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Pay Equity and Awards Team
Fair Work Commission
11 Exhibition Street
Melbourne VIC 3000

By email: awards@fwc.gov.au

Response to the Fair Work Commission Discussion Paper on Work and Care, Modern Awards Review 2023–24

Thank you for the opportunity to make a submission on the Discussion Paper on Work and Care for the Modern Awards Review 2023–24.

We welcome the Fair Work Commission's efforts to ensure that it consults widely on a range of employment and workplace relations topics that will lead to better living standards and fairer working conditions for all workers in Australia.

Our submission focuses on changes that should be made to the Modern Awards and legislation for employment and working conditions in Australia, in order to improve the lives of workers who have caring responsibilities and prevent the exploitation of workers experiencing disadvantage and intersectional vulnerabilities including gender.

This submission is jointly made by South-East Monash Legal Service (**SMLS**), WEstjustice Community Legal Centre (**WEstjustice**) and Jobwatch (**JW**). We are each members of Community Legal Centres Australia, the Federation of Community Legal Centres (Victoria) (**FCLC**) and the FCLC Victorian Employment Law Working Group (**VELWG**).

About our services

Established in 1973, **SMLS** is a community legal centre that provides free legal advice, assistance, information, and education to people experiencing disadvantage in our community. SMLS also undertakes significant community development, as well as policy and law reform. Our vision is a fair and inclusive community where people can access the resources, networks and support they need to resolve legal issues and overcome barriers to social, cultural, and economic inclusion and participation. We provide employment law advice in relation to the full range of employment issues, and we operate outreach services at the Fair Work Commission and Study Melbourne in response to the ongoing need within our local community for free employment law assistance. See www.smls.com.au

WEstjustice is a community legal centre providing free legal help, financial counselling and support to people in the Western suburbs of Melbourne. Our community is one of the fastest growing areas in Australia and is highly diverse, comprising many newly arrived refugee and migrant communities, significant representation from Asia, Africa and the Pacific Islands, and a growing Aboriginal and Torres Strait Islander community. WEstjustice believes in a just and fair society where the law and its processes don't discriminate against vulnerable people, and where those in need have ready and easy access to quality legal education, information, advice and casework services. The Employment and Equality Law Program at WEstjustice was established in 2014 and offers legal and work rights education to

international students, young people, newly arrived migrants and refugees, and people experiencing family violence. See www.westjustice.org.au

JobWatch is an employment rights, not-for-profit community legal centre. We are committed to improving the lives of workers, particularly the most vulnerable and disadvantaged. JobWatch was established in 1980 and is the only service of its type in Victoria, Queensland and Tasmania. Our centre provides the following services:

- Information and referrals to workers from Victoria, Queensland and Tasmania, via a free and confidential telephone information service (TIS);
- Community legal education, through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other appropriate organisations;
- Legal advice and representation for vulnerable and disadvantaged workers across all employment law jurisdictions in Victoria; and
- Law reform work aimed at promoting workplace justice and equity for all workers.

The vast majority of JobWatch's callers and clients are not union members and cannot afford to get assistance from a private lawyer. See www.jobwatch.org.au.

Work and Care Review

As outlined in the Fair Work Commission Discussion Paper, carers, particularly women, continue to face many challenges when trying to balance work and care responsibilities. Women's workforce participation is still lower than that of men and we have a way to go to reach gender pay parity. Whilst all women should not feel forced to enter the workforce, and the importance of unpaid work should be highlighted, social inclusion and the opportunity to participate is important. Equally, men should be given the flexibility and encouraged to work and care, which in turn promotes women's participation. Modern Awards must raise the minimum safety net and current terms and conditions of working rights to promote this participation and inclusion, which in turn will go some way to achieve gender equality.

In our respective submissions to the Select Committee on Work and Care¹ and in our joint submission to The Treasury Employment Whitepaper,² we outlined these challenges and refer to these submissions, with excerpts provided for ease of reference below.

JobWatch Submission to the Select Committee on Work and Care:

In our experience, many Australian workers, particularly women, still struggle to successfully juggle work and care responsibilities (including care for children, aging relatives or family members with disabilities). Whilst many women in the community are under-employed and/or lack security of employment (which makes it extremely difficult for them to ask for time off work for care needs), many professional women, who are in permanent and often full-time work, feel overworked and torn between work and family commitments. Women in

¹<https://www.smls.com.au/wp-content/uploads/2023/11/SMLS-Letter-to-Select-Committee-on-Work-and-Care-20.09.22.pdf>; https://jobwatch.org.au/wp-content/uploads/202209_Work-and-Care-Submission.pdf.

²<https://www.smls.com.au/wp-content/uploads/2023/11/2022.12.05-Joint-submission-Employment-white-paper-final.pdf>

both of these categories suffer the effects of gender inequality and are in need of special measures to alleviate their situations.

SMLS Submission to the Select Committee on Work and Care:

Many of our clients are in precarious or insecure jobs and working in low-paying industries. By and large for the clients we see, opting for insecure or precarious employment is not a matter of choice but often as a result of having no other alternatives. Insecure and precarious employment creates barriers for those workers who are also carers to children, those with a disability and the elderly.

Fundamentally, in order to achieve social cohesion, there needs to be an eradication of the immense disparities in wealth and income in our society and elimination all forms of discrimination, including discrimination based on race, gender, disability and age. Any reforms aimed at promoting social cohesion must be working towards removing systemically entrenched barriers for certain cohorts of workers from achieving secure and decent work. We see that migrant workers, visa holders, women, workers who speak English as a second language and workers with a disability are disproportionately over-represented in low-paying and precarious jobs. These barriers are exponentially felt for those workers that are also carers.

Our submissions are intended to demonstrate the added challenges that our clients face when balancing up carer/worker obligations and the increased burdens when people are facing insecurities such job insecurity, financial insecurity and visa insecurity.

Joint Employment Whitepaper Submission:

In our joint submission to Treasury on the Employment Whitepaper,³ we discussed the importance of breaking down the barriers prohibiting or restricting women's participation on the workforce.

Pay equity and equal opportunities for women

To increase labour force participation and remove systemic barriers to employment, greater emphasis must be put on ensuring gender pay equity and creating equal opportunities for women. Pay equity and equal access to employment opportunities play a major role in women's mental and physical health. Further reform is also needed in relation to the following:

- *Childcare access and costs, as the cost of childcare is a major contributor to discouraging women from entering or re-entering the workforce;*
- *The period and amount of paid parental leave legislated for both parents; and*
- *Unpaid carer's leave entitlements (particularly in the context of the pandemic) to better protect workers or prospective workers who are carers.*

We reiterate the importance of a higher level of standard of living and improved working conditions rather than forcing women or carers into work:

³ <https://www.smls.com.au/wp-content/uploads/2023/11/2022.12.05-Joint-submission-Employment-white-paper-final.pdf>

We support reducing the barriers to employment and raising labour force participation. However, the emphasis should be on improving working conditions and the standard of living and providing opportunities to participate in the workforce rather than a generalised push to full labour force participation. Greater emphasis must also be placed on the important role carers (for example carers of children, family members, the elderly and the disabled) have in our society and the importance of this unpaid labour force participation. These are not new issues. We have been advocating for changes in these areas for many years and have repeatedly made calls for changes to employment and migration law to improve the situation for workers, particularly migrant workers and international students.

Key Areas for Reform

At a high level, with reference to the discussion questions at page 147-149 of the Discussion Paper, we recommend that the modern awards be varied to the extent necessary to reflect the recommendations of the Senate Select Committee, to the extent that they align with our recommendations and submissions set out below.

Table of Recommendations		
Recommendation	Recommendations from the Senate Select Committee on Work and Care Interim and Final Reports relevant to the FWC Modern Awards Review on Work and Care	Our Recommendations and previous submissions
Final Report Recommendation 15 - Entitlements and remuneration for all care sector workers	<p>The committee further recommends the Australian Government support a priority application to the FWC through the newly established care and community sector expert panel, for award wage increases for all care sectors including early childhood education, disability care and aged care, and all sectors covered by the relevant childcare, and Social, Community Home Care and Disability Services Industry (SCHADS) Awards.</p> <p>In order to address pay equity and to stem the flow of workers out of the care sector, such a priority application should draw the FWC’s attention to:</p>	<p>We support the recommendation for wage increases across all care sectors and call for increased funding of childcare subsidies to offset any increases in childcare fees associated with wage increases.⁴</p> <p>As outlined in WEstjustice’s submission on the National Gender Equality Strategy:⁵</p> <p><i>Women traditionally carry the burden of caring responsibilities and represent a significant portion of the caring sector, including significant representation from migrant women. Pay and conditions must be improved in these industries.</i></p>

⁴ <https://www.smls.com.au/wp-content/uploads/2023/11/2022.12.05-Joint-submission-Employment-white-paper-final.pdf>.

⁵ [https://westjustice.org.au/cms_uploads/docs/230428--national-gender-equality-strategy-submission-\(final\).pdf](https://westjustice.org.au/cms_uploads/docs/230428--national-gender-equality-strategy-submission-(final).pdf); see also https://jobwatch.org.au/wp-content/uploads/202209_Work-and-Care-Submission.pdf.

	<ul style="list-style-type: none"> • the need to reconsider and appropriately reward classifications, wage structures, conditions and entitlements across all care sectors and awards, and under the SCHADS Award. This consideration should include appropriate relative pay across the care sector reflecting the nature of work and qualifications, skills and experience. It should also recognise the impact of gender on caring roles and the unique skills, variability and value of care work; • the appropriateness of care sector employees receiving payments for work-related travel time, administrative responsibilities and engagement with essential training; and • the appropriateness of a minimum shift call-in time across the care sector (for example, a four-hour minimum or another identified suitable minimum period). <p>The Australian Government should consider mechanisms to fund and implement, in accordance with historical practice, any wage increases and improved conditions agreed to by the FWC.</p>	<p><i>The rate of pay in the caring sector must appropriately acknowledge the educational attainment and investment required for those roles. Women engaged by small employers do not often have the benefit of collective bargaining efforts which often assists with improved pay and conditions. Appropriate wage setting at the award level is important to ensure gender equality across these industries.</i></p> <p><i>Some of our clients in the care industry have been engaged as independent contractors and were being paid as low as \$8.60 per hour. Minimum wages must be extended to workers who are classed as independent contractors, who are doing work that is otherwise covered by an award.</i></p> <p><i>Monitoring wages in these industries may provide an indicator to ensure that work traditionally classed as “women’s work” is adequately remunerated. Current research also indicates significant disparity in retirement income available to men in comparison to women, which reflects the ongoing income disparity during the lifespan. Continuing to monitor income disparity at retirement as an outcome will also assist to evaluate whether measures taken reduces gender inequity at retirement age. Finally, gender inequality means that women’s earnings are often significantly less than that of men. Women are often financially reliant on men and are vulnerable to exploitation especially when they are experiencing family violence. These experiences can be exacerbated in case of migrant women in an unfamiliar cultural and social environment. In addition, women may</i></p>
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<p>Final Report</p> <p>Recommendation 17 - Leave arrangements—defining immediate family</p>	<p>The committee recommends that the definition of ‘immediate family’ in the <i>Fair Work Act 2009</i> be amended and broadened for the purposes of an employee accessing carer’s leave. In addition to the current definition the following persons should be classified as ‘immediate family’:</p> <ul style="list-style-type: none"> • Any person who is a member of an employee household and has been for a continuous period of over 18 months; • Any of the employee’s children (including adopted, step and ex-nuptial children); • Any of the employee’s siblings (including a sibling of their spouse or defacto partner); and • Any other person significant to the employee to whom the employee provides regular care. 	<p>We support broadening the definition of ‘immediate family’ in the Act and in Awards.</p> <p>We recommend broadening the definition of immediate family in the Awards to take into consideration the cultural nuances of the diverse workforce in Australia and their caring responsibilities, for example including aunts, uncles, cousins, nieces and nephews. It should be framed from a ‘needs’ based lens taking into consideration the many varying roles a carer can take and that family can be considered wider than a household.</p> <p>Many CaLD carers may have a very broad definition of family (including their wider community or support network), and as such their caring responsibilities may be greater.</p> <p>These scenarios could be covered by broadening the definition to include: “any other person significant to the employee to whom the employee provides care.” We suggest removing the word ‘regular’ from the recommended wording by the Senate Select Committee to ensure caring responsibilities that may not be ‘regular’ are covered.</p> <p>The Commission should also have regard to the <i>Family Violence Act 2008</i> (Vic), which has a definition of family member which includes: “<i>the cultural recognition of the relationship as being like family in the</i></p>

		<p><i>relevant person's or other person's community"</i></p> <p>We suggest reducing the period of time from 18 months to 6 months. This will cover those carers who may have caring responsibilities for household members who have only recently come into their care. We see this amongst newly arrived migrant workers with children who may stay with family while finding their feet, as well as amongst international students who may have caring responsibilities for other student housemates.</p> <p>We also recommend further consultations are made with Aboriginal and Torres Strait Islander organisations to ensure that the various care arrangements such as kinship care are covered under any amendments to the Awards.</p>
<p>Final Report</p> <p>Recommendation 18 - Leave arrangements</p>	<p>The committee recommends the Australian Government consider the adequacy of existing leave arrangements and investigate potential improvements in leave arrangements in the <i>Fair Work Act 2009</i>, including separate carer's leave and annual leave.</p>	<p>We reiterate our recommendation that:</p> <p><i>The Government should investigate options for further reform in relation to childcare access and costs, the period and amount of paid parental leave legislated for both parents, and also personal leave to better protect workers or prospective workers who are carers.</i>⁶</p> <p>We also refer to the following previous submissions on leave arrangements.⁷</p>
<p>Final Report</p> <p>Recommendation 19 - Leave arrangements</p>	<p>The committee recommends the Australian Government request the FWC to review access to and compensation for paid, sick and</p>	<p>We recommend amending Modern Awards to allow annual leave at half pay. Carers of children are often left without support during school holidays and must rely on expensive</p>

⁶ <https://www.smls.com.au/wp-content/uploads/2023/11/2022.12.05-Joint-submission-Employment-white-paper-final.pdf>.

⁷ https://jobwatch.org.au/wp-content/uploads/202209_Work-and-Care-Submission.pdf; <https://www.smls.com.au/wp-content/uploads/2023/11/SMLS-Letter-to-Select-Committee-on-Work-and-Care-20.09.22.pdf>; <https://jobwatch.org.au/wp-content/uploads/Carers-Leave-Submission--For-Web.pdf>.

	<p>annual leave for casual and part-time workers.</p>	<p>extra-curricular or sport programs to care for their children whilst they work. Alternatively, they may be required to take unpaid leave which can put a financial strain on many families. The option to take annual leave at half pay provides flexibility and options for carers, and further facilitates women's participation in the workforce.</p>
<p>Interim Report Recommendation 5 - Rosters & Final Report Recommendation 21 - Rostering</p>	<p>The committee recommends that the Australian Government amend the <i>Fair Work Act 2009</i> to provide improved rostering rights for employees, and in particular working carers, by:</p> <ul style="list-style-type: none"> • ensuring employers implement rostering practices that are predictable, stable and focused on fixed shift scheduling (for example, fixed times and days); and • amending section 145A of the Act to require employers genuinely consider employee views about the impact of proposed roster changes, and take the views of the employee, including working carers, into consideration when changing rosters and other work arrangements. <p>The committee recommends, alongside its Interim Report recommendations to ensure employees have predictable, stable rosters, the Australian Government supports a review by the FWC of current industrial awards, to require employers to give advance notice of at least two weeks of rosters and roster changes (except in exceptional circumstances) and genuinely consider employee views about the impact of proposed roster changes and to accommodate the needs of the employee.</p>	<p>We support the Committee's recommendations in relation to stable rostering to ensure carers are supported.</p> <p>To achieve the Modern Award objectives of access to secure work across the economy, gender equality and workplace conditions that facilitate women's full economic participation we support amendments to Modern Awards:</p> <ol style="list-style-type: none"> 1. to require employers ensure workers have predictable, stable working conditions and rosters. 2. to require employers to consider employee views and their caring responsibilities and the impact on roster changes and work arrangements. 3. to include the right for employees to 'say no' to extra hours and protection from negative consequences. 4. to introduce a minimum of two weeks notice to changes of rosters <p>We also support the formal recognition of workers 'right to say no' to extra hours, and recommend that a worker's right to refuse extra hours, and a casual worker's right to refuse a particular shift are explicitly recognised in modern awards as workplace rights within the meaning of the <i>Fair Work Act 2009</i>.</p>

	<p>The committee further recommends the Australian Government support a review by the FWC into current industrial awards, to ensure employees have a 'right to say no' to extra hours with protection from negative consequences.</p>	
<p>Final Report Recommendation 22 - Working week</p>	<p>The committee recommends the Australian Government write to FWC suggesting a review of the operation of the 38-hour working week set in the National Employment Standards, the extent and consequences of longer hours of work.</p> <p>The review should also consider stronger penalties for long hours and other possible ways to reduce them, including through the work, health and safety system which requires employers to ensure safe working hours as a part of providing a safe workplace.</p>	<p>We support the Committee's recommendations to further explore the 38-hour work week, and stronger penalties for long hours/work weeks.</p> <p>We also suggest the FWC amend the Modern Awards for better harmony with state Workplace Health and Safety laws including psychosocial hazards.</p>
<p>Final Report Recommendation 23 - Right to disconnect</p>	<p>The committee recommends the Australian Government consider amending the <i>Fair Work Act 2009</i> to include an enforceable 'right to disconnect' under the National Employment Standards, giving all workers a right to disconnect once their contracted working hours have finished and restricting employers from communicating with workers outside of work hours, except in the event of an emergency or for welfare reasons.</p> <p>The committee further recommends the Australian Government increase penalties for employers who commit wage theft through, for example, unpaid additional hours of work and consider changes to law that</p>	<p>We support the recommendation that modern awards be updated to reflect the right to disconnect which now forms a part of the National Employment Standards.</p>

	make these cases subject to criminal charges.	
Final Report Recommendation 24 - Rostering	<p>The committee recommends the mandatory annual reporting of companies with over 20,000 employees in Australia to the FWC on workplace practices to ensure roster justice and flexible working arrangements.</p> <p>The committee further recommends the mandatory collection of data by these companies of requests, including at store level, for roster changes and flexible working arrangements, and the percentage of changes to shifts that have been initiated by the employer within one week of the shift taking place. The data should:</p> <ul style="list-style-type: none"> • include a collection of all requests including those deemed 'informal' and detail whether these requests were approved, approved with modification, or denied; • provide information on the length of employment (up until the date of reporting) for that employee after their request was initially made; and • be provided in full to the Workplace Gender Equality Agency and published on the respective company's website. 	We support the recommendations of the committee, and further recommend that flexible working arrangements should be available for all carers, immediately upon commencement of employment.
Final Report Recommendation 25 - Job security and penalty rates for additional hours	The committee recommends the Australian Government respond to the recommendations of the Senate Select Committee on Job Security as a matter of priority. The committee reiterates those	We reiterate the recommendation, as outlined in SMLS' submission on

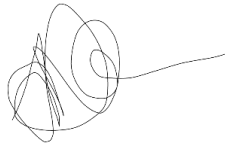
	<p>recommendations and calls on the Australian Government to:</p> <ul style="list-style-type: none"> • develop a new statutory definition of casual employment that reflects the true nature of the employment relationship and is restricted to work that is genuinely intermittent, seasonal or unpredictable; and • restrict the use of low base hour contracts, which can be ‘flexed up’ without incurring any pay penalty for additional hours worked beyond contract, and ensure permanent part-time employees have access to regular, predicable patterns and hours of work. This could include implementing penalty rates for any hours worked over the contracted amount. For example, if an employee is contracted for 15 hours and their employer rosters them for more, they should be paid a penalty rate for hours worked beyond the contracted amount. <p>The committee further recommends that the Australian Government develop clearly delineated statutory definitions of part-time and full-time employment and that these definitions, as well as a definition of casual employment, be inserted into the <i>Fair Work Act 2009</i>. These definitions should accurately reflect modern employment relationship and address employers’ use of widely accepted legal loopholes, which can result in employment conditions that do not align with community expectations. In particular, the growing trend of</p>	<p>Work and Care,⁸ that <i>there be a statutory presumption that in the absence of an express agreement between the employer and employee, it is presumed the employment is on a permanent basis unless proven otherwise. A statutory presumption of permanent employment should be created to deter unscrupulous employers and remove the significant burden from mistreated employees to prove their employment status.</i></p> <p><i>We are pleased to see the recent changes to the Fair Work Act introducing pathways to casual conversion however the pathway has flaws, and whilst the Act provides employees pathways to make a complaint, many of our clients are less inclined to complain due to the real fear of job loss. Furthermore, whilst there is now a statutory definition of casual employment in the Act, the definition is not adequate as it wrongly presumes that parties have comprehensive conversations about the terms of engagement at the commencement of work. We see that there is indeed still significant confusion amongst employees and employers as to whether the terms of employment is on a casual or permanent basis. It is often not expressly discussed (for example it may be that the worker is a new arrival or that there is an unequal bargaining power between employer and employee), and the conduct of the parties is not necessarily consistent with either type of employment.</i></p>
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⁸ <https://www.smls.com.au/wp-content/uploads/2023/11/SMLS-Letter-to-Select-Committee-on-Work-and-Care-20.09.22.pdf>; see also [https://jobwatch.org.au/wp-content/uploads/202209 Work-and-Care-Submission.pdf](https://jobwatch.org.au/wp-content/uploads/202209_Work-and-Care-Submission.pdf).

	<p>part-time work to function as a form of casual employment without the benefit of casual loading.</p>	
<p>Final Report Recommendation 26 - Gig Workers</p>	<p>The committee recommends that the principle of equal pay for equal work should be applied to gig workers, who currently do not have the same conditions and entitlements as other workers. Gig workers should have the same rights regarding predictability of work, liveable income, decent health and safety standards, and paid sick and holiday leave.</p> <p>The committee further recommends the Australian Government remove incentives for gig platforms to avoid workplace regulations.</p>	<p>As outlined in SMLS’ submission on Work and Care,⁹ we reiterate that:</p> <p><i>We see there is an urgent need to regulate digital platform operators to ensure workers are receiving a decent income, have safe working conditions and have access to prompt and low-cost options to resolve workplace disputes.</i></p> <p><i>We support the Labor Government’s commitment to “extend[ing] the powers of the Fair Work Commission to include “employee-like” forms of work, allowing it to better protect people in new forms of work from exploitation and dangerous working conditions. This change will allow the Fair Work Commission to make orders for minimum standards for new forms of work, such as gig work.” This will in turn protect those vulnerable gig workers who have the added responsibilities of being carers.</i></p> <p><i>Many carers can feel pushed into on-demand work because of the ‘flexibility’ it provides, however they are then faced with poorly paid work and often left unprotected from accidents or injury as many are not insured and cannot afford the cost of insurance. Given the immense power imbalance between the worker and the digital platform operator, whereby the worker has close to no bargaining power or ability to negotiate the terms of the engagement, it is far cry from what would normally be expected if it were truly an independent contractor arrangement. The lack of effective</i></p>

⁹ <https://www.smls.com.au/wp-content/uploads/2023/11/SMLS-Letter-to-Select-Committee-on-Work-and-Care-20.09.22.pdf>; see also https://jobwatch.org.au/wp-content/uploads/202209_Work-and-Care-Submission.pdf and <https://www.smls.com.au/wp-content/uploads/2023/11/2022.12.05-Joint-submission-Employment-white-paper-final.pdf>.

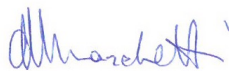
		<i>protections for vulnerable workers in the gig/on-demand/digital economy is intolerable.</i>
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Ashleigh Newnham
Director, Advocacy and Development
South-East Monash Legal Service Inc.
Ashleigh.Newnham@smls.com.au



Jennifer Jones
Legal Director, Employment and Equality Law
WEstjustice (Western Community Legal Centre)
jennifer@westjustice.org.au



Gabrielle Marchetti
Principal Lawyer
JobWatch Inc.
gabriellem@jobwatch.org.au