child is:

(a) under school age; or
(b) under 18 with a disability.

The Bill proposes new and expanded rights to flexibility that will form a part of the National Employment Standards. Employees may request a change in working arrangements (such as their hours of work, patterns of work or location of work) because of any of the following circumstances:

(a) the employee is the parent, or has the responsibility for the care of a child who is of school age or younger. There is an express right for employees returning to work from birth related or adoption leave to request to work part time;
(b) the employee is a carer within the meaning of the *Carer Recognition Act 2010*. This extends to those providing personal care, support and assistance to individuals because of disability or medical condition(s);
(c) the employee has a disability;
(d) the employee is 55 years of age or older;
(e) the employee is experiencing violence[1] from a member of the employee's family;
(f) the employee provides care or support to a member of the employee's immediate family, or household, who requires care or support because that member is experiencing violence from his or her family.

Employers will retain the right to refuse requests for flexible working arrangements on 'reasonable business grounds'. These are now proposed to be identified by illustration in the Act. Reasonable business grounds include (but are not limited to):

(a) that the new working arrangements requested by the employee would be **too costly** for the employer;
(b) that the employer does not have the capacity to change the working arrangements of other employees to accommodate the new working arrangement;
(c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
(d) that the new working arrangement would likely result in a significant loss of efficiency or productivity;
(e) that the new working arrangement would likely have a significant **negative impact** on customer service.

(emphasis above is mine)

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The examples are designed to lead any consideration of what is or is not a reasonable business ground. They reflect an intention that will require employers to meet a relatively high (if not excessive) threshold in demonstrating a proper basis for refusing a request. The cost is to be "too costly"; the new arrangement having a "significant loss" or "significant negative impact" on the business. This will no doubt be a complaint from many business groups.

2. Parental Leave and Protections for Pregnant Workers

Presently the Act confers an entitlement for pregnant employees who can transfer to a safe job where:

(a) they are entitled to unpaid parental leave;
(b) they have satisfied the notice and evidence requirements for unpaid parental leave; and
(c) they have provided their employer with evidence that it is safe for them to continue to work, but not advisable to do so in their current position because of risks associated with the pregnancy or the position.

The Bill proposes an entitlement for any pregnant employee to a transfer to a safe job for a stated period (called the "risk period") if they provide reasonable evidence that it is inadvisable for them to continue in their present position because of:

(a) illness, or risks, arising out of the pregnancy; or
(b) hazards connected with that position.

If there is an "appropriate safe job" available, then the employer must transfer the employee to that job for the risk period, with no other change to terms and conditions of employment. An "appropriate safe job" is one that has the same ordinary hours of work as the present position or a different number of ordinary hours but as agreed with the employee. If that happens, and they are transferred, the pay for the employee in the safe job is at the 'full rate of pay' for the hours worked in the risk period that would have attached to the position prior to the transfer.

If there is **no** "appropriate safe job" and the employee is entitled to unpaid parental leave, then the employee is entitled to "**paid** no safe job leave" for the risk period, paid at the employees 'base rate of pay' (so long as notice and evidence requirements are also met).

A pregnant employee will be entitled to "**unpaid** no safe job leave" where there is no appropriate safe job available and the employee is **not** entitled to unpaid parental leave (because of a lack of continuous service for example), so long as reasonable evidence is provided in support. This will mean keeping the job open, for the 'risk period' which ends when the pregnancy ends.

Parents' rights to take concurrent unpaid parental leave will also be extended from 3 weeks to 8 weeks. Parents will also be able to take this concurrent leave in separate periods but each period must not be shorter than 2 weeks unless the employer agrees.

Parents will still be required to provide their employer with 10 weeks notice of their intention to take parental leave, unless they intend to take it in separate periods. In that case, they will be required to provide 10 weeks' notice for the first period of concurrent leave and 4 weeks' notice for the remaining periods of leave.

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Amendments are also proposed to the special maternity leave provisions. Eligible employees are presently entitled to unpaid special maternity leave when pregnant and unfit for work. Any period of unpaid special maternity leave reduces the employee's entitlement to 12 months of unpaid parental leave. The proposed amendment will be that unpaid special maternity leave will not reduce an employee's entitlement to 12 months of unpaid parental leave.

3. Rostering Protections

The Bill will require that all modern awards, by 1 January 2014, include a term requiring consultation with employees about a change to their "regular roster" or ordinary hours of work **and** which allows for the representation of those employees for the purposes of that consultation.

The employer will also be required to:

(a) provide information to the employees about the change;
(b) invite employees to give their views about the impact of the change (and specifically any impact on their family or caring responsibilities); and
(c) consider any views about the impact of the change given by the employees.

Section 205 dealing with mandatory terms in enterprise agreements is proposed to be amended to require that all enterprise agreements include a term that requires employers to consult employees about a:

(a) major workplace change that is likely to have a significant effect on employees; or
(b) change to their regular roster or ordinary hours of work.

As with modern award terms, employers will be required to provide information, invite views and consider those views about the impact of the change. On the face of the amendments there is no limitation of the provision to permanent staff and the proposal extends to casuals working 'regular rosters'.

4. Workplace Bullying – "the Anti-Bullying Measure"

The proposed changes follow the release of the Standing Committee on Education and Employment report "*Workplace Bullying – we just want it to stop*" (Workplace Bullying Report). The perceived lack of remedy and protection for workplace bullying has been the subject of complaint for some time, largely left to relevant Occupational Health and Safety laws and/or systems of workers compensation. The proposed changes are designed to provide direct and timely recourse for those allegedly bullied.

Surprisingly, the amendments propose to extend that right of recourse beyond the employment relationship, to 'workers' as that term is defined by the *Work Health and Safety Act 2012* (SA). This will mean a right of recourse for contractors, subcontractors, trainees, apprentices and volunteers working for persons conducting a business or undertaking (as defined by the *Work Health and Safety Act 2012* (SA)), against 'persons'. How this interacts with the accused's right to silence protected under the law is not addressed at all. Significantly, an application to the Fair Work Commission (FWC) does not interfere with the worker's right to commence or continue civil proceedings or proceedings under work health safety laws. In addition, the President of FWC is authorised to disclose information that comes from FWC proceedings, directly to WHS regulators.

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A worker is taken to be bullied at work if an individual or group of individuals repeatedly behaves unreasonably towards the worker (or group of workers of which he/she is a member) and that creates a risk to safety. This does not apply to 'reasonable management action' carried out in a 'reasonable manner'.

FWC will be required to deal with the application within 14 days, whether by conference or hearing. If satisfied the worker has been bullied **and** there is a risk of this continuing, any appropriate orders may be made to prevent the bullying, but not an order to pay a pecuniary amount.

The Bill proposes that a contravention of FWC's order will be a civil remedy provision attracting penalties, not an offence, with those applications able to be brought by a person affected by the contravention, an industrial association or inspector. This change, if introduced, will raise significant concerns for individuals who may face personal liability for non-compliance with FWC orders, if made.

5. Right of Entry

Amongst the most contentious changes relates to the proposed amendments to the right of entry provisions. FWC will be given power to resolve disputes about the frequency of visits to the workplace by permit holders for discussion purposes, during meal times or other breaks.

The Bill proposes that permit holders exercising right of entry, if unable to agree with the occupier on a room or area to hold interviews or discussions, will have a right to do so in any room or area where meal or other breaks are taken. In doing so, the permit holder is to comply with any reasonable request of the occupier to take a particular route to get there.

FWC may deal with disputes about the frequency of entry to hold discussions, including by arbitration but orders by arbitration are only available if the frequency of entry would require an **unreasonable diversion** of the occupier's **critical resources**. The bar is again set high in terms of what employers will need to demonstrate to obtain orders to limit or minimise entry for discussion purposes.

Significant changes are proposed for accommodation and transport arrangements for permit holders exercising right of entry in remote areas, being those areas where accommodation is not reasonably available to the permit holder unless the occupier provides it. Where the occupier enters (or is required to enter) into an accommodation or transportation arrangement it must not charge the permit holder, or their organisation, any more than is necessary to cover the cost of the accommodation and/or transportation.

FWC will have the jurisdiction to deal with disputes such as:

(a) whether accommodation is reasonably available or the premises are reasonably accessible; or
(b) whether providing accommodation or transport would cause the occupier undue inconvenience; or
(c) whether a request to provide accommodation or transport has been made within a reasonable period.

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6. Penalty Rates

The Bill proposes a new modern awards objective by requiring FWC to take into account the need to provide additional remuneration for:

(i) employees working overtime; or
(ii) employees working unsocial, irregular or unpredictable hours; or
(iii) employees working on weekends or public holidays; or
(iv) employees working shifts

in addition to other considerations in the setting or varying of modern award conditions.

7. Further Amendments

At the time of writing, the Government has also proposed amendments to broaden anti-discrimination grounds to include sexual orientation, gender identity and intersex status. This will be by amendment to the *Sex Discrimination Act 1984* (Cth)[2].

Further detail and commentary as to those changes will be provided in our next newsletter.

Summary

The changes proposed are in many respects beyond that which was anticipated by discussions on the topic. They will no doubt be the subject of strong debate from both sides of the fence, and particularly from employers and employer groups who would regard many of the changes as an imposition on flexibility, the right to manage efficiently, and the ability to compete in today's competitive market.

Endnotes

1. The term "violence" is not defined in the Bill

2. See the *Sex Discrimination (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013*