

 t: 03 9269 0247 f: 03 9269 0440

E-mail: sarah.winch@vla.vic.gov.au

**Melbourne Office**

350 Queen St  
Melbourne VIC 3000

GPO Box 4380  
Melbourne VIC 3001

DX 210646 Melbourne VIC

t: 03 9269 0234  
1800 677 402

[www.legalaid.vic.gov.au](http://www.legalaid.vic.gov.au)  
ABN 42 335 622 126

28 January 2014

Ms Elizabeth Broderick  
Sex Discrimination Commissioner  
Australian Human Rights Commission  
Level 3, 175 Pitt Street  
SYDNEY, NSW, 2000

  
Dear Ms Broderick,

**Submission to the National Review of Pregnancy and Return to Work**

Victoria Legal Aid (VLA) welcomes the opportunity to contribute to the Australian Human Rights Commission's National Review of Pregnancy and Return to Work.

In 2012-13, VLA provided legal advice and assistance in over 1,770 discrimination matters and our Legal Help telephone information service responded to 3,742 discrimination and employment related queries. Our dedicated Equality Law Program holds weekly anti-discrimination law advice sessions and regularly provides advice and representation to clients who suffer discrimination, harassment, victimisation and vilification.

The enclosed submission focuses largely on the experiences of our clients who face discrimination during pregnancy, and in most cases tells our clients' stories directly in their words, with their permission. The submission also outlines recommendations for reform based on our practice experience and the experiences of our clients.

If you have any queries about this submission, please do not hesitate to contact Dan Nicholson (Director, Civil Justice Access and Equity) on (03) 9269 0691 or Melanie Schleiger (Manager, Equality Law Program) on (03) 9269 0112.

Thank you for the opportunity to contribute to this Review. We would welcome any further opportunity to assist the Review.

Yours faithfully



**BEVAN WARNER**  
Managing Director

## **Submission to the Australian Human Rights Commission**

### **National Review of Pregnancy and Return to Work**

January 2014

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Written requests should be directed to Victoria Legal Aid, Research and Communications, 350 Queen Street, Melbourne Vic 3000.

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## About Victoria Legal Aid

Victoria Legal Aid (VLA) is a major provider of legal services to socially and economically disadvantaged Victorians. In 2012-2013, VLA provided legal advice and assistance in over 1,770 discrimination matters and our Legal Help telephone information service responded to 3,742 discrimination and employment related queries. Our dedicated Equality Law Program holds weekly anti-discrimination law advice sessions and regularly provides advice and representation to clients who suffer discrimination, harassment, victimisation and vilification. We represent clients with complaints of discrimination in various jurisdictions, including the Federal Court and the Federal Circuit Court, utilising federal anti-discrimination legislation, the *Fair Work Act 2009* (Cth) (FW Act) and the *Equal Opportunity Act 2010* (Vic) (EO Act).

By helping people seek redress for discrimination, we seek to promote equality and reduce disadvantage in the community. Pregnancy discrimination is a key strategic advocacy issue for the VLA Equality Law Program due to the prevalence of the issue and the impact on our clients. Our clients experience pregnancy discrimination in a variety of ways:

- Inability to find work while pregnant;
- Dismissal and selection for redundancy during their pregnancy, maternity leave, and on return from maternity leave;
- Diminution of work conditions during the pregnancy and on return from maternity leave;
- Refusal of maternity leave; and
- Refusal to accommodate flexible work conditions on return from maternity leave.

This submission expands on the [submissions](#) that Victoria Legal Aid made to the then Department of Families, Housing, Community Services and Indigenous Affairs' 2013 review of the *Paid Parental Leave Act 2010* (Cth) and to the Senate Legal and Constitutional Affairs Committee's 2012/13 inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2013.

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## Introduction

An Australian Bureau of Statistics November 2011 study (*Pregnancy and Employment Transitions*, released November 2012) found that 67,300 women, or 19% of all participants, reported discrimination in the workplace while they were pregnant.

However, it is clear that only a small number of women affected by pregnancy and parental discrimination seek redress. In 2011/12 the Victorian Equal Opportunity Commission only received 209 enquiries about pregnancy discrimination, and the Australian Human Rights Commission only received 423. Trends in our legal practice suggest that the relatively low rate of complaints and contested hearings in relation to pregnancy and parental discrimination encourages a culture of non-compliance by employers who are typically not pursued for discriminatory practices of this kind, and face minimal repercussions when they are pursued.

VLA's first hand experience assisting those who have suffered discrimination has informed our observations and recommendations in this submission. The impact of pregnancy and parental discrimination on our clients has been highlighted through numerous de-identified client stories and case studies. Those stories in quotation marks in this submission have been told in the client's own words, with their permission, and reflect their real experience and perception of discrimination.

A substantial number of our clients experience discrimination either after they have advised their current or prospective employer that they are pregnant or when they seek to return from parental leave. Of the clients who VLA assists with pregnancy and parental discrimination, a significant number decide not to pursue their complaint due to the stress and uncertainty of taking legal action.

Women who lose their employment because of pregnancy discrimination are frequently left without their expected level of income at the time of the child's birth. This leads to financial hardship, debt, housing insecurity, and pressure to return to work soon after the baby's birth. Pregnancy discrimination is therefore an issue that affects VLA priority clients and can create systemic and ongoing financial and social disadvantage for our clients and their children.

Our submission makes recommendations which, if adopted, would ensure that:

- Working conditions adequately accommodate pregnancy and childcare needs;
- Pregnancy and parental discrimination is prevented; and
- Those who experience pregnancy and parental discrimination are adequately supported.

In turn, these outcomes support the Federal Government's policy commitment to '[d]eliver a genuine paid parental leave scheme and lift female participation rates in Australian workplaces': *The Coalition's [Policy to Improve the Fair Work Laws](#)* (May 2013) ('Policy').

The Policy also highlights the importance of supporting small business to understand the laws relating to employment. This commitment aligns with our recommendation 5 regarding the importance of adequate information about rights and obligations.

We would be pleased to discuss any aspect of this submission further with the Australian Human Rights Commission (AHRC).

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## Impact of pregnancy and parental discrimination

Pregnancy and parental discrimination not only has short term emotional and financial impacts, it has a significant impact on women's ability to participate in the workforce. Women who have experienced discrimination often find it incredibly difficult to break back into the workforce or to obtain a role at their previous level of seniority or expertise. This can have a long term impact on a woman's emotional wellbeing, her career, and her family's financial security.

### Toula's story:

“My son is now over two years old, and I still feel the effects of this discrimination. The sadness and anger has permeated every aspect of my life. It has affected me professionally, financially, and socially. I feel like I have lost my confidence and my career. It is very difficult to find a part-time position, that is not a junior role, that allows me to continue develop my professional skills, with a new organisation.

I have lost my professional network, as I left my workplace one day for what I thought would be a temporary absence, and never returned. Furthermore, because it was my manager who facilitated my discriminatory exit from the workplace, I no longer have a referee to substantiate six years of professional service, all of which affects my future employability. I am no longer in touch with old friends and colleagues and I feel as if I have been banished from the sector, which is the core of my work experience. It is also embarrassing, as I cannot explain to people what happened.

While negotiations about my discrimination complaint were underway, both my husband and I were unemployed. This put a great deal of pressure on our relationship. When you meet someone and make a commitment to building a family life with them and part of the commitment is your financial contribution and earning capacity, you feel like you are letting them down when you cannot provide. It has been the cause of great sorrow and conflict.

As a result of my discrimination, I have lost the earnings I would have received from part-time employment and paid for childcare for a year and a half, to keep the childcare place, in the hope of returning to work or finding new employment. My earning capacity is still reduced as I have not been able to secure part-time work since I left the company, and we are now a single income family. This is something that we never planned for.

As a woman who met her partner late in life I have had twenty years of professional independence - making a contribution to my workplace and society. I received a great deal of satisfaction from my career, and it was a big part of who I was. I have now had to embrace motherhood fulltime, which I often find challenging and isolating. I miss having a professional life with the intellectual stimulation and autonomy that comes with having a career. I should not have had to say good bye to that part of myself because I decided to have children.”



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## Work rights which accommodate parenthood

### Adjustments during pregnancy

In order to continue working during their pregnancy many pregnant workers require some adjustments to their working conditions or arrangements because of the physical symptoms of pregnancy. For example a woman may need to take more regular bathroom breaks, to sit rather than stand, or to avoid heavy lifting incidental to her role during her pregnancy. While the Victorian EO Act requires reasonable adjustments to be made for parents and carers as well as those with a disability, there is currently no positive obligation on employers to make reasonable adjustments for a woman during her pregnancy under Victorian or federal law.

Instead, the woman has to make a complaint of indirect discrimination, or try to define her normal pregnancy symptoms as a disability so that she can access the reasonable adjustment provisions for persons with a disability. Because such claims can be complex, they rarely settle quickly. While the FW Act provides for transfer to a safe job or paid 'no safe job leave' if the employee is fit to work but unable to perform her role for health and safety reasons, this solution is generally too extreme. More commonly, there will simply be some minor aspects of the employee's role that require adjustment, or the employee requires flexibility to accommodate her morning sickness. The impact of failing to make adjustments for a pregnant employee can be significant, as illustrated by Julie's story below.

#### Julie's story:

“ I worked as a full time sales consultant for about three years. I told my manager that I was pregnant early on because I was so sick that I thought he needed to know. When I told him I was pregnant, he asked me in a disparaging way if I would keep it. I replied 'of course'.

My pregnancy was very rough. I was sick from day one with nausea, dizziness, hot flushes and vomiting. My 'morning sickness' actually lasted all day. Sometimes I was vomiting 10 times a day. My boss got angry because I took frequent toilet breaks. Even though he knew I had morning sickness, he'd text me while I was vomiting and tell me to get back onto the floor immediately. I had bad back and leg pain, but I wasn't allowed to sit down. If I did, he'd click his fingers at me like I was a dog and tell me to stand up.

My doctor gave me a medical certificate saying that I should reduce my hours. My boss refused. He said that I was employed full time so they didn't have to accommodate my request for part time work. I said 'I've got no choice do I?' He said 'not really'. I was left with an ultimatum: resign or work full time hours, which I couldn't keep doing because I was so sick and uncomfortable. He left me with no choice but to resign.

I'm not on Centrelink, and after I pay rent I've got no money for food let alone stuff for the baby. I can't afford to pay my bills and I've maxed out my credit cards. I'm on the verge of having my car repossessed and my utilities cut off. I've got nobody who can loan me money so I could even lose the roof over my head. I'm so stressed I can hardly breathe.”

Recommendation 1: That the *Fair Work Act 2009* (Cth), the *Sex Discrimination Act 1984* (Cth) and state discrimination laws be amended to require that duty holders make reasonable adjustments for persons (including employees and prospective employees) who are pregnant.

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## Accommodating family responsibilities

There is no explicit obligation on employers to reasonably accommodate the responsibilities of a parent or carer under the FW Act or *Sex Discrimination Act 1984* (Cth) (SD Act), whereas this obligation is explicit under the Victorian EO Act. However, in our experience it is often ignored or overlooked by employers. Under the EO Act, an employer must not unreasonably refuse to accommodate an employee's responsibilities as a parent or carer. 'Reasonable accommodation' may include, for example, working from home one morning a week, flexibility in start and finish times, returning to work on a part time basis or taking a period of unpaid leave after the birth of the child.

In our experience, the provisions of the FW Act dealing with a right to request flexible working arrangements are not effective in achieving their apparent purpose. These provisions are not enforceable, are only available to employees who have worked for 12 months or more and impose strict procedural requirements which are not well understood. Numerous clients have reported that when they request flexible working arrangements on returning to work under these provisions, their employer simply provided a cursory refusal, as described below by our client, 'Miranda', or offered them a part-time or casual role in a position with less pay and less seniority. This is despite employer obligations to accommodate parental responsibilities under the EO Act as well as the protection from indirect discrimination under that Act and the SD Act.

### Miranda's story

“ I worked as a full-time business analyst for 15 months before taking 12 months of maternity leave. Four months before I was due to return to work I contacted my manager to negotiate flexible working arrangements. I had hoped to work part-time and slightly reduced hours so that I could take my son to and from childcare, or else work from home one-two days a week. My husband also works and we don't have anyone nearby who can help look after our son. Our nearest family live an hour away. Also, I am still breastfeeding, so I wanted a private place at work where I could lactate.

My manager refused to explore part-time work and said no to my other requests, except the private room for lactation. He said that my requests weren't workable, even though an industry recruiter has told me that my role is commonly done on a part-time basis at other companies. My boss also says that if I return to work I will be required to travel regionally and overseas at short notice and for two weeks or more, even though I didn't do this before I went on maternity leave. He said that if I don't agree to work full time and travel with a moment's notice then I have to tender my resignation.

I have been so nervous, and knowing that I didn't have many business days left before I was meant to return to work really stressed me out. I wanted to resign but we need the money now. To keep the peace and obtain a reference, I will do as my boss wishes. Unfortunately, this is such a small industry and everyone knows everyone. If I were to make a formal complaint I would lose my credibility and make myself unemployable.”

Recommendation 2: That the *Fair Work Act 2009* (Cth) and the *Sex Discrimination Act 1984* (Cth) be amended to impose an enforceable obligation on employers to reasonably accommodate family responsibilities consistent with employer obligations under the *Equal Opportunity Act 2010* (Vic).

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## Part time return to work

Our clients often report that their employer is prepared to give them their pre-parental leave position when they return from parental leave, but only if they return to work full time. The negative impact of this ultimatum is illustrated by the stories of Caroline and Anna below. While the return to work guarantee in the FW Act is enforceable, it does not provide for a right to return to work on a part time basis. This significantly weakens the usefulness of the entitlement, especially since full time work is often not possible after the birth of a child. Enshrining a guaranteed right to return to work part time would address this concern.

There are circumstances in which an employer is justified in not offering the employee the same position following parental leave. Whether it is reasonable for an employer to refuse a return to work request depends on circumstantial factors. Currently, the return to work guarantee within the FW Act allows an employer to refuse when there are “reasonable business grounds for refusal”. In our experience, employers interpret the phrase “reasonable business grounds” more expansively than is intended under the legislation, limiting the circumstances under which the return to work guarantee applies.

VLA's primary submission is that any part time return to work guarantee introduced into the FW Act be qualified by a test similar to that provided for in s 19 of the Victorian EO Act which prohibits unreasonable refusal to accommodate parental or carer's responsibilities and lists factors relevant to a determination of whether that refusal is unreasonable. The factors taken into account include the circumstances of the employer, the nature of the employee's role, and the consequences of accommodating or not accommodating the employee's parental or carer responsibilities. A part time return to work guarantee which required an employer to consider competing factors, would be more meaningful than one which adopted the “reasonable business grounds” approach currently taken in the FW Act.

If the AHRC does not accept our recommendation that the reasonableness of refusing part time return to work should be assessed with reference to the factors outlined in s 19 of the EO Act, we submit that a part time return to work guarantee should be introduced subject to “reasonable business grounds”.

### Caroline's story

“Prior to returning from maternity leave my experience had, on the whole, been positive. Over the course of my tenure, my commitment had been rewarded with a significant promotion. I had been selected to attend a well respected and expensive management training course and just prior to maternity leave, I received my full performance bonus and a glowing review.

When I left to go on maternity leave, I had reached the level of middle management in my area. It would have been expected, having recently completed the management course, that I would be considered for promotion as opportunities arose upon my return. Instead, as discussions regarding my return progressed, it became clear, that unless I was able to commit to returning full time to the business, I was going to be demoted and have my package adjusted to suit. I was subjected to deliberate stalling during my return negotiations and then a systematic undermining and what I would now label a bullying campaign once I started to question this practice upon my return.

After six confidence eroding months and despite what appeared to be a genuine, if belated attempt by HR to address some of the issues, I decided to accept an external offer and

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resigned. My current role provides the flexibility I need to juggle work and family life. In order to achieve this though, I have taken a role in a small business with very limited growth potential. It is not a role that I enjoy, but it's a necessity.

On a personal level, I am shattered by this experience. Last year, at the same time as I attended a conciliation session with my former employer at the Victorian Equal Opportunity & Human Commission, I commenced weekly therapy due to anxiety attacks I had started having during my brief return to work. My hope had been that I would regain my confidence and composure once I left the toxic environment behind. Instead, on the contrary, I now feel very anxious and nervous about my performance and job security. This manifests itself in anxiety attacks which rarely even register with my new colleagues because I can hide in the back stalls now, but to me, the person who used to chair meetings and negotiate high level contracts, it's devastating.”

### **Anna's story**

“I worked as a full time manager in a large call centre for over ten years. I love my job and wanted to return after maternity leave. I told my manager that I wanted to return to work three or four days per week. I couldn't arrange full time child care, and I also just wanted to spend time with my children as they are growing up. We have part time managers so I assumed it would be fine. He said it would depend on what's available but assured me that job share was possible.

One month later, my boss told me that there was no position available for me because the person that they hired to replace me wanted to continue working in the role. He told me that my role was full-time and that it would be too hard for me to do it part-time, even with a job share arrangement. I tried to discuss how it could work, but he'd already made up his mind.

He then offered me a role as an operator with less pay, less seniority, less responsibility and less challenging work. The role would have involved a pay cut of approximately \$40,000. Although the role was almost entry level and would have been a huge step back, he urged me to think about it if flexibility was important to me. He said that if I took the lesser part time or casual role, then we could reassess my role when my replacement resigned, although there was no guarantee that this would happen.

After getting legal advice from VLA, I reminded my employer about its obligations to accommodate my family responsibilities, comply with the return to work guarantee and not discriminate. My manager reluctantly offered me a part time project management role and a team leader role in six months when my 'maternity cover' resigns. I accepted the offer even though it involves less pay, less seniority and no bonuses because there was simply too much at stake. I know it's not good enough but I felt like I had no choice. My partner still works there so I can't make waves. He's already paying for the fact that I've tried to assert my rights.”

Recommendation 3: That the return to work guarantee within the *Fair Work Act 2009* (Cth) be amended to include an enforceable right to return to the employee's pre-parental leave position part time, unless there are reasonable grounds for refusal.

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## Technical requirements for leave without pay

Currently the FW Act limits eligibility for unpaid parental leave to employees who have been in their role for 12 months and have complied with certain strict procedural requirements.

For example, a client was recently denied parental leave and dismissed after failing to comply with the requirement to give written notice of his intention to take parental leave, even though his employer knew that the employee's wife was pregnant and that he intended to take parental leave. This dismissal and refusal to allow two weeks' parental leave was likely unlawful under the anti-discrimination provisions of the Victorian EO Act and the SD Act. In our experience however, employers often look to the FW Act rather than state or federal anti-discrimination legislation to determine their obligations. To avoid confusion, the FW Act should be amended to remove the time restriction and strict procedural requirements for leave without pay. This would ensure that the obligation to allow unpaid parental leave under the FW Act is consistent with the co-existing obligations to reasonably accommodate parental responsibilities, and not to indirectly discriminate based on pregnancy and parental status under the EO Act and the SD Act.

### Cassandra's story

“ I was working part time as a receptionist for a business I had been employed with for nearly 10 years and I was due to go on maternity leave for the second time. I had told my boss that I was pregnant early on and when the time came closer to start my leave, I gave him written notice of my intention to return to work after 12 months and thought everything was fine. After a few months of leave I was told by my boss that business had slowed down and that there would not be a position for me to return to. I explained to him that I needed to return to work after my maternity leave and he didn't sound positive at all. About a week later I received a letter from him stating that as I had not given the required notice of intention to go on maternity leave, that they considered my last day prior to my leave as my last day of employment and they terminated my position with them. They included a brochure from Fair Work to show that I had not given them the correct notice.

I was so shocked, I just couldn't believe what had happened. I had always had a good working relationship with everyone in the office and I just felt like it was a big slap in the face that after nearly 10 years, that was it! I thought that I had no choice but to just accept what had happened and start looking for a new job when the time came. I couldn't stop thinking about what had happened for at least a week, my mind was racing with thoughts of "What was I going to do?" We live in a rural area with seasonal employment. Jobs, especially part time positions, are very limited and when they do come up, you are competing with lots of people. I was thinking about studying but found it was too hard at this point of my life with two young children at home.”

Recommendation 4: That the *Fair Work Act 2009* (Cth) be amended to provide a right to unpaid parental leave that is consistent with employers' obligations under the *Equal Opportunity Act 2010* (Vic) and the *Sex Discrimination Act 1984* (Cth).

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## Preventing pregnancy and parental discrimination

### Informing workers of their rights and responsibilities

Often employers and employees do not seek advice about their rights and obligations until the employment relationship has irrevocably broken down. While the employee may be able to obtain some compensation through discrimination law, the impact on their career is rarely remedied.

These conflicts and their impact could be avoided if employers and employees knew their rights and obligations in relation to pregnancy and parental status at an early stage. This could be easily addressed if:

- employers were obliged, under the FW Act, to provide a fact sheet to employees outlining their rights and obligations relevant to pregnancy and parental status when the employee notifies their employer that they are pregnant, or intend to take parental leave; and
- the Department of Human Services were obliged, under the *Paid Parental Leave Act 2010* (Cth) (PPL Act), to provide a fact sheet to employees and employers about their rights and responsibilities when they make a claim under the Paid Parental Leave Scheme.

These measures would build upon existing obligations to provide fact sheets and information to employees under the FW Act and PPL Act.

#### Amanda's story

“I am pregnant with my second child and working full time in retail. I was finding it increasingly difficult to juggle full time work with being a pregnant working mother, so I asked my manager if I could go part time. I've also got pregnancy related hypertension which I need to monitor carefully, and standing on my feet all day causes pain and discomfort. My feet and hands swell up to barely functional stage past 3pm on days that I work.

My manager agreed to move me to a 'floating' position three days per week while they trained a person to cover my role. The owner of the business approached me and asked me to guarantee that I would be well enough to work until my proposed maternity leave, and if not, that he'd replace me. He also said that people were complaining that I was leaving early, even if I was unwell. I always asked my manager if I needed to leave early to attend an appointment or because I wasn't well.

This made me feel like I was disposable and that due to being pregnant I was no longer a valued employee. I was worried about losing my job and being replaced. I'd like to return to my original full time role after maternity leave.

Victoria Legal Aid was compassionate and understanding in a difficult situation. My lawyer helped me understand my rights as an employee, which gave me the confidence to approach my bosses and help stamp out unfair treatment of myself and my colleagues. Victoria Legal Aid also helped me to prepare a letter to my employer setting out my rights and their responsibilities about transferring me to a safe job, accommodating my requests to work part time because of my son, and my return to work.

The letter was a huge help. The owner apologised sincerely for what was said and they became accommodating towards my pregnancy and pregnancy related illness after that. It was a huge relief!”



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Recommendation 5: That the *Fair Work Act 2009* (Cth) and the *Paid Parental Leave Act 2010* (Cth) be amended to require that employees be notified of their rights and obligations at an early stage.

## Information sharing

A large number of our clients are made redundant by their employer while they are on maternity leave. As this occurs while they are away from the workplace, it is very difficult for employees to prove that their termination was due to pregnancy discrimination.

When exercising their rights and trying to ensure compliance with the law, employees face a substantial information asymmetry in these circumstances because the employer holds the information that might establish whether or not discrimination was likely to have occurred.

A requirement that the employer provide relevant information about the redundancy to employees who are made redundant after the employer is informed of the pregnancy and before return to work would address this unbalanced position. Employers would be required to provide this information on the day that an employee is notified of their redundancy so that the employee can seek advice and, if necessary, lodge an application for adverse action or unfair dismissal within the 21 day time limit under the FW Act. Information provided could include the number of employees made redundant in the employee's section and what has happened to the duties that the employee was previously performing. This would enable employees to assess whether there was a genuine redundancy and whether there had been pregnancy discrimination. Importantly, the information sharing requirement would also prevent the occurrence of discriminatory terminations in circumstances where there is no genuine redundancy.

There are currently no obligations in the FW Act to provide information to an employee who has been made redundant.

### Sophie's story

Sophie worked in a professional role for over 5 years before she took some time off on maternity leave. While she was on leave she contacted her employer about returning to work and asked if she could return to her role part time. Her employer said that it might not be possible and asked her to fill in a flexible working arrangements request which she did. A few days after she sent the form in HR called and said that she was being made redundant without providing a reasonable explanation as to why her role was no longer required.

Sophie suspected that her old role was being performed by her maternity leave replacement, however Sophie's employer maintained that her section had changed while she was on maternity leave and the duties were either no longer required or were being performed by employees in other positions. Sophie didn't have any friends at work. She emailed an old colleague seeking information about what was happening in her section but this colleague was not prepared to help her.

Sophie's lawyer told her it was hard to assess whether or not the redundancy was genuine without more information. She was told that she could commence a legal proceeding and seek access to documents but she may find that these support her employer's position. Sophie didn't know what to do, she knew that if she didn't accept the redundancy they wouldn't give her a supportive reference and she was worried about her future. Sophie

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decided that it was too hard to challenge the redundancy and decided to instead focus on looking for a new job.

Recommendation 6: That the *Fair Work Act 2009* (Cth) be amended to require that employers provide information about key operational changes, including all positions that were made redundant, to employees who are made redundant after they notify their employer that they are pregnant.

## **An adequate response to pregnancy and parental discrimination**

### **Victims of pregnancy discrimination should have access to the PPL**

Our practice experience demonstrates that discrimination in employment on the basis of pregnancy is a significant bar to women accessing paid parental leave (PPL) entitlements. Women who are fired because of their pregnancy find it difficult to obtain alternative short-term employment and are often unable to meet the PPL work test, which can compound the disadvantage already experienced from the unlawful discrimination. To our knowledge there has not been a finding of pregnancy discrimination under either state or federal law where the decision maker has ordered that the respondent compensate the applicant for their lost entitlement to the PPL. Women rarely recover the full amount of their PPL if they choose to resolve their complaint by agreement.

Eligibility for PPL requires an employee to satisfy the “work test” under the PPL Act. Exceptions contained within s 36A of that Act could be expanded to include circumstances where a woman is discriminated against while pregnant.

#### **Rachel’s story**

“ I worked at a medical centre as a permanent part time employee for 6 years with hours which let me drop off and pick up my child from school. I told my boss that I was pregnant almost as soon as I found out, and I had bad morning sickness early on in the pregnancy. My manager told me that I was no longer reliable and that everyone used my name to joke about taking a sick day, “you’re not going to throw a “Rachel” are you?”. A few months into my pregnancy my manager reduced my hours and told me that I was now a casual employee. My new hours no longer worked with school drop off and pick up times. When I told my manager that I wanted to go back to my old hours she said that it would be easier this way now that I’m pregnant. Soon after, just over 3 months before my due date, my manager fired me for no good reason. When it happened I was speechless, and I left work crying. I had put in so many years to the business and after all that they just treated me like I was worthless, I felt completely devalued.

I applied for Newstart but could not meet my mortgage repayments. I was not eligible for the Paid Parental Leave Scheme because I had been fired just one week shy of the 10 month mark. I became depressed and I thought my whole world had ended. I contacted Victoria Legal Aid and lodged an application arguing that I was discriminated against because of my pregnancy. Following this, my boss started making threatening phone calls to me and my family. Everything was already so stressful, but these threats were the worst. I was scared to pick up the phone and check the mail.



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In the end I got some compensation but it did not fully compensate me or cover my lost entitlement to the Paid Parental Leave Scheme. Having said that, nothing could compensate me for what I went through. Soon after the matter settled I lost my baby at 8 months pregnant. I can't prove it but I really believe that the stress had something to do with my baby's death. I feel like they put me through so much, and if they didn't do what they did to me at least I would have had something to go back to after I lost my baby.

It took me over 12 months to get a new job. I just didn't think I was good enough, I was scared and anxious and would have panic attacks where I couldn't breathe. I was under a lot of stress due to losing the job, I couldn't pay my bills for a year, I nearly lost the house, and I've got a really bad credit rating now. I'm only just starting to get back on track. I've just started a new job and I'm actually happy now going to work, I feel like they value me and it's made my confidence a lot better.”

**Recommendation 7:** That the *Paid Parental Leave Act 2010* (Cth) be amended to enable women who have experienced pregnancy discrimination to access the Paid Parental Leave Scheme.

## **Regulators with powers to assist victims and improve standards**

Our clients often find it very difficult to enforce their rights at a time when they are financially vulnerable and focussed on the arrival of their baby. Australian anti-discrimination law relies on individuals to hold discriminators to account, which is particularly problematic in situations of workplace discrimination, where complainants and witnesses are financially dependent on the discriminator.

The great majority of people with legitimate complaints under Australian anti-discrimination law do not report the conduct or make a complaint. In the context of workplace discrimination against parents, it is our experience that clients are deterred by:

- Fear of negative reputational consequences and of being punished at work;
- Difficulties proving the conduct, including due to lack of access to documents such as emails and other information held by the perpetrator, and witness reluctance to give evidence;
- A lack of access to discrimination legal advice and limited understanding of rights or how to exercise them, in conjunction with the complexity of the law and legal processes;
- The poor cost-benefit of litigation (even if the complaint is successful) due to the significant time, energy and cost involved in pursuing a complaint of discrimination (at a period in life when applicant is energy and time poor and has dependent children) and the fact that compensation payments are low.

Under s 682(1)(f) of the FW Act, the Fair Work Ombudsman has the power to bring complaints on behalf of clients and has done so on a few occasions to date in relation to pregnancy discrimination matters<sup>1</sup>. The number of prosecutions is extremely limited in comparison to the prevalence of pregnancy discrimination. The Fair Work Ombudsman's enforcement role in this area should be

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<sup>1</sup> In 2012 to 2013 the Fair Work Ombudsman filed only 3 discrimination matters in Court, Fair Work Ombudsman Annual Report 2012-2013, 32

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increased through provision of greater resources and priority status being given to the pregnancy discrimination investigations. Additionally, the Australian Human Rights Commission should be given investigatory and enforcement powers over discrimination matters generally including, but not limited to, parental workplace discrimination.

### **Maria's story**

Maria worked part-time as a customer service representative for a travel agency. Maria had worked there for seven months when she notified her boss, Ramona, that she was pregnant. Ramona said she was very happy for Maria and reminded her that she had her review meeting with the senior manager (Bob) the next week. Maria asked for feedback about how she was going and Ramona told her that she had steadily improved since she started at the agency and was doing well. Ramona said that she would tell Bob about Maria's pregnancy before the meeting and then Maria and Bob could discuss issues like Maria's maternity leave at the meeting.

At the meeting, Bob told Maria that they were terminating her employment as she was 'seriously underperforming'. Maria was devastated. She asked Bob whether Ramona had spoken to him in the previous week, and he said that Ramona had told him that Maria's sales performance had not improved sufficiently to warrant employing her on an ongoing basis. Bob did not say anything about Maria's pregnancy, and Maria was so distressed that she did not raise it as an issue. Maria suffered anxiety attacks for several weeks after her employment was terminated before her baby was born.

About three months later, Maria then inquired about paid parental leave and was told that she wasn't eligible because she failed the work test. Maria was sure that the reason she was fired was her pregnancy, but she didn't have any proof as no one at work would agree to be a witness for her. Maria decided not to pursue a complaint of discrimination because of the difficulties of getting supporting evidence for her claim and because of the stress involved in lodging a complaint while she was pregnant.

Recommendation 8: That the AHRC have the power to conduct own motion investigations and compliance actions without requiring an individual complaint to be made, and that the Fair Work Ombudsman expand its role in this area to bring more complaints on behalf of clients

### **Guidance on appropriate compensation**

With some notable exceptions, awards of compensation in discrimination matters are very low when compared to the loss suffered. It is our experience that individuals are discouraged from pursuing complaints of discrimination because the amounts of compensation awarded in anti-discrimination matters do not adequately off-set the time and expense of pursuing a complaint. The case study below demonstrates how inadequate compensation awards in this area can be.

This problem could be addressed through appropriate guidelines on compensation payable in discrimination matters which the decision maker was obliged to consider. This would assist Courts and Tribunals in making compensation awards in discrimination complaints. Guidelines would also assist parties in reaching settlement of a complaint at conciliation. The guidelines should direct decision makers to take into account both the past and future (anticipated) effects of the discrimination.

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## Jenny's story

Jenny was working casually as a cleaner to support herself and her two children. When she told her boss that she was pregnant, he initially agreed to allow her to work up until the birth. When she was nearly 6 months pregnant he terminated her employment telling her that she shouldn't be working in her condition and she should go and look after her kids. If she had been allowed to work a few weeks more, Jenny would have been eligible for PPL.

With no other source of support, Jenny applied for Newstart. After rent her Newstart allowance only left her \$100 per week for food and bills. Jenny searched for alternative employment but no one was prepared to hire her at 6 months pregnant.

Jenny commenced a discrimination action to seek compensation for her lost earnings, her loss of PPL, and pain and suffering. But in preliminary communications, Jenny's employer contended he had given her verbal warnings about her performance before firing her and denied that her pregnancy played a role in his decision.

Given the frequently low awards of compensation in this jurisdiction her employer was not prepared to offer even half of her past economic loss, let alone any future economic loss or compensation for pain and suffering. Further her employer was not prepared to compensate her for her lost eligibility for the Paid Parental Leave Scheme.

As Jenny had already given birth at this stage, and was faced with a lengthy hearing process and the burden of proving her case while looking after three children, she agreed to settle for a tenth of the loss she suffered.

Recommendation 9: That guidance be developed by the Australian Human Rights Commission regarding appropriate compensation rates where discrimination is established; and that the *Sex Discrimination Act 1984* (Cth) be amended to require the guidance to be taken into account when assessing compensatory awards.

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## Summary of recommendations

- Recommendation 1: That the *Fair Work Act 2009* (Cth) the *Sex Discrimination Act 1984* (Cth) and state discrimination laws be amended to require that duty holders make reasonable adjustments for persons (including employees and prospective employees) who are pregnant.
- Recommendation 2: That the *Fair Work Act 2009* (Cth) and the *Sex Discrimination Act 1984* (Cth) be amended to impose an enforceable obligation on employers to reasonably accommodate family responsibilities consistent with employer obligations under the *Equal Opportunity Act 2010* (Vic).
- Recommendation 3: That the return to work guarantee within the *Fair Work Act 2009* (Cth) be amended to include an enforceable right to return to the employee's pre-parental leave position part time, unless there are reasonable grounds for refusal.
- Recommendation 4: That the *Fair Work Act 2009* (Cth) be amended to provide a right to unpaid parental leave that is consistent with employers' obligations under the *Equal Opportunity Act 2010* (Vic) and the *Sex Discrimination Act 1984* (Cth).
- Recommendation 5: That the *Fair Work Act 2009* (Cth) and the *Paid Parental Leave Act 2010* (Cth) be amended to require that employees be notified of their rights and obligations at an early stage.
- Recommendation 6: That the *Fair Work Act 2009* (Cth) be amended to require that employers provide information about key operational changes, including all positions that were made redundant, to employees who are made redundant after they notify their employer that they are pregnant.
- Recommendation 7: That the *Paid Parental Leave Act 2010* (Cth) be amended to enable women who have experienced pregnancy discrimination to access the Paid Parental Leave Scheme.
- Recommendation 8: That the AHRC have the power to conduct own motion investigations and compliance actions without requiring an individual complaint to be made, and that the Fair Work Ombudsman expand its role in this area to bring more complaints on behalf of clients.
- Recommendation 9: That guidance be developed by the Australian Human Rights Commission regarding appropriate compensation rates where discrimination is established; and that the *Sex Discrimination Act 1984* (Cth) be amended to require the guidance to be taken into account when assessing compensatory awards.