WOMEN'S LEGAL SERVICES NSW

Incorporating
Domestic Violence Legal Service
Indigenous Women's Legal Program

31 January 2014

Ms Elizabeth Broderick
National Review Reference Group
Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2001

By email: pregnancyandwork@humanrights.gov.au

Dear Ms Broderick,

Supporting Working Parents: Pregnancy and Return to Work National Review

1. Women's Legal Services New South Wales (WLS NSW) is a community legal centre that aims to achieve access to justice and a just legal system for women in the state of New South Wales. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.

2. We welcome the opportunity to provide a written submission to the Australian Human Rights Commission (AHRC) in relation to its national review *Supporting Working Parents: Pregnancy and Return to Work*.

Overview

3. WLS NSW has advised and represented many women who have experienced discrimination related to pregnancy, parental leave and return to work. We draw on the experiences of our clients in responding to this submission as well as the experiences of our lawyers in advising and representing clients in this area of the law.

4. Many of our clients report experiencing discrimination during their pregnancy, while they were on leave and/or once they return to work and are seeking to work under flexible conditions. Unfortunately it is common for our clients to experience discrimination in all three areas.

5. The commonality of many of the experiences faced by our clients and the frequency with which we are contacted by clients for advice and representation in this area of law would indicate the high prevalence of discrimination faced by women in relation to pregnancy at work, while on parenting leave and once they return to work.

6. Overwhelmingly, our clients are socially and economically disadvantaged and work in precarious employment. Our clients are more likely to be young women in casual employment or short term contracts, women with low levels of literacy, many of whom have English as a second language, women earning less than $50,000 per annum, women who are single parents and women in cleaning, factory, packing jobs and administration.

7. The consequences of discrimination in employment on our clients are far reaching. On a psychological and emotional level it leads to loss of confidence, high levels of stress and anxiety and depression. It is well known that high levels of stress and anxiety are not conducive to health during pregnancy and can lead to miscarriages or other complications during pregnancy. It is also not conducive to caring for a new born or juggling a return to work with family responsibilities. For those women who lose their job, are demoted or lose other career opportunities, it can lead to significant financial losses and pressures. Loss of income has other effects such as vulnerability in relation to housing and can mean a greater tendency to take other paid work which is much lower than she was paid in the position from which she was terminated or made redundant. It may also mean a woman makes a decision not to return to the workforce at all.

8. On a systemic level, such widespread discrimination ultimately builds an expectation or acceptance that discrimination is the norm and there is no point to challenging it. It also maintains traditional stereotypes that women with children should be at home caring for their children rather than being empowered to make choices around balancing work and family.

9. Clients frequently report feeling like they are seeking preferential treatment or privileges over their non-pregnant employees and those who do not have responsibilities for caring for young children. This feeling is compounded by attitudes, express and overt, by employers toward employees seeking to assert their rights.

10. We will utilise de-identified client case studies throughout the first part of this submission to illustrate the common themes and experiences of our clients. These experiences will be divided into the most common experiences while a client is pregnant, those while she is on leave and those when she returns to work.

11. In the second part of this submission, we will draw on the experiences of our clients and lawyers to examine limitations and gaps with the current legislative protections and make recommendations for reform.

Common themes and experiences of women during pregnancy

Prospective employment

12. While the *Sex Discrimination Act* (SD Act) makes it unlawful not to employ a woman because she is pregnant or potentially pregnant, women have reported to us that they have still experienced discrimination in prospective employment when they were not employed due to pregnancy or by having a previously made job offer withdrawn.

13. Women also report to us that previously approved changes of position within her current employment are retracted after informing of a pregnancy.

Kerry had been employed for 6 months before being offered a team leader position on completion of a 2 day course. When Kerry told her employer she was about to commence IVF, her employer withdrew the offer of training and team leader position.

Terms and conditions of employment during pregnancy

14. Our clients commonly report that they experience different treatment at work after informing an employer she is pregnant. These experiences include:

    - not being offered training which is being offered to all other employees;
    - being demoted;
    - not being offered a promotion or considered for other roles within the organisation;
    - having a previously made job offer withdrawn;
    - having assumptions made about the work and duties they can and can not undertake;
    - not being offered or given safe work or safe work leave;
    - not being allowed to take sick leave or unpaid leave to attend pre-natal appointments;
    - loss of shifts; and
    - having negative comments and / or attitudes directed toward them in relation to their pregnancy and impending leave.

Renae had been promised a promotion within her company as soon as a position became available. Shortly after advising her employer of her pregnancy, a suitable position became available. Renae's employer told her not to apply for the position because she wouldn't get it since she was going to take parenting leave. The position was ultimately given to a man with much less experience than Renae.

Bei had been employed as a casual for 2 years before informing her employer she was pregnant. Almost immediately, her employer reduced her rostered hours until she was not given any shifts at all.

Marcia was employed for 4 years before taking parental leave following the birth of her child. Prior to going on leave Marcia negotiated with her employer about her return to work arrangements. Her employer raised concerns about her capacity to continue working after the birth of her child since she would now have the care of a child. Her employer advertised Marcia's position as a permanent position which meant that when Marcia returned to work, she was forced to take a menial and much more low paid position than the one she had occupied prior to the birth of her child.

Marlene worked in a nursing home and worked shifts that rotated through morning, afternoon and night. On medical advice, Marlene requested to only work morning shifts during her third trimester. Her employer refused this request and proceeded to only roster her on evening shifts.

Nadia's employer forced her to take unpaid leave for antenatal appointments and then threatened to terminate her employment if she kept taking time off work to attend appointment.

Restructures, redundancies and termination of employment

15. Women commonly report that that their employment is terminated or their position made redundant or restructured after informing an employer of their pregnancy.

16. Some clients report that employers use a pregnancy to terminate employment under the guise of "protection" of mother and foetus. Other employers do not regard it as their responsibility to provide a pregnant worker with a safe work place and leave employees to choose between their job and a safe pregnancy.

17. Women also report that fixed term contracts are not renewed.

18. Other women have called our service for advice because they fear repercussions when informing an employer of pregnancy. These fears are usually based on the experiences of former colleagues in the workplace after disclosure of pregnancy or based on comments and attitudes of employers about pregnancy in the workplace.

Jian was employed in a managerial position in a large company. Shortly after advising her employer of her pregnancy, her employer informed her that her position was being relocated overseas and she was transferred accordingly. While on parental leave, Jian's position in Australia was advertised but she was not informed it was being advertised or given an opportunity to apply. Shortly after, Jian's overseas position was made redundant and her employment terminated.

Alice was employed on a series of 12 month contracts and had an expectation of her contract being renewed again once it expired. After telling her employer of her pregnancy and requesting light duties on the basis of a medical certificate, her employer terminated her contract citing the lack of available ongoing work. Alice was directed to take unpaid leave for the remainder of her pregnancy and told she could contact her employer once she was ready to return to work but her employer could not guarantee any work.

Hema was employed in an administrative role in a company which was making a number of redundancies. She sought advice about her obligations to inform her employer of her pregnancy because she feared her position would be made redundant as soon as her employer found out she was pregnant. This fear was based on seeing other pregnant colleagues have their positions made redundant.

Marla was employed as a casual factory worker and has limited English language skills. She feared the loss of her job like previous pregnant colleagues and so concealed her pregnancy and worked in unsafe conditions until she could no longer conceal her pregnancy. Her employment was ultimately terminated.

Rita had worked for her employer for 8 months when she found out she was pregnant. After informing her employer, she was pressured to resign by her employer who told her that she was not eligible for parental leave and would not have a job to return to after she had the baby.

Tung had been working for 6 years for her employer on a series of 12 month contracts. When Tung informed her employer she was pregnant, her employer would not renew her contract and refused to provide her with paid parental leave.

Common themes and experiences of women whilst on parental leave

Restructures, redundancies and termination of employment

19. It is a very common experience that whilst on leave, our client's positions are terminated, made redundant or restructured.

Deidre was employed in a mid size company and had been working in the company for 5 years. She had been given a number of promotions over the years. Deidre took 12 months leave and when she was due to return to work she was told there had been a restructure and she would now be working from a different office in a new position, which was of lower pay and lower status than the job she had before taking leave. Her employer did not advise her of a restructure at the time it was taking place and when she asked why, her manager said he didn't have time for people on maternity leave and that it was her responsibility to come into the office if she wanted to find out what was happening while she was on leave.

Karla had worked for her employer for 17 years in a full time role. After taking parenting leave she returned as a part-time employee. As soon as she returned to work, her employer constantly pressured her to make a choice between returning full-time or taking a lower status position. He said her current position could not be worked part-time after all because she was a woman with responsibilities for a child.

Ametha had worked for her employer for 16 years when she took parenting leave a second time. While on leave, her manager called her to say that her position no longer existed and she would be transferred to another section. When Ametha returned to work, she found out that her old position had been replaced by an almost identical position but called by a different name and filled by the man who took her place when she was on leave.

Bonnie had worked for her employer for 11 years before taking parenting leave. Just before going on leave, her employer told her that when she returned to work she would be returning to a different position. She was also handed a termination letter. When Bonnie enquired about redundancy, her employer retracted the termination letter. While on leave, Bonnie's manager contacted her to say that while she could return to work after her leave, her desk was now occupied by someone else and she would now need to work out of her car.

Eliza took parenting leave after working with her employer for 18 months. While she was on leave, one of her colleagues contacted her to say that her employer was saying he had lost faith in her. When she contacted her employer to discuss her return to work, he said she needed to resign or he would dismiss her and cited performance issues. Her employer had never raised any concerns with her before she took leave and had in fact told her more than once what a great job he thought she was doing.

Christie went on parenting leave after working 5 years as a full time employee. She made arrangements to return after 13 months. Just before returning to work her employer contacted her to say she is welcome back at work but only as a casual.

Lita had worked for her employer for 2 years as a permanent part-time employee before telling her employer she was pregnant. As soon as she told her employer of her pregnancy and tried to arrange unpaid parenting leave, her employer's attitude toward her became hostile and her employer said she was not obliged to give Lita leave. While her employer ultimately gave Lita leave, while she was on leave, her employer sent an email telling Lita that her role had now changed and it would be too difficult for her to manage when she had the care of a young child.

Pressure to return to work early

20. Women frequently experience pressure to return from parenting leave early to accommodate staff shortages or other operational issues in the workplace. Women perceive this as a lack of understanding of and respect for the period of approved leave and feel pressure from the employer to return as requested so as to ensure continued employment.

Janna took parenting leave after the birth of her first child. She reached an agreement with her employer before taking leave that for the final month of her leave period, she would work 4 hours from home each week. While she was on leave, her employer then pressured her to take on an extra day of work each week from home for the final 2 months of her leave. He said that if she didn't agree, he would terminate her employment and find someone else. Janna was a single mother and was dependent on her employment and felt she had no choice but to agree.

Inappropriate comments and negative attitudes

21. Many women report employers, managers and other colleagues making inappropriate comments and holding negative attitudes about parental leave.

22. Our clients report that such comments make them feel uncomfortable and embarrassed and as though they are inconveniencing their employer by pursuing their legal entitlements.

23. Many clients report that previously harmonious working conditions become strained and often performance issues are raised which had never been raised prior to announcing pregnancy and taking leave.

Li applied for parenting leave. Her employer made her feel as though she was asking for special treatment for applying for leave and also told Li that he would be sure not to replace Li with another woman in case she also wanted to take parenting leave.

Stella made an agreement with her employer before going on leave that when she returned to work, she would do reduced hours and days for a period of 6 weeks while she transitioned back to the workplace. Once she returned to work, her employer retracted the agreement and told her she would need to return immediately to the hours and days she was doing prior to going on leave or she would need to resign.

Common themes and experiences of women upon return to work

Restructures, redundancies and termination of employment

24. Whilst it is common for the position held by a woman prior to her pregnancy to be targeted for redundancy or restructure while she is on leave, it is also frequently reported that positions accommodated by women once they return from leave are made redundant or restructured.

25. Whilst some of these redundancies and restructures are legitimate, it would appear that many are sham redundancies because the position or substantive position is still being done by another person within the workplace; frequently by the person who held the position while the woman was on parental leave.

26. Women also frequently report being refused a return to the position they held prior to going on leave and instead being forced or pressured to take positions that are of lower pay, with lower prospects for career options and / or lower status.

> Loretta worked for her employer for 4 years before taking parenting leave. While she was on leave, Loretta was told her position as a project worker was being reviewed. Just before Loretta was due to return to work, her employer contacted her to say there were no projects available and as such there was no work for her to return to. Her employer said that she should just extend her unpaid parenting leave period for another year to see if things changed and that they weren't making any positions redundant.

> Lana was on parenting leave and due to return to work the following week when her employer contacted her to say they had changed her permanent position to a contract position and that there was now no work available.

> Brenda had worked for her employer for 6 years before taking parenting leave for 6 months. After being back at work for 2 weeks, she was told her position was being made redundant. When Brenda asked for reasons, she said that her role as a mother meant that she was "not as adaptable now and therefore no longer suitable for this workplace."

Lack of flexible working arrangements

27. Women frequently advise that employers are strongly resistant to accommodating flexible working arrangements for women returning to work.

28. It is also common to find that previously made agreements are reneged upon a return to work.

> Christine made arrangements with her employer to work during school hours 3 days a week so she could care for her young children. Shortly after reaching this agreement, her employer changed his mind and said he needed her 5 days a week and until 4.30pm each day. When Christine said she couldn't work in the office those hours, her employer said she would need to transfer the phones to her mobile phone so that at least she could answer the phones during the hours and days he needed her. Christine felt pressured to agree even though she didn't want to work these hours. Despite demanding that Christine

work more hours and days than agreed, her employer failed to pay Christine for the hours she worked from outside the office.

June made arrangements before going on leave to return to work part-time with a combination of hours to be worked from the office and home. While she was on leave, her employer contacted her and asked her to return from her leave early and on a full-time basis because there were insufficient staff numbers to run the business. June offered to work some hours from each week but was reluctant to return from leave early. In the end June agreed to work 3 days in the office and 3 hours from home on another day. When June returned to work, she found that her employer had unilaterally changed her position to one of lower status and pay. She was sure it was because she hadn't agreed to return full-time. June said her employer placed great pressure on her to resign so that someone could be employed full-time in her place.

Mary had worked for her employer for 14 years before taking 6 months parenting leave. Prior to going on leave, she made an agreement with her employer to return to work 3 days a week for the following 12 months. When Mary returned to work, her employer told her that he was retracting their agreement and she would either need to come back to work full-time or take a lesser paid part-time position.

Rhonda had an agreement with her employer to return to work part-time after taking parenting leave. 3 weeks after returning to work, her employer told her she needed to come back full-time or he was going to fire her.

Veronica sought to return to work part-time or as a job share arrangement. Both of her requests were denied and no reasons were given. Veronica felt no other option but to resign.

Inappropriate comments and negative attitudes

29. Many women report employers and managers making inappropriate comments and holding negative attitudes about their request for flexible working arrangements. This often continues even after a woman commences working under agreed flexible conditions.

30. Our clients report that such comments and attitudes make them feel uncomfortable and embarrassed and as though they are inconveniencing their employer by pursuing their legal entitlements.

31. Many clients report that previously harmonious working conditions become strained and often performance issues are raised which had never been raised prior to announcing pregnancy and taking leave.

Bianca had worked for her employer for 3 years on a part-time basis and had the care of 2 young children. Bianca's employer kept asking Bianca to work back late and every time Bianca said no, he yelled at her about how she placed her children over her job and that he could never depend on her for anything.

Limitations with current legislative protections and recommended reforms

32. Legislative protections for pregnant employees and parents returning to work can be found in the federal and state anti-discrimination Acts and in the *Fair Work Act* (FW Act).

33. The case studies highlighted in this submission and the obvious prevalence of discrimination in these areas would suggest that the legislative provisions need strengthening and / or improved implementation.

34. This submission will primarily focus on gaps and recommendations for reform in the FW Act and the SD Act.

35. On the face of it, there is substantial over-lap between the provisions under the FW Act and the SD Act. However, there are key differences in each Act in the protections afforded employees, the obligations placed on employers and the processes involving in filing and pursuing a claim or complaint. Some of these key differences include the definitions of discrimination, the limitation periods for filing complaints or claims, the liability for costs orders where a claim is unsuccessful, the defences, exceptions and exemptions available to employers and the burden of proof. Some of these issues are discussed in further detail later in this submission. In effect this means that while there may be benefits in having a choice of jurisdictions, the responsibility for choosing the right jurisdiction is often a legislatively complex and technical task and sometimes over-whelming for employees.

36. In many respects the FW Act provides stronger protection for employees than the SD Act. These strengths can be found in the reverse onus of proof, the Fair Work Ombudsman as a regulatory body and the protection against costs orders. These factors assist in addressing the power imbalances between vulnerable employees and employers and significantly increase an employee's ability to participate in the complaint process. However there are gaps in the FW Act and a need for greater legislative protection or clarity in some of it's provisions. These will be addressed in this submission.

37. As with the FW Act, we will make recommendations for reform of some of the current provisions contained in the SD Act. While our clients generally report to us that the complaint and conciliation process at the AHRC is user-friendly and often achieves positive outcomes, unfortunately when a matter does not settle, complainants are faced with filing a claim in the federal court. Claims in this jurisdiction bring with it the burden of proof and the risk of adverse costs orders, arguably strong barriers to access to justice for complainants in discrimination matters. These are all considerations complainants need to take into account when considering jurisdiction.

38. Consideration should be given to strengthening the provisions of the SD Act by creating positive obligations in the Act. In its current form, the right to a workplace free from discrimination is effectively only a right to complain once discrimination has occurred.

39. Consideration should also be given to strengthening the Act by including provisions for penalties to be applied for breaches of the Act. This will be discussed in more detail later in the submission.

Information on rights, responsibilities and entitlements during pregnancy, parental leave and return to work

40. Employees are responsible for researching and pursuing their entitlements during pregnancy, leave and return to work. Other than the requirement to provide new employees with a list of the National Standards, there is no legislative onus on employers to provide employees with detailed information on their rights. However our clients commonly tell us that they find it difficult to find information.

41. The complexity of the legislation and the lack of readily available information means that parents are likely to be unaware of their rights and entitlements in relation to pregnancy, leave and return to work and unable to enforce entitlements.

42. It is highly likely that employers are also lacking in knowledge as to their rights and responsibilities in relation to employees.

43. There are important time limits in the FW Act that effect a person's entitlements in relation to things such as safe work, return to work and extending leave. This information is not readily clear in the Act (or elsewhere) and at times requires reference to multiple sections. For example, in order to seek paid no safe job leave under section 81A of the Act, an employee must first have complied with the notice and evidence requirements in section 74 of the Act. If an employee has not complied with these notice periods, she is not entitled to rely on section 81A. Further, section 75 provides an employee with a right to extend on one occasion their period of parental leave. However this employee must have first complied with the notice and evidence requirements in section 74 of the Act and then the notice period in section 75. Section 75 does not make any provision for discretion with respect to this notice period which means that where an employee does not give notice in accordance with the requirements and an employer does not exercise discretion of their own volition, the employee has no legal recourse against this decision.

44. There are also complex provisions in the FW Act relating to the interaction of and limitations on leave for both parents of a child.

45. The lack of a codified process which places responsibilities upon the employer to advise an employee of their rights and responsibilities in relation to things such as leave, safe work, return to work and flexibility compounds this issue.

Recommendation: that employers have the responsibility for informing employees by way of a template document implemented through the National Employment Standards (NES) about their rights and responsibilities under the FW Act, work health and safety laws and anti-discrimination laws in relation to pregnancy, parental leave and return to work. Employers should also be mandated to supplement this information in writing with any additional provisions that fall to an employee under any relevant award, agreements, contract and policy.

Recommendation: that there be a comprehensive education campaign for employers and employees on rights and responsibilities upon pregnancy, parental leave and return to work.

Right to extend parental leave

46. Under section 76 of the FW Act, an employee has a right to request an extension of parental leave from 12 months to 24 months. However, in our experience, there is a general reluctance amongst employers to support such an extension and employers frequently fall back on the defence of reasonable business grounds to refuse the request. There is currently a lack of clarity as to what constitutes reasonable business grounds and arguably it is a low bar for an employer to argue. A preferable test is the unjustifiable hardship test.

47. Further, the FW Act does not provide an avenue of appeal against such refusals, with the exception of a general disputes claim to the Fair Work Commission (FWC) in the rare event there are provisions to this effect in an Enterprise Agreement. In effect this means that the protections in the FW Act are of limited benefit for many parents seeking to extend their parental leave beyond 52 weeks.

Recommendation: that an employer can only refuse an extension of parental leave beyond 52 weeks on the basis of unjustifiable hardship.

Recommendation: that there be a right of appeal to the Fair Work Commission against a refusal to extend parental leave.

Right to request flexible working arrangements

48. Whilst section 65 of the FW Act places obligations on employers to provide flexible working arrangements for employees with carer and family responsibilities, the employer can rely on reasonable business grounds to refuse the request. There is currently a lack of clarity as to what constitutes reasonable business grounds and arguably it is a low bar for an employer to argue. A preferable test is the unjustifiable hardship test.

49. In the event an employer refuses a request for flexible working arrangements on reasonable business grounds, the FW Act does not provide an avenue of appeal against the refusals, with the exception of a general disputes claim to the FWC in the rare event there are provisions to this effect in an Enterprise Agreement. In effect this means that the protections in the FW Act are of limited benefit for many parents seeking flexibility due to their carer and family responsibilities.

50. Stronger protection would be afforded by the adoption of a positive obligation on employers to accommodate flexible working arrangements. An example of such a provision can be found in section 19(1) of the *Equal Opportunity Act 2010* (Vic) which provides that an employer *"must not, in relation to the work arrangements of an employee, unreasonably refuse to accommodate the responsibilities that an employee has as a parent or carer."*

51. Further, the right to request flexible working conditions only applies to those who have completed 12 months continuous service with their employer. This is an unnecessary limitation in the FW Act.

52. Section 14 of the SD Act provides employees with protection from discrimination on the basis of their carer responsibilities in the terms and conditions of their employment. However this section does not create a positive obligation on employers to be flexible, but rather simply a responsibility on employers not to discriminate. The SD Act would afford greater protection if it were to create a positive obligation on employers to accommodate flexible working arrangements and other such terms and conditions of employments and the failure to do so equates to an unlawful act of discrimination (such as in the Victorian EEO Act as discussed above).

53. Section 7A of the SD Act only provides protection from direct discrimination on the basis of family responsibilities rather than also providing protection from indirect discrimination as is the case with the *NSW Anti-Discrimination Act* (AD Act). Whilst it is possible to make arguments of indirect discrimination using the sex discrimination provisions, this is complex and convoluted, particularly for unrepresented complainants. The absence of protection from indirect discrimination in the area of family responsibilities appears to be an anomaly given the SD Act provides protection from direct and indirect discrimination in the areas of pregnancy, marital status and breastfeeding.

54. In some jurisdictions, including Sweden, Belgium, Germany and the Netherlands, there is a codified right to part-time work or other flexible working arrangements following a return to work. Such rights enforce positive obligations on employers to provide flexible work arrangements for their employees.

55. Section 84 of the FW Act provides a return to work guarantee after a period of unpaid parental leave. Section 64 of the FW Act provides for an employee to request flexible working arrangements where the employee has a child who is school age or younger. While these provisions are integral to supporting parents and must be retained, there are longer term implications for the substantive position held by an employee prior to the taking of parental leave. In making a variation to the employment contract, such as reducing days of work from a full-time position to a part-time position, there is no automatic right for that employee to return to the substantive position the employee held prior to taking leave. It is important that employees know whether they have a "right" to revert back to their substantive position at a later date or whether the variation to their employment contract is a permanent one.

Recommendation: that the SD Act and FW Act be amended to provide a positive right to work part-time and provide for other flexible arrangements for those with carer and family responsibilities.

Recommendation: that the FW Act be amended to provide a right to flexible working arrangements for all employees regardless of length of employment.

Recommendation: that an employer can only refuse flexible working arrangements on the basis of unjustifiable hardship.

Recommendation: that there be a right of appeal against a refusal to approve flexible working conditions

Recommendation: that the SD Act be amended to provide grounds of indirect discrimination on the basis of family responsibilities.

Recommendation: that employers have an obligation to formalise arrangements for flexible working arrangements prior to a person taking leave and such agreements can only be retracted by an employer where an employer establishes unjustifiable hardship grounds for retracting the agreement. This recommendation should not limit the right of an employee to exercise their rights seek to change their working arrangements where the need arises in order to combine their work and carer responsibilities.

Reasonable adjustments, including safe work provisions

56. The SD Act does not make provision to force employers to make reasonable adjustments to accommodate the needs of pregnant employees. This is a glaring gap in the Act.

57. As illustrated by way of our case studies, there are many circumstances where employers could easily have made adjustments to the working conditions of a pregnant employee but chose not to. These include reducing the lift loads of employees working in packing houses, factory floors and patient care and rostering shifts to accommodate women during the latter stages of pregnancy.

58. Whilst employees can rely on the somewhat complex safe work provisions in the FW Act, an employer can refuse on reasonable business grounds. There is currently a lack of clarity as to what constitutes reasonable business grounds and arguably it is a low bar for an employer to argue. A preferable test is the unjustifiable hardship test.

59. The FW Act does not provide an avenue of appeal against a refusal by an employer to make reasonable adjustments with the possible exception of making a general protections claim against the employer in the event the employer takes adverse action against an employee for asserting or inquiring about a workplace right.

60. As discussed earlier, there are complex notice and evidence requirements with respect to the safe work provisions under the FW Act which are difficult to navigate and form a barrier to the exercise of rights.

Recommendation: that the SD Act be amended to provide a positive obligation on employers to make reasonable adjustments for pregnant employees.

Recommendation: that the FW Act be amended to provide that employers must make reasonable adjustments to accommodate the needs of pregnant employees unless it can be shown that this would cause unjustifiable hardship.

Recommendation: that the FW Act provide a right of appeal against a refusal to make reasonable adjustments or a failure to respond with reasons within 21 days.

Redundancies and restructures

61. Whilst section 83 of the FW Act provides that employers must consult with employees on unpaid leave about redundancies and restructures, the commonality of experiences of our clients shows that there is a need for increased protections.

Recommendation: that the FW Act be amended to provide that a failure to consult is an act of discrimination which carries a penalty.

Costs in federal discrimination matters

62. While the AHRC itself is a no costs jurisdiction, if a matter can not be resolved during or following a conciliation at the AHRC, the complainant must make an application to have the matter heard by a federal court. Such applications are technical and complex, time consuming and not user friendly for self represented litigants. In addition, applicants run the risk of adverse costs orders in the event they are unsuccessful. All of these factors are disincentives to taking a matter to court, and in some circumstances, even bringing a matter before the AHRC where a complainant believes the employer will not make an attempt to resolve the matter at conciliation.

63. By contrast the FW Act and AD Act are no costs jurisdictions. This means that where a complainant believes a matter is not likely to settle at the AHRC conciliation conference, it is advisable that they file at the FWC or the NSW Anti-Discrimination Board where there is no risk of a costs order in the event they are unsuccessful.

64. The risk of an adverse costs order is one of the most significant barriers to pursuing a complaint of discrimination in the federal system.

Recommendation: that for the purpose of discrimination complaints, the Federal Court and the Federal Circuit Court become a no cost jurisdiction. Exceptions could allow for costs in matters shown to be frivolous or vexatious or where a party displays unreasonable conduct during the course of the proceedings.

Paid breastfeeding and lactation breaks and facilities

65. At present there is no right to paid or unpaid breastfeeding or lactation breaks or a right to appropriate facilities to enable a working mother to breastfeed or express milk.

Recommendation: that the FW Act be amended to provide working mothers with paid breastfeeding and lactation breaks and access to appropriate facilities for such purposes.

Paid antenatal leave

66. At present there is no legislated right to leave for pregnant employees to attend antenatal appointments. Some employers provide sick leave for this purpose, whilst other employers do not.

Recommendation: that the FW Act be amended to provide paid leave for pregnant employees to attend antenatal appointments.

Exception to discriminate in recruitment under the NSW Act

67. In NSW it is not unlawful to choose not to employ a woman because she is pregnant.

Recommendation: that the current exception in the *Anti Discrimination Act* 1977 (NSW) be removed so that there are mirror provisions in state and federal legislation which make it unlawful not to employ a woman because she is pregnant.

Introduction of a regulatory and investigatory body for federal discrimination matters

68. The current complaint model is one which requires an individual to identify and make a complaint of discrimination. While this individualised model has the advantages of enabling and empowering an individual to take action in relation to alleged unlawful discrimination and settling disputes with terms of agreement which are in a form suitable to the complainant, it usually brings with it obligations of confidentiality which means that on a systemic level, discrimination goes unchallenged.

69. Many clients contacting us for advice express concern about their capacity and resources to make such a complaint, particularly given they are usually on leave and / or balancing work and parenthood. This is particularly so for unrepresented complainants.

70. Currently, there is no power for the AHRC or its Commissioners to investigate of its own volition conduct that appears to be unlawful discrimination or to commence proceedings on behalf of an individual or group because it warrants such action for systemic reasons.

71. In addition to the individualised model, there would also be advantages in a regulatory and investigatory body which is not solely reliant upon an individual making a complaint and which can investigate and where appropriate prosecute breaches of anti-discrimination legislation, impose penalties and seek compensation on behalf of complainants. Such a body would be a deterrent to those employers who repeatedly and / or deliberately breach anti-discrimination legislation and provide an opportunity for public awareness and addressing systemic discrimination.

Recommendation: that the AHRC (or another regulatory body) be empowered to investigate and prosecute complaints of discrimination without requiring an individual complaint.

Recommendation: that the AHRC be empowered to seek penalties for breaches of the Acts as well as compensation and damages for the individual/s without necessarily requiring an individual complainant. We recommend that penalties mirror those available under the FW Act.

Increased powers for the AHRC

72. The AHRC can't compel employers to attend a conciliation conference. This is especially problematic where the only other option open to a complainant is to file in a federal court with costs provisions.

73. Our clients commonly express frustration and disappointment that employers do not comply with the terms of settlement reached during a conciliation conference. The AHRC does not have the power to enforce agreements reached between parties at conciliation and there is no power for such agreements to be registered with a court or tribunal as an enforceable agreement as is the case under the AD Act. This means that individual complainants are forced to pursue compliance through state courts under a breach of contract claim; an option out of reach of the vast majority of complainants. Powers of enforcement are a glaring gap in the current legislative provisions.

Recommendation: that the SD Act be extended to provide powers to the AHRC to compel respondents to attend conciliation conferences, with prosecutory powers to penalise respondents who do not attend.

Recommendation: that the AHRC have powers to initiate proceedings on behalf of an individual to enforce agreements made before the AHRC.

Recommendation: that the AHRC have powers to enforce agreements and / or that the federal discriminations acts are amended to provide for registration of agreements so that they become enforceable orders.

Burden of proof in discrimination matters

74. The burden of proof in discrimination matters before the state and federal anti-discrimination bodies falls to the individual complaining of discrimination. This contrasts starkly with the general protections provisions of the FW Act which reverses the onus of proof in providing that a person is found to have taken the adverse action for a discriminatory reason unless the respondent proves otherwise.

75. Reversing the onus of proof would remove the current difficulties faced by complainants in proving discriminatory conduct and provide consistency with the FW Act.

Recommendation: that the onus of proof be reversed so that the employer bears the onus of proving that the acts complained of were not for discriminatory reasons.

Casualisation of workforce

76. All of the issues raised in this submission are exacerbated for the increasing number of casual employees in our community. The lack of guarantee to regular and set hours and lack of protection afforded permanent employees means casual workers face increased vulnerability to discriminatory conduct by employers.

77. Many employers still believe that pregnant employees employed on a casual basis are not the owed the same (or any) entitlements as pregnant employees employed on a permanent basis, even those who work regular and systematic hours.

Recommendation: The SD Act and FW Act be extended to provide that all casual employees are eligible for unpaid parenting leave, giving them the same protections as permanent staff regardless of the number of hours worked each week and length of employment.

Labour hire companies

78. It has been our experience that an increasing number of employees are being placed in employment under labour hire arrangements.

79. Where employees are placed in workplaces under labour hire arrangements, it is inherently difficult to identify the ultimate employer because the structure is deliberately designed to ensure that the labour hire company and workplace where the employee attends for work each avoid liability. Further, it is common for labour hire companies to claim they do not have the power to force the businesses in which labour hire employees are placed to provide entitlements such as safe work or parental leave. On the other hand the business itself says that its contract is with the labour hire company and not the individual employees.

80. We are aware of an instance where a long term systematic casual employee lost her employment when her employer said that it was not safe for her to continue working in her current position as a pregnant employee. However, she was also encouraged by the employer to approach a labour hire company utilised by the company for work and was ultimately provided with very similar work throughout her pregnancy in the same business. Arguably, this was because the employer knew there was less chance of liability under a labour hire arrangement.

81. Given that labour hire companies tend to place the most vulnerable of employees in employment and have an overwhelmingly casualised workforce, this means that those employees seeking to enforce a right or make a complaint about their employment find it the most difficult to do so.

Recommendation: that there be legislative clarification about liability for employers where employees under labour hire arrangements seek to take action in relation to their employment.

Need for properly funded legal services to provide advice and representation to complainants

82. In 2006, the NSW Working Women's Legal Service (WWLS) had its funding withdrawn. While funding was given to Inner City Community Legal Centre for one year to provide a similar service, since that time, NSW has not had a dedicated Working Women's Legal Service.

83. WLS NSW strongly argues the need for re-funding a WWLS in NSW. The experiences of our clients illustrate the gendered nature of women's experiences in their employment, namely discrimination on the basis of pregnancy, family and carer responsibility and sexual harassment. Women are also particularly vulnerable in their employment by virtue of a greater tendency to be part-time or casual employees and employment in more vulnerable and marginalised workforces. A WWLS gives women the option of approaching a women only service which will provide an appropriate and sensitive legal service and which acknowledges the gendered experiences of women in their employment.

84. Beyond the funding of a dedicated WWLS in NSW, WLS NSW also advocates for funding of other community legal centres and legal aid to provide advice and representation in employment and discrimination matters. Under current funding, CLCs can not meet the demand for representation in discrimination and general protections matters and can not act for all clients.

85. The high cost of legal representation and the dearth of free legal representation available to complainants in discrimination matters or general protections matters, means that the majority of complainants ultimately choose not to pursue their matter, particularly beyond conciliation, even where a matter has failed to settle and where the grounds of discrimination are strong.

86. Taking matters to the federal courts is technical, complex, time consuming, and daunting. This is an impediment to individual complainants wishing to pursue matters as an unrepresented litigant through the courts.

87. Dedicated funding for employment and discrimination services would eliminate some of the barriers currently faced by complainants wishing to pursue matters under the FW Act, the SD Act or the AD Act

Recommendation: that a funded WWLS be re-established in NSW as well as other states and territories in Australia that do not have a dedicated WWLS. Such funding should not be to the detriment of other funded WWLS and dedicated employment services across Australia.

Recommendation: that public and community based legal services be properly funded to provide advice and representation to complainants

We hope the issues raised in the submission help inform discussions and ultimately further protections in this area of the law.

If you would like to discuss any aspect of this submission, please contact Philippa Davis, Assistant Principal Solicitor or me on (02) 8745 6900.

Yours faithfully,
Women's Legal Services NSW

Janet Loughman
Principal Solicitor