



# **Fair Work Amendment Bill 2013**

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Submission to Education, Employment and Workplace  
Relations Committee, Parliament of Australia Senate

**Carers Victoria submission**

**April 2013**

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# 1 Introduction

## 1.1 About Carers Victoria

Carers Victoria is the state-wide peak organisation representing more than 700,000 family carers across Victoria – people caring for ageing parents, children with disabilities, and spouses with mental illness or chronic health issues.<sup>1</sup>

Carers Victoria is a member of the National Network of Carers Associations and the Victorian Carer Services Network. Carers Victoria is a non-profit association which relies on public and private sector support to fulfil its mission with and on behalf of carers. Carers Victoria is a membership based organisation. Our members primarily consist of family carers, who play an important role in informing our work, contributing to advocacy and strategic aims, and distributing information more widely to other carers.

## 1.2 About this submission

Carers Victoria welcomes this opportunity to comment upon the Fair Work Amendment Bill 2013. The Bill has the potential to improve the lives of many people with caring responsibilities.

This submission will be relatively brief. It will be confined to comments about the right to request flexible working arrangements for carers (Schedule 1-Family-friendly measures Part 3). This is the part of the Bill most specific to the circumstances of people with caring responsibilities. Although not a focus of this submission, significant numbers of carers will also have a keen interest in the right to request flexible work for employees with a disability, employees over 55 years old and those experiencing family violence.

# 2 Carers and workforce participation

Australian Bureau of Statistics data estimates that there are 2.6 million carers in Australia, of whom 770,000 are primary carers.

Carers have lower rates of workforce participation than other Australians of equivalent age. Survey of Disability, Ageing and Carers (SDAC) data shows that 58.3% of carers participate in the workforce in comparison with 69.7% of non carers.<sup>2</sup> For primary carers,<sup>3</sup> the workforce participation rate drops further to 42.3%.

Patterns of participation also differ according to carer status. Primary carers in particular are more likely to work part time than full time (52% of employed primary carers work part time) in comparison with employed non-carers (38% of whom work part time). The much lower rate of full time employment for primary carers is also the case for the broader population of carers (19.2% of carers work full time versus 42% of average Australians).

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<sup>1</sup> This submission will use the term 'carer' to refer to those people caring for a person with a disability, chronic health condition, mental illness or a person with age related frailty.

<sup>2</sup> Australian Bureau of Statistics, Survey of Disability, Ageing and Carers (SDAC) 2009

<sup>3</sup> A primary carer is a person who provides the most informal assistance, in terms of help or supervision, to a person with one or more disabilities (ABS Disability, Ageing and Carers, Australia User Guide)

Understandably, these lower levels of workforce participation rates translate into lower income levels for carers. The average income for carers is 25% lower than that of non-carers<sup>4</sup> and carers are over represented in the lowest two income quintiles. Lower incomes combine with the need to meet additional costs of disability caring to create significant financial hardship for many carers.

There is also evidence that carers tend to work in lower paid jobs than the general population. A report produced jointly by Deakin University, Australian Unity and Carers Australia found that, even among carers who work full time, average earnings are \$7200 less per year than the general population.<sup>5</sup>

These statistics speak to the considerable difficulties faced by many carers in combining their care responsibilities with paid employment. Although there is strong evidence that the majority of unemployed carers would like paid employment,<sup>6</sup> many cannot because of multiple barriers. Others choose to work in casual jobs or in roles with reduced responsibility and skill level as a trade off with their caring role.

For those caring intensively over many years, the costs are extended even beyond the caring years by reduced or negligible superannuation accumulation. This means that many ex-carers continue to be dependent upon income support for an aged pension.

Paid work brings benefits in addition to the obvious financial ones. It can provide dignity, a sense of purpose, structure and social participation. Carers commonly report that employment creates a respite effect – a break from caring and an opportunity to have social interaction, and a different identity and role than that of ‘carer’. The population of carers is not homogenous. Many carers have healthy and satisfying lives. There is some evidence that it is those carers who are locked out of the workforce for long periods who have the worst health and wellbeing.

This has several important implications for policy. At a personal level, it is largely individuals carrying the opportunity costs of caring. Recent discussion about the need for a National Disability Insurance Scheme (NDIS)<sup>7</sup> has highlighted the inequity of this situation, recommending that the costs of care be borne more evenly across the community. At a broader economic level, Australia can ill afford to forgo the labour and skills of such a large proportion of the population. At the same time, modeling shows that the availability of family carers relative to the number of those needing care will decline in future years. This will create additional demands upon care systems and, in turn, government revenue. Supporting individuals to achieve a more even balance of paid employment and caring responsibilities should be part of any effort to improve the sustainability of care.

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<sup>4</sup> ABS SDAC 2004

<sup>5</sup> Cummins, RA, Hughes, J, Tomy, A, Gibson, A, Woerner, J, & Lai, L 2007, ‘Special report: the wellbeing of Australians: carer health and wellbeing’ *Australian Unity wellbeing index*, survey 17.1, Deakin University, Carers Australia & Australian Unity, Melbourne.

<sup>6</sup> This submission will use the term ‘paid work’ to emphasise that unpaid caring is also work and should be valued as such.

<sup>7</sup> Now named ‘DisabilityCare Australia’

### 3 What carers need

A 2008 study of those carers in receipt of carer specific income support payments<sup>8</sup> identified the following main barriers to paid employment (see Table 1). While some of the listed barriers are clearly beyond the scope of this submission, it is highly relevant that difficulty in arranging working hours was one of the major impediments. Note that, for carers encountering the most difficulty, it can be the combination of multiple barriers that hinder workforce participation rather than any single factor.

**Table 1** (Edwards et al 2008)

**Main barriers to employment identified by female carers who were not in the labour force but would like to work, by payment type**

	Payment type	
	Carer Allowance only	Carer Payment
	%	%
No alternative disability care arrangements available	22.4	21.6
Would be too disruptive to the person with the disability	12.7	17.6
Difficult to arrange working hours	23.0	15.7
Loss of skills from being out of the workforce	3.0	2.0
Age	6.7	17.6
Cost of paying for disability care while at work	2.4	2.0
Other	27.3	23.5
No difficulties expected	2.4	0.0
<b>Number of observations</b>	<b>165</b>	<b>51</b>

Notes: Excludes those aged 65 years or older. Of the 84 carers who indicated that there was an "other" barrier to employment, 27 (32.1%) indicated that their own health was a factor.

Source: FCPDS 2006

Carers Victoria, Carer Australia and other members of the network of Carer Associations have consistently advocated for carers to have a right to request flexible work.<sup>9</sup> The current Act supports this right for a parent (or a person who has responsibility for a child) of a child under school age or a child with a disability up to the age of 18 years.<sup>10</sup> The Amendment Bill's extension of this right to carers regardless of the age of the person needing care is to be whole heartedly welcomed.

<sup>8</sup> Edwards, B, Higgins, DJ, Gray, M, Zmijewski, N, & Kingston, M 2008, 'The nature and impact of caring for family members with a disability in Australia', *Research report*, no. 16, 2008, Australian Institute of Family Studies (AIFS), Melbourne

<sup>9</sup> Carers Victoria, Submission to Better Support for Carers 2008, Carers Australia pre budget Submissions, 2012-13, 2013-14

<sup>10</sup> Fair Work Act 2009

## 4 Key issues for the Amendment

### 4.1 Eligibility

#### 4.1.1 Definition of carer

The Amendment Bill states that an employee may request changes in working arrangements if they are a carer within the meaning of the *Carer Recognition Act 2010*. In turn, the *Carer Recognition Act* states that:

(1) For the purpose of this Act, a **carer** is an individual who provides personal care, support and assistance to another individual who needs it because that other individual:

- (a) has a disability; or
- (b) has a medical condition (including a terminal or chronic illness); or
- (c) has a mental illness; or
- (d) is frail and aged.<sup>11</sup>

It is possible to mount alternative definitions of a 'carer'. For example, the 2012 Adam Bandt Fair Work Amendment (Better Work/Life Balance) Bill proposed that a right to request flexible work should apply to an employee 'who has responsibility for the care of another person'.<sup>12</sup> This definition would potentially be more inclusive than that used in this Amendment Bill. Broadening the definition further in this way might be welcomed as a positive step by work-life advocates who refer to the international evidence that a right to request is most effective and least administratively problematic when it is a universal right for all employees.<sup>13</sup> In countries where the right of request is limited to certain groups, there can be sensitivity and awkwardness in asserting a right that is not available to all members of the workforce. There is also a persuasive argument that eligibility should refer to caring responsibilities because it is these that are most relevant to determining the level and type of flexibility required rather than whether an employee has a particular identity or not.

On balance, Carers Victoria supports the Amendment Bill's definition of carer for two reasons:

- although a universal right to request flexible work for all employees may be more beneficial to carers than a more bounded one, there is recognition that a stepped approach to achieving change is more realistic, given Australia's current political and industrial relations dynamics, and
- the Amendment Bill's reference to the Carer Recognition Act is an appropriate use of the Act. The Carer Recognition Act needs to be routinely applied to other legislation in order to develop currency and potency.

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<sup>11</sup> Carer Recognition Act 2010 5(1)

<sup>12</sup> Fair Work Amendment (Better Work/Life Balance) Bill 2012

<sup>13</sup> This is the case for legislation in the Netherlands

#### 4.1.2 Proof of carer status

There is also a more general issue about the application of right to request provisions that relates to practice. The Bill's Explanatory Memorandum makes it clear that the legislation has no evidence requirement attached to the request, but that 'It would be expected that documentation relating to the particular circumstances of an employee would be addressed in discussions between employers and employees'.<sup>14</sup> In these circumstances, it can be very unclear for employees and employers alike as to the level of evidence and information that is necessary to trigger a desired change. Employees may disclose aspects of their situation in great detail as a way of educating their employer or advocating for their case. Caring by definition involves a person who receives care. An employee may feel inhibited in disclosing information about their family member's condition or level of disability because they wish to protect their privacy and dignity, particularly when there is great stigma in the community about the person's condition. On the other hand, an employee may feel obliged to provide more information than necessary about their family member, in doing so breaching the privacy of their family member.

Over-disclosure of sensitive and personal information can change the dynamic between an individual employee and employer. The employer has more personal information about an employee who is requesting flexible work than other non-requesting employees. Some employees will be very aware of this possibility and may be wary of making the disclosures that they may need to achieve an evidenced request. The employer has a responsibility to manage this information securely and to ensure that it is only used in respect to the initial purpose of the disclosure.

Guidelines about managing disclosure and information are necessary to assist employees and employers. The Victorian Equal Opportunity and Human Rights Commission's *Family Responsibilities – Guidelines for Employers and Employees* provide a useful example of how these guidelines can be made accessible and relevant.<sup>15</sup> Development of guidelines should consider the merits of using employee Statutory Declarations as a way of providing accountability without the need for over disclosure.

#### 4.1.3 Duration of employment and eligibility

The current Fair Work Act states that, in relation to a request for flexible work arrangements,

65 (2) *The employee is not entitled to make the request unless:*

- (a) *for an employee other than a casual employee-the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or*
- (b) *for a casual employee-the employee:*
  - i. *is a long term casual employee of the employer immediately before making the request; and*
  - ii. *has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.*

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<sup>14</sup> House of Representatives, Fair Work Amendment Bill 2013 Explanatory Memorandum

<sup>15</sup> These guidelines were made to support the Equal Opportunity Amendment (family responsibilities) Act 2008 (Vic)

It can be presumed that this clause is the product of a compromise. It does, however, contain potential problems for employees. For example:

- prospective or recently appointed employees cannot request the flexibility they might need in order to sustain their care responsibilities or, indeed, paid employment
- current employees who have negotiated workplace flexibility may feel that they cannot move jobs to another employer because of the possibility of losing it
- the provisions for casual employees contains several undefined and subjective terms, for example, 'long term', 'reasonable', 'regular', 'systematic'. These ambiguities weaken the provision.

The current 12-month qualification risks diluting the principle behind the right to request. It could support a dynamic in which employees need to effectively earn a right to request through demonstrating value and good performance.

While international evidence shows that workplace flexibility does tend to increase employee retention, productivity and loyalty, this should not be a trade-off for individual employees. Such an assumption would undermine the basis and clarity of the legislation—that employees' right to request flexibility is informed by their carer status, not their work performance, productivity or seniority. Use of probation periods and the 'reasonable business grounds' clause are available to employers seeking to mitigate the risk of new employees exploiting or abusing a right to request flexible work. As for any anxiety that employees would miss out on jobs if they disclosed their carer status during the job application process, this speaks to limitations of current discrimination laws or problems with their application in this arena.

The current 12-month qualification requirement means that, in effect, the right to request flexible work is limited to long-term employees with recently emerged care responsibilities. Carers with long term care responsibilities, such as those with a family member with a lifelong condition disability, require workplace flexibility from their first day of work. For them, there is no magical change in care circumstances that occurs after working for the same employer for 12 months. This group of carers, who are numerous and already significantly disadvantaged, will remain unable to find the workplace flexibility they need and will continue to be shut out of permanent jobs under the Amended Bill. Limiting eligibility for a right to request in this way may also have the unintended consequence of discouraging carers from disclosing the reality of their care situation to employers.

There is a need to review this requirement. More extensive and detailed research about the impacts of the *Fair Work Act* upon employees (and different cohorts of carers), prospective employees and employers may be needed in order to inform future amendments of the Act in this regard.

## **4.2 Reasonable business grounds**

The Amendment Bill contains a new, non-exhaustive list of what might constitute reasonable business grounds. The intention behind this as a way of educating employers and employees about interpretation of the Act is a worthy one. As such, they are necessarily confined by the role and format of legislation. For example, there is no detail about how an employer might determine what 'excessive cost' might mean in relation to a request, and how this might be determined or calculated. Further guidance is likely to be necessary, again through production and dissemination of employer-employee guidelines.

### 4.3 Strengthening the legislation for carers

There is formal evidence from other jurisdictions, and anecdotal evidence from Australia that carers are highly sensitive to workplace dynamics. They will carefully weigh up the risks of disclosure about their care situation with the likelihood of achieving the flexibility they need. Carers commonly report that they felt they had to leave their paid job because of a lack of flexibility. Many carers will choose to do this rather than make a request for flexibility. In short, if they do not think that their request will be taken seriously, they will not make one and will leave their job instead. This can be wasteful for both the carer and employer.

These issues often remain hidden. Surveys that only measure the outcomes of requests made for flexible work do not reveal the broader picture of employee and employer behaviour and its implications. One example of this is that, in other countries with equivalent legislation the issues have had a gendered aspect, with men less likely to make a request for flexibility because they thought it more likely that the request would be refused due to community norms about gender roles.<sup>16</sup>

The Amendment Bill does not address the key concern that the *Fair Work Act* does not have enough ‘teeth’ to be effective for carers needing flexible work.

#### 4.3.1 Legislative support to ensure that requests are taken seriously

The Act does not require that employers demonstrate that they have taken a request seriously. There is also little guidance about how this might occur. A meaningful process would involve joint problem solving between both parties to arrive at a mutually acceptable arrangement in good faith. This process may require time and creativity. The legislation does not encourage this; indeed the new list of examples of reasonable business grounds in the Amendment may further shift the balance towards a focus on refusal rather than finding solutions.

#### 4.3.2 Right to appeal an adverse decision

The Fair Work Act contains no provision for an employee to appeal the refusal of a request for flexibility. An employer complies with the Act by making

*... a written response to the request within 21 days, stating whether the employer grants or refuses the request.*

There is no doubt that many employers are reasonable and will support flexible work because they understand the family pressures and responsibilities faced by most employees. Furthermore, work done in the United Kingdom has demonstrated that providing employees with flexibility is sensible and cost effective on business grounds because it results in better employee retention, productivity and loyalty.<sup>17</sup>

This legislation should not be aimed at well informed and reasonable employers. In spite of how prevalent disability and caring are in our community, their impacts are still not

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<sup>16</sup> See Hegewisch article at the end of this document

<sup>17</sup> See [www.employersforcarers.org](http://www.employersforcarers.org)

commonly understood by all employers. A more robust expectation that a request is taken seriously and that appeal is possible would have added value in raising awareness about caring issues.

Evidence from other countries shows that a right to request flexible work does not result in 'an opening of the floodgates' of requests. Please see attached article by Ariane Hegewisch for more detail. This may be of some reassurance to Australian employers, as will a reminder that the right is to make a request for flexibility not a right to flexibility. It should also not be assumed that a right to appeal will result in a large number of appeals. With sufficient guidance and education about the legislation for employers and employees, only a small number of appeals should eventuate. There is a balance to be achieved here: weak legislation will ensure that few requests are made because of low expectations by the employees who need flexibility.

## 5 Recommendations

Carers Victoria recommends that:

1. Guidelines are collaboratively developed to support employers and employees to apply the provisions of the Fair Work Act. It may be beneficial to have separate guidelines addressing the right to request flexible work. Guidelines should include:

- advice about what constitutes good practice in terms of process
- material about disclosure issues and respective responsibilities
- suggestions and examples of types of flexible work arrangements
- detail and resources to support adequate documentation, and
- more detail about how to consider reasonable business grounds.

2. The 12 month qualification period before employees can make a request for flexible working arrangements is reviewed and omitted to allow recent or new employees with existing care responsibilities to request flexibility.(Fair Work Act 65 (2)(a)).

3. Terms of definitions relating to entitlement of casual employees to request flexibility are clarified (Fair Work Act 65(2)(b)).

4. Rigorous and fine grained research is conducted into the impacts of right to request legislation on different parties and cohorts.

5. The Fair Work Amendment Bill details that employers must demonstrate that they have taken a request for flexible work seriously.

6. The Amendment includes a right for employees who have requested flexibility to appeal an unreasonable adverse decision through a third party such as Fair Work Australia.