

**ACTU SUBMISSION**  
**TO THE**  
**AUSTRALIAN HUMAN RIGHTS COMMISSION**  
**SUPPORTING WORKING PARENTS: PREGNANCY AND RETURN TO WORK**  
**NATIONAL REVIEW**



## **ACTU Submission**

**to the**

### **Australian Human Rights Commission**

#### **Supporting Working Parents: Pregnancy and Return to Work National Review**

##### **INTRODUCTION**

The Australian Council of Trade Unions (ACTU) represents 1.8 million working Australians and their families. For more than a quarter of a century the ACTU has been advocating for better support for parents combining caring responsibilities and paid work including paid parental leave, protection against discrimination, safe working conditions for pregnant employees and family friendly work arrangements.

In 1979 the ACTU won 12 months unpaid leave for mothers in the Maternity Leave Test Case. In a series of cases since then, the ACTU has fought for the extension of this leave to include adopting mothers (1985), fathers (1990) and casual employees (2001). Our advocacy for paid maternity leave in the early nineties resulted in the maternity allowance in 1993, the introduction of the Baby Bonus in 2005 and, finally, in 2010, the introduction of Australia's first paid parental leave scheme.

In 2005 the ACTU Work and Family Test Case won employees' right to request an extension of parental leave up to 24 months, the right for parents to request to take eight weeks of concurrent parental leave and additional allocation of leave for caring purposes. In 2012 we successfully advocated for amendments to the Fair Work Act which improved safe work provisions for pregnant employees, the right to request flexible work arrangements for carers and consultation over roster changes which take into account employees caring responsibilities.

The ACTU welcomes this Review of Pregnancy and Return to Work from Parental Leave.

***Discrimination in relation to pregnancy and returning to work from parental leave remains prevalent in our community.***

- Around 20% of women experience some level of discrimination in the workplace while pregnant;<sup>1</sup>
- Almost one third of mothers did not return to the workforce from parental leave;<sup>2</sup>
- Almost one quarter of complaints received by the Sex Discrimination Commissioner in 2011-12 related to pregnancy discrimination and family responsibilities.<sup>3</sup>
- Almost one quarter of the complaints investigated by the Fair Work Commission Commissioner in 2011-12 related to an allegation of pregnancy discrimination.<sup>4</sup>

In light of this data, it is clear that systemic barriers to women's' participation in the Australian workforce exist.

***Addressing the systemic disadvantage faced by employees having and caring for children is a critical, not just for reasons of equity and fairness but also to ensure a sustainable productive economy.***

In order to achieve a sustainable economy and productive labour market, Australia must address the current skills shortage by increasing its female workforce participation. Given that Australia's birth rate is currently below population replacement level, policies need to both remove disincentives for women to have children and support their participation in the workforce. Take up rates of parental leave indicate that it is still mostly women who assume the primary caring role for young children and that women in their key child bearing years remain the largest untapped pool of labour. These women are also amongst the most skilled and experienced workers in the labour market and outdated policies requiring them to sacrifice either paid work or child rearing are unsustainable.

Australian women continue to face more barriers to combining paid work and family than women employed in many other OECD countries.<sup>5</sup> We must remove the barriers Australian women face

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<sup>1</sup> ABS 'Pregnancy and Employment Transitions, 2012

<sup>2</sup> ABS 'Pregnancy and Employment Transitions, 2012

<sup>3</sup> Sex Discrimination Commission Annual Report 2011-2012

<sup>4</sup> Fair Work Commission Annual report 2011-2012

when they are pregnant or returning from parental leave. In 2003, Treasury officials estimated that a 2.5% increase in labour participation rates would produce an additional 9% increase in economic output by 2022. Even a modest increase of 1.5 per cent of female participation in the 25-45 age range would grow GDP by up to 1.25 per cent over the next 20 years, and hold this at an additional one per cent the following two decades.<sup>6</sup>

We must also support working fathers who increasingly need or want to participate in the caring and raising of their children. The majority of modern families now have both parents in paid work and most rely on two incomes to meet their financial obligations.<sup>7</sup> Indeed, one in four households now has a female primary income earner.<sup>8</sup> This trend towards a greater sharing of paid work and caring responsibilities requires a cultural shift in the way we organise and structure workplaces. The ACTU Census of 40,000 workers in 2011 found that the 2<sup>nd</sup> most important issue nominated by both men and women was balancing work and family.<sup>9</sup>

The ACTU strongly believes that working parents need a suite of integrated, supportive provisions to assist them to combine work and family from pre-birth to caring for school age children, including:

- Access to paid antenatal and reproductive health leave;
- Safe workplaces and practices for pregnant employees;
- An effective Paid Parental Leave scheme which encourages workplace attachment;
- A fair, affordable and efficient anti-discrimination framework;
- Family friendly working arrangements and leave provisions;
- Quality, affordable and accessible childcare;
- Workplace audits and programs which identify and address systemic barriers; and

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<sup>5</sup>Women's, particularly mothers', workforce participation rate in Australia is 19% lower than men's- the fifth highest gap in the OECD. AMP NATSEM, Income Wealth Report "She Works Hard for her Money" Australian Women and the Gender Divide, University of Canberra, April 2009, p.1.

<sup>6</sup>Gruen, D and Garbutt, M. The Output Implications of Higher Workforce Participation, Treasury Working paper, October 2003.

<sup>7</sup>ABS Australian Social trends 4102.0 December 2011, 'Fifty Years of labour Force: Now and Then', p.2; AMP NATSEM Report, Issue 34 "Modern Family- The Changing Shape of Australian Families", October 2013

<sup>8</sup>AMP NATSEM Report, Issue 34 "Modern Family- The Changing Shape of Australian Families", October 2013

<sup>9</sup>ACTU Census

- A cultural shift towards valuing women and men’s work and caring responsibilities.

Removing the barriers to workforce participation for parents benefits the economy as a whole and it is appropriate that the contributions, rights and obligations be balanced fairly amongst parents, the government and employers.

Work and family balance is a matter of long standing interest to the ACTU and the working people and their families who we represent. The ACTU and affiliated unions consulted its membership widely in order to gauge their key issues and experiences and to canvass their views on what improvements could be made to address discrimination in relation to pregnancy and returning to work from parental leave, and is pleased to present the following submission to the Australian Human Rights Commission.

### **Previous Inquiries**

It should be noted that a score of previous investigations have confirmed the prevalence of discrimination in pregnancy and return to work in Australia, yet many of the recommendations arising from those inquiries remain unadopted.

### ***National Inquiry into Pregnancy and Work***

Less than half of the recommendations arising from the Sex Discrimination Commission’s 1999 National Inquiry into Pregnancy and Work<sup>10</sup> have been implemented with only 15 recommendations fully and 6 partially implemented of the Report’s total of 47 Recommendations.

### ***Inquiry into Pay Equity and Female Workforce participation***

A significant number of the Recommendations of the 2009 ‘Making it Fair’ Report have been adopted, particularly in relation to equal remuneration principles in the fair Work Act and the establishment of the Pay Equity Unit within Fair Work Australia. However, Recommendations 19, 20 and 21 which relate specifically to improving anti-discrimination measures, such as a greater role for

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<sup>10</sup> Sex Discrimination Commission National Inquiry into Pregnancy and Work, *Pregnant and productive: It’s a right not a privilege to work while pregnant* (1999)

the Australian Human Rights Commission to instigate legal action where in the public interest and to mandate training and / or counselling for repeat offenders remain outstanding.<sup>11</sup>

### ***Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act and Consolidation of Discrimination Legislation***

The consolidation of discrimination legislation ultimately reflected the majority of recommendations arising from a 2008 review of the Sex Discrimination Act (1984). The consolidation of legislation process culminated in the 2013 Human Rights and Anti-Discrimination (HRAD) Bill which ultimately failed to pass through Parliament.

The ACTU supported the HRAD Bill because it contained three key reforms which would set a fairer and more just foundation upon which discrimination law is based in this country:

- Introduction of a fairer, shared burden of proof (whereby employees must establish evidence to support a prima facie case of discrimination which, if successful, employers must disprove);
- Removal of the barrier to lower paid complainants by introducing a no cost jurisdiction (where costs cannot be awarded against a party); and
- A simplified definition of discrimination (which removes the distinction between direct and indirect discrimination and is easier to understand).

This ACTU submission advocates the adoption of many of the outstanding Recommendations made under these previous Inquiries and reflected in the HRAD Bill.

We note the positive effects on women's labour market participation from the previous government's introduction of the Paid Parental Leave (PPL) scheme in 2011, the Dad and Partner Pay scheme in 2012 and significant recent increases to the funding of childcare. In particular, the 2013 amendments to the National Employment Standards will support safe work environment for pregnant employees and greater consideration of family and caring responsibilities in the workplace.

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<sup>11</sup> House of Representatives Standing Committee on Employment and Workplace Relations, "Making it Fair" Report: Pay Equity and Associated Issues to Increasing Female Participation in the Workforce, November 2009

The new Workplace Gender Equality Act will facilitate collection of data relating to discrimination in the workplace, including access to training and equal opportunity at work.

We also note that the current government's proposed PPL scheme will increase the amount of PPL available to many employees, although we are concerned that the removal of the obligation of the employer's role in providing PPL payments will undermine the positive effects the role has on enhancing the workplace culture to value and support pregnant employees and those with caring responsibilities.

## **SUMMARY of RECOMMENDATIONS**

This submission makes the following key recommendations:

### ***Data collection and monitoring***

1. Appropriately resourced data collection and monitoring of pregnancy and return to work discrimination including through the Workplace Gender Equality Agency, Australian Human Rights Commission and the Fair Work Commission Pay Equity Unit.
2. Conduct specific research to identify the incidence and nature of any modifications made in workplaces following resolution of a discrimination complaint or a finding of discrimination relating to pregnancy and return to work.
3. Ensure data collection and monitoring of pregnancy and return to work discrimination includes identification and analysis of areas of systemic discrimination.

### ***Leadership and cultural change***

4. State and Federal Human Rights and Equal Opportunity Commissions, the Fair Work Ombudsman and Safe Work Australia should produce information for employers and employees on their current legal rights and responsibilities regarding pregnancy and return to work discrimination.
5. The Workplace Gender Equality Agency and State, Federal Human Rights and Equal Opportunity Commissions. The Fair Work Ombudsman and Safe Work Australia should publish best practice

guidelines for employers to ensure they meet their legal rights and responsibilities regarding pregnancy and return to work discrimination.

6. The Government should commission a report identifying the long term economic and social benefits to employers, employees and the wider community of increased workforce participation of parents with caring responsibilities.
7. Any amendments to the existing Paid Parental Leave Scheme should ensure that the employer role is maintained in order to facilitate broader cultural change within the organisation.

### ***Anti-discrimination law***

8. Re-introduce the Human Rights and Anti-Discrimination Bill 2013, in particular the proposed provisions which introduce a positive objective to achieve *substantive* equality with an obligation on employers to take reasonable and appropriate measures to eliminate discrimination as far as possible, a shared burden of proof and a no costs jurisdiction;
9. In the alternative, amend the Federal Sex Discrimination Act (1984) to introduce a positive objective to achieve substantive equality with an obligation on employers to take reasonable and appropriate measures to eliminate discrimination as far as possible, a shared burden of proof and a no costs jurisdiction;
10. Ensure a fast, effective and affordable remedy model for discrimination complaints;
11. Provide for the Australian Human Rights Commission and other representative organisations to initiate investigations and claims of systemic discrimination on behalf of complainants;
12. Provide for advocacy support and representation of vulnerable and disempowered discrimination complainants;
13. Establish new regulatory models that actively uncover discrimination, assist organisations to eliminate discrimination, prevent its recurrence, and enforce compliance;

14. Strive for greater synergy between complaints- based anti-discrimination law and complementary preventative legislation such as, for example, the Workplace Gender Equality Act 2012 (WGEA);
15. Improve the level of punitive damages in discrimination cases; and
16. State and Federal discrimination law terminology should adopt the Victorian Equal Opportunity Act 2010 definition of 'family and caring responsibilities' and provide that an employer must not, in relation to the work arrangements of an employee or a person offered employment, unreasonably refuse to accommodate the responsibilities that the person has as a parent or carer.<sup>12</sup>

### ***Employment law***

The Fair Work Act 2009 should be amended to:

17. Remove the restrictions on eligibility to leave and other entitlements for casual employees and employees with less than 12 months service;
18. Clarify the personal leave provisions to explicitly state that employees may use personal leave to attend ante natal visits or other reproductive health appointments;
19. Include an obligation on employers to reasonably accommodate an employee's request for flexible work arrangements (as in the Victorian Equal Opportunity Act), outlining the considerations that must be given in determining whether a request is reasonable to refuse and allow employees to appeal an unreasonable refusal;
20. Provide employees with a right to return to work part time from parental leave until their child reaches 2 years of age unless the employer has serious countervailing business grounds;
21. Provide a separate, additional entitlement for dedicated carers leave;
22. Provide for paid breastfeeding breaks and appropriate facilities; and

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<sup>12</sup> Victorian Equal Opportunity Act 2010, s.17 (1) [see Appendix A]

23. Ensure employees are consulted about any proposed roster changes and their family and caring responsibilities are accommodated as far as reasonably practicable.

#### ***Work Health and Safety law***

24. Ensure there is direct reference to the reproductive health of workers, pregnant workers, workers who have recently given birth, who are breast feeding and/ or returned to work in relevant Work Health and Safety Regulations, including provisions relating to identification of hazards, management of risk and control measures.
25. Ensure there is direct reference to the reproductive health of workers, pregnant workers, workers who have recently given birth, who are breast feeding and/ or returned to work in the existing relevant Codes of Practice.
26. Develop a specific Code of Practice which details the specific workplace health and safety hazards and risks which can arise in relation to reproductive health, pregnancy, breastfeeding mothers and mothers returning to the workplace after giving birth. The Code of Practice should include issues such as the reproductive hazards of manual tasks, night work, biological agents and hazardous substances and also cover the provision of appropriate facilities in the workplace, as well as work equipment, personal protective equipment and health surveillance and existing industrial and anti-discrimination legislation and employer obligations and responsibilities in this area.

#### ***Implementation of laws***

27. The Australian Human Rights Commission should undertake an education and awareness-raising program which is specifically targeted at ensuring organisations take necessary steps to ensure all levels of management are aware of their legal responsibilities towards employees who are pregnant or returning to work.
28. In conjunction with Recommendations 4 and 5 above, the Fair Work Ombudsman should initiate a public campaign to ensure breaches of existing anti-discrimination protections are identified and remedied.

29. The Australian Human Rights Commission and the Australian Stock Exchange should advocate that Chief Executive Officers and shareholders take an active role in ensuring organisational practices and procedures support appropriate management accountability of discrimination matters.

### ***Compliance***

30. Include preventative mechanisms in the State and Federal anti-discrimination legal framework, including the capacity for the State and Federal Human Rights and Equal Opportunity Commissions to issue improvement notices and enforceable undertakings from employers and the Workplace Gender Equality Agency to implement the procurement guidelines for non-compliant employers.
31. Develop and implement a comprehensive Compliance Strategy by Safe Work Australia which includes information and education components, monitoring and enforcing activities, sharing of information between regulators and the conduct of proceedings under relevant work health and safety laws.

### ***Support structures***

32. Ensure that government policies relating to early childhood education and care and out of school hours care provide quality, accessible and affordable care which is supportive of the needs of working parents including their need to balance paid work and caring responsibilities.
33. Ensure that taxation and social welfare policies do not act as a further disincentive to parents combining paid work and caring responsibilities.

### ***Policies and programs***

34. Continue initiatives such as 'Employers of Choice' and 'Champions of Change' conducted by organisations such as the Workplace Gender Equality Agency , the Australian Human Rights Commission and the Diversity Council of Australia which promote and encourage best practice policies and programs.

## RESPONSE TO DISCUSSION PAPER

### 4. WHAT DO WE KNOW ABOUT DISCRIMINATION EXPERIENCED BY PREGNANT EMPLOYEES AND WOMEN AND MEN RETURNING TO WORK AFTER TAKING PARENTAL LEAVE TODAY?

We do know that the available data on discrimination experienced by pregnant employees and women and men returning to work after taking parental leave is only the 'tip of the iceberg'. The Australian Human Rights Commission estimates that only a small minority of discrimination result in formal complaints. Of those formal complaints, a quick perusal of the most recent case law provides an indication of the types of discrimination experienced, including:

- Termination because of employers attitude that pregnant women should not be working;<sup>13</sup>
- Demotion, reduction of hours of work and pressure on pregnant employees to resign;<sup>14</sup>
- Deliberate misrepresentation of pregnant employees' entitlements to parental leave and to return to work;<sup>15</sup>
- Pressure to abort a pregnancy and pressure to resign;<sup>16</sup>
- Being made redundant whilst on parental leave;<sup>17</sup>
- Having rosters changed whilst on parental leave in order to pressure employees to resign upon return to work;<sup>18</sup>
- Being made redundant upon return from parental leave;<sup>19</sup>

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<sup>13</sup> Fair Work Ombudsman v **Wongtas** Pty Ltd (No 2) [2012] FCA 30 (2 February 2012)- the manager told the employee she should "stay at home in bed"

<sup>14</sup> *Ucchino v Acorp Pty Ltd [2012] FMCA (27 January 2012)*, In this case a former director of a childcare centre was demoted to 'staff relief float' on a casual basis when she returned from parental leave. Upon refusing to accept the demotion, her employer terminated her employment on the grounds of 'poor performance.'

<sup>15</sup> *W.K.O Pty Ltd (Trading as Dinki Di Childcare Centre Innaloo) Federal Court 2012*

<sup>16</sup> "*Air Controllers Claim Sexual Bias*", *The Australian*, July 29, 2010 (MBC), where the claimant cited her manager telling her that her pregnancy did not suit the roster and that he had a "coat hanger in the back of his car"

<sup>17</sup> "*Women Claim Discrimination by Virgin Blue*", *News.com.au*, 5 March 2012, in this case the claimants alleged their managers said they were 'square pegs they were trying to fit in a round hole' and another advising that "all females should be put on contracts, and that way when they get pregnant it's easier to get rid of them"

<sup>18</sup> *A Dalley Holdings Pty Ltd, Federal Court 2012*, in this case the roster was changed to include 'sleep over shifts' which she could not perform due to her responsibilities to care for her 11month old baby

<sup>19</sup> "*Discrimination Case is Settled Out of Court*", *Sydney Morning Herald*, 27 October 2011, p.3, in this case evidence revealed the employer's desire to 'weed out' part-time staff, with one email by the Chairman, stating, "*I don't know what*

- Constructive dismissal upon return to work from parental leave<sup>20</sup>.

#### **Q4.1 What discrimination do employees face in the workplace related to pregnancy, parental leave or on returning to work after parental leave?**

Due to the fact that the majority of employees do not pursue formal claims and that many cases are settled on a confidential basis, the bulk of information regarding the nature of discrimination experienced by pregnant employees and women and men returning to work after taking parental leave is through anecdotal evidence and survey research.

The ABS 'Pregnancy and employment transitions 2012' data appears to reflect the case law, revealing that the most common kinds of treatment women reported in the survey included:

- Missing out on opportunity for promotion (34%);
- Missing out on training or development opportunities (32%);
- Receiving inappropriate or negative comments from their manager/supervisor (28%)
- Having hours or duties changed without consultation (20%); and
- Demotion (9%).

As part of the consultation process for this Inquiry, the ACTU established a telephone hotline and online survey for employees to contribute their stories and experiences to the Inquiry. The total number of contributions from employees, including those received by individual unions directly from their members, was just over 350 submissions. All contributions reproduced in this submission have been de-identified. An analysis of the responses shows that the following forms of discrimination were also prevalent.

#### ***Pre-employment***

A number of members commented that discrimination occurred before they were pregnant.

*"I went to one interview where I was asked if I intended to have children and that my age (27) was a concern as it was the time most women want to start a family."*

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*has happened in the past but the way we are going to operate in the future is that we are only having full-time employees on the payroll."*

<sup>20</sup> Holtham Family Pty Ltd (trading as The Soup Box Shepparton), Workplace Express 27 July 2012, in this case the employer engaged another person to perform the same duties as the pregnant employee and gave her shifts to the new employee.

### ***Pre-natal medical appointments and personal leave***

Members reported difficulties accessing personal or sick leave to attend pre-natal medical appointments, with some having to use maternity leave or annual leave and being given a hard time over having to attend medical appointments during work hours despite this being the only time they were available.

### ***Unsafe work practices***

Numerous members reported managers not accepting or ignoring medical advice, requiring them to work in unsafe environments or to continue to perform unsafe duties that put them and their baby at risk.

For example, a supermarket employee working in a bakery department was repeatedly told to perform heavy lifting and duties such as climbing ladders and using heavy duty cleaning equipment despite providing doctors' advice to a number of levels of management that this was impacting seriously on her pregnancy. The employee suffered serious tearing of her uterus and consequently experienced premature birth resulting in complications endangering the baby.

*“On night time it happened once I fainted after the end of the service, I was working 6 hours straight without any break or any possibility to eat something. I had to ask my GP for a medical certificate to stipulate to give me a break to eat after 4h of work.”*

### ***Unreasonable refusal by employers to make adjustments to accommodate pregnant employees***

Many employees reported that their managers refused to make reasonable, and in many instances very minor adjustments to the physical environment or work arrangements to accommodate their pregnancy.

For example, a supermarket cashier was refused a request for a stool to sit on whilst checking items out behind the register to assist with the pressure and swelling of her feet.

Another supermarket store employee was refused requests to take toilet breaks outside the allocated schedule. She wet herself in front of customers and suffered humiliation and discomfort.

### **Unnecessary removal from duties**

*"I was asked to leave immediately by my manager as he deemed it was unsafe for me to continue to do my duties as I was over 36 weeks pregnant (my duties mainly involved my sitting at a desk in an office for 90% of my work hours)."*

*"They then wanted to change my position fully so that I could not be seen by prospective clients."*

### **Termination and constructive dismissal**

Some members reported blatant discrimination resulting in termination of their employment:

*"I got a thank you card and flowers and then got fired."*

*"I asked if I could come to sort out my group certificate. I went back in and the person that was going to take over my position was working there... Word of mouth had gotten back to me that the manager was telling people that I am on maternity leave, not that he fired me."*

A significant number of employees reported being constructively dismissed either when pregnant or upon return to work from parental leave.

*"When I informed my employer of my pregnancy she said, "you are going to have it terminated aren't you? Because if you don't I'm going to have to sack you." I was told that I would either be sacked for infractions of the rules over the last week and was given 3 warnings then and there (one for using a bad tone of voice to a manager, another for leaving paperwork on a manager's desk when he was on the phone and another for not concentrating and making a typing error."*

*"My boss told me that he didn't want a pregnant woman working at the store because he didn't think I'd be able to handle the workload. He told me I could resign now and he'd give me a good reference or if I stayed he would demote me and put me on performance management which I would certainly fail."*

Many members expressed their experiences that it was clear their employer just didn't want the employee to return regardless of their efforts to make arrangements to suit the employer's needs.

*“A few months ago my team leader wanted to discuss my return to work. She said I wouldn’t be able to do my current job part time, and, as there weren’t any other part time opportunities in the branch for me, most likely I would have to be put in the redeployment pool. I then said I could come back full time after my parental leave as my partner could look after the baby full time as he has more flexibility with his work. She said that she couldn’t have me coming back to my role as it is such a critical role and she couldn’t afford for me to be taking sick leave and carer’s leave.”*

### ***Being targeted for redundancy***

As reflected in the case law and ABS data, a substantial number of employees reported either that a ‘restructure’ was announced shortly after they notified their employer of their pregnancy or that they were targeted for redundancies.

*“I was in a department of about 10 people. The boss announced a restructure of the department. The only change was my position was abolished and a new very similar position was created in its place.”*

*“Whilst I was on maternity leave there were some redundancies. I ended up taking a redundancy package because I couldn’t face going back there.”*

*“I emailed them on the 14<sup>th</sup> April to discuss returning to work. It took them til the 4<sup>th</sup> of June for them to get back to me. They said that I had the option to have my position made redundant or be demoted to a more junior position. No other jobs were made redundant.”*

### ***Demotion and lack of access to training and career development opportunities***

*“When I was about to take leave to have my baby I found out that the principal had employed another permanent teacher to replace me... and I would be moved out of that role.”*

*“The Director of business unit decided that as a mother my mind would be on this role rather than focusing on my work role, therefore he decided that on my return to work after this child I would go from being office manager to the data entry clerk. This was announced at a team meeting without prior discussion with me.”*

*“My roles and responsibilities were reduced and minimised to the same level as an admin temp even though I was a senior officer. I was then routinely excluded from strategic planning meetings despite my seniority. The discrimination I felt was not overt, but more exclusionary, the diminishment of my role left me feeling very undervalued and useless despite my knowledge that I had earlier held the position I occupied through years of hard work and loyalty.”*

*“I returned to my position last year to find that my job had changed from non-teaching Deputy Principal to relief teaching. I was told it had to change because I was returning part time. My key responsibilities were redistributed. I was deskilled and disempowered.”*

*“I discussed my disappointment with the reduced responsibilities with corporate HR... they suggested that had I been more proactive at keeping in touch I would have been aware of the changes. Obviously had I known that changes were coming I would certainly have tried to discuss them but it did not occur to me to call in regularly to ask if I was being demoted.”*

### **Reduced hours**

Reducing employee's hours was often reported as a mechanism to remove pregnant women or employees returning to work from parental leave from the workplace.

*“I was required to work one lesson 4 times a week. I complained, and had my workload reduced to 2 days, then, in 2012 my workload was reduced to 0.5- one day a fortnight in the library.”*

*“It's late into my pregnancy, so they have now put me down to 8 hours from 24 hours. They said I was lucky that I didn't tell them earlier as they would have cut me back straight away if they had known about it.”*

*“I was happy to return to work full time but they wanted me to do split shift- 4 hours in the morning, 4 hours unpaid wait and then 4 hours in the evening. I declined the offer and the only option given to me was to resign.”*

Quite a few members reported that they were forced to resign then reapply for casual or part time jobs with no right to return to their original permanent, full time position.

*“When I asked a year later to come back full time again to my previous status of employment, I was told that I was now a permanent part-timer, despite never having agreed that this was anything but a temporary arrangement whilst I had a young baby at home.”*

*“They told me I had to resign from my job and when I returned I would have to go back through the employment agency to apply for a job.”*

### ***Unreasonable refusal by employers to accommodate employees with caring responsibilities***

In many cases, employees reported that unreasonable refusal to accommodate caring responsibilities upon returning to work was used as a means to force them to resign from the workplace or accept inferior, casual or short term work contracts.

*“I found childcare for my daughter and arranged to meet my manager the week before I was due back at work as we had verbally agreed I could work part time when I returned. However, I discovered my old boss had left and there was a new marketing manager. He told me yes, I was welcome back but it had to be full time or not at all. I could not find full time childcare and I had to resign.”*

*“One of my work colleagues who had a child with a terminal illness was refused her request to work part-time for the few months of her sons remaining life because her problem was not an ongoing one.”*

### ***Breastfeeding***

Although not many members submitted comments directly relating to breastfeeding, a number did report difficulties accessing appropriate break times and facilities.

*“I had to ask the boss to leave the office as it was the only private space. I ended up finding that expressing in the back seat of my car was more effective. My breaks were also regulated times so I couldn't express when I needed to.”*

### ***Discrimination in pregnancy or return to work is a key contributor to long term disadvantage***

Many employees reported that the consequences flowing from their experiences of discrimination in pregnancy and return to work had a long term negative impact on their careers, earnings capacity and income security.

Discrimination in pregnancy or upon return to work forced many women to lose or leave their job and attempt to re-enter the labour market again, often in lower paid, casual and insecure work.

Losing or leaving employment resulted in a loss of entitlements crucial to balancing work and family such as sick leave, annual leave and long service leave. This prevented some women from returning to paid employment at all or to applying only for part-time or casual work often below their skills and experience, lower paid, insecure and often without superannuation benefits.

As the ABS data indicates, for those who did return to their job from parental leave, some of the most prevalent forms of discrimination they experience was denial of opportunities for promotion, and access to training and development.

Dropping out of paid work, entering into low paid, insecure work or having a career stunted has a long term effect on the career paths, incomes and savings of women. For example, non-managerial women in fulltime employment currently earn 84.6 per cent less than full-time men. When part-time employment is included, women earn only 67 per cent of male earnings, or \$271 less per week.<sup>21</sup>

While the gender pay equity gap is not entirely due to women's experiences of discrimination in pregnancy and return to work from parental leave, there is no doubt that it has a profound negative effect on women's employment patterns and earnings. ABS data indicates that women aged 25-34 in their key child rearing years suffer the greatest gender pay gap of all other age groups, earning just 62% of men's average incomes<sup>22</sup>. Women returning from parental leave suffer the greatest decrease in earnings- on average a return from a three year break to have children, irrespective of how many hours she works, results in a 10% drop in a woman's *hourly* earnings.<sup>23</sup> This can only be

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<sup>21</sup> Workplace Gender Equality Agency, Gender Workplace Statistics At a Glance, 2013, <http://www.wgea.gov.au/research-and-resources/fact-sheets-and-statistics>

<sup>22</sup> AMP NATSEM, Income Wealth Report "She Works Hard for her Money" Australian Women and the Gender Divide, University of Canberra, April 2009, p.25

<sup>23</sup> AMP NATSEM, Income Wealth Report "She Works Hard for her Money" Australian Women and the Gender Divide, University of Canberra, April 2009, p.30

attributed to returning to a lower paid job, being demoted or consistently missing out on promotions.

**Q4.2 What other data is available on the prevalence and nature of discrimination in relation to pregnancy at work and returning after parental leave?**

In addition to case law, ABS survey results and anecdotal evidence collected by unions, data that provides similar insight into the prevalence and nature of discrimination is available from:

- State and Federal Human Rights and Equal Opportunity Commissions, legal advocacy organisations and women's groups such as working women's centres;
- Australian and International academic research; and
- Anecdotal evidence from contributions to websites and blogs with a significant audience of women and working parents.

**5. WHAT CONCERNS EMPLOYERS?**

**Q5.1.1 What challenges do employers face in accommodating pregnant employees and women and men returning to work after parental leave?**

The ACTU acknowledges there are some challenges employers face in accommodating pregnant employees and those returning from parental leave. In particular, the need for replacement employees during periods of parental leave and the restructuring of work arrangements most new parents need upon return from parental leave, are examples cited by some employers. However, in our experience, most employers who are committed to supporting pregnant employees and those with caring responsibilities most often are able to accommodate their needs.

It should be noted that the legal requirements on employers to do so are extremely reasonable. The need for some employers to replace employees during periods of paid and/or unpaid parental leave has existed since 1979 when women won the right to 12 months unpaid parental leave.

Similarly, employers are not obliged to accommodate an employee's request to change working arrangements upon return to work. The Fair Work Act merely requires employers to consider a request whilst allowing employers very broad grounds to reasonably refuse an employees' request.

When balanced against the difficulties employees face in combining pregnancy and returning to work from parental leave with new caring responsibilities, these challenges to employers are clearly reasonable and necessary to meet modern community standards.

Indeed, more and more progressive employers are embracing diversity in their workforce and reaping benefits of maintaining loyal, skilled and experienced staff.

Increasing the incentive to return to work with the same employer reduces the significant costs associated with staff turnover. For employers the estimated costs of replacing staff ranges from 25 per cent to 200 per cent of the annual salary.<sup>24</sup>

Whilst individual workplaces face different challenges supporting and accommodating the needs of pregnant employees and those returning from parental leave, it is the cultural attitudes towards working parents that is the key barrier. The stories of employees repeatedly highlight that an employer's or manager's attitude towards working parents as more significant than the actual challenges an organisation faces. Their stories reflect a disconnect between the stated family friendly policies of the organisation and the reality of management practices, for example:

*"My organisation- although an employer of choice for women with 3000 employees in Victoria- made it extremely difficult for me to return to work. Although they have great policies, they do not practice them."*

These experiences are also borne out in research material, such as the conclusion drawn by the recent Ernst & Young Report which found that that "initiatives don't work unless organisations also address: resistance to change, ingrained organisational and cultural beliefs, unconscious bias, societal norms- and sometimes sheer ignorance."<sup>25</sup>

#### **Q5.1.2 What support do employers need to accommodate pregnant employees and women and men returning to work after parental leave?**

Gaps in employers' awareness of their rights and responsibilities towards pregnant employees and those returning from parental leave need to be addressed. In particular, anecdotal evidence suggests that middle management levels are often identified as the problem, both in terms of lack of

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<sup>24</sup> 'Paid Maternity leave: Long Overdue', Australian Council of Trade Unions Submission to the productivity Commission Inquiry into Paid maternity, Paternity and Parental Leave, May 2008, p. 16.

<sup>25</sup> Ernst and Young, "In His Own Words: The Male Perspective on Gender Equality", Women in Leadership Series, 2013

awareness of their responsibilities and training on how to accommodate pregnant employees and those with caring responsibilities. Many of the stories ACTU received for this Review highlighted management inability to recognise the benefits of supporting pregnant employees and those with caring responsibilities and how to manage team dynamics. There is a strong need to ensure all of the workforce is engaged in any education and awareness raising exercises.

However, whilst education and awareness raising exercises are good initiatives, they are not enough. It is clear that government leadership and legislation is required to change discriminatory cultural attitudes towards working parents. Justifying the introduction of the right to request flexible work arrangements for employees in 2011, the UK government concluded that the most effective way to promote cultural change was to introduce statutory obligations, noting that “even a sustained and extensive campaign is unlikely to have the significant effect on employment culture sought by this policy, and a major challenge would be reaching and convincing those who are resistant to change- which promotion campaigns will always struggle to achieve without the pressure of change in the operating environment of businesses.”<sup>26</sup>

Clearer drafting of the current legislation would assist in some instances, for example, the right to request a change to work arrangements for carers in the Fair Work Act should spell out the process of determining the reasonable accommodation of a request (as it is in the Victorian Equal Opportunity Act) to provide guidance and support to both employers and employees.

In addition, the publication of guidelines and model policies would be helpful both to employers and employees to clarify their legal and industrial rights and responsibilities.

Ongoing collection of relevant data is critical to measuring trends, assessing the success of programs and identifying where gaps in policy and law exist. The new Workplace Gender Equality Act 2012 should collect data from reporting organisations which assists in the identifying the experiences of employees and employers in order to better inform the production of education programs and model policies.

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<sup>26</sup> HM Government, Consultation on Modern Workplaces: Extending the right to request flexible working to all: Impact Assessment, May 2011

**Q5.2.1 What strategies assist with retaining and supporting employees who are pregnant or have taken parental leave?**

***Pregnant employees can be supported by:***

- Ensuring safe work places and practices, including making reasonable adjustments to accommodate the needs of pregnant employees;
- Conducting management training across all levels and ensuring accountability for safe work places and practices;
- Providing adequate leave for pregnant employees to attend ante natal and reproductive health appointments;
- Disseminating information to employees about their rights;
- Supporting discrimination claimants and addressing the cause of discrimination;
- Ensuring workplaces have effective anti-discrimination policies and practices and management accountability (including at the CEO and shareholder level) as part of a risk management tool.

***Employees returning from parental leave can be supported by:***

- Providing effective communication and consultation with employees on parental leave;
- Ensuring non-discriminatory management practices and accountability (including in key performance measures) and corporate accountability at the CEO and shareholder level;
- Providing flexible work arrangements , consultation and accommodation of employees' family and caring responsibilities when proposing roster changes;
- Providing adequate leave for employees to care for dependents;

- Conducting audits of organisational barriers to parents and identifying strategies to address indirect discrimination;
- Providing active career development support including training and development opportunities and career path mapping; and
- Supporting discrimination claimants and addressing the cause of discrimination.

**6. The current national legal and policy framework relevant to the rights of pregnant employees and women and men returning to work after taking parental leave.**

***Anti-discrimination law***

The Commonwealth Sex Discrimination Act (1984) makes it unlawful to treat a person unfairly because they are pregnant, potentially pregnant, breastfeeding or have family responsibilities. It includes both direct and indirect discrimination. There is inconsistency across Federal, State and Territory anti-discrimination legislation, each protecting variously those with ‘family and caring responsibilities’, ‘family responsibilities’ or ‘caring responsibilities’. The Victorian Equal Opportunity Act 2010 provides that an employer must not, in relation to the work arrangements of an employee or a person offered employment, unreasonably refuse to accommodate the responsibilities that the person has as a parent or carer.<sup>27</sup>

***Employment laws and policies***

The Fair Work Act 2009 sets out minimum terms and conditions of employment in Australia through the National Employment Standards (NES). Employees are entitled to:

- A safe job, or to be transferred to an appropriate safe job during pregnancy or to paid or unpaid ‘no safe job leave’ for the period of risk if no safe job is available;
- Special maternity leave if required;
- Use of personal leave for pregnancy related illnesses;

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<sup>27</sup> Victorian Equal Opportunity Act 2010, s.17 (1)[see Appendix A]

- Twelve months unpaid parental leave (with the right to request an extension of up to total of 2 years);
- Return to the same position they held before they commenced their period of parental leave, or if that position no longer exists, an alternative available position for which they are qualified and suited nearest in status and pay to the pre-parental leave position;
- Request flexible working arrangements, such as a change in hours, patterns or locations of work from their employer;
- Be consulted about the impact of proposed roster changes on their caring responsibilities.

### ***Paid Parental Leave***

In 2010, the Australian Government enacted the Paid Parental Leave Act 2010 (Cth), which established Australia's first paid parental leave scheme. The scheme entitled primary carers of newborn babies to 18 weeks' pay at the national Minimum Wage. In 2012 the government introduced Dad and Partner Pay, entitling partners to 2 weeks' pay at the National Minimum wage.

### ***Occupational Health and Safety Law*** (see 6.31, 6.32)

#### **Q6.2.1 Does the law adequately protect pregnant employees and parents returning to work after taking parental leave against discrimination?**

As stated in the introduction, evidence suggests the current anti-discrimination and industrial legal framework provides inadequate protection for pregnant employees and those returning from parental leave. It is intolerable that 20% of women report being discriminated against at work due to pregnancy or caring responsibilities and that one in three mothers do not return to their jobs following parental leave.

### ***Anti-discrimination law***

The current anti-discrimination laws do not adequately protect pregnant employees and parents returning to work after taking parental leave because:

- All the emotional, time and financial responsibility is placed on the complainant. This is particularly likely to discourage parents of newborn children from pursuing complaints;
- The high cost of going to court and the difficulty of meeting the current prohibitive burden of proof requirements discourage complainants from bringing forth a case;
- There is no formal support or advocacy assistance for complainants;
- The technical complexity of the anti- discrimination laws makes it difficult for employers, employees and community members to understand their rights and obligations under the law;
- There are gaps in the legislation such as no legal requirement on employers to make reasonable adjustments to accommodate the needs of pregnant employees, and no legal prohibition on employees seeking discriminatory information.
- There is no capacity to address systemic discrimination as the legal framework operates on a system of individual complaints even though the evidence suggests much discrimination is systemic either across a workplace, an industry or towards a particular group of people;
- There is no capacity for the laws to prevent further discrimination from occurring as most cases are settled confidentially and in many instances the perpetrator or cause of the discrimination remains within the organisation; and
- Inadequate punitive measures enable discrimination to remain a matter which is not treated seriously and, in some cases, simply budgeted for by organisations as part of their acceptable risk management

### ***Employment Law***

The Fair Work Act was amended in 2013 to include some improvements for pregnant employees and employees with caring responsibilities, including provisions relating to safe work, roster changes and the right to request flexible work arrangements. However, the Act remains deficient in the following areas:

- It excludes a significant number of employees from basic rights and entitlements because they are casual or have less than 12 months service;
- The right to request flexible work arrangements does not require employers to reasonably accommodate an employee's request. Employers may refuse a request on a very broad range of 'reasonable business grounds' including financial, efficiency and productivity grounds as well as any impact on customer service, inability to organise work among existing staff; inability to recruit a replacement employee or organise practical arrangements to accommodate the employee's request. There are no procedural guidelines as to what would be unreasonable and employees have no right to appeal an unfair refusal;
- The personal leave provisions do not clearly state the leave may be used for pregnancy and birth related matters;
- The aggregation of personal and carers leave has an indirect discriminatory effect on workers with caring responsibilities who must "make do" with 10 days leave to cover their own illnesses and those of their dependents;
- There is no provision for paid breastfeeding breaks and facilities;
- The unclear definition of same or similar job creates unnecessary disputation; and
- There is no right for employees to return part-time from parental leave.

***Occupational Health and Safety Law*** (see 6.3.1, 6.3.2)

**Q6.2.2 Are the laws adequately implemented?**

There are inadequacies in the implementation of the laws, including:

- The reality that many employees lack power in the workplace and risk losing their jobs, hours of work or shifts if they complain. This is especially significant for employees in casual work and those who need to balance caring responsibilities;

- Pregnant employees who have been discriminated against don't want to return to discriminatory workplace knowing that the discriminatory attitudes towards them will persist;
- Without support or resources, complainants who are expecting or caring for a newborn do not have the emotional, time or financial resources to pursue claims;
- Many employees and employers unaware of their rights and obligations;
- Many employees who are aware of their rights nevertheless make a calculated assessment of whether it's worth pursuing given the lack of enforceability of the right and the repercussions of doing so;<sup>28</sup>
- Some employers set aside savings to cover discrimination claims and have no intention of addressing the issue;
- Lack of monitoring the prevalence of discrimination, particularly across employers, industries or groups of people results in an inability to prevention of repeat or persistent discrimination;
- The fact that complainants often ends up having to leave the workplace sends a message to perpetrators and organisations that discrimination goes unpunished;
- The prevalence of confidential settlements of discrimination claims mean many cases don't see the light of day;
- Laws which are unclear are implemented haphazardly and are highly dependent on an individual manager's attitude.

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<sup>28</sup> Skinner, N., Hutchinson, C., & Pocock, B., "The Big Squeeze: Work, Home and Care in 2012", Australian Work Life Index 2012, University of South Australia, 2012

### **Q6.2.3 How could the laws and their implementation be strengthened?**

#### ***Anti-discrim laws:***

Unions regard access to justice as a fundamentally important area of reform of discrimination law. No matter how many improvements are made to specific provisions of legislation, if victims of discrimination are restricted from accessing the benefits of those improvements because costs or unrealistic burdens of proof discourage them from bringing forth their case, the improvements are meaningless.

The ACTU has consistently expressed the view that, in recognition of the systemic nature of discrimination and in order to improve the effectiveness of the antidiscrimination legal framework, reform is required to:

1. Introduce a positive objective to achieve substantive equality and include an obligation on employers to take reasonable and appropriate measures to eliminate discrimination as far as possible;
2. Introduce a shared burden of proof to make it less easy for employers to hide behind performance management or restructuring to constructively dismiss pregnant employees or those returning from parental leave;
3. Ensure a fast, effective and affordable remedy model;
4. Provide for the State and Federal Human Rights and Equal Opportunity Commissions and other representative organisations to initiate investigations and claims of systemic discrimination on behalf of complainants;
5. Provide for advocacy support and representation of vulnerable and disempowered complainants;
6. Establish new regulatory models that actively uncover discrimination, assist organisations to eliminate discrimination, prevent its recurrence, and enforce its non-compliance;

7. Strive for greater synergy between complaints- based anti-discrimination law and complementary preventative legislation such as, for example, the Workplace Gender Equality Act 2012;
8. Include preventative mechanisms; and
9. Improve the level of punitive damages.

***Employment law:***

The Fair Work Act 2009 should be amended to:

- Remove the restrictions on eligibility to leave and other entitlements for casual employees and employees with less than 12 months service;
- Clarify the personal leave provisions to explicitly state that employees may use personal leave to attend ante natal visits or other reproductive health matters;
- Include an obligation on employers to reasonably accommodate an employee's request for flexible work arrangements (as in the Victorian Equal opportunity Act), outlining the considerations that must be given in determining whether a request is reasonable to refuse and allow employees to appeal an unreasonable refusal;
- Provide employees with a right to return to work part time from parental leave until their child reaches 2 years of age unless the employer has serious countervailing business grounds;
- Provide a separate, additional entitlement for dedicated carers leave;
- Provide for paid breastfeeding breaks and facilities; and
- Ensure employees are consulted about any proposed roster changes and their family and caring responsibilities accommodated as far as reasonably practicable.

**Occupational Health and Safety Law** (see 6.3.1, 6.3.2)

#### **Q6.2.4 What challenges do employers face in implementing employment laws and policies?**

Employers do face challenges in implementing some of the employment laws and policies, primarily in terms of cost to the business, capacity to accommodate changes to work arrangements and replacement staff as well as managing competing employee interests.

However, it is our experience that an employer's or manager's attitude towards working parents is more significant than the actual challenges an organisation faces.

In addition, there is also a strong business case for employers to provide family friendly work conditions. Businesses that actively encourage family friendly workplaces overwhelmingly report the positive benefits to the organisation including productive and motivated employees, better retention of skilled staff in a competitive labour market, and being recognised as an employer of choice.

For employers, the estimated costs of staff turnover ranges from 25% to 200% of the annual salary due to separation costs, replacement and recruitment costs, training costs and loss of productivity.<sup>29</sup>

Employers and the Australian public also benefit from a strong labour market which supports a sustainable tax base to stimulate consumer spending and investment. Maintaining a sustainable tax base will be a critical issue in the near future as our declining workforce struggles to support a growing aging population.

In light of the importance of ensuring pregnant employees and working parents can continue to participate in the paid workforce, the challenges facing employers are both reasonable and essential.

#### **Q6.2.5 What challenges do employees face while pregnant, on or returning to work after taking parental leave?**

Employee contributions to this inquiry highlighted the following challenges:

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<sup>29</sup> National Pay Equity Foundation Submission to HREOC 2002.

- Ineligibility for basic workplace entitlements because of casual employment or insufficient length of service;
- Gaps in the legislation which have the practical effect of being weak and/ or unenforceable;
- Being forced to choose between returning from parental leave full time or not at all due to an employer or manager's lack of acknowledgment of the employees' changed circumstances or unwillingness to accommodate the employee's changed circumstances;
- Inability to enforce rights because of insecure work or concerns about being victimised or treated unfavorably;
- Unsupportive workplace culture and biased management attitudes which serve as 'blockers' to balancing work and family;
- Time, financial and emotional pressure related to expecting or having a baby mean that victims often don't pursue discrimination or unfair treatment;
- Remedies to discrimination are insufficient to justify pursuing claims;
- Employees do not wish to return to workplaces which have no intention of dealing with the discriminatory behaviour;
- Limited access to the benefits of workplace bargaining agreements, particularly for women in low paid, insecure work who are more likely to be award dependant and have low negotiating power;
- Lack of supportive social framework such as quality, accessible and affordable childcare to help balance work and family;
- Effective marginal tax rates and high childcare costs act as disincentives to entering paid work; and
- Diminished career development opportunities and stereotyping (the 'mummy track').

### **Q6.3.1 What difficulties are there for employers and employees in understanding relevant work health and safety standards in relation to pregnant employees in the workplace?**

Employers are legally obligated to ensure they understand and implement the relevant work health and safety laws and standards in their workplace.<sup>30</sup> Anecdotal evidence, however, suggests that in many workplaces, employers and managers are not adequately aware of these legal obligations, particularly in relation to work and pregnancy, including:

- Their legal rights and responsibilities to provide a safe workplace for all employees including pregnant workers;
- Appropriate actions to be taken in relation to ensuring a safe work environment and duties for pregnant workers; and
- Lack of information and awareness of hazards specifically relating to pregnancy.

Whilst a lack of understanding awareness of work health and safety legislation is a factor, evidence collected by the ACTU and affiliated unions for this Review, indicates that many employers simply do not take their legal obligations seriously enough to ensure they meet their responsibilities to ensure the health and safety of pregnant employees.

In our view, this lack of attention to the work health and safety needs of employees planning a pregnancy, who are pregnant or returning to work from parental leave requires specific enunciation of the common workplace hazards specifically relating to reproductive health, for example:

- Increased risks associated with manual handling, lifting and twisting as muscles are often weaker during pregnancy;
- Strenuous physical activity, such as heavy lifting, prolonged standing in pregnancy can result in late term miscarriage and premature labour;
- Increased risk of slips, trips and falls due to changes in pregnant employee's centre of gravity;

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<sup>30</sup> Work Health and Safety legislation refers to PCBU and worker. These definitions are broader than 'employer' or 'employee'. The ACTU also notes that these issues go beyond 'standards' as there is a legally binding Health and Safety Act in each of Australia's nine Work Health and Safety jurisdictions.

- Low or high blood pressure due to increased production of blood in the body while pregnant, exacerbated by prolonged sitting and prolonged standing;
- Occupational exposure to certain chemicals, drugs, fumes, radiation and viruses may be a significant hazard to reproductive health, mother and foetus or breast fed babies – through skin absorption, ingestion, inhalation and poor hygiene practices;
- Fatigue and irregular work patterns including long hours and shift work;
- Exposure to heat and cold in the workplace including heat stress and dehydration; and
- Pregnancy based bullying and harassment.

**Q6.3.2 Are there any gaps in work health and safety laws and policies in relation to pregnant employees?**

The significant gap in the current work health and safety laws and supporting regulations and codes of practice is the lack of any direct reference to employees who are planning a pregnancy, are pregnant or have just returned to work from parental leave.

The ACTU recommends that the work health and safety legal framework should recognise that there are specific workplace environments and practices that may:

- Constitute a hazard to reproductive health; and/or
- Increase risk for a pregnant worker; and/or
- Only arise when a worker is pregnant; and/or
- Constitute a hazard to an unborn child; and/or
- Constitute a hazard to a breastfeeding mother and her newborn; and /or,
- Constitute a hazard to a mother returning to work after giving birth.

### ***Work Health and Safety Regulations***

Reference should be made in Work Health and Safety regulations to reproductive health, pregnancy, breastfeeding mothers and mothers returning to the workplace after giving birth. The regulations should be amended to ensure that employers are required to identify, undertake risk assessments and control any risks to the reproductive health of workers, pregnant workers, workers who have recently given birth, who are breast feeding and/ or returned to work. Current regulations regarding these matters are Section 18 (Duty to identify hazards), Section 19 (Management of risk) and Section 20 (Hierarchy of control measures).

### ***A Dedicated Work Health and Safety Code of Practice***

Specific reference to pregnancy also needs to be made in the existing relevant Codes of Practice to include specific reference to the risks associated with reproductive health, pregnancy, breastfeeding and returning to work after birth, including:

- Hazardous Manual Tasks
- Work health and safety consultation, cooperation and coordination
- Managing risks of hazardous chemicals in the workplace
- How to manage workplace health and safety risks
- Managing work environment and facilities
- Guide for preventing and responding to workplace bullying.

In addition, the ACTU supports the development of a Code of Practice which details the specific workplace health and safety hazards and risks which can arise in relation to reproductive health, pregnancy, breastfeeding mothers and mothers returning to the workplace after giving birth.

A dedicated Code of Practice should include issues such as the reproductive hazards of manual tasks, night work, biological agents and hazardous substances and also cover the provision of appropriate facilities in the workplace, as well as work equipment, personal protective equipment and health surveillance. A Code of Practice should also highlight existing industrial and anti-discrimination legislation and employer obligations and responsibilities in this area.

## ***Compliance Strategy***

We would also recommend the development and implementation of a comprehensive Compliance Strategy by Safe Work Australia, consistent with the existing Compliance Policy endorsed by the Workplace Relations Ministers' Council on 10 August 2011<sup>31</sup>.

A Compliance Strategy should include information and education components, monitoring and enforcing activities, sharing of information between regulators and the conduct of proceedings under relevant work health and safety laws. Such a Compliance Strategy would only be effective if the health and safety of pregnant women and their babies at a workplace level is given primary consideration.

### **Q6.3.3 Are there any practical challenges or issues with the interaction of anti-discrimination, employment and work health and safety laws and policies?**

The ACTU believes the most common practical challenge is twofold:

- 1) A general lack of employer commitment to ensure appropriate organisational awareness of the current obligations under anti-discrimination, employment and work health and safety laws; and
- 2) Instances where actions by employers result in pregnant workers being injured, their baby's health being compromised, being discriminated against, harassed and bullied and other negative changes in their employment conditions relating to their pregnancy or return to work including loss of entitlements and termination of employment.

### **Q6.3.4 What difficulties are there in complying with work health and safety standards to make workplaces safe for pregnant employees?**

The ACTU believes the primary difficulty in compliance with existing work health and safety standards to make workplaces safe for pregnant employees is a lack of employer awareness and adherence to their legal obligations and duties relating to pregnant workers and their return to work after birth. The general failure of Work Health and Safety regulators to provide information to

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<sup>31</sup> <http://www.safeworkaustralia.gov.au/sites/swa/about/publications/pages/national-compliance-enforcement-policy>

employers and employees about hazards, hazard management and risks around pregnancy and to effectively ensure standards are being met appropriately, compounds this situation.

Many problems currently confronted by workers who are planning to become pregnant, are pregnant, on leave or returning to work would be addressed if employers adhered to their current legal obligations and duties to identify, assess and control hazards in the workplace. Specific pregnancy Regulations, an accompanying Code of Practice and Compliance Strategy would assist in focusing and providing specific direction and guidance.

#### **Q7.1.1 What policies or programs assist with the retention of employees while pregnant and on return to work after taking parental leave?**

All workplaces should have policies which apply to the strategies outlined in question 5.2.1. In addition, all workplaces should have anti-discrimination, sexual harassment, balancing work and family and safe workplace policies.

Many progressive workplaces implement programs to advance the situation of pregnant employees and those with caring responsibilities in a practical way, for example promoting flexible work practices and including family friendly policy objectives in management KPIs. These programs are most successful when developed in consultation with employees and are targeted, monitored and focused on delivering outcomes. Many employers report that programs which are integrated with, and central to, meeting the organisation's overarching goals are more likely to be successful (for example where diversity is seen as a business benefit).

Organisations such as Workplace Gender Equality Agency, State and Federal Human Rights and Equal Opportunity Commissions and the Diversity Council of Australia are able to provide support in the form of best practice example, resources and education programs.

Guidelines and Codes of Practice also provide meaningful direction and data collection by relevant agencies assists to monitor improvements, identify areas in need of attention and provide a sense of appropriate standards.

However, it should be noted that policies and programs are of themselves generally unenforceable and are not appropriate substitutes for laws which provide pregnant employees and those with caring responsibilities with real rights. Women in low paid, part time and casual employment are less likely to have access to policies and programs which are not required as minimum legal entitlements.

## **Impact of discrimination against pregnant employees and women and men returning to work after taking parental leave**

### **(a) On women**

Discrimination against pregnant employees and those returning to work after taking parental leave has a disproportionate effect on women. The effects are long term and wide ranging, including:

- Frustrating women's right to paid work, career development and financial independence;
- Preserving traditional stereotypes about gender roles based on women having to choose between their careers and having a family;
- Being forced into casual contract and insecure which is likely to be lower in pay, skills and status;
- Finding the barriers to balance paid work with family responsibilities too great and resigning altogether; and
- Reducing women's retirement incomes and savings.

### **(b) On parents and families**

The majority of families now have both parents in paid work and are dependent on two salaries to meet their costs of living. The impact of discrimination on parents and families includes:

- Financial and caring pressures on (particularly low-income) families;
- Denial of both parents opportunity to bond in the crucial early stages of parenthood;
- Negative effect on the general health and wellbeing of parents and families; and
- Negative effect on job and income security as parents are forced into casual or contract work and receive no paid leave entitlements.

All of the above impacts are greater for sole parents.

**(c) On business and the wider Australian community**

Discrimination against pregnant employees and those returning from parental leave undermines the significant benefits of a sustainable birth rate and paid workforce participation rates. The impact on business and the wider community includes:

- Loss of qualified and highly trained staff;
- High cost of recruiting new employees;
- Loss of productivity in the workplace;
- Low levels of employee satisfaction and staff morale;
- Loss of diversity in the workplace;
- Fostering of negative attitudes that undervalue pregnant women and parents in the community;
- Negative effect on overall economic productivity and growth in Australia's gross domestic product;
- Lower levels of (particularly women's) superannuation savings and increased reliance on age pension and other welfare needs; and an
- Unsustainable tax base.

An effective anti-discrimination and employment law framework which supports pregnant employees and those caring for children provides long term benefits to all Australians by:

- Ensuring Australia is a fair and equitable society that provides a fair go for all;

- Stimulation of the labour market and economy through increased female participation in the workforce;
- Return on investments in education and training;
- Assisting employers to attract and retain skilled and experienced female employees; and
- Giving families and young children a well-adjusted start in life.

## APPENDIX A

### EQUAL OPPORTUNITY ACT 2010 (VIC) - SECT 17

#### Employer must accommodate responsibilities as parent or carer of person offered employment

- (1) An employer must not, in relation to the [work arrangements](#) of a person offered [employment](#), unreasonably refuse to accommodate the responsibilities that the person has as a parent or [carer](#).

#### Example

An employer may be able to accommodate a person's responsibilities as a parent or [carer](#) by offering work on the basis that the person could work additional daily hours to provide for a shorter working week or occasionally work from [home](#).

- (2) In determining whether an employer unreasonably refuses to accommodate the responsibilities that a person has as a parent or [carer](#), all relevant facts and circumstances must be considered, including—
- (a) the person's circumstances, including the nature of his or her responsibilities as a parent or [carer](#); and
  - (b) the nature of the role that is being offered; and
  - (c) the nature of the arrangements required to accommodate those responsibilities; and
  - (d) the financial circumstances of the employer; and
  - (e) the size and nature of the workplace and the employer's business; and
  - (f) the effect on the workplace and the employer's business of accommodating those responsibilities, including—
    - (i) the financial impact of doing so;
    - (ii) the number of persons who would benefit from or be disadvantaged by doing so;
    - (iii) the impact on efficiency and productivity and, if applicable, on customer service of doing so; and
  - (g) the consequences for the employer of making such [accommodation](#); and
  - (h) the consequences for the person of not making such [accommodation](#).



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