

## THE FAIR WORK COMMISSION

Matter No: AM2015/1

### FOUR YEARLY REVIEW OF MODERN AWARDS – FAMILY AND DOMESTIC VIOLENCE CLAUSE

#### SUBMISSIONS IN REPLY OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION

1. The National Farmers' Federation (NFF) has submitted at paragraph 72 of its submission that:

Individual employees choose how they will use their accrued leave, and the same minimum entitlements apply to all comparable employees. A choice to use leave for a particular purpose does not involve any differential treatment by another.

2. The NFF further submits that 'discrimination requires different treatment of one person by another'. This is not correct. The phrase 'discrimination against women' is defined by article 1 of the *Convention on the Elimination of Discrimination against Women*<sup>1</sup> to mean:

[a]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

3. This definition includes both direct and indirect discrimination against women, be it intentional or unintentional, in respect of law or practice, in all aspects of public and private life.<sup>2</sup> Direct discrimination against women constitutes different treatment explicitly based on grounds of sex and gender differences.<sup>3</sup>

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<sup>1</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981). The CEDAW is scheduled to the *Sex Discrimination Act 1984* (Cth) (SDA). Section 5 of the SDA also defines 'sex discrimination' to include both direct and indirect discrimination. Section 7D of the SDA also permits 'special measures intended to achieve equality'.

<sup>2</sup> *Dubravka Simonovic*, Chairperson of the Committee on the Elimination of Discrimination against Women (2007-2008), *Introductory Note to the Convention on the Elimination of All Forms of Discrimination against Women*, New York, 18 December 1979. See also: CEDAW Committee, General Recommendation No. 28 on the Core Obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc CEDAW/C/GC/28, [16].

<sup>3</sup> CEDAW Committee, General Recommendation No. 28 on the Core Obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc CEDAW/C/GC/28, [16]. See also: *Dubravka Simonovic*, Chairperson of the Committee on the Elimination of Discrimination against Women (2007-2008), *Introductory Note to the Convention on the Elimination of All Forms of Discrimination against Women*, New York, 18 December 1979.

However, the CEDAW Committee has explained in its General Recommendation No. 25 that ‘indirect discrimination against women’:

may occur when laws, policies and programmes are based on seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women. Gender-neutral laws, policies and programmes unintentionally may perpetuate the consequences of past discrimination. They may be inadvertently modelled on male lifestyles and thus fail to take into account aspects of women’s life experiences which may differ from those of men.<sup>4</sup>

4. The Convention’s aim is the elimination of all forms of discrimination against women both *de jure* and *de facto*, resulting from the activities or omissions on the part of States parties, their agents, or committed by any persons or organizations in all fields of life, including in the areas of politics, economy, society, culture, civil and family life. Its goal is the recognition and achievement of the *de jure* and *de facto* equality of women and men, which is to be achieved by a policy of elimination of all forms of discrimination against women incorporating all appropriate legislative and programmatic measures.<sup>5</sup>
5. *De jure* (or formal) equality and *de facto* (or substantive equality) are different but interconnected concepts. Formal equality assumes that equality is achieved if a law or policy treats men and women in a neutral manner. Substantive equality is concerned, in addition, with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience.<sup>6</sup>
6. The principles of non-discrimination and equality are related to the concept of ‘social inclusion’.<sup>7</sup> The promotion of social inclusion is one of the principal objects of the *Fair Work Act 2009* (Cth)<sup>8</sup> and one of the factors to be taken into

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<sup>4</sup> CEDAW Committee, General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, Supp No 38, UN Doc A/59/38 (2004) annex I. See also: CEDAW Committee, General Recommendation No. 28 on the Core Obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc CEDAW/C/GC/28, [5], [16]; ICESCR [13].

<sup>5</sup> *Dubravka Simonovic*, Chairperson of the Committee on the Elimination of Discrimination against Women (2007-2008), *Introductory Note to the Convention on the Elimination of All Forms of Discrimination against Women*, New York, 18 December 1979. See also: CEDAW Committee, General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, Supp No 38, UN Doc A/59/38 (2004) annex I, [4]; CEDAW Committee, General Recommendation No. 28 on the Core Obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc CEDAW/C/GC/28, [16], [20].

<sup>6</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 16 on article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights, UN Doc E/C.12/2005/3 (2005), [7]-[8].

<sup>7</sup> See: Professor Gillian Triggs, President of the Australian Human Rights Commission, ‘Social inclusion and human rights in Australia’ Chain Reaction Foundation Breakfast Café, KPMG Level 15, 10 Shelley Street, Sydney, 20 August 2013, <https://www.humanrights.gov.au/news/speeches/social-inclusion-and-human-rights-australia#fn7> (viewed 12 October 2016).

<sup>8</sup> *Fair Work Act 2009* (Cth), s 3.

account in the modern awards objective.<sup>9</sup> There is no universally accepted definition of 'social inclusion'. The United Nations Educational, Scientific and Cultural Organization (UNESCO) uses the following definition:

Inclusive society is defined as a society for all, in which every individual has an active role to play. Such a society is based on fundamental values of equity, equality, social justice, and human rights and freedoms, as well as on the principles of tolerance and embracing diversity.<sup>10</sup>

7. Under article 2 of the Convention, States parties agree to 'pursue by all appropriate means' and 'without delay'<sup>11</sup> a policy of eliminating discrimination against women.<sup>12</sup> The CEDAW Committee has explained that the emphasis is on 'forward movement', from the evaluation of the situation to the formulation and initial adoption of a comprehensive range of measures to building on those measures continuously, in the light of their effectiveness and new or emerging issues, towards the Convention's goals. The policy:

must be comprehensive in that it should apply to all fields of life, including those which are not explicitly mentioned in the text of the Convention. It must apply to both public and private economic spheres, as well as to the domestic sphere, and also ensure that all branches of government (executive, legislative and judicial branches) and all levels of government assume their respective responsibilities for implementation. It should incorporate the entire range of measures that are appropriate and necessary in the particular circumstances of the State party.<sup>13</sup>

8. Although domestic and family violence affects the working lives of both parties, it is victims and survivors (primarily women), rather than perpetrators (primarily men), who are typically discriminated against in the workplace. Discrimination

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<sup>9</sup> *Fair Work Act 2009* (Cth), s 134(1)(c).

<sup>10</sup> UNESCO. Consultations of the Director-General with Member States. *Social Inclusion, Social Transformations, Social Innovation: What role for UNESCO in 2014-2021?* 23 November 2012. This approach is in line with the Copenhagen Declaration and Programme of Action, a key outcome of the 1995 World Summit for Social Development.

<sup>11</sup> The words "without delay" make it clear that the obligation of States parties to pursue their policy, by all appropriate means, is of an immediate character. It does not allow for any 'purposely chosen incremental manner' in the implementation of a State's obligations. It follows that delay cannot be justified on any grounds, including political, social, cultural, religious, economic, resource or other considerations or constraints within the State. Where a State party is facing resource constraints or needs technical or other expertise to facilitate the implementation of its obligations under the Convention, it may be incumbent upon it to seek international cooperation in order to overcome these difficulties. See: CEDAW Committee, General Recommendation No. 28 on the Core Obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc CEDAW/C/GC/28, [29].

<sup>12</sup> See also: CEDAW Committee, General Recommendation No. 28 on the Core Obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc CEDAW/C/GC/28, [35].

<sup>13</sup> CEDAW Committee, General Recommendation No. 28 on the Core Obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc CEDAW/C/GC/28, [24] - [25]. See also: CEDAW Committee, General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, Supp No 38, UN Doc A/59/38 (2004) annex I, [8].

takes many forms, but may include: being denied leave or flexible work arrangements to attend to violence-related matters, such as moving into a shelter.<sup>14</sup>

9. As recently highlighted by the Australian Law Reform Commission:

[f]requently those experiencing violence exhaust their existing leave entitlements, particularly where the violence occurs over a prolonged period. In addition, there is currently a discretionary element associated with the granting of leave in cases of family violence. In light of this, the ALRC considers existing leave provisions provided for in the NES may not adequately provide for the needs of employees experiencing family violence. (citations omitted)<sup>15</sup>

10. The Commission refers to and repeats its earlier submissions at paragraph 63-67 outlining how the current leave entitlements may have a detrimental impact on employees subjected to family and domestic violence.

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<sup>14</sup> See, e.g., Australian Human Rights Commission, Submission to the Australian Law Reform Commission Inquiry into Family Violence and Commonwealth Laws: Employment and Superannuation (21 April 2011), para. 47. At: [http://www.humanrights.gov.au/legal/submissions/2011/20110421\\_family\\_violence.html](http://www.humanrights.gov.au/legal/submissions/2011/20110421_family_violence.html).

<sup>15</sup> Australian Law Reform Commission, *Final Report: Family Violence and Commonwealth Laws—Improving Legal Frameworks* (Report No 117, 2012) 23. At [www.alrc.gov.au/inquiries/family-violence-and-commonwealth-laws](http://www.alrc.gov.au/inquiries/family-violence-and-commonwealth-laws) (viewed 21 April 2016).