



Australian Human Rights Commission

GPO

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Submitted via website form: <http://www.humanrights.gov.au/supporting-working-parents-pregnancy-and-return-work-national-review-community-organisations>

20<sup>th</sup> December 2013

Dear Commission

The National Working Women's Centres (NWWC) are pleased to have the opportunity to submit this response.

The NWWC in South Australia, the Northern Territory and Queensland are community-based not-for-profit organisations that support women employees whatever their age, ethnicity or work status by providing a free and confidential service on work related issues. All three Centres are small agencies that rely on funding from the Commonwealth Fair Work Ombudsman, State (SA and Qld) and Territory governments (NT).

The Working Women's Centres opened in 1979 in South Australia and in 1994 in the Northern Territory and Queensland. Since their beginnings, the Centres have worked primarily with women who are not represented by a union, their own lawyer or other advocate. We provide advice, information and support in lodging complaints and claims. As we are not legal services and can not provide legal advice, we refer women with legal needs to appropriate legal services. Many women who contact our Centres are economically disadvantaged and work in very precarious areas of employment.

NWWC also conduct research and project work on a range of issues that women experience in relation to work. These have included access to child care, Repetitive Strain Injury, outwork, family friendly practices, WHS, workplace bullying, the needs of Aboriginal and Torres Strait Island women, pregnancy and parental status discrimination, Community Development Employment Project (CDEP), work/life balance, pay equity and the impact of domestic violence on women workers and their workplaces. Although some of the issues have changed for women since the Centres began operation, the work that we do remains consistent with the philosophy that all women are entitled to respect, to information about their rights and equal opportunity in the workplace.

We are happy to be contacted about this submission.

Yours sincerely



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1. **Please provide any data on the prevalence, nature and consequences of discrimination experienced by women when they became pregnant at work and/or men and women who have returned to work after taking parental leave with the National Review**

The three Working Women's Centres each have individual data collection systems. Statistics from each of the systems are provided below.

**SAWWC 2012/2013 data:**

- 8.5% of the total enquiries were for specialised assistance on Pregnancy discrimination, Family responsibilities discrimination, Work and Family, Maternity entitlements, and/or Sex discrimination;
- 25% of all cases were to do with Maternity Entitlements, Sex Discrimination, Family responsibilities, Pregnancy discrimination and/or Work and family

**NTWWC 2012/2013 data:**

- 8.8% of long contacts with clients were for Pregnancy discrimination, Family responsibilities discrimination, Work and Family, Maternity entitlements, and/or Sex discrimination;
- 7% of all cases were to do with Maternity Entitlements, Sex Discrimination, Family responsibilities, Pregnancy discrimination and/or Work and family

**QWWS 2012/2013 data:**

- 8.5% of the total enquiries were for specialised assistance on Pregnancy discrimination, Family responsibilities discrimination, Work and Family, and/or Sex discrimination;
- 23.4% of all cases were to do with Sex Discrimination, Family responsibilities, Pregnancy discrimination and/or Work and family

Please note that for all three sets of statistics provided above there may be some inflation, as not all cases of sex discrimination (for example) pertain to the issues covered by the AHRC enquiry. However, there are also other categories of statistics collected (such as 'Employment Conditions') which may pertain in some manner to pregnancy discrimination and return to work issues but are extremely difficult to disaggregate. Likewise we know that our records of calls or cases in relation to 'Redundancy' will include a number of clients who have been 'made redundant' after they have informed their employer of their pregnancy. These too are difficult to disaggregate without doing a complete manual file audit. These statistics should only be taken as a guide.

## 2. Please provide any case studies of women and men's experiences of discrimination with the National Review

The following case studies are drawn from multiple clients from the NT, Queensland and SA Working Women's Centres. In order to protect the anonymity of our clients, we have combined stories and changed personal details such as names.

We realise we have included a lot of case studies, however, in trying to sift through the multitude of stories, it became apparent that while there are common themes, each story is unique and provides a useful insight into what discrimination in this area may look like.

### Case studies of Pregnancy Discrimination

**Kwi** complained that her manager's attitude changed towards her as soon as she told him she was pregnant. She was told that she would need to complete more reports, and perform new tasks that she had never had to do before.

**Clara** works as a casual customer service officer in the hospitality industry. After informing the boss of her pregnancy, Clara's rostered hours were cut. She asked the boss why and was told "it's because you're so big. It's for the baby's safety". Clara intended to work up until 38 weeks and had been cleared by her Dr to do so, however at around 30 weeks she was told "this is your last week, because you're so big". Clara responded "I'm only pregnant I'm not disabled?" and the manager just smiled at her. The manager implied that if she left quietly they would take her back after her leave, even though they were not obliged to do this as she was casual. When Clara spoke to the HR Manager she was told that her Manager was only looking out for her and her baby's safety.

**Anh** is pregnant and wants to apply for unpaid parental leave but she falls short of the 12 month qualification period by 3 weeks. She has requested to use annual leave and sick leave to make up the shortfall but the CEO refused her request.

**Maria** works in a small regional town. She had to have leave from work to fly to the major city in order to undergo fertility treatment. She felt that her manager was not happy with the arrangements, even though she did not take leave but took her work with her to complete during the travel. Maria reported that after this, her manager was asking her to report more often and asking her to account for her time in a way that hadn't happened before. Maria wrote the reports as required, but never received any feedback. Following the treatment Maria had a successful implant and was in early pregnancy. Around this time Maria was called into a meeting, and was told to bring a support person. The meeting went for 90 minutes and included her manager as well as four other people from outside organisations (on teleconference), some of whom she didn't know. The meeting discussed Maria's performance. She ended up having to tell her whole medical story and broke down

during the meeting. The meeting continued and she had to sit through it. During the meeting Maria was sobbing, highly stressed and emotional, but the meeting was not stopped. After the meeting, she had 5 hours of cramps and later miscarried.

**Koula** has worked as casual for 3 years in a community care facility. She has worked 15-30 hours per week during this time. Last month a new manager commenced, and Koula announced her pregnancy. The new manager cut Koula's hours to 3 per week and has refused to guarantee her any hours at all. When she questioned this she was told she was a casual worker and they wouldn't guarantee hours.

**Michaela** was pregnant and was experiencing bullying at work by her manager. Her manager would micro-manage all her work, and constantly criticise and nit-pick her in front of her colleagues. One day at work Michaela experienced heavy bleeding and miscarried her baby. She went home on sick leave. The next day while she was recovering and grieving at home, her manager emailed her a piece of work she had completed for him the week before, outlining all of her errors. When Michaela fell pregnant for the second time, she was too scared to tell her boss and tried to hide her pregnancy as long as possible.

**Pixie** works in a job where she is on her feet all day and has very limited breaks. She suffered a miscarriage followed by severe health complications. When she fell pregnant again six months later she requested light duties and explained to her boss about her anxiety due to her previous medical history. Her boss refused her light duties.

**Ruth** is a long-term casual employee working at an abattoir in a regional area. Her first language is Mandarin. She suffered a miscarriage and, when she fell pregnant again some months later, she requested light duties, supported by medical certificate about the work she *could* do (as well as limitations) and approached her boss for reasonable adjustments. She noted that these light duties might not be throughout the entire pregnancy. Her boss used barriers of language and her casual status, then delays to senior management in a city office to defer any action until a time that the company went into liquidation. Ruth had lost two months' wages and as a result of the two months "waiting" for approval of light duties, was not eligible for the Federal Government's paid parental leave as she failed the work test.

**Gabrielle** worked as the Director of a sporting organisation, and her two kids were paid members of the club and used the facilities there. Gabrielle advised her management committee that she was pregnant. Two days later she was dismissed, told to leave work immediately, and she was also told that her children would no longer be able to use the facilities. The letter of termination cited performance issues as the reason for her termination; however Gabrielle says that performance reasons were never brought up with her in the three years she had been employed.

**Esther** found out she was pregnant whilst at work on a Friday afternoon, and disclosed this in confidence to her workmate. She asked her workmate not to tell anyone, as she hadn't yet told her partner or her family. On Monday morning she got a call from her manager who told her she was fired for 'dishonesty'. When she asked him what this meant he told her that she should have disclosed her pregnancy to him rather than 'gossiping' about it to co-workers.

**Tai** works in a shop. She is four months pregnant and problems at work began when her boss found out. Her boss began to bully her, complain to other staff she uses her pregnancy as an excuse not to do things, and has told Tai she isn't allowed to sit down while working (they were allowed to when she wasn't pregnant). Tai is suffering morning sickness and has been told that she is spending too much time in the bathrooms and not enough on the shop floor. Tai complained to HR but nothing has been done. The HR Manager said to Tai "Pregnancy is not a sickness". Tai also has been told by HR that she can only work up until she is 34 weeks pregnant, and this will mean she will fall short of the 12 months service need to qualify for the employer's paid maternity leave. Tai found out that she can work past 34 weeks with a medical certificate but is scared to talk to the HR Manager about this.

**Piper** commenced a full-time permanent position three months ago, and found out she was pregnant 1 month later. She says that her first month of employment was very good, people were nice and the managers were helpful. However, she says this all changed after she revealed she was pregnant. She emailed the news to her boss and received no reply. Her co-worker said to her "I hope you won't be on mat leave for too long because I have to do your job while you're away". Last week her boss asked her for a report that would detail all her work and her time in and out of the office. She has never been asked for this before.

**Gita** was working under a visa which only allowed her 6 months. After this time the boss took her off the books and paid her cash, and began the process of sponsoring her to work as in a technical position. During this time Gita told her bosses (a husband and wife team) she was pregnant. Gita said immediately after this her relationship with the boss's wife began to deteriorate. She called Gita lazy, and was constantly nit-picking. Gita asked to reduce her hours as she was tired from the pregnancy but they refused.

**Penelope** is pregnant. She informed her supervisor that she needed a day off work to attend antenatal appointments and this was noted on the roster. The next day she went in to work and was told she was suspended for not showing up at work.

## **Case studies on returning to work discrimination**

**Betty** was on 8 weeks of maternity leave, and prior to this she had negotiated with her boss that when she returned to work she would be able to work from home for 4 days per week and work out of the office for the remaining day. This was agreed to both verbally and in writing. Betty had secured childcare to suit these arrangements. One week before she was due back, Betty was called into a meeting with the boss, and was told that they no longer agreed to these arrangements, and that she would have to either return full-time next week, or take the full 12 months unpaid maternity leave and return full time in 12 months.

**Mina** was on maternity leave and saw her job advertised in the local paper. Mina rang her boss and asked what had happened. She was told that this was a different job and her job was being made redundant. Mina pointed out that the duties of the job advertised looked similar to hers, and she was told that the title was different, as it was “Administrative Support Officer” rather than “Administrative Officer”.

**Kali** had worked for her employer for 14 years, and was on maternity leave. She wrote to her employer part way through the leave to request to return to work on a part-time basis. Her employer did not reply. She wrote again and got an email back with one word: No. Kali rang to find out what the reason for the denial was. She was told the role is full-time. Kali has no one to look after her baby and cannot find a childcare place.

**Chan** returned to her full-time retail position after 12 months parental leave. Her baby was in childcare. Chan was presented with a new roster that required her to work evening shifts. Chan explained that this was not possible as the childcare centre closed at 6pm and she had no other care options. Chan was dismissed.

**Katrina** returned to work on a part-time basis after parental leave. The policy at her work states that part-time workers are not able to access study leave or training that exceeds their hours. Katrina is unable to access a training course that is required for her position as she works 3 days per week and the training course is 4 days. She has been told she will need to complete the fourth day in her own time and will not be paid for it. This is despite the additional childcare costs Katrina will incur for the additional day's work.

**Salima** has worked with her company for 7 years. A year ago she argued that her position should be reclassified as a manager's position but this was refused. She is currently on maternity leave, but is continuing to do some work whilst on leave. There is another employee acting in her position. Last month Salima found out that her position is being made redundant, and the employee acting in her position was being promoted to a new

position, with the same duties as Salima's permanent position, only reclassified as a manager position. The position was not advertised.

**Asha** applied for and was granted for 6 months parental leave from her job which she had been in for the previous 5 years. She could not find suitable childcare in this time and discussed her problem with her manager. She proposed that either she bring her baby into work until she finds childcare, or she extends her leave by another six months. Her employer texted her to tell her that this was inconvenient, that she cannot bring her baby into work and that there may be no job to come back to if she does not return immediately. Asha managed to find some part-time care for her baby and informed her employer. She was told that the position was full-time.

**Rosa** went on 12 months maternity leave, but contacted her Manager after 10 months to ask if she would be able to return earlier. She offered work in any capacity, full or part-time, and stated that she was happy to comply with the needs of the business. She wanted to indicate that she was also willing to take on a leadership role that she knew was vacant. Her Manager advised that he would look into an available position but that it would be difficult for her to return into a management role as "the system had changed so much that she might find it hard to get back into it." After many months her Manager never got back to her. Eventually, Rosa needed a source of income and started working casually with another company. Rosa was sent a letter by her Manager accusing her of misconduct because she was working with another company without authorisation.

**Ursula** has worked with her company for 6 years as a casual. She worked there for 3 years before having her first child and having 12 months parental leave. She returned to the same position after her leave, and after 3 more years of work she went on 6 months parental leave with her second baby. Following this her Manager said they would not have her back. There were no agreements in writing.

**Zhi** has a two year old son with a disability and she has negotiated part-time work in order to be able to take him to his various appointments. She has been told that the arrangement is being reviewed as there is a new Manager. She is feeling very anxious about this meeting and thinking about resigning so she doesn't have to go through it.

**Judith** works part-time but three months ago her boss asked if she could go full-time. She said she would like to do this but had to sort out childcare arrangements for her son and asked for three months to do this. This was agreed to. During this three months Judith found out she was pregnant. She still wants the full-time position but is scared to tell her Manager she is pregnant. She said her Manager will think she has been manipulative and only wants full-time work so she gets a higher rate of paid maternity leave.



**Luka** is working in Australia on a 457 visa. Her employer has been sponsoring her for almost 3 years. She recently went on maternity leave. She applied for three months as this is what the boss said she was entitled to, however she later learned that she was entitled to twelve months and thus applied to extend her leave. Her boss told her that if she didn't come back in the next two weeks she would no longer have a job.

**Aroha** worked in an office in a professional position which required a lot of travel. In the last few months of her pregnancy she was transferred (by agreement) to a clerical job so she could sit down more and not need to travel. During this time a replacement for her professional position was hired and Aroha was asked to train him. Aroha went on 12 months maternity leave. When she contacted her employer to discuss her return to work plan she was told that her replacement was able to stay on and could perform the travel component of the job, and that the only suitable position left for Aroha was the lower level clerical position with less pay. She went along with this to assist the business.

**Felicity** was a full-time supervisor in her company before taking 10 months maternity leave, supervising over 30 staff, and in a position of some authority and responsibility. On her return to work she asked to return 3 days per week. She was told the only part-time position available was a low level position. She was offered the choice of this or to go on unpaid leave. Felicity said she accepted the position. She is now located in a windowless office, with no other staff. She feels she has been hidden in a back office and has been given no work to do. She sees the role as a step down and very detrimental to her career. She said that even though the Company policy is to provide "meaningful work for part time employees", she feels this is not followed in reality as women who have attained high levels find that they are told there are no part-time positions.

**Parvati** has returned to work after maternity leave, and was told that her work would support her to express breastmilk when she went back to work. Since she returned however, she has not been able to have any time to express. Often she is in meetings for up to four hours without a break. Her work said they would provide a space for her to express in, and she found out today that she can be seen by people outside.

**Tiffany** returned to her job after parental leave and discussed with her supervisor her plans to express milk for her baby. Her supervisor agreed that she could do this, but the only available place with privacy was the toilets. Tiffany works in a male-dominated worksite with shared bathrooms. Tiffany felt very embarrassed about expressing in the toilets, particularly since she needed to use an electric breastpump which was plugged in to the main powerpoint at the sink area and made a loud noise that other users of the bathroom could hear. Tiffany is a member of the occupational health and Safety sub-committee, and was mortified when an agenda item in relation to her breastmilk came up at the meeting.

One of the staff had complained that the labelled bottles of breastmilk in the fridge were a 'contaminated substance' and should not be in the common fridge.

**Mollie** negotiated flexible hours after returning from maternity leave. It was agreed she could have a half hour lunchbreak, rather than an hour, and leave at 5.00 rather than 5.30 so she could get to after school care before it closes to pick up her daughter. This arrangement was working well for 12 months, until a new boss commenced. He says he is concerned about her leaving early and says it is not fair on other staff. He says she will soon be expected to work till 5.30pm each day.

**Kiki** has worked for her company (NGO) for 7 years, for the first 5-6 years as a part-time casual and then in a manager's position perm full-time. She left to go on unpaid maternity leave. She wrote up a mat leave plan requesting to return in a part-time, working from home capacity. They agreed to this. She recontacted in Sept 2012 to request extension. They said call back when you are ready to return. She called back in January and was told that there was no work for her due to a restructure and that if she returned then others would lose hours and it was not viable.

**Dina** worked in a remote community in a position which involved driving to and from a nearby community in a work car. She had been there for 5 years. When she returned from maternity leave with her second child, she arranged to bring him to work with her as he was exclusively breastfed. This was accepted and supported for approximately 4 months. Recently a new Manager started, and asked Dina to sign her contract; she was told it was just paperwork as they didn't have it on file. Dina did not have time to read what she was signing, and the Manager was standing over her with a pen. The next day the Manager told Dina that she could no longer bring her baby to work, and that part of the contract she signed yesterday was a vehicle policy stating that only company employees could be taken in company vehicles, and that her baby did not count as a company employee. Dina complained that her baby was too small for childcare and was exclusively breastfed. Her manager said "That is your parenting responsibility, not ours. There is always formula". Her Manager also told her that if she couldn't leave the baby at home she would have to be demoted to a different position.

**3. Has your organisation observed any trends in relation to discrimination experienced by women when they become pregnant at work and/or men and women who have returned to work after taking parental leave?**

It would be clear to the reader from the previous case studies that common themes emerge when discussing pregnancy and return to work discrimination. These are drawn out below:

## Pregnancy:

- Many of our clients report **attitudinal changes** from managers following an announcement of their pregnancy. Previously harmonious work relationships may become strained, and often performance issues are raised seemingly out of the blue. This area is particularly difficult to formulate into a complaint, as it is by its very nature amorphous.
- At the extreme end, many of our clients have had their **employment terminated** as a direct consequence of their pregnancy. Rarely of course is the real reason or the termination given. Often false performance issues are raised or the employee is told that 'she has been made redundant' when clearly no proper process for making a position redundant has been followed. We make further comments on 'redundancy' under our next point 'Parental leave and return to work'.
- Employees being made to feel **uncomfortable, embarrassed, or inconvenient** when asking for their basic entitlements in relation to their pregnancy or their return to work rights. Many employees still see their employment entitlements as *privileges* not rights, and feel hesitant to 'push their case' for these. In many cases this is exacerbated by the employee's lack of knowledge and information about what they are entitled to, as well as an employer's ignorance about their legal obligations towards pregnant or returning employees. All too often the employee-employer interaction over this issue is one of gratefulness and largesse rather than an engagement about managing inherent rights to maximise productivity and care.
- Following on from the previous point, some of the greatest areas of discomfort arise from the **lack of mandated formal processes** in discussing an employee's pregnancy negotiating parental leave and return to work plans. The onus is entirely on the individual employee to research and understand her entitlements according to her individual contract, enterprise agreement, award and organisational policies and to advocate for herself within these borders. This contributes to the feeling many employees report of going 'cap in hand' to their employer to inform them of their pregnancy and their need to access their entitlements, such as safe no paid job leave or unpaid parental leave.
- For some clients, the discrimination arises as the **refusal of their basic entitlements**, such as an eligible employee applying for paid leave and being refused.
- Many clients have contacted us asking about their entitlements to **time off for attending antenatal appointments**. While some workplaces allow sick leave for this time, many do not.
- We have also had clients who have reported a **lack of flexibility** in meeting their eligibility requirements for their entitlements, such as "Anh" above, who fell short of her 12 month qualification period for

unpaid leave by 3 weeks. Her request to use annual leave and sick leave to make up the shortfall was refused.

- Many of our clients report **work health and safety issues** arising due to their pregnancy. Interestingly, these seem to take two forms. On the one hand there are cases of employers misusing an OH&S framework and terminology in order to discriminate against an employee, such as “Clara” above who had her rostered hours cut and was told this was for her unborn baby’s “safety”. On the other is the pregnant employee who seeks to address legitimate risks to themselves and their unborn baby and is met with the reply of “pregnancy is not a sickness”. These employees may be seeking light duties, reduced hours, or a workplace safety assessment.
- We have had reports of employers requiring a pregnant employee to provide more information about their condition and wellbeing and ability to work than is lawfully entitled to request.
- We have particularly seen this issue arise in the context of employees who have experienced a **miscarriage, a difficult pregnancy or are undergoing IVF procedures**. It is common (and understandable) for women who have miscarried prior to their current pregnancy, or who have been through difficult medical procedures to obtain their pregnancy, to have elevated levels of anxiety and concern for the viability of their current pregnancy, and seek support from their employer to alleviate this concern through pursuing their entitlements under work health laws. This may include seeking light duties, safe work or no safe job paid leave. Unfortunately we have not always seen employers demonstrating an understanding of the physical and emotional pressures women may be placed under in this situation. What is often felt as cruelty or insensitivity from an employer in this time can stay with a women for the rest of her life.
- Finally, all of the above issues are **exacerbated for women in casual employment**. Their lack of a guarantee to regular and set hours can be used to veil pregnancy discrimination.

#### **Parental leave and return-to-work:**

- Clients wishing to extend their parental leave from 12 months to up to 24 months, as provided for under the Fair Work Act, have had their requests denied. Under the Fair Work Act, requests can be denied by the employer on reasonable business grounds. There is currently **no avenue of appeal** for employees who have had their request denied, with the possible exception of a general dispute to the Fair Work Commission if this is provided for in the employees’ enterprise agreement.

- Alternatively, employees who request flexible work may have their request agreed to upon the condition that the employee accepts a job which is **lower in status, pay, or job satisfaction**.
- Clients have been informed that the job they held immediately prior to going on parental leave has been made redundant. This may happen whilst they are on parental leave or when they wish to return. Sometimes these redundancies are genuine, but often they are **'sham' redundancies** as evidenced by the fact that the job is still being done by another employee. In many cases this is the employee that has been acting in the position whilst the first employee was on parental leave.
- Clients have reported being **refused access to their permanent position** upon return, and being placed in a different position which is often of a lower pay or status.
- There are many examples in our casework of **flexible work arrangements** being agreed to by one manager and rejected by the new replacement manager when it is time to return. Often these arrangements have not been formalised in any way. Many employees feel that to request formalisation in writing would be to 'push the envelope' too far.
- As with pregnancy discrimination, some of the greatest areas of discomfort arise from the **lack of mandated formal processes** in discussing an employee's return to work plans. The onus is entirely on the individual employee to research and understand her entitlements according to her individual contract, enterprise agreement, legislation, award and organisational policies and to advocate for herself within these borders. This contributes to the feeling many employees report of going 'cap in hand' to their employer to request their entitlements.

4. **Identify any limitations or gaps in the legislative and policy framework in relation to pregnancy discrimination and return to work. What are the key challenges in the relevant legislative and policy framework?**

**4.1 The individualised complaint model**

At present, the onus is on the individual complainant to identify discrimination occurring and to lodge a complaint, either internally or with an external authority such as the Australian Human Rights Commission or the Fair Work Commission. Many people experiencing discrimination, particularly at the time of pregnancy, do not have the individual resources or capacity to take on this responsibility. This individual as opposed to societal responsibility is reinforced by the fact that the AHRC cannot initiate investigations into unlawful discrimination under antidiscrimination laws; it can only conciliate once a complaint is lodged.

The individual complaints-based model has been criticised for its limited ability to affect discriminatory behaviour across society. A number of reports have recommended that the Commission, or the relevant specialist Commissioner, be empowered to investigate potential breaches of Commonwealth antidiscrimination laws without an individual complaint being made, and that the Commission be empowered to bring actions for breaches of antidiscrimination laws in the federal courts. Others have recommended allowing the Commission to issue compliance notices for breaches of the Act and for breaches of agreements made following conciliation. For example, the Victorian Act empowers its Commission to investigate issues of discrimination without an individual complaint, to seek enforceable undertakings and apply to the Victorian Civil and Administrative Tribunal to enforce undertakings. Similarly, the antidiscrimination provisions of the Fair Work Act can be enforced through investigations and enforcement actions undertaken by the Fair Work Ombudsman.

The complaints-based model relies upon victims identifying and standing up for their rights. In our experience, women going through this type of discrimination often do not have the time, confidence, psychological strength, security and resources to pursue complaints.

#### **4.2 Right to request**

The most obvious gap in the current range of entitlements in this area, and one that has been highlighted time and time again by the NWWC, as well as many other key groups, is the lack of a right to flexible work and the lack of an appeal process for the refusal of requests for flexible work or extended parental leave.

Currently an employee has the right to request flexible work arrangements on a variety of grounds, including caring responsibilities. The WWCs acknowledge the recent expansion of these grounds and commends the Government for this move.

However, we maintain that a right to *request* an entitlement has little substance as an enforceable right. Codifying an existing right (the right to ask) may be a useful attempt to change workplace culture, but it certainly does not strengthen women's and parent's workplace rights. Parents whose requests for flexible leave are refused have little choice. They either accept the (usually) full-time position and make childcare arrangements (often difficult or impossible), or they tender their resignation.

Since 1978, Swedish parents have had the right to work six hours a day (at *pro rata* pay) until their children turn eight. Germany now grants the right to work part-time to employees in enterprises with more than 15 workers; the Netherlands enacted a similar right in enterprises of 10 or more workers. Belgium grants employees the right to work 80% time for five years.

#### **4.2 Lack of an appeal process**

Currently under the Fair Work act an employee who has had their request for flexible work arrangements or extended parental leave refused, whether reasonably or unreasonably, has **no** mechanism for appeal unless this has previously been agreed to in a contract or

enterprise agreement. This severely limits the enforceability of the provision, leaving many employees seeking flexible work and extended parental leave (predominantly women) with rights on paper only. This has been a serious impediment to achieving greater work life balance for employees.

NWWC are aware of numerous cases where workers with legitimate needs for flexible working arrangements have had their request unreasonably denied. These employees are often faced with being forced to work full time, convert to casual employment or resign.

## **1. Entitlements to paid breastfeeding breaks and access to facilities**

In Australia at present there is no right to paid (or unpaid) breastfeeding/lactation breaks or right to access appropriate facilities in the workplace in which a working mother can breastfeed a baby or express milk. Australian women are protected by the anti discrimination legislation that prohibits discrimination against breastfeeding women, and imposes a duty on employers to make reasonable adjustments for their needs. However, this falls far short of legislated rights to paid breaks and facilities.

Several European countries have legislated these rights, including Germany (paid breaks of half an hour at least twice a day until the child is one year old) and the Netherlands (paid breaks of least 15 minutes, as often and for as long as necessary, up to 1/8 of total working hours). Netherlands industrial law also requires employers to provide rest areas for pregnant employees as well as those breast-feeding or expressing milk, must have access to a private room where she can rest with a bed or proper couch.

Recently, the Queensland public service introduced an entitlement of one hour of paid lactation break for every eight hours worked, and several other organisations have this in their enterprise agreements. However, without positive statements in legislation, the level of breastfeeding support required by workplaces is open to interpretation and assumes all women have the confidence to raise the issue with their employer.

These entitlements are in line with the International Labour Organisation Maternity Protection Convention, 2000 (No. 183), Article 10, which states that:

- 1. A woman shall be provided with the right to one or more daily breaks or a daily reduction of hours of work to breastfeed her child.*
- 2. The period during which nursing breaks or the reduction of daily hours of work are allowed, their number, the duration of nursing breaks and the procedures for the reduction of daily hours of work shall be determined by national law and practice. These breaks or the reduction of daily hours of work shall be counted as working time and remunerated accordingly*

## **2. No entitlements to paid antenatal leave**

There is no legislated right to leave for pregnant employees to attend antenatal appointments. It is open to debate whether an individual's sick leave may be used to cover

these appointments, and too often, pregnant employees do not wish to stir the pot any more than necessary by asking for an unclear entitlement.

In Norway and the Netherlands pregnant employees are entitled to paid time off from work for antenatal examinations.

#### **4.5 No requirement of OH&S risk assessments whilst pregnant**

Unfortunately, in some cases, the OH&S framework has been used as a veil for discrimination against pregnant employees as discussed above. Despite this, it is important to remember that the purpose of the legislation is to provide protection and safety for all workers, and that pregnant workers may have a particular need for these protections.

In our experience it is rare for a workplace to initiate a risk assessment in order to ensure that their pregnant employee and her unborn baby is safe and protected at work, and to put in place risk minimisation measures. It is usually the pregnant employee who needs to advocate for these measures.

With the exception of NSW Workcover, a cursory review of the OH&S authorities' websites in each state and territory reveals a paucity of material in relation to pregnancy risk assessment materials. In the NT and WA the only relevant material available on the websites is an Information sheet addressing manual handling during pregnancy. There is no material at all on the sites for the regulatory authorities in SA, the ACT, Queensland, Tasmania, Victoria, nor on the Safework Australia website.

It is no wonder then that proactive and supportive risk assessments to ensure pregnant women's safety in the workplace are (anecdotally) extremely rare. It is also little wonder that women are reluctant to bring up possible safety issues.

Again, international comparisons may be useful here. In Germany, an employer must provide an evaluation of the safety of the workplace and the working conditions for pregnant women and employees who are breast-feeding. In the Netherlands, a "risk inventory and assessment report" must be prepared by employers specifying how employees can work in a safe and healthy way and include an inventory of specific risks during pregnancy, the period shortly after confinement, and during breast-feeding.

#### **4.6 The burden of proof in anti-discrimination legislation**

The burden of proof for a complainant of direct discrimination under all Commonwealth, State and Territory antidiscrimination laws falls entirely on the complainant. This contrasts with the Fair Work Act general protection provisions, in which the burden shifts to the respondent. This inconsistency may make the Fair Work Act a more attractive remedy for a potential complainant.

Adopting a reverse burden of proof would harmonise the employment discrimination laws at the Federal level and would enable case law about both provisions to develop together.



**5 Please provide case studies of leading practices and strategies for addressing discrimination in the workplace in relation to pregnancy, parental leave or return to work that you can share with the National Review.**

**6 What sorts of outcomes or recommendations would you like to see from this National Review?**

The NWWC makes the following recommendations:

1. That there be a positive requirement for employers to hold a meeting with their pregnant employee who has notified her employer of her pregnancy, and to provide her with a template information sheet on her rights and responsibilities under the Fair Work Act, occupational health and safety laws and anti-discrimination laws, as well as any relevant award, enterprise agreement, individual contract or workplace policy and procedures.
2. That there be a positive requirement for employers to provide an employee returning from parental leave a template information sheet on her rights and responsibilities under the Fair Work Act, occupational health and safety laws and anti-discrimination laws, as well as any relevant award, enterprise agreement, individual contract or workplace policy and procedures.
3. That current legislation be amended to allow for a right to part-time or other form of flexible work for parents returning to work after parental leave, for organisations of 15 or more employees.
4. That current legislation be amended to allow for an employee to appeal to the Fair Work Commission against an employer's refusal to a request for part-time or other flexible work arrangements, and that there be a clearer definition of what constitutes reasonable business grounds for refusal.
5. That current anti-discrimination laws' burden of proving workplace discrimination in relation to pregnancy and family responsibilities be reversed such that it falls on the employer and not the employee.
6. That there be legislative reform to provide working mothers with adequate paid breastfeeding or lactation breaks and access to appropriate facilities for breastfeeding or lactation, including a lockable, private room (not a toilet) with power and access to refrigeration.
7. That there be legislative reform to provide pregnant employees with the entitlement to paid antenatal leave.
8. That resources for advocacy services such as the Working Women's Centres be maintained and extended, to ensure that employees experiencing discrimination on the basis of pregnancy and parenthood have adequate support, information and representation.
9. That the Sex Discrimination Commissioner be enabled to pursue investigations without requiring an individual complainant.
10. That the concept of an incentive payment to small employers be explored to assist with recruitment and training of staff replacing parental leave takers, subject to a 'test' or checklist showing they have met best-practices criteria. This should include 'best practice' considerations for workers returning part-time and/or requiring flexibility after parental leave.

11. That further research be completed on the issue of the potential connections between pregnancy and redundancy.