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**NTEU Submission**  
to the  
***AHRC Supporting Working Parents: Pregnancy and  
Return to Work National Review***

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The National Tertiary Education Union (NTEU) directly represents the professional and industrial interests of 28,000 staff working in higher education, including staff in Australia's universities and research institutes and staff in some other tertiary sector organisations. On behalf of our members, we welcome the opportunity to provide a submission to the National Review.

NTEU covers employers ranging from universities, TAFE institutions, other education providers and research institutes.

Our coverage includes a diverse range of workers, from all general staff to academics, of whom we have exclusive coverage. These workers include world leading experts in their field, academics across all disciplines, researchers, technical and administrative staff, and university and institute trades and related staff.

At 57% of our total membership and as a similar proportion in the sector, NTEU has always had a significant interest in issues affecting women workers and has devoted specific resources to pursuing these issues. We welcome the opportunity to make a submission to the *AHRC Supporting Working Parents: Pregnancy and Return to Work National Review*.

NTEU was at the forefront of achieving paid parental leave for its members via enterprise bargaining, with many institutions now providing 36 weeks paid leave. As part of our original submissions around the Paid Parental Leave (PPL) legislation, NTEU had specific concerns including:

- That the PPL scheme operate in addition to what is achieved for workers via enterprise bargaining.
- That qualification periods take into account long-term casuals or fixed-term employees who have breaks in employment (the 'work test').
- Accrual of leave entitlements while on PPL.
- Paid superannuation on parental leave<sup>1</sup>

Some of these issues are outstanding and we offer further recommendations in relation to them.

NTEU also supports Submission to this Review of the Australian Council of Trade Unions (ACTU).

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<sup>1</sup> Productivity Commission Inquiry into Paid Maternity, Paternity and Parental Leave: *Submission of NTEU*, NTEU, 2008.

## Issues related to PPL

Part 3A, Objects of the *Paid Parental Leave Act 2010* encapsulate on-going concerns of our members including the aim to:

*(c) encourage women to continue to participate in the workforce; and*

*(d) promote equality between men and women, and the balance between work and family life.*

These objects are also reflected in the new *Gender Equality Act 2012* [see sn. 2A].

Governments, employers and unions must ensure that our workplaces reflect the intent of our modern legislation, that the laws are comprehensive, and support the reality of life for Australian workers. NTEU has strongly advocated for an improved focus on the suite of measures designed to assist working parents. These include broader access to the current Paid Parental Leave scheme, via the legislation, with some improvements. They also include the following issues:

- An improved and extended right to request flexible working arrangements, including a right for all workers to request arrangements which suit them and their families, and a comprehensive disputes mechanism.
- Protection against discrimination on the grounds of pregnancy.
- Protection around the right to return to work following a period of parental leave.
- Affordable and accessible child care.

The first of these concerns was recently improved via amendments to the *Fair Work Act*, but there is still no automatic disputes mechanism for workers wishing to challenge a rejected right to request.

Discrimination on the grounds of pregnancy and on return to work continue to be a problem, with many workers facing little choice but to take less hours and pay in order to meet family commitments or return to work full-time and compromise their caring responsibilities.

A recent decision in the Fair Work Commission was a rare 'win' for a woman worker (and a rare decision around constructive dismissal) in relation to this issue. The woman concerned felt she had no choice but to leave her employer after her request for part-time work on return from parental leave was unreasonably refused. The Commissioner in this case found

that the right to “*give birth to children without foreclosing (a woman’s) employment*” was essential.<sup>2</sup>

NTEU are still dealing with discrimination around return to work provisions. At a large Victorian University, the Union is currently dealing with a dispute in the Communications Technology (ICT) division, where women returning to work from maternity leave have all been informed that they are not eligible for part time work under the university’s return to work provisions due to the university’s ‘business case’. NTEU is in dispute with the University, but we note that over the last few years, the University has paid out 55 ICT staff members who otherwise would have sought to access the University’s return to work provisions. It would appear that while the University’s Family Friendly policy is accessible elsewhere in the university, a blanket decision by management to unofficially exclude ICT staff from accessing these provisions is in place, irrespective of the merits of their situation. It also illustrates the broader problem faced by employees, in that although policy and clauses in collective agreements may provide for flexible return to work provisions, accessing these can be difficult and may be easily blocked by management without adequate justification.

Improvements to return to work from parental leave, local working arrangements and job security must go hand in hand with efforts to provide quality and affordable child care.

Currently some NTEU members can access child care within or close to their workplaces, as many Australian higher education institutions provide on-site child care. However, places are in demand and costs can be prohibitive particular for precariously employed workers.

The freezing of the child care cap in 2013 has had an impact on families facing large child care costs and attempting to juggle care with work commitments.<sup>3</sup> However, the likelihood of additional changes to child care costs pending the outcome of an as yet unreleased Government review into childcare funding does not bode well for families already struggling with this expense. We note that the Federal Government also cut \$300m allocated for childcare staff wages in late 2013.

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<sup>2</sup> See *Hanina Read v Australian Institute of Superannuation Trustees* [2013] FWC 3144, 31 May 2013.

<sup>3</sup> See *The Cost of Kids: The cost of raising children in Australia*, AMP/NATSEM Income and Wealth Report, May 2013.

## **Improvements to the Paid Parental Leave Act**

One of the key issues for NTEU members around PPL continues to be qualification and accessibility.

Currently only one-third of University staff have on-going employment.<sup>4</sup> Of those deemed 'casual' many are not true casuals but have been employed on a casual basis for many years. These workers deserve access to PPL and indeed require a greater safety net of work/family measures to help balance their already uncertain hours and earnings. The same is true of fixed term employees who are employed in roles which by their very nature include breaks in service.

Extending the eligibility for PPL in this way will better reflect the reality of work for Australia's many workers in insecure employment. In tertiary education, it will take account of the many long-term employees who nevertheless have extended breaks from paid employment – for example, long-term casual academics who are not employed over semester breaks. Indeed NTEU would argue that the current eligibility criteria are discriminatory and therefore contrary to the objects of the PPL Act and the spirit of other Australian industrial and anti-discrimination law.

## **Improvements to Anti-discrimination law**

NTEU supports the recommendations of the ACTU in regards to current anti-discrimination legislation. In particular, we agree that all state and federal anti-discrimination law should contain a positive duty on public and private sector employers, educational institutions and other service providers to eliminate discrimination and harassment, and promote equality. While many university institutions have in place anti-discrimination policy, it can be difficult to ensure that policies are implemented and adhered to in practice.

Further recommendations:

- Anti-discrimination, equity and industrial legislation should provide consistent terminology. The term 'family responsibilities' should be changed to 'family and caring responsibilities' in relevant Federal and state legislation so that it is consistent with the terminology used throughout the *Workplace Gender Equality Act 2012* (Cth) and s 351(1) of the *Fair Work Act 2009* (Cth).

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<sup>4</sup> *Independent Inquiry into Insecure Work in Australia*, Submission of National Tertiary Education Union (NTEU), 2012. <http://www.unicasual.org.au/publications/submissions>

- The definition of ‘caring responsibilities’ is simply a person who cares, or is expected to care for, a dependent who reasonably relies on the person for care or support. Alternatively, the definition used in s.4 (1) of the *Equal Opportunity Act 1984 (WA)* could be used as a consistent definition.
- AHRC should recommend that the defence of “Inherent requirement of the job”, currently included at Part 3-1, Division 5 of the *Fair Work Act* is too vague a term and is prone to abuse by employers. As long as this remains in the legislation, it proves a potentially insurmountable barrier to employees seeking maintain or return to their nominal job.

Finally, we agree with the argument that courts should have the capacity to award punitive damages as a mechanism to deter future unlawful behaviour by employers and organisations that continue to foster or ignore discriminatory behaviour, and for the use of corrective and preventative orders which will bring about the systemic change required to avoid future discrimination.

We also agree that the AHRC should be delegated the capacity to issue performance improvement notices, enforceable undertakings or similar preventative remedies to problem employers.

## **Employment law**

The NTEU also supports changes to the following legislation around industrial and employment rights:

- ***Improve National Employment Standards (NES) in the Fair Work Act to include:***
  - Return to work provisions- allow the right to part time work upon return from PPL for 2 years
  - Paid leave should be available for ante natal visits;
  - Paid breastfeeding breaks
  - Dedicated paid carers leave
  - 48/52 and other family friendly leave arrangements

- **General Protections in the Fair Work Act**

- Part 3- 1, Division 3 of the *Fair Work Act* provides general protections for employees seeking to exercise a workplace right. In theory, a woman returning from a period of parental leave could bring action against an employer upon return to the workplace if they were coerced into making or varying an Individual Flexibility Arrangement, which is one of the workplace rights as defined. Workers are also protected against discrimination under the Act in relation to pregnancy and family or caring responsibilities [s. 351].
- Given the degree of evidence required to prosecute an adverse action case to its conclusion under the Act, and the hurdles in proving discrimination (for example, the vagaries of “inherent requirements of the position” under this section of the legislation), employers should be encouraged to take *positive* action in relation to parents returning to the workplace. This could include obliging employers to notify employees of their right to request flexible work arrangements as an alternative to signing an Individual Flexibility Arrangement (IFA).

- **Health and Safety**

- When the Model Health and Safety laws were being developed in 2011, several Unions supported the establishment of a specific Code of Practice or Guidelines for pregnant workers. At present there are guidance notes in some jurisdictions, and specific Codes or Guidance materials around particular hazards which incorporate protections for pregnant workers. These include guidance around exposure to chemicals or shift work, but NTEU recommends a comprehensive Code which ranges from protection from hazards – including psychosocial hazards such as bullying- , and fatigue, guidance for transfer to safe work, including risk assessment, and assessment upon return to work.<sup>5</sup>

### **Further Measures to address Discrimination in Pregnancy and Return to Work**

In addition to the legislative changes noted above, the NTEU supports the introduction of structures and measures that specifically support women and carers, and their families and support networks, when dealing with pregnancy and return to work:

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<sup>5</sup> See *New risks and trends in the safety and health of women at work*, European Risk Observatory, Literature Review, European Agency for Safety and Health at Work; (2013).

- A fair, anti-discrimination framework needs to be put in place and regulated to ensure adherence ;
- It should be realised that Paid Parental leave is not only a paid industrial entitlement, but also central to ensuring the relationship with the workplace is maintained, and that return to work provisions are vital to the success of the re-establishment of the employment relationship;
- Family friendly working arrangements should also be taken seriously by employers, noting the increase in shared parenting and care giving arrangements. In short, there needs to be acceptance of the value of the contribution of women to the workforce and of men in caring roles;
- Improved access to affordable, quality childcare for all who need it.

The NTEU is a progressive trade union, with a strong focus on issues of gender equity and social justice. We support the focus of the Review as it examines both the prevalence and impact of discrimination relating to pregnancy in the workplace, and barriers in returning to work after the period of parental leave. For our part, we know that although there may be a raft of policies and requirements under EBAs in our universities, cases of discrimination and barriers for women returning to work after taking parental leave are far from rare. It is our strong view that it is not enough to just have improved legislative and policy frameworks in place; both employers and workers must be educated around issues of pregnancy discrimination and the importance of flexible, return to work provisions. However, there must also be a mechanism to ensure employers adhere to their responsibilities for pregnant workers, that these workers are appropriately supported whilst on parental leave, and barriers to return to work provisions are removed. Finally, stronger, punitive avenues need to be established in order to address serious breaches by employers.

We make this Submission at a time when it is not clear just what the Abbott Government's approach to industrial relations and discrimination at work will be. We therefore welcome the opportunity to suggest improvements to the framework of our laws in this area and to emphasise the large amount of work still to be done. Most importantly we stress the vital role of the Commission itself in agitating for change and education, and in ensuring that employers and governments prioritise these issues.