



INDEPENDENT
INQUIRY into
Insecure Work

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Independent Inquiry into Insecure Work in Australia

Written submission cover sheet

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KINGSFORD
LEGAL CENTRE

20 January 2011

Dear Mr Howe

Submission to the Independent Inquiry into Insecure Work in Australia

Please find enclosed Kingsford Legal Centre's submission to the Inquiry. We welcome the opportunity to provide feedback on the extent and impacts of insecure work in Australia.

If you would like to discuss any aspect of the submission please contact the Centre on (02) 9385 9566.

Yours Faithfully

Elizabeth Meyer
Solicitor

Josephine Montgomery
Student Law Clerk

David McGill
Student Law Clerk



Submission to the Independent Inquiry into Insecure Work in Australia

1. Introduction

Kingsford Legal Centre (KLC) welcomes the opportunity to make a submission to this inquiry. KLC is a community legal centre and part of the Faculty of Law at the University of New South Wales. We provide advice and representation to people who live and work in the Botany and Randwick local government areas as well as to staff and students at the University of New South Wales. KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

KLC provides a specialist employment service within our catchment as well as a state-wide specialist discrimination service. KLC has acted for a number of clients in unfair dismissal conciliations and arbitrations, general protections complaints (particularly in relation to workplace rights and discrimination) and in relation to unpaid entitlements. KLC also provides advice on a wide-range of employment issues such as redundancy, disciplinary action, occupational health and safety and workplace rights for parents and carers.

2. Our clients and the extent of insecure work in Australia

In 2011 KLC provided advice to over 300 clients on employment law issues and almost 200 advices on discrimination matters (a substantial proportion of which relate to discrimination in employment).

Of the clients that KLC's employment clinic advised in 2011, 55% stated they earned \$40,000 or less annually; 92% of clients stated that they earned less than \$60,000p/a. Of the 8% of clients earning over \$60,000 the majority were at risk of losing their job or were about to commence a period of unpaid or low paid leave, such as parental leave.

62% of clients were not born in Australia, with many speaking little or no English. 2% of our clients identified as being either Aboriginal or Torres Strait Islander.

As seen in the statistics above, KLC's employment clinic services a predominantly low income and vulnerable sector of the community. Our experience suggests that insecure work is quite a widespread phenomenon within this community.

3. The workers that are most at risk of insecure work and why

In KLC's experience some of the people who are most likely to be engaged in insecure work are:

a. Migrant workers and workers from a non-English speaking background

Migrant workers may be at risk of insecure employment because their Visa conditions require them to remain in a particular form of employment¹, permit them to work only a certain amount of hours² or prevent them from claiming social security benefits if they become unemployed³.

Insecure employment and Visa conditions

Babul is a full-time student. Under his Visa conditions he cannot work more than 20 hours a week whilst studying. Babul worked as a cleaner in a large shopping centre. When he applied for the job he told his boss that he could only work 20 hours a week. He was told this wouldn't be a problem. Babul was employed as a casual employee and worked sporadic shifts. He was paid the same hourly rate as a permanent employee and did not receive any leave or other entitlements. He was often rostered on for more than 20 hours per week.

One night Babul accidentally damaged a wall at work. The next day he was told he was dismissed. Babul lodged an unfair dismissal complaint. After he lodged the complaint he received a letter from his employer telling him that if he continued with the unfair dismissal complaint they would raise the fact that he had been working more than 20 hours a week.

Babul received advice from KLC. He was advised that he was in breach of his Visa conditions and that he faced mandatory deportation if the Minister for Immigration and Citizenship became aware of this. Babul decided not to go ahead with his unfair dismissal complaint for fear of being deported. KLC was able to get the employer to agree to repay Babul his missing casual loading entitlement.

These workers are often from a non-English speaking background and may be unskilled (or unable to have their home country qualifications recognised in Australia) and working in low

¹ For instance, employees who are sponsored to live in Australia by their employer on a Subclass 457 Visa.

² For instance students who are restricted to working 20 hours or less a week and face deportation if the restriction is breached.

paid positions in the retail, hospitality, health and social services, cleaning and security industries. Many are from countries that do not have strong workplace laws. Few clients know what protections apply to them and are not advised when they start work whether they are casual or permanent or which Modern Award covers their employment. Few clients know where to go for help with employment problems and they are rarely union members. Some of our clients even believe that, even though they are working in Australia, Australian employment laws will not protect them unless they are a permanent resident or citizen.

Insecure employment in small to medium sized enterprises

Meanu had been employed as a Laundry Worker for five years for a medium size employer with approximately 30 employees. Her main duties were sheet packaging and pressing. Meanu worked regular hours each week however, she was not paid annual leave, personal leave or other entitlements that a permanent employee would usually receive. Meanu also did not receive a casual loading. In fact, Meanu was paid a flat hourly rate despite the fact some of her shifts started at 3pm and ended at 4am and she worked on weekends. Meanu's flat hourly rate was well below the minimum wage.

Meanu does not speak English well and does not know anything about Australian employment laws. She was not provided with a written employment contract when she started work. She receives payslips but they do not have all the details required by the FWAct.

Meanu's husband heard about Modern Awards from a friend. He looked up Meanu's Award and realised she was being underpaid. He helped her write to her employer to ask to be repaid. After getting the letter Meanu was dismissed because of a 'downturn in business'. Worried about how she and her husband would pay the bills Meanu concentrated on finding another job as soon as possible.

Weeks later Meanu and her husband came into KLC for advice. It was too late for Meanu to make an unfair dismissal or general protections complaint in relation to the dismissal. Meanu had also found out that the company had now gone into liquidation.

Over the five years of her employment Meanu had been underpaid almost \$70,000. Over a year after she was dismissed Meanu receives a dividend from the liquidator of just \$20,000.

Of those clients who are aware of their employment law rights (or at least some employment law rights), many still accept working arrangements that do not comply with the law. Clients have told KLC that "any job is better than no job" or that "once I get some experience I can look for something that pays better". Clients are often pressured into unsafe or demeaning positions in order to stay in employment. One client who was a qualified architect in his home country was "in charge of the garbage" at his workplace, despite being employed as a junior architect and was asked to change his name to something "more Anglo" so clients would feel more comfortable dealing with him.

Insecure employment and vulnerable workers

Yoon applied for a position advertised in the local Chinese language newspaper for work in a packaging factory. When she arrived at the job she was told that she would have to work for a week on an unpaid trial. Although Yoon suspected this wasn't legal she was desperate for a job and so decided to go ahead anyway.

There were other new workers starting on the trial too – all of them spoke little or no English. They were all told that permanent positions were available for workers who did well during the trial.

Yoon and the other workers all worked well during the unpaid trial and successfully packaged a big order that had come in that week. At the end of the week however they discovered that there were no ongoing positions being offered. Yoon and the other workers suspected that the employer just needed some extra workers to deal with the large shipment and never had any intention of giving them ongoing positions.

b. Working parents and carers

Working parents and carers may not be available for full time work and often have to settle for more temporary forms of employment if they are not able to find ongoing part time work. Development and career advancement opportunities are often limited for these workers. They tend to change employment more regularly and lose access to the benefits of longer term employment (such as unpaid parental leave, unfair dismissal protection and long service leave).

Some workers with “part time” arrangements find themselves in a situation where they are part time on paper (and paid as such) but still expected to do the work of a full time employee. When their performance is evaluated they are often seen as not achieving to the same extent as their full time colleagues who have no-care commitments (and are paid full time wages). Many are granted ‘flexible’ arrangements only to be ‘performance managed’ out of their employment later.

Insecure work and caring responsibilities

Daphne has worked with the same company for 6 years. When she became pregnant with her first child she and her employer agreed she would work from home predominantly, visiting the office once a week to “check in”. There was never any discussion about what hours she would work (i.e. office hours) or how long the arrangement would continue for.

Two years after starting her work from home arrangement Daphne fell pregnant again. She intended to take some parental leave after the birth, as she had started back at work the day after her first child was born and didn't want to do so again. Daphne planned to go back to her old position, working from home, after a few months.

Four months before she was due to give birth Daphne's son was badly injured and she needed to take unexpected leave to care for him. Daphne used all her available personal leave to care for her son. While she was on leave she received a letter from her employer telling her that, on the day her personal leave ran out, she was expected to return to work and that from then on she would have to work from the office full time. They did not consult with her at all about this change in working arrangements.

Daphne made a discrimination complaint against her employer. In response they alleged that her performance had been poor ever since she started working from home. Daphne feels she could never work for the company again, but at 5 months pregnant, she does not know who else would be willing to employ her. Unless she gets a new job (or goes back to her old one) she will no longer be entitled to the Government's Paid Parental Leave Scheme.

c. Aboriginal and Torres Strait Islander people

As a group Aboriginal and Torres Strait Islander people face greater economic and social disadvantage across education, employment and housing. Aboriginal and Torres Strait Islander people are more likely to experience contact with the criminal justice and welfare systems than other Australians. As such they are a particularly vulnerable group in relation to insecure work. They may be more likely to face discrimination in the workplace and be employed in low skilled, low paid work.

Insecure work and criminal records

John is a 19 year old Aboriginal man. He has just been offered a job with a Government Department as part of an Indigenous Recruitment Program. He has to undergo pre-employment criminal history screening before he will be employed. He receives a list of offences that may prevent him being employed if they are on his criminal record. One of the offences is "damage to property". When John was 18 he was caught drawing on a wall at the bus stop with a texta. He was convicted of "damage to property".

John is very worried that he will now lose the job because of his conviction.

d. Workers who have not yet completed their minimum employment period

Employment is insecure for all employees who are not able to access the unfair dismissal provisions under the *FWAct*, regardless of their form of employment. This includes employees

who have not yet completed their minimum employment period, which is 12 months for small business employees and 6 months for all other employees.⁴

Many KLC clients have been dismissed in an unfair manner but have no recourse because their employment lasted less than the minimum employment period. In some cases, KLC has seen employees being dismissed just before their minimum employment period ceased. In one case an employee, with no prior performance or conduct concerns was dismissed the day before he would have met the 6 month requirement.

KLC notes that in New Zealand, the minimum employment period is 90 days⁵. This period seems appropriate given that a longer period, such as under the current provisions⁶, may allow employers to engage in the practice of dismissing employees just before the completion of their minimum employment period.

Dismissal immediately prior to completion of minimum employment period

Antoine worked for a medium sized logistics company. He had received encouraging feedback about his performance in his role over the course of his employment. After working for the company for exactly five months and 29 days, his manager called him into a meeting without any notice and told him he was to finish up that afternoon. When Antoine asked for reasons why he was being dismissed his manager told him he didn't have to provide reasons because he was still on probation.

e. Employees of small businesses

The nature of employment in small businesses may be less secure because small businesses may have volatile resource requirements and may offer a less flexible environment for employees. The viability of many small businesses may be uncertain and as a result many small business employees may face uncertainty in their employment. Small business owners and managers may be less informed about legal requirements since they may not have access to human resources advice or other administrative support.

Further, small business employees have fewer rights under the *FWAct* in relation to access to unfair dismissal remedies and redundancy payments.

f. People with a disability

People with a disability may have requirements which restrict the types of work they can take on, may require adjustments (which are often at the employer's expense) to be made in order to perform the inherent requirements of their position and are more likely to require access to

⁴ *Fair Work Act 2009*(Cth) s383.

⁵ *Employment Relations Act 2000*(NZ), s67A.

⁶ As stated above, the current minimum employment period under s 383 of the *FWA* is 12 months for small business employees and 6 months for all other employees.

personal leave entitlements. People with a disability are more likely to face discrimination in the workplace and may be subject to prejudice and stereotypes.

Insecure work and mental illness

Wendy works for a large company in the CBD. Wendy has experienced Bipolar disorder for 15 years. It is well managed and does not generally affect her day to day life. Wendy's doctor suggests she try a new medication and advises her she should take some time off work while making the transition. Wendy discloses to HR that she has Bi-polar and requests unpaid leave (she has used up all her personal leave as she regularly has to visit doctors and specialists during business hours).

A few months later Wendy starts having problems with some of her colleagues at work. She feels that two colleagues in particular gang up on her and bully her. She complains to her manager but he does really do anything and just tells her to ignore them. After a few more weeks Wendy snaps and swears at one of the colleagues. The colleague makes a complaint about Wendy to HR.

Wendy is called into a meeting with HR. She is told that they have concerns for the safety of her colleagues. They refer to her Bipolar and tell her they have decided she is unfit for work. They tell her they will not let her return to work unless she visits a psychiatrist and the psychiatrist gives them a report stating she is fit for work. Wendy is suspended without pay. Wendy feels this is a complete breach of her privacy and feels as if her Bipolar is being used as an excuse to deal with the situation.

g. Labour hire employees

Many labour hire employees have what can essentially be an employment relationship with their host employer. Many have little or no contact with the labour hire agency other than at the start of their employment or when they get paid. Yet, labour hire employees have little access to the benefits of being an employee. Access to paid leave, redundancy entitlements and access to unfair dismissal and general protections regime are restricted in many cases.

Insecure work and labour hire employees

Gary has worked at a courier company for 8 years through a labour-hire arrangement. He is a good worker – he never misses a day and has never had any complaints about his performance or conduct. Each year he takes a short holiday at Easter and Christmas.

This year Gary's mother-in-law, who lives overseas, has been unwell. His wife has been overseas caring for her. Gary asked permission from the courier company to go see his wife

for a week. While Gary is overseas he gets food poisoning and his trip home is delayed by two days.

When he arrives back in Australia he calls the courier company to see when his next shift will be. He is told they have to 'let him go'. He is told that he's a good worker but they just need someone 'more reliable'. The labour hire company tells him they will help him find other work but they won't try to get the courier company to re-employ him.

4. The effects of insecure work

a. Financial security

Casual workers and labour hire employees in particular are likely to face financial insecurity due to the changing nature of their employment. Many cannot rely on a regular income or may lose their income source unexpectedly.

Low income and a lack of career development have a flow on effect to the superannuation contributions of employees in insecure work. People in insecure work may have difficulty supporting themselves and their families in retirement and may in fact have to work later in their lives for financial reasons.

KLC notes that the financial situation of people in insecure work may also make it difficult for them to join a union. Most of the clients we see are not union members – many, especially those new to Australia, do not even know that unions exist or how they go about joining. In many cases, we encourage clients to join their union, particularly where we see systemic workplace issues that would be better dealt with on a collective basis or where one client becoming a union member may have a knock-on effect amongst colleagues in a non-unionised workforce.

However, often unions require back dated membership dues from new members who join with an existing workplace issue. This policy may prevent or discourage many people in insecure work, and often the most vulnerable workers, from joining a union.

b. Occupational health and safety of workers and workplaces

Many KLC clients are required to work excessively long hours which pose a real risk to their safety. Migrants or workers who are less educated may be ill informed of Australia workplace health and safety law and feel pressured to engage in unsafe work practices.

c. Wellbeing and health of workers outside the workplace, including impact on family and other relationships

It is common for KLC clients who have been subjected to unfair treatment or harsh conditions at work to also have ongoing family issues and other crises in their lives. Often this arises

from the stress and trauma of their employment situation and the uncertainty over their finances and their future. In some cases, insecure work arrangements have led women experiencing domestic violence to remain in an unsafe relationship because of the (relative) financial security the relationship provides.

d. Training and skills development & career progression and opportunities

Casuals, employees on fixed term and specified task contracts and labour hire workers may have fewer opportunities for training and skill development as employers are less likely to invest in these employees if they are unlikely to remain with the employer for a long period of time. Employers may not provide equal opportunities to parents and other workers with carer responsibilities because they perceive that these workers are less dedicated to their work or that their care responsibilities might prevent them from taking on higher level roles. Furthermore these workers commonly miss out on training and skills development if they work flexible hours in order to meet family/private commitments.

5. The rights and entitlements/working conditions that can best assist to provide security for workers

KLC has observed that employees in insecure employment may be more at risk of breaches of their workplace rights. For instance many of KLC's clients who work in casual positions have been paid significantly below their award wage. A potential cause for this is that employees in insecure positions may be reluctant to assert their rights for fear of their employment being terminated or other adverse action being taken, despite this being prohibited under the *FWAct*.

Many clients, despite knowing that their rights are being breached or knowing that they have legal actions for redress are isolated from the legal system due to their level of English, education or income. Many come from countries where workers have few rights or where these rights are not readily enforced. Others simply do not have the time to enforce their legal rights – they are too busy finding a new job so they can continue to pay the bills.

In our experience few employees are provided with important details about their employment when they start work. The majority of employees are not provided with a *Fair Work Information Statement* when they start work, many are not advised whether they are permanent or casual employees (in fact we regularly see payslips that identify employees as being "permanent casuals" or "part time casuals" despite neither of these statuses being legally accurate) and few are advised (even when they ask their employer) what Modern Award they work under.

The most exploited workers receive no documentary evidence of their employment such as an employment contract or pay slip. KLC has come across a number of clients who have no way of proving they were ever employed apart from their own word. Although other colleagues could vouch for the fact that they were employed, these colleagues are hesitant to

assist our clients for fear of losing their own jobs. This does not just impact upon employees who have been dismissed or underpaid but also those who have been injured at work and need access to Workers Compensation.

Generally we agree with the recommendations made in the Options Paper. However, below we have commented on those recommendations that have particular relevance to KLC clients or issues that are not dealt with in the Options Paper.

a. Rights in relation to unfair dismissal remedies

As noted above, many employees are in insecure work purely by reason of the fact they have no access to unfair dismissal laws. KLC recommends that the minimum employment period for unfair dismissal protection under the *FWAct* be reduced to 90 days for all employees, including small business employees.

The 14 day time period for making an unfair dismissal complaint under s 394 of the *FWAct* prevents many KLC clients from making a complaint. As a consequence, many unfair dismissal cases which have strong grounds may never be heard. In order for employees to have security in their positions, the unfair dismissal provisions must be enforceable. In contrast, general protections applications involving dismissals may be made within 60 days of termination. KLC recommends that the statutory limitation on unfair dismissal complaints be increased to 60 days.

The meaning of “dismissed” under s 386 of *FWA* expressly excludes the non renewal of a fixed term or specified task contracts. United Kingdom legislation⁷ by contrast does include non-renewal of contracts as a form of dismissal. Consequently UK unfair dismissal legislation covers decisions not to renew employment contracts, and requires employers to provide reasons for the decision not to renew an employee’s contract. KLC submits that this level of protection is required in Australia given that fixed term and specified task employment are fast growing forms of employment. Furthermore, it is recommended that a minimum notice period is required for the decision not to renew employment contracts.

b. Protection from discrimination on the basis of irrelevant criminal history and religion

Discrimination in employment is prohibited by the International Labour Organisation Convention 111 (ILO 111).⁸ According to the Australian Human Rights Commission, this extends to discrimination on the basis of a person’s criminal record and religion.⁹ KLC notes however that neither of these forms of discrimination is prohibited by Federal discrimination law and as such, employees in many states do not have enforceable rights where they are discriminated against on the basis of their criminal record or religion.

⁷ *Employment Rights Act 1996* (UK)

⁸ <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C111>

⁹ http://www.hreoc.gov.au/human_rights/criminalrecord/on_the_record/brochure/index.html

KLC has had a number of clients in the past who have experienced great difficulty gaining secure employment as a result of their criminal history. Many have also experienced discrimination on the basis of their religion. KLC recommends that Australia bring anti-discrimination legislation in line with ILO 111 to prohibit discrimination on the basis of criminal record and religion.

c. Enforceability of “right to request” provisions and carer’s discrimination

As noted in the Options Paper, the current right to request provisions of the National Employment Standards are largely unenforceable. We agree with the recommendation in the Options Paper to extend the right to request provisions, subject denials of requests to challenge before Fair Work Australia and to provide a right to return to work part-time after parental leave.

Additionally, we recommend that the *Sex Discrimination Act 1984* (Cth) be amended to include protection from indirect discrimination on the basis of family responsibilities. This would enhance the protection of parents and carers, especially male parents and carers.

d. Rights for casual workers

We also agree with the recommendation in the Options Paper to increase the ability of casual workers (and long-time labour hire or rolling contract workers) to convert to permanent roles. Whilst we agree that some workers’ employment may be put at risk if there is a mandatory conversion after a certain period of work (as some employers will seek to dismiss them to avoid conversion) and other employees may not wish to convert, we still believe that the majority of employees would benefit from the ability to request conversion after a certain period of time.

We recommend that conversion be mandatory after a period of 12 months of regular and systemic employment, with the option for employees not wishing to convert to elect to remain a casual.

Alternatively, we recommend creating a “right to request” provision for casuals who have worked regularly and systemically for a period of 12 months. The “right to request” should be similar in nature to the existing “right to request” provision in the National Employment Standards however, “denials” should be subject to challenge in Fair Work Australia (as per ‘c’ above’).