

Chapter 4 – Definitions and grounds of discrimination under the *Sex Discrimination Act 1984*

Potential pregnancy in the *Sex Discrimination Act 1984*

- 4.1 Under the *Sex Discrimination Act 1984* (Cth) (the SD Act), it is unlawful to discriminate on the ground of pregnancy or potential pregnancy.¹
- 4.2 Potential pregnancy is defined as including
- a) the fact that the woman is or may be capable of bearing children; or
 - b) the fact that the woman has expressed a desire to become pregnant; or
 - c) the fact that the woman is likely, or is perceived as being likely, to become pregnant.²
- 4.3 The inquiry revealed that problems of discrimination on the ground of potential pregnancy most often arise in relation to recruitment or promotion of women who are of child-bearing age. The processes of recruitment and promotion are dealt with at chapter 11.
- 4.4 Submissions and consultations generally indicated satisfaction with the definition of potential pregnancy, deeming it adequate and clear.³ However, one state Chamber of Commerce and Industry put forward the view that paragraphs (a) and (c) of the definition
- ...are both very broad descriptions that are open for interpretation by Courts and Tribunals. There is no clear definition to these matters and in fact, they do not contain objective boundaries.⁴
- 4.5 The Human Rights and Equal Opportunity Commission (HREOC) is of the view that the legislative definition is generally adequate and clear. However, discussion of the definition of potential pregnancy will be included in the Guidelines.

Pregnancy Guidelines 1: That the Guidelines provide assistance with the definition of potential pregnancy and include examples of what could constitute discrimination on that ground.

¹ s 7 *Sex Discrimination Act 1984* (Cth).

² s 4B *Sex Discrimination Act 1984* (Cth).

³ See for example, Australia Post (Submission no 44); Australian Nursing Federation (Submission no 45); Shop, Distributive and Allied Employees' Association (Submission no 74); Working Women's Centres (Submission no 88).

⁴ Queensland Chamber of Commerce and Industry (Submission no 5).

Pregnancy in the *Sex Discrimination Act 1984*

- 4.6 Pregnancy under the SD Act, however, is not legislatively defined. Other legislation that concerns pregnancy provides no additional guidance.⁵ Submissions to the inquiry strongly encouraged clarification of the definition of pregnancy.⁶
- 4.7 The every day meaning of pregnancy refers to a time during which a woman carries a developing foetus. The term of “pregnancy”, however, when required to be interpreted by courts in anti-discrimination cases, covers the condition of being “with child” as well as having the signs and symptoms of being pregnant. Thus, the physical elements of pregnancy such as having a large stomach and tiredness have been considered to be included in the term “pregnancy”.⁷
- 4.8 The extent of the prohibition on pregnancy discrimination within the SD Act must also be considered in determining the scope of the term “pregnancy”. Depending on the circumstances of the discrimination, pregnancy discrimination can be unlawful under the SD Act pursuant to the following sections
- section 5 – prohibition of direct and indirect sex discrimination;
 - section 7 – prohibition of discrimination on the grounds of pregnancy or potential pregnancy;
 - section 7A – prohibition of less favourable treatment on the ground of family responsibilities.⁸
- 4.9 None of these sections limit the scope of the term “pregnancy”. On the contrary, section 7 of the SD Act which specifically refers to pregnancy, is broadly applicable. For example, section 7 does not explicitly indicate that the pregnancy must be existing in order to make a claim. Hence, an example raised by an industry submission detailing discrimination against large women, assumed to be pregnant, even though they were not, would be covered by this section.⁹
- 4.10 Less favourable treatment based on a past pregnancy, whether it be a full term pregnancy or not, can also be discrimination, for example, less favourable treatment of a woman because her employer expects her to get pregnant again or because a previous pregnancy involved considerable sick leave. Where women have been denied their jobs after finishing maternity leave, the

⁵ See for example *Substitute Parents Agreement Act 1994* (ACT); *Surrogate Parenthood Act 1994* (Qld); *Family Relationship Act 1975* (SA); *Surrogacy Contracts Act 1975* (Tas); *Reproductive Technology Act 1988* (SA); *Infertility (Medical Procedure) Act 1984* (Vic).

⁶ Queensland Chamber of Commerce and Industry (Submission no 5); Australian Reproductive Health Alliance (Submission no 22); Confidential (Submission no 47); Anti-Discrimination Commission Queensland (Submission no 68); Townsville Community Legal Service (Submission no 78); Working Women’s Centres (Submission no 88).

⁷ *Bear v Norwood Private Hospital* (1984) EOC 92-019.

⁸ This section applies only when the employee is dismissed.

⁹ Australian Women in Agriculture (Submission no 55).

provisions of section 7 have been held to be applicable, despite the fact that the conduct occurred when the woman was no longer pregnant.

- 4.11 For example, in *Gibbs v Australian Wool Corporation*,¹⁰ a woman was transferred to new duties on her return from maternity leave without adequate consultation. The Hearing Commissioner found that the complainant's pregnancy was a factor in the change in duties. This was because the pregnancy led to her being on maternity leave and restructuring occurred without consultation during this time. Thus, the conduct of the respondent was unlawful under section 7.¹¹
- 4.12 Again, in *Milevski v Boral Building Services*, Commissioner Merkel stated that "...consequential maternity leave...is a characteristic which appertains generally to persons who are pregnant...",¹² and in *Coard v Mobil Pty Ltd*, Commissioner Kohl held that failing to consult women who are on maternity leave is discrimination under section 7(2) of the SD Act.¹³
- 4.13 A more restrictive view of the definition of pregnancy was given in *HREOC v Mount Isa Mines*,¹⁴ where Justice Lockhart indicated that a failure to employ a woman because she had the characteristic of possibly becoming pregnant could not be discriminatory on the ground of pregnancy "...because the woman is not in fact pregnant".¹⁵ However, this narrow interpretation was made before the inclusion in 1995 of potential pregnancy as a ground of unlawful discrimination under section 7 and, for this reason, HREOC views the *Mount Isa Mines* case as limited in determining the current scope of the term "pregnancy" within the SD Act.
- 4.14 Despite the *Mt Isa Mines* case, HREOC's view is that the spectrum of conduct relating to pregnancy for the purposes of section 7 can range from a woman's potential pregnancy, to her actual pregnancy through to the consequences of her pregnancy such as having a child, lactating, breastfeeding and taking leave to care for the child. Also included would be fertility treatments (such as in-vitro fertilisation), miscarriage, termination of a pregnancy and instances of still birth.
- 4.15 In the past, the tendency for complainants under the SD Act has been to frame cases where women are actually or potentially pregnant under section 7 and post-pregnancy cases under section 5. For example, in *Finance Sector Union v The Commonwealth Bank of Australia*,¹⁶ which involved an allegation by a group of employees that they were refused access to retrenchment benefits because they would be on maternity leave when the redundancy occurred, the

¹⁰ *Gibbs v Australian Wool Corporation* (1990) EOC 92-327.

¹¹ See also *Lowe v Staples* (1994) EOC 92-645 where a complaint of pregnancy discrimination based on pregnancy and the resulting maternity leave was made out.

¹² *Milevski v Boral Building Services Pty Ltd* 1 September 1994, HREOC (unreported).

¹³ *Coard v Mobil Pty Ltd & Ors* 3 July 1997, HREOC (unreported).

¹⁴ *HREOC v Mount Isa Mines & Ors* (1993) EOC 92-548.

¹⁵ *HREOC v Mount Isa Mines & Ors* (1993) EOC 92-548, 79,740.

¹⁶ *Finance Sector Union v Commonwealth Bank of Australia* (1997) EOC 92-889.

claim was framed in terms of direct pregnancy discrimination (section 7(1)) for those women who were actually pregnant and indirect sex discrimination (section 5(2)) for those women who were on maternity leave. Sections 5 and 7 should not be considered mutually exclusive in such cases and, depending on the circumstances, women who are pregnant or are on maternity leave may use both sections to make a complaint of discrimination. In practice, however, it is more likely that the complaint will be made without reference to any particular section and the relevant sections identified in the course of handling of the complaint by HREOC.

- 4.16 It is also important to note that an act may be found to be unlawful discrimination under sections 5, 7 or 7A of the SD Act even though the discriminatory reason was one of a number of reasons for the doing of the act. The discriminatory reason need not be the dominant reason for the act.¹⁷

Scope of definitions - summary

- 4.17 Based on this analysis, the following summary is provided about the scope of the definitions concerning pregnancy under the SD Act.

- It is clear from case law that pregnancy or potential pregnancy is a characteristic appertaining to sex.¹⁸ Thus, both section 5 and section 7 of the SD Act may apply where a woman is actually pregnant, experiencing physical change due to pregnancy or where she is potentially pregnant.
- It has been held that physical characteristics of pregnancy, such as a large stomach, can be included in the definition of pregnancy for the purposes of section 7.¹⁹
- It has also been held that taking maternity leave is a characteristic which generally appertains to women and is thus a characteristic appertaining to sex within the scope of section 5 of the SD Act.²⁰
- By analogy, taking maternity leave may also be a characteristic appertaining generally to women who are pregnant and therefore fall within section 7 of the SD Act.²¹

Pregnancy Guidelines 2: That the Guidelines provide clarification about the definition of pregnancy for the purposes of the *Sex Discrimination Act 1984* (Cth).

Direct discrimination

¹⁷ s 8 *Sex Discrimination Act 1984* (Cth) provides that if an act is done for two or more reasons including a discriminatory reason then it does not matter whether the discriminatory reason is the dominant reason for the act, for liability to found under the Act.

¹⁸ *Bear v Norwood Private Hospital* (1984) EOC 92-019; *Marshall v Marshall White* (1990) EOC 92-304; *HREOC v Mount Isa Mines* (1993) EOC 92-548.

¹⁹ *Bear v Norwood Private Hospital* (1984) EOC 92-019.

²⁰ *Hickie v Hunt & Hunt* (1998) EOC 92-910; *McNeils v University of Melbourne* (1993) EOC 92-487; *Kemp v Minister for Education* (1991) EOC 92-340.

²¹ *Milevski v Boral Building Services* 1 September 1994, HREOC (unreported).

- 4.18 Direct discrimination on the ground of pregnancy or potential pregnancy occurs when a person treats a pregnant or potentially pregnant woman less favourably than, in circumstances that are the same or not materially different, that person treats or would treat someone who is not pregnant or potentially pregnant, because of
- (a) the woman's pregnancy or potential pregnancy; or
 - (b) a characteristic that appertains generally to women who are pregnant or potentially pregnant; or
 - (c) a characteristic that is generally imputed to women who are pregnant or potentially pregnant.²²
- 4.19 The motive of the employer or respondent is not relevant in determining whether direct discrimination has occurred.²³
- 4.20 In addition, a complainant needs only to show that the discriminatory reason is one of the reasons for the treatment in order to prove unlawful discrimination.²⁴
- 4.21 This is illustrated in the case of *Larsen v RSPCA*²⁵ where a pregnant woman made a complaint to HREOC under the SD Act after she was dismissed during her pregnancy. The Hearing Commissioner concluded that the dominant reason for the dismissal was not the employee's pregnancy, but the dissatisfaction by the employer with the standard of the complainant's work. However, the fact she was pregnant did influence the decision made by the employer and the Commissioner found the complaint substantiated on the basis that
- [a]lthough the complainant's pregnancy only played a lesser part in the committee's decision to dismiss her, s. 8 of the Act indicates that pregnancy need not be the dominant or substantial factor in a dismissal for that dismissal to be unlawful.²⁶
- 4.22 An example of direct pregnancy discrimination is a case where a pregnant woman informs her employer of her condition and the employer demotes her to a position that does not have contact with the public, because the employer does not personally like her altered or soon to be altered appearance and assumes others too will find it unattractive.
- 4.23 Another example of direct pregnancy discrimination is the dismissal of a pregnant employee on the basis that the workplace is unsafe for her. An employer who dismissed a pregnant bar attendant on the basis that she might fall on the slippery floors and injure her unborn child, was found to have acted in a discriminatory manner because all employees were at risk of slipping. From an occupational health and safety perspective it was up to the employer to alleviate the risk of injury for all employees. From the anti-discrimination

²² s 7(1) *Sex Discrimination Act 1984* (Cth).

²³ *Waters & Ors v Public Transport Corporation* (1991) EOC 92-390; *R v Birmingham City Council; Ex parte Equal Opportunities Commission* (1989) 2 WLR 520 at 525-526.

²⁴ s 8 *Sex Discrimination Act 1984* (Cth). See also footnote 17.

²⁵ *Larsen v RSPCA Northern Division (Tasmania)* (1991) EOC 92-356.

²⁶ *Larsen v RSPCA* (1991) EOC 92-356, 78,439 at 78,441.

perspective, what was required in the circumstances was not to dismiss a particular employee but to take steps to remove the danger and alleviate the general risk of injury.²⁷

- 4.24 An example of direct discrimination on the ground of potential pregnancy is where an employer refuses to employ women of child-bearing age because they may become pregnant. In such a case HREOC would consider as evidence, asking female job interviewees about their marital status, number of children or their desire and/or their partner's desire to have children.
- 4.25 While submissions to the inquiry were generally satisfied with the terms and operation of section 7(1), several submissions suggested that the Guidelines should include case studies to facilitate increased awareness about the section.²⁸
- 4.26 HREOC has taken on board the practical comments made by consulting firm Families At Work that

...for those with limited literacy skills or English as a second language who are involved with the management of employees, the definition may be unclear or difficult to understand. Such people may be in a position to discriminate or be discriminated against, but are unable to understand the definition by law. Should there be an attempt to provide definitions or examples in 'plain English'?²⁹

Pregnancy Guidelines 3: That the Guidelines provide plain English definitions and case studies of direct discrimination on the grounds of pregnancy and potential pregnancy.

Less favourable treatment in direct discrimination

- 4.27 A requirement of the definition of direct discrimination is that the pregnant or potentially pregnant woman be treated less favourably than someone who is not pregnant or potentially pregnant.³⁰ As one submission noted, "less favourably" can mean different things to different people. Sometimes employers may intend to be supportive but actually act in a discriminatory manner.³¹

Whilst pregnant, I recently apologised for yawning at work, saying to the conductor ... that I was tired due to pregnancy. Soon after, I was rostered off the most prestigious concert of the year (which also involved travel) and a casual booked to replace me, perhaps because my male section principal (who had overheard the exchange) may have assumed I would have appreciated the time off. What he did not also realise was that, apart from the considerations of whether I wanted to go or not (which I was not asked about), my absence

²⁷ *Allegretta v Prime Holdings Pty Ltd t/a Phoenix Hotel & Anor* (1991) EOC 92-364, 78,506.

²⁸ Families At Work (Submission no 40); H Tuckey (Submission No 56); Shop, Distributive & Allied Employees' Association (Submission no 74); Townsville Community Legal Service (Submission no 78).

²⁹ Families At Work (Submission no 40).

³⁰ s 7(1) *Sex Discrimination Act 1984* (Cth).

³¹ H Tuckey (Submission no 56).

that week would potentially cost me a week of pay later in the year after the birth. The rest of my section objected and I was reinstated, but not without drama.³²

- 4.28 The concept of “less favourably” in section 7(1) of the SD Act is objective and does not require motive or intention by the employer.

Pregnancy Guidelines 4: That the Guidelines provide an explanation, including case studies, of “less favourable treatment” for the purposes of direct discrimination against pregnant and potentially pregnant employees.

Indirect discrimination

- 4.29 Indirect discrimination on the ground of pregnancy or potential pregnancy at work occurs when someone imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging pregnant or potentially pregnant employees.³³ However, the SD Act provides that discrimination will not occur if the condition, requirement or practice is reasonable in the circumstances.³⁴ It is for the employer to prove that the requirement is reasonable.³⁵
- 4.30 Some submissions indicated that greater clarity regarding the definition of indirect discrimination was required.³⁶ The Australian Chamber of Commerce and Industry stated that the tests for indirect discrimination were unclear. In particular, it felt that cases which had considered the concept of indirect discrimination merely added to the lack of clarity. The submission suggested that “...a more sensible approach...” would be to restrict the scope of the term “condition, requirement or practice” under the SD Act.³⁷
- 4.31 The phrase “condition, requirement or practice” is similar to that used in other anti-discrimination legislation. For example, some use the phrase “requirement or condition”.³⁸ Judicial interpretations of the phrases used in other jurisdictions and legislation may be used in the construction of the phrase in the SD Act. Ultimately, the correct interpretation is one which takes into account the whole of section 7(2) and the objects of the SD Act in their entirety.

³² H Tuckey (Submission no 56).

³³ s 7(2) *Sex Discrimination Act 1984* (Cth).

³⁴ s 7B(1) *Sex Discrimination Act 1984* (Cth).

³⁵ s 7C *Sex Discrimination Act 1984* (Cth).

³⁶ Families At Work (Submission no 40); Shop, Distributive and Allied Employees’ Association (Submission no 74); Townsville Community Legal Service (Submission no 78); Women’s Legal Services Network (Submission no 94).

³⁷ Australian Chamber of Commerce and Industry (Submission no 84).

³⁸ For example, the phrase “requirement or condition” is used in the *Disability Discrimination Act 1992* (Cth); *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 1995* (Vic); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act* (SA); *Equal Opportunity Act 1984* (WA) and *Discrimination Act 1991* (ACT). This is the phrase that was referred to by the Australian Chamber of Commerce and Industry in its submission. The *Racial Discrimination Act 1975* (Cth) uses the phrase “term, condition or requirement”.

- 4.32 Case law indicates that a “condition, requirement or practice” may manifest in a number of forms, including policies, practices, rules, routines, standards or stipulations, whether they be formal or informal.³⁹ As it is a threshold requirement, courts have tended to interpret this phrase, and similar phrases, broadly so as not to defeat the object of anti-discrimination legislation. For example, in the High Court case of *Australian Iron and Steel Pty Ltd v Banovic*,⁴⁰ Justice Dawson said that the words “requirement or condition” under the *Anti-Discrimination Act 1977* (NSW) should be construed broadly “...so as to cover any form of qualification or prerequisite demanded by an employer of his employees”. However, Justice Dawson noted that it was necessary to formulate the actual requirement or condition with some precision. Thus, the retrenchment policy of “last on, first off” was found to be a requirement or condition within the terms of section 24 of the *Anti-Discrimination Act 1977* (NSW).⁴¹
- 4.33 The case of *Waters v Public Transport Corporation*⁴² considered whether the removal of conductors from trams in Melbourne constituted a requirement or condition under the disability discrimination provisions of the *Equal Opportunity Act 1995* (Vic). The High Court held that the removal of conductors could be seen as a requirement or condition, the requirement being that the complainants use trams without the assistance of conductors. All seven judges of the Court found that a requirement or condition involves “...something over and above that which is necessarily inherent in the goods or services provided”.⁴³ All members of the High Court commented on the need to construe the words of the statute generously.
- 4.34 In the case of *Hickie v Hunt and Hunt*, which involved a claim under section 5(2) of the SD Act, a law firm’s insistence that a partner work full time was considered to be a requirement for the purposes of the definition of indirect sex discrimination in the SD Act.⁴⁴
- 4.35 In keeping with these interpretations, HREOC is of the view that each case should be considered in its own circumstances, with reference to objects of the SD Act if further guidance is needed.⁴⁵ The “condition, requirement or practice” test is a threshold test so it is important not to interpret this in a narrow manner so as to exclude the relevant facts from analysis of indirect discrimination.

³⁹ See R Hunter *Indirect Discrimination in the Workplace* Federation Press Sydney 1992 for a general discussion of indirect discrimination in the workplace.

⁴⁰ *Australian Iron and Steel Pty Ltd v Banovic* (1989) EOC 92-271.

⁴¹ *Australian Iron and Steel Pty Ltd v Banovic* (1989) EOC 92-271, 77-737.

⁴² *Waters v The Public Transport Corporation & Ors* (1991-1992) 173 CLR 349.

⁴³ Mason CJ and Gaudron J at 78,674, Dawson and Toohey at 78,693, McHugh J at 78,699, Brennan J at 78,684. Brennan J dissented from the finding that removal of the conductors was a requirement or condition.

⁴⁴ *Hickie v Hunt* (1998) EOC 92-910.

⁴⁵ See s 3 *Sex Discrimination Act 1984* (Cth).

- 4.36 It could be said that the provisions of the SD Act cover a greater range of conduct than the *Disability Discrimination Act 1992* (Cth) or the *Racial Discrimination Act 1975* (Cth), particularly as the term “practice” is not found in either of the other two Acts. Inclusion of the term provides an opportunity to examine systemic aspects of discrimination that evolve because of practices and policies which may not otherwise be addressed by the SD Act. HREOC therefore considers that this is an important inclusion in the definition of indirect discrimination.⁴⁶ Submissions did not submit specific examples of this causing particular difficulty for employers when managing pregnancy or potential pregnancy at work.

Disadvantage in indirect discrimination

- 4.37 Proving indirect discrimination under the SD Act also requires that pregnant or potentially pregnant employees be disadvantaged by the condition, requirement or practice.⁴⁷
- 4.38 In some cases, disadvantage arising from indirect discrimination will be obvious. In others, whether or not disadvantage has occurred is a question to be determined after investigation of the individual facts of the case.
- 4.39 One submission to the inquiry requested that the construction of “disadvantage” in sections 7 and 7B be reviewed.⁴⁸ HREOC is of the view that an attempt to define “disadvantage” would unnecessarily complicate the definition. It would probably amount to no more than a dictionary-style definition and hence it would be more practical to clarify this concept by using examples in the Guidelines.

The “reasonableness” test in indirect discrimination

- 4.40 An area of difficulty several submissions highlighted was the “reasonableness test”. The SD Act provides that a respondent can avoid liability for indirect discrimination by proving that the condition, requirement or practice was reasonable.⁴⁹ A state Chamber of Commerce and Industry and a regional Legal Centre felt that the term “reasonable” needed definition.⁵⁰
- 4.41 The SD Act describes the matters to be taken into account in deciding whether a condition, requirement or practice is reasonable. These are
- (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and
 - (b) the feasibility of overcoming or mitigating the disadvantage; and

⁴⁶ See paras 4.46 – 4.51 for a discussion of systemic discrimination.

⁴⁷ s 7(2) *Sex Discrimination Act 1984* (NSW).

⁴⁸ Australian Chamber of Commerce and Industry (Submission no 84).

⁴⁹ ss 7B and 7C *Sex Discrimination Act 1984* (Cth).

⁵⁰ Queensland Chamber of Commerce and Industry (Submission no 5) and Townsville Community Legal Centre (Submission no 78).

- (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.⁵¹
- 4.42 A requirement that pregnant employees must comply with the same lifting requirements as other employees may amount to indirect discrimination if this is unreasonable in the circumstances. A practice of conducting regular office meetings early in the morning, which a pregnant employee is unable to attend because she suffers from morning sickness, may amount to indirect discrimination if it is reasonable to conduct the meetings at another time.
- 4.43 The test of reasonableness is an objective one, so respondents would not generally succeed with an argument that the condition, requirement or practice was reasonable in their opinion, if there were no objective support for this position. Therefore it is important that employers and employees are aware, at least in broad terms, of what is likely to be considered objectively reasonable. HREOC acknowledges further practical clarification of, and guidance on, this provision would be useful and is of the view that it can be achieved in the Guidelines.
- 4.44 The onus is on the respondent (generally the employer) to prove that the discriminatory act was reasonable in the circumstances. Generally, it is the employer who has possession of information which demonstrates the reasons for workplace decisions, including costs and business developments. HREOC considers the onus of proof on employers in this situation is important in that employers ought to be able to justify business decisions. Requiring complainants to show that there is no possible reasonable explanation is unnecessarily onerous. Each set of facts is considered on an individual basis and must be “reasonable in all the circumstances” of the case.⁵²
- 4.45 In practice, most complaints made to HREOC concern cases of direct discrimination.⁵³ However, the prohibition on indirect discrimination is an important mechanism for dealing with more subtle or systemic forms of discrimination often resulting from predetermined behaviour. Education through the Guidelines is a valuable way to raise awareness about indirect discrimination.

Pregnancy Guidelines 5: That the Guidelines provide clarification of the prohibition on indirect discrimination against pregnant and potentially pregnant employees under the *Sex Discrimination Act 1984* (Cth). In particular, Guidelines should provide plain English definitions and case studies.

⁵¹ s 7B (2) *Sex Discrimination Act 1984* (Cth).

⁵² s 7B *Sex Discrimination Act 1984* (Cth).

⁵³ In the 14 months between January 1998 and March 1999, 75% of total pregnancy complaints lodged under the *Sex Discrimination Act 1984* (Cth) were direct discrimination – 51 of 68 complaints.

Systemic discrimination

- 4.46 Systemic discrimination was defined by the Australian Law Reform Commission in its *Equality Before the Law: Justice for women* report to mean "...practices which are absorbed into the institutions and structure of society and which have a discriminatory effect".⁵⁴ Hunter described it as "... a complex of directly and/or indirectly discriminatory (or subordinating) practices which operates to produce general...disadvantage for a particular group".⁵⁵
- 4.47 This form of discrimination refers to long standing cultural practices and attitudes. These practices and attitudes are often hidden or acted upon without conscious recognition. The person engaging in systemic discrimination does not analyse or consider the consequences of the act, nor are they opposed to it, as it represents the way that things have always been done. In the employment context, this often means that women are discouraged from seeking entry to the workforce or particular parts of it, rather than being excluded by an identifiable act of discrimination.
- 4.48 The inquiry has revealed that pregnancy and potential pregnancy in the workplace operate within a cultural framework of assumptions and prejudices towards women that can act to disadvantage them. For example, if employers expect that women will take a break from the labour force to bear children and assume that this means they will be less committed to their career, then training and other types of career encouragement are more likely to be invested in men.⁵⁶ These "systemic" pressures are difficult to measure. However, research by Zetlin and Whitehouse suggested that women accessing maternity leave or family flexible work practices tend to be seen as "family" rather than "career" people.⁵⁷
- 4.49 Personal experiences detailed in submissions illustrated these points.
- My employer has some excellent family-friendly policies in place. However, my boss's attitude to flexible hours for mid-level positions is not good. Flexible hours should be available to all, not just a select few. Unfortunately, the manager of each work unit rules yes/no to such things and in my case it is no. Since men hold most of the management jobs, it is impossible for them to see things from the other side of the coin.⁵⁸
- 4.50 Several functions of HREOC under the SD Act provide means by which systemic discrimination can be tackled. In particular, educational, research and inquiry functions allow HREOC to examine systemic issues through inquiries

⁵⁴ Australian Law Reform Commission *Equality Before the Law: Justice for women* Report 69(1) Sydney 1994, 3.29. See also Australian Law Reform Commission (Submission no 21).

⁵⁵ R Hunter *Indirect Discrimination in the Workplace* Federation Press Sydney 1992, 13. See also Women's Electoral Lobby Australia (Submission no 97).

⁵⁶ G Whitehouse (Submission no 103).

⁵⁷ D Zetlin and G Whitehouse "Balancing Work and Family Commitments: Developments in innovative organisations" (1998) 23(3) *Journal of Early Childhood* 9. HREOC notes that submissions and consultations indicated that some men who take time out for family responsibilities are also labelled as not committed to their careers.

⁵⁸ Women's Electoral Lobby Australia (Submission no 97).

such as this one.⁵⁹ The production of the Guidelines aims to change discriminatory policies and practices that are systemic within organisations and within the broader community.

- 4.51 Affirmative Action laws also provide a means by which systemic discrimination can be identified and eliminated through the reform of policies, practices and attitudes within individual workplaces.⁶⁰

⁵⁹ s 48(1)(d) – (h) *Sex Discrimination Act 1984* (Cth).

⁶⁰ *Affirmative Action (Equal Employment Opportunity for Women) Act 1987* (Cth).

Chapter 5 – Areas covered by the *Sex Discrimination Act 1984* and exemptions

Employment relationships

- 5.1 The *Sex Discrimination Act 1984* (Cth) (the SD Act) prohibits discrimination against pregnant or potentially pregnant employees.⁶¹
- 5.2 Submissions and consultations raised numerous issues about the application of the SD Act to different employment categories, in particular, casual workers. Some submissions told the inquiry that it is difficult to determine who is covered by the SD Act.⁶² These submissions considered that broad definitions should be provided as part of the Guidelines.
- 5.3 This chapter examines the different forms of employment relationships and relevant exemptions. The inquiry's terms of reference do not allow for a detailed examination of prohibitions on discrimination against pregnant and potentially pregnant women by qualifying bodies⁶³, or registered organisations under the *Workplace Relations Act 1996* (Cth).⁶⁴
- 5.4 The SD Act defines employment broadly to include
- part time and temporary employment;
 - work under a contract for services; and
 - work as a Commonwealth employee.⁶⁵
- 5.5 This broad definition would cover
- casual employees;
 - shift workers;
 - seasonal employees;
 - contractors;
 - employees on fixed term contracts; and
 - apprentices and paid trainees.⁶⁶
- 5.6 Unpaid workers may also be covered under the SD Act.⁶⁷
- 5.7 The SD Act also makes it unlawful to discriminate on the ground of pregnancy or potential pregnancy against

⁶¹ s 14 *Sex Discrimination Act 1984* (Cth).

⁶² New South Wales Government (Submission no 99); Anti-Discrimination Commission Queensland (Submission no 68).

⁶³ s 18 *Sex Discrimination Act 1984* (Cth).

⁶⁴ s 19 *Sex Discrimination Act 1984* (Cth); s 188 *Workplace Relations Act 1996* (Cth).

⁶⁵ s 4 *Sex Discrimination Act 1984* (Cth).

⁶⁶ Not all state and territory Acts cover partnerships, commission agents, contract workers and employment agencies.

⁶⁷ See paras 5.25 – 5.31.

- commission agents;⁶⁸
- contract workers;⁶⁹
- employment of partners in partnerships of six or more persons;⁷⁰ and
- the services of employment agencies.⁷¹

Casual, seasonal and fixed term employees

- 5.8 Past experience and inquiry consultations have identified that it is often assumed that casual employees are not covered by the SD Act, because they are excluded from maternity leave provisions and from unfair and unlawful dismissal remedies under the *Workplace Relations Act 1996* (Cth) if they have been employed for less than 12 months.⁷² However, the SD Act covers pregnant and potentially pregnant casuals in all aspects of employment including recruitment.⁷³
- 5.9 In the same way, shift workers, seasonal employees, employees on fixed term or short term contracts, apprentices and paid trainees are all covered by the SD Act, even though they may be excluded from other anti-discrimination provisions. Submissions also indicated limited understanding with respect to the extent of coverage for these workers.

Commission agents, contract workers and partnerships

- 5.10 Commission agents are provided the same protection as other employees by the SD Act. This is not the case under all state/territory anti-discrimination legislation.
- 5.11 Under the SD Act a commission agent works for an individual or organisation as their agent and is paid either wholly or in part, by commission.⁷⁴ Section 15 of the SD Act makes it unlawful for a principal to discriminate in selecting and engaging a commission agent and in the way in which commission agents are treated once they are engaged.⁷⁵
- 5.12 A contract worker under the SD Act is employed by one individual or organisation but works for another under a contract between their employer and the individual or organisation for which they perform the work.⁷⁶ Section 16 of the SD Act makes it unlawful for a principal to discriminate against a contract worker in the terms and conditions of the work, in allowing the

⁶⁸ s 15 *Sex Discrimination Act 1984* (Cth).

⁶⁹ s 16 *Sex Discrimination Act 1984* (Cth).

⁷⁰ s 17 *Sex Discrimination Act 1984* (Cth).

⁷¹ s 20 *Sex Discrimination Act 1984* (Cth). This is discussed further in ch 11.

⁷² regs 30B(1)(d), 30B(3) *Workplace Relations Regulations 1996* (Cth).

⁷³ See paras 10.5 – 10.39 for a detailed discussion of casual workers.

⁷⁴ s 4 *Sex Discrimination Act 1984* (Cth).

⁷⁵ In relation to a commission agent, a principal is defined as a person for whom the commission agent does work as a commission agent: s 4 *Sex Discrimination Act 1984* (Cth).

⁷⁶ s 4 *Sex Discrimination Act 1984* (Cth).

contract worker to continue the work, by denying or limiting access to any benefit associated with the work or by subjecting the contract worker to any other detriment.⁷⁷

- 5.13 Contract workers include “temps” from employment agencies or labour hire firms that hire out specialised employees including secretarial staff, information technology experts or engineers.⁷⁸ With the increasing trend for organisations to contract out parts of their operation (such as human resource management, information technology, technical expertise and management) utilising labour hire firms, consultants or specialised employment agencies, this section of the SD Act is of increasing relevance.
- 5.14 Partners and people being considered for admission into a partnership are also protected under the SD Act from discrimination.⁷⁹ The SD Act applies only to partnerships of six or more.

Statutory appointees, judges and members of parliament

- 5.15 The extent of coverage provided by the SD Act for federal statutory appointees, federal judges and federal members of Parliament was raised during the inquiry. Several submissions called for clarification of the SD Act’s coverage and amendment, if necessary to ensure full coverage of these categories.⁸⁰
- 5.16 Statutory officers, such as Commissioners of the Human Rights and Equal Opportunity Commission (HREOC), appear to be covered by the SD Act as “Commonwealth employees” which are broadly defined to include someone who holds an administrative office.⁸¹ This broad definition may allow statutory officers to make a complaint under the SD Act if they were to suffer pregnancy or potential pregnancy discrimination. However, there is no precedent for this.
- 5.17 It does not appear however that judges would be covered in any way by the SD Act if they were to suffer unlawful pregnancy or potential pregnancy discrimination. As a Commonwealth employee is defined to include someone

⁷⁷ In relation to a contract worker, a principal is defined as a person for whom the contract worker does work pursuant to a contract between the employer of the contract worker and the person: s 4 *Sex Discrimination Act 1984* (Cth).

⁷⁸ Some submissions specifically asked for clarification of the coverage of the *Sex Discrimination Act 1984* (Cth) for temporary employees from labour hire firms: Anti-Discrimination Commission Queensland (Submission no 68); Shop Distributive and Allied Employees’ Association (Submission no 74). Concern has been raised at suggestions made that certain employees of labour hire firms could be supplied on a basis that the employer that hires the employee on a contract need not abide by anti-discrimination laws: N Field “Labour hire firms flaunt laws in search of business” *The Australian Financial Review* 4 June 1999, 24. It remains the view of HREOC that contract workers of labour hire firms are covered by the *Sex Discrimination Act 1984* (Cth).

⁷⁹ s 17 *Sex Discrimination Act 1984* (Cth).

⁸⁰ Australian Reproductive Health Alliance (Submission no 22); Families At Work (Submission no 40); Australian Nursing Federation (Submission no 45); Shop Distributive and Allied Employees’ Association (Submission no 74).

⁸¹ ss 4(1), 9(5), 108 *Sex Discrimination Act 1984* (Cth).

who holds an administrative office but does not extend to someone holding a federal judicial office, it appears that federal judicial office holders are in a relatively vulnerable position, which is inappropriate.

- 5.18 Any complaint of discrimination under the SD Act by an employee against a judge would generally be made against the Commonwealth, as the employer.
- 5.19 The Public Service Association of New South Wales assisted a member who experienced unlawful discrimination by a judge at the state level.

In 1997, the PSA made representations to the NSW Attorney-General's Department after one of our members, who was eight months pregnant, and an Associate to a [Judge], sought our assistance after the Judge advised her that he wasn't going to support her application for maternity leave because she had chosen a new career.

The Judge told our member that he believed women should stay at home with their children. The Attorney-General's Department [reviewed] the Judge's decision and approved her paid and unpaid maternity leave.

The outcome of this (and other related complaints) made by our member is that our member was granted her maternity leave....⁸²

- 5.20 HREOC was informed by the Australian Institute of Judicial Administration that it is currently developing a model procedure for the internal resolution of complaints about grievances made by employees of judicial bodies.
- 5.21 Federal members of Parliament do not appear to be covered by the SD Act either, as they are elected rather than employed.⁸³
- 5.22 Employees who work for a federal member of Parliament and who are employees of the Commonwealth⁸⁴ can lodge a complaint of discrimination against their employer, the Commonwealth, if discriminated against on the basis of pregnancy or potential pregnancy. Where the employee, such as a housekeeper, is engaged privately, any action for discrimination against the member of Parliament would depend on whether the member of Parliament is the employer.
- 5.23 The intent of federal and state/territory anti-discrimination legislation is to ensure fair and equal access to all positions and fair non-discriminatory treatment. It is therefore essential that clarification of coverage of the SD Act

⁸² Public Service Association of New South Wales (Submission no 92). Courts at a federal level are independent from the federal Government and are self administering. They deal with complaints of improper employment behaviour internally.

⁸³ The Victorian Equal Opportunity Board came to the same conclusion regarding elected state and local representatives, in particular local councillors in *The Council of the Municipality of Mosman v The Deputy Commissioner of Taxation* (unreported, Equal Opportunity Board of Victoria, 8 February 1984).

⁸⁴ s 20(1) *Members of Parliament (Staff) Act 1984* (Cth): "[a] Senator or a Member of the House of Representatives may, on behalf of the Commonwealth, employ, under an agreement in writing, a person as a member of the staff of the Senator or Member."

for federal statutory appointments, federal judicial appointments, federal members of Parliament and their employees is achieved and that all parties to these arrangements are well informed of the situation.

- 5.24 HREOC will bring this matter to the attention of the team conducting the human rights legislation consolidation project currently being undertaken by the federal Attorney-General's Department. The concerns raised also fall within state/territory jurisdictions and should therefore be addressed at that level too.⁸⁵

Recommendation 7: That the Attorney-General examine the issues of coverage for federal statutory appointees, judicial office holders and members of Parliament, to provide clarification of coverage and, if necessary, extend the provisions of the *Sex Discrimination Act 1984* (Cth) to cover these positions formally.

Unpaid workers

- 5.25 Unpaid work is not specifically excluded from the SD Act.⁸⁶ However, unpaid workers may not be covered by the SD Act if they are not considered to be employees and an employment contract does not exist.⁸⁷ For an employment contract to exist, like other contracts, it requires a mutual exchange of benefit (generally work in exchange for remuneration) and an intention to create a legally binding relationship. Both questions must be considered in the individual circumstances of each case.⁸⁸
- 5.26 A mutual benefit can occur in ways other than through the exchange of work for remuneration. For example, where a person is required to perform a certain amount of work experience to obtain registration by a qualifying board, the benefit exchanged can be a period of unpaid work in exchange for proper supervision and experience.⁸⁹
- 5.27 Thus, while unpaid workers may be employees under the SD Act, the situation is not entirely clear and will depend very much on the specifics of any relationship. It is also possible that if unpaid workers do not fall within the ambit of an employment relationship, they may fall within the provision relating

⁸⁵ Some states have already addressed this issue, although in a limited capacity. See, for example, s 93AA *Equal Opportunity Act 1984* (SA) which has established a regime for dealing with a complaint of sexual harassment against parliamentarians and judges.

⁸⁶ The Queensland and South Australian anti-discrimination Acts specifically provide that an employee includes an unpaid worker: s 4 *Anti-Discrimination Act 1991* (Qld); s 5(1) *Equal Opportunity Act 1984* (SA). The Tasmanian Act defines employment as including employment both with or without remuneration: s 3 *Sex Discrimination Act 1994* (Tas).

⁸⁷ CCH Australia Limited *Australian Labour Law Reporter* CCH Sydney 1998, 1000.

⁸⁸ Further, under the provisions of the *Sex Discrimination Act 1984* (Cth) relating to discrimination in work, the respondent to a complaint must be an employer: s 14 *Sex Discrimination Act 1984* (Cth).

⁸⁹ In addition to the existence of an employment contract, there is a body of case law that may support the existence of an employment relationship even when there is no employment contract, if the unpaid worker has "... put himself [or herself] under the control of an employer to be regarded as such": *Johnson v Lindsay and Co* (1891) AC 37, per Lord Herschell. However, this body of law has not been extensively relied upon in recent times.

to discrimination in the provision of goods, services and facilities in section 22 of the SD Act.⁹⁰

- 5.28 Unpaid work is increasing in incidence, with some people undertaking official and unofficial unpaid internships or work experience in order to obtain the experience needed to enter the workforce or to retrain for another profession. Varying in duration and content, these periods of unpaid work can be highly structured programs that can provide employers and workers with considerable benefits.
- 5.29 Voluntary workers make a considerable contribution to the charitable and non-profit sector and there is no reason why these workers should not be protected from discrimination on the basis of pregnancy and potential pregnancy.⁹¹ The Guidelines will provide assistance on this issue, however it would also be appropriate for the SD Act to be amended to ensure that unpaid workers are protected against discrimination.
- 5.30 One form of “unpaid” work is the Work for the Dole Scheme. Persons engaged under this scheme are not employees for the purposes of the *Workplace Relations Act 1996* (Cth) due to a provision of the *Social Security (Work for the Dole) Act 1997* (Cth).⁹² However, this provision does not preclude persons engaged in the scheme from being considered employees under the SD Act, nor under the common law or under state/territory legislation. The situation is unclear and has not been legally tested.
- 5.31 Under the Community Development Employment Projects Scheme (CDEP) which has been established for Indigenous people, members of participating communities, organisations or groups forgo individual unemployment benefits for a wages grant paid to the community, with each community deciding on its own work program.⁹³ The Aboriginal and Torres Strait Islander Commission, which administers CDEP, is of the opinion that participants in the scheme are employees for the purposes of all employment related legislation, including the *Workplace Relations Act 1996* (Cth) and the SD Act. In cases of unfair dismissal relating to CDEP which have been brought before the Australian Industrial Relations Commission, a direct employer-employee relationship has been established.⁹⁴

⁹⁰ s 22 prohibits discrimination on the basis of pregnancy or potential pregnancy in the provision of goods, services or facilities, whether for payment or not. The meaning of services and facilities has been interpreted broadly in anti-discrimination legislation. For example, in identifying a service, it can assist to look at the type of benefits provided by the service. Such benefits could include training, guidance, instruction and supervision: *Woods v Wollongong City Council* (1993) EOC 92-486. Alternatively, it could be argued that facilities are being provided to unpaid workers and thus section 22 of the *Sex Discrimination Act 1984* (Cth) may apply.

⁹¹ Townsville Community Legal Service (Submission no 78).

⁹² s 631C *Social Security (Work for the Dole) Act 1997* (Cth). See also Department of Employment, Workplace Relations and Small Business Supplementary Submission (Submission no 101).

⁹³ Department of Employment, Workplace Relations and Small Business Supplementary Submission (Submission no 101).

⁹⁴ Department of Employment, Workplace Relations and Small Business Supplementary Submission (Submission no 101).

Pregnancy Guidelines 6: That the Guidelines provide clarification of the coverage of pregnant and potentially pregnant unpaid workers under the *Sex Discrimination Act 1984* (Cth).

Recommendation 8: That the Attorney-General amend the *Sex Discrimination Act 1984* (Cth) to ensure coverage of unpaid workers.

Recommendation 9: That those federal Government Departments and agencies conducting formal unpaid work schemes ensure that participants in those schemes are provided with protection from discrimination on the ground of pregnancy and potential pregnancy.

Commonwealth laws and programs

5.32 The SD Act also makes it unlawful for an individual or an organisation exercising power under a Commonwealth law or program to discriminate on the ground of pregnancy or potential pregnancy.⁹⁵ A Commonwealth program can extend to include any program that operates fully or partly under the auspices of a federal program.⁹⁶ Thus, the SD Act applies to the way in which a Commonwealth Government program is conducted, such as in the allocation of places for a training program and whether a pregnant or potentially pregnant person is offered a place. In addition, any persons, such as administrative or training staff, employed to conduct the program would receive the full protection of the SD Act even though they may formally be an employee of a state/territory government and normally excluded from SD Act coverage.

Liability of employers for discrimination

5.33 The growing use of licences or franchise agreements in business may raise issues of coverage and vicarious liability, under the SD Act, of a licensor or franchisor for acts of discrimination that occur in the licensed business or franchise.

5.34 One large organisation sought clarification around this area in its submission to the inquiry, and stated that

[t]he issues surrounding who is an employee (and in some instances, who is the employer) is becoming increasingly contentious in general and also for Australia Post. For example, the definition has been considered “fuzzy” in regard to our Licensee Post Office Licensees.⁹⁷

5.35 While currently it is unlikely that a licensor or franchisor could be deemed an employer under the SD Act, there may be some circumstances where vicarious liability could arise. Section 106 of the SD Act provides that an employer or principal can be vicariously responsible for the discriminatory acts of an

⁹⁵ s 26 *Sex Discrimination Act 1984* (Cth).

⁹⁶ *Hough v Council of the Shire of Caboolture* (1993) EOC 92-480; *Harris v Bryce* (1993) 41 FCR 388.

⁹⁷ Australia Post (Submission no 44).

employee or agent, if those acts would be unlawful under the SD Act. In addition, section 105 of the SD Act deems that a person who causes, instructs, induces, aids or permits another person to do a discriminatory act under the SD Act, to be liable for that act. Vicarious liability may not arise where the employer or principal takes all reasonable steps to prevent such unlawful discrimination.

- 5.36 One of Australia's major franchisors has proactively attempted to deal with these issues by requiring their franchisees to abide by corporate policies.

Employee relations policies and practices are designed at corporate level and are applied to all employees, ie franchisee's term of licence requires adoption of McDonald's policies, practices and minimum standards.⁹⁸

Pregnancy Guidelines 7: That the Guidelines provide clarification of the rights and obligations under the *Sex Discrimination Act 1984* (Cth) for parties involved in licence agreements and franchise agreements.

Permanent and temporary exemptions

- 5.37 There are a number of exemptions under the SD Act that render acts and practices which would normally be discriminatory on the ground of pregnancy or potential pregnancy, not unlawful.
- 5.38 Some of the exemptions under the SD Act have already been subject to review.⁹⁹ However, the reviews conducted did not specifically examine the impact of exemptions in the area of discrimination on the ground of pregnancy and potential pregnancy.

Rights, privileges and services connected with pregnancy or childbirth

- 5.39 The SD Act makes it clear that any rights and privileges granted to a woman in connection with pregnancy or childbirth are not unlawful discrimination against a man, for example, maternity leave and transfer to safe work during pregnancy.¹⁰⁰ In addition, the SD Act states that it is not unlawful to provide services to one sex only when the nature of the service is such that it can only be provided to members of one sex.¹⁰¹
- 5.40 It is not discriminatory in the workplace to request or require a person who is pregnant to provide medical information concerning the pregnancy.¹⁰²

⁹⁸ Deanne Bevan, Vice President and Director of Employee Relations, McDonalds Australia Ltd (Personal communication with Sex Discrimination Commissioner, 1 April 1999).

⁹⁹ Human Rights and Equal Opportunity Commission *Sex Discrimination Act 1984 – A review of exemptions* AGPS Canberra 1992; Australian Law Reform Commission *Equality Before the Law: Justice for women* Report 69 (1) ALRC Sydney 1994.

¹⁰⁰ s 31 *Sex Discrimination Act 1984* (Cth).

¹⁰¹ s 32 *Sex Discrimination Act 1984* (Cth).

¹⁰² s 27(2)(b) *Sex Discrimination Act 1984* (Cth). See also paras 9.16 – 9.31; 12.77 – 12.90.

Employees of state/territory instrumentalities

- 5.41 Under section 13 of the SD Act, employees of an instrumentality of a state or territory are not covered by section 14 of the SD Act.¹⁰³ However, section 26, concerning the administration of Commonwealth laws and programs, is not subject to this exemption.¹⁰⁴ An “instrumentality of a State” is defined as a body or authority established for a public purpose by a law of a state and includes a technical and further education institution conducted by a state, but does not include any other institution of tertiary education.¹⁰⁵
- 5.42 Therefore, employees not covered under the SD Act include employees in state/territory government departments, state/territory authorities, state/territory public or government schools, TAFE, state/territory hospitals and local councils. In addition, the SD Act may not cover statutory corporations and quasi-autonomous state bodies in the public sector.¹⁰⁶ Most of these exempted employees are protected by state/territory legislation.¹⁰⁷
- 5.43 Due to this wide scope of exemptions,¹⁰⁸ both the 1992 HREOC review of exemptions and the Australian Law Reform Commission’s *Equality Before the Law: Justice for women* report recommended that section 13 be repealed “to provide the same basic level of protection for the rights of all women whatever state or territory they inhabit”.¹⁰⁹
- 5.44 The submissions of the Australian Law Reform Commission¹¹⁰ and the Anti-Discrimination Commission of Queensland¹¹¹ both raised concerns at the significant number of employees excluded from the SD Act by this exemption. In the opinion of the Anti-Discrimination Commission of Queensland,
- [w]hilst the gaps are in effect filled by State anti-discrimination legislation, it is not appropriate that the Commonwealth Act which gives effect to Australia’s obligations under CEDAW, should maintain such a significant exclusion.¹¹²
- 5.45 The section 13 exemption is included in the SD Act because Australia operates within a federal system where state and federal acts operate together.¹¹³ As is

¹⁰³ s 13 *Sex Discrimination Act 1984* (Cth).

¹⁰⁴ s 26 *Sex Discrimination Act 1984* (Cth).

¹⁰⁵ s 4 *Sex Discrimination Act 1984* (Cth).

¹⁰⁶ Human Rights and Equal Opportunity Commission *Sex Discrimination Act 1984 – A review of exemptions* AGPS Canberra 1992, 43.

¹⁰⁷ State and territory anti-discrimination legislation is discussed in detail at ch 7.

¹⁰⁸ The conclusions of the reports reviewing exemptions under the *Sex Discrimination Act 1984* (Cth) were also based on the fact that the Northern Territory (until 1992) and Tasmania did not have sex discrimination legislation at the time. Both states have since introduced anti-discrimination legislation.

¹⁰⁹ Australian Law Reform Commission *Equality Before the Law: Justice for women* Report 69(1) ALRC Sydney 1994, 3.76.

¹¹⁰ Australian Law Reform Commission (Submission no 21).

¹¹¹ Anti-Discrimination Commission of Queensland (Submission no 68).

¹¹² Anti-Discrimination Commission of Queensland (Submission no 68).

¹¹³ The operation of federal and state/territory legislation is discussed at paras 7.1 – 7.7.

discussed in Chapter 7, employers may suffer considerable confusion at the array of anti-discrimination legislation in Australia and the number of differences between them in the area of pregnancy and potential pregnancy. HREOC reiterates the conclusion of its 1992 report that “there are obvious advantages in this area of law...for there to be mutual recognition of laws and a concerted effort at achieving a uniform national standard”.¹¹⁴

Recommendation 10: That the Attorney-General amend section 13 of the *Sex Discrimination Act 1984* (Cth) to remove the exemption of employment by an instrumentality of a State.

Domestic duties or residential care of children

- 5.46 The SD Act provides that it is not unlawful for an employer to discriminate against a person on the basis of their sex, in the arrangements made to determine who should be offered employment or in determining who should be offered employment, in connection with employment to perform domestic duties on the premises on which the employer resides.¹¹⁵
- 5.47 While the exemption provided is only in relation to sex discrimination, sex can be broadly defined to include characteristics of one sex, which could, in some cases, include pregnancy and potential pregnancy.¹¹⁶ However, it should be noted that this exemption only applies to the recruitment and hiring process. Once an employee has been hired, it is unlawful to discriminate on the basis of pregnancy or potential pregnancy.
- 5.48 A similar exemption exists in relation to employment involving the duties of caring for a child or children in a place where the child or children reside. It applies only to exempt the employer from unlawful discrimination on the ground of sex in the arrangements made to determine who should be offered employment and in determining who should be offered employment.¹¹⁷ The exemption also applies in relation to contract workers. It is not unlawful for a principal to discriminate against a contract worker on the ground of sex by not allowing the contract worker to work or continue to work, where the position involves these duties.¹¹⁸

Religious bodies and religious schools

- 5.49 Certain exemptions under the SD Act concern potential conflicts between anti-discrimination provisions and religious beliefs and practices.

¹¹⁴ Human Rights and Equal Opportunity Commission *Sex Discrimination Act 1984 – A review of exemptions* AGPS Canberra 1992, 53.

¹¹⁵ s 14(3) *Sex Discrimination Act 1984* (Cth).

¹¹⁶ See para 4.17. However, the exemption from the prohibition on sex discrimination would not appear to allow an employer to discriminate against a pregnant or potentially pregnant candidate in favour of a woman who is not pregnant or potentially pregnant, in the recruitment and hiring process.

¹¹⁷ s 35(1) *Sex Discrimination Act 1984* (Cth).

¹¹⁸ s 35(1) *Sex Discrimination Act 1984* (Cth).

- 5.50 An exemption applies to the employment of members of staff at educational institutions that are conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, in so far as any discrimination is pursuant to those tenets.¹¹⁹ A similar provision applies to contract workers working for religious bodies and religious schools.¹²⁰
- 5.51 The exemption applies only to hiring and dismissal practices – it does not allow discrimination during the course of employment.
- 5.52 These provisions exempt discrimination on the ground of sex, marital status and pregnancy. They do not actually exempt potential pregnancy from unlawful discrimination. It is unclear whether the ground of sex, which is included in the exemption, would include potential pregnancy in these circumstances.¹²¹
- 5.53 State/territory anti-discrimination legislation contains similar exemptions, although the provisions are not identical. The *Workplace Relations Act 1996* (Cth) also contains an exemption for religious institutions from the prohibition on discriminatory termination of employment¹²² and from the requirement that agreements be non-discriminatory.¹²³
- 5.54 Several submissions commented on the exemption, most supporting their removal.¹²⁴ There was concern that the provisions were too broad and interpreted to result in unfair use to the detriment of pregnant women.
- 5.55 HREOC supports the Australian Law Reform Commission comment that
- ...religious freedom and the right to enjoy culture and religion must be balanced with the right to equality and with the principle of non-discrimination. The statutory exemption prefers one right over another and precludes any consideration of where the balance between the rights should be.¹²⁵
- 5.56 The arguments in support of, and against, this exemption were comprehensively examined by HREOC in 1992¹²⁶ and by the Australian Law Reform Commission in 1994.¹²⁷ Both inquiries concluded with recommendations that the exemption should be removed or at least modified in its scope of

¹¹⁹ s 38(1) *Sex Discrimination Act 1984* (Cth).

¹²⁰ s 38(2) *Sex Discrimination Act 1984* (Cth).

¹²¹ See para 4.17.

¹²² s 170CK(4) *Workplace Relations Act 1996* (Cth).

¹²³ s 170LU(6)(c) *Workplace Relations Act 1996* (Cth); sch 8 *Workplace Relations Regulations 1996* (Cth).

¹²⁴ Australian Law Reform Commission (Submission no 21); Australian Reproductive Health Alliance (Submission no 22); Labor Council of NSW (Submission no 41); Australian Council of Trade Unions (Submission no 59); Working Women's Centres (Submission no 88).

¹²⁵ Australian Law Reform Commission *Equality Before the Law: Justice for women* Report 69(1) ALRC Sydney 1994, rec 3.81.

¹²⁶ Human Rights and Equal Opportunity Commission *Sex Discrimination Act 1984 – A review of exemptions* AGPS Canberra 1992, 54 – 83.

¹²⁷ Australian Law Reform Commission *Equality Before the Law: Justice for women* Report 69(1) ALRC Sydney 1994, 3.77 – 3.81.

operation.¹²⁸ HREOC reiterates and continues to support these recommendations.

Recommendation 11: That the Attorney-General amend the *Sex Discrimination Act 1984* (Cth) to remove the exemption contained in section 38 for educational institutions established for religious purposes in relation to pregnancy and potential pregnancy.

Other exemptions

5.57 Section 30 of the SD Act exempts discrimination on the ground of sex where it is a genuine occupational qualification to be a person of a particular sex.¹²⁹ HREOC is not aware of any circumstances where this exemption has ever been used in relation to pregnancy or potential pregnancy.

5.58 Another section which needs to be considered is section 40 of the SD Act which exempts

- a determination or decision of HREOC;¹³⁰
- an order of a court;¹³¹
- an order or award of a court or tribunal having power to fix minimum wages and other terms and conditions of employment;¹³²
- a certified agreement;¹³³ or
- certain federal Acts.¹³⁴

Temporary exemptions

5.59 The SD Act gives the Sex Discrimination Commissioner the power to grant temporary exemptions from the operation of the SD Act.¹³⁵ It is the policy of the current Commissioner and indeed past Commissioners to grant exemptions only in strictly limited circumstances. Where exemptions are granted, the Commissioner's preference is to define them in narrow terms, limited in duration and subject to conditions, monitoring and reassessment at regular intervals, which is consistent with the objects of the SD Act and the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW).¹³⁶

¹²⁸ Human Rights and Equal Opportunity Commission *Sex Discrimination Act 1984 – A Review of Exemptions* AGPS Canberra 1992, 4.76; Australian Law Reform Commission *Equality Before the Law: Justice for women* Report 69(1) ALRC Sydney 1994, rec 3.11.

¹²⁹ s 30 *Sex Discrimination Act 1984* (Cth).

¹³⁰ s 40(1)(c) *Sex Discrimination Act 1984* (Cth).

¹³¹ s 40(1)(d) *Sex Discrimination Act 1984* (Cth).

¹³² s 40(1) (e) *Sex Discrimination Act 1984* (Cth). Awards which contravene the *Sex Discrimination Act 1984* (Cth) are further discussed in paras 8.94 – 8.106.

¹³³ s 40(1)(f) *Sex Discrimination Act 1984* (Cth).

¹³⁴ s 40(2) *Sex Discrimination Act 1984* (Cth) sets out which federal Acts are exempt.

¹³⁵ s 44 *Sex Discrimination Act 1984* (Cth).

¹³⁶ *Convention on the Elimination of All Forms of Discrimination Against Women* GA Res 180 (XXXIV 1970), 19 ILM 33 (1980).

- 5.60 A series of temporary exemptions was granted to organisations in the lead industry to exempt them from the prohibition on discrimination against pregnant employees within the lead industry. These exemptions have now lapsed.¹³⁷ There are currently no temporary exemptions relating to pregnancy and potential pregnancy under the SD Act.
- 5.61 This limited approach to the granting of temporary exemptions was supported by inquiry submissions.¹³⁸ However, submissions did indicate an unfamiliarity with the substance and scope of temporary exemptions, an issue which can be dealt with in the Guidelines.¹³⁹
- 5.62 Anti-discrimination legislation in states/territories also makes provision for the granting of temporary exemptions.¹⁴⁰ However, a temporary exemption under state/territory legislation does not provide an automatic exemption from the federal SD Act.

Special measures

- 5.63 The SD Act provides that it is not discriminatory to take a special measure for the purpose of achieving substantive equality between women who are pregnant or potentially pregnant, and people who are not pregnant or potentially pregnant.¹⁴¹ Special measures undertaken in compliance with federal or state/territory laws are also exempt from the SD Act.¹⁴²
- 5.64 Detailed guidelines on special measures under the SD Act were produced by HREOC in 1996.¹⁴³
- 5.65 A special measure is a voluntary action (act, practice, program, plan, policy, arrangement, mechanism or activity) taken by an employer to achieve substantive equality between employees who are pregnant or potentially pregnant and those who are not.¹⁴⁴ To comply with the special measures provisions of the SD Act, an action must meet certain criteria. For example, a special measure may have the purpose of addressing disadvantages experienced by pregnant or potentially pregnant employees in areas where they have been and continue to be unequal.¹⁴⁵ These disadvantages are often due to systemic

¹³⁷ Issues concerning the lead industry are discussed at paras 9.71 – 9.84.

¹³⁸ Anti-Discrimination Commission Queensland (Submission no 68); New South Wales Government (Submission no 99).

¹³⁹ See for example, Queensland Chamber of Commerce and Industry (Submission no 5).

¹⁴⁰ See Table 7.1 at p 84.

¹⁴¹ s 7D(1)(c) and (d) *Sex Discrimination Act 1984* (Cth).

¹⁴² s 40(6) *Sex Discrimination Act 1984* (Cth).

¹⁴³ Human Rights and Equal Opportunity Commission *1996 Guidelines for Special Measures under the Sex Discrimination Act 1984* Sydney 1996.

¹⁴⁴ The special measures provision of the *Sex Discrimination Act 1984* (Cth) gives effect to art 4(1) *Convention on the Elimination of All Forms of Discrimination Against Women* GA Res 180 (XXXIV 1970), 19 ILM 33 (1980).

¹⁴⁵ Human Rights and Equal Opportunity Commission *1996 Guidelines for Special Measures under the Sex Discrimination Act 1984* HREOC Sydney 1996, 12. To satisfy the requirements of a special

inequality which is difficult to address in ordinary anti-discrimination measures.¹⁴⁶ The aim of special measures is not to discriminate by conferring favours but rather to achieve equal outcomes for people who have been disadvantaged with people who have not.

- 5.66 Special measures must be examined on a case by case basis to determine if they fit within the terms of the SD Act. It should be noted that actions which may be lawful special measures under the SD Act may be unlawful actions under state/territory anti-discrimination legislation. Any employers who wish to implement a special measure should ensure that the measure is not unlawful under state/territory law. In addition, employers are strongly encouraged to consult the HREOC *1996 Guidelines for Special Measures under the Sex Discrimination Act 1984* before designing and implementing a special measure.¹⁴⁷

Pregnancy Guidelines 8: That the Guidelines include an explanation of the scope of exemptions and special measures under the *Sex Discrimination Act 1984* (Cth) in relation to pregnancy and potential pregnancy and provide advice and assistance on factors to consider in making a formal application for a temporary exemption.

measure, the measure may be taken solely for the purposes set out in section 7D(1) or for that purpose as well as other purposes, whether or not that purpose is the dominant or substantial one: s 7D(3) *Sex Discrimination Act 1984* (Cth).

¹⁴⁶ Human Rights and Equal Opportunity Commission *1996 Guidelines for Special Measures under the Sex Discrimination Act 1984* HREOC Sydney 1996, 13. Systemic discrimination is discussed at paras 4.46 – 4.51.

¹⁴⁷ Human Rights and Equal Opportunity Commission *1996 Guidelines for Special Measures under the Sex Discrimination Act 1984* HREOC Sydney 1996.

Chapter 6 – Types of discriminatory conduct or acts

Prohibition on discrimination in employment relationships

- 6.1 The *Sex Discrimination Act 1984* (Cth) (SD Act) seeks to provide comprehensive coverage of all areas of the employment relationship from recruitment, to the formation of the employment contract through to the treatment of employees and the termination of the employment contract. The exceptions to this coverage are relatively minor.
- 6.2 This chapter analyses the application of the SD Act to employment and explores the strengths and weaknesses in that coverage.
- 6.3 The areas of discrimination that are made unlawful under the SD Act can be summarised as follows. It is unlawful for an employer to discriminate against an employee, a principal to discriminate against a commission agent or contract worker, or a partnership to discriminate against a partner on the ground of pregnancy or potential pregnancy
- in the arrangements made for the purpose of determining who should be employed or engaged;¹⁴⁸
 - in determining who should be employed or engaged;¹⁴⁹
 - in the terms or conditions on which employment or other work is offered.¹⁵⁰
- 6.4 The first two of these categories relate to recruitment processes and are dealt with in detail in Chapter 11. The third category is partly a recruitment process and partly dealt with as an element of employment in this chapter. The SD Act also provides that it is unlawful to discriminate
- in the terms and conditions afforded the employee, commission agent, contract worker or partner;¹⁵¹
 - by denying access, or limiting access, to opportunities for promotion, transfer or training, or to any other benefits associated with the employment or work to the employee, commission agent, contract worker or partner;¹⁵²
 - by dismissing the employee, terminating the engagement of the commission agent or contract worker, or expelling a partner;¹⁵³ or
 - by subjecting the employee, commission agent, contract worker or partner to any other detriment.¹⁵⁴

¹⁴⁸ ss 14(1)(a), 15(1)(a) *Sex Discrimination Act 1984* (Cth).

¹⁴⁹ ss 14(1)(b), 15(1)(b), 17(1)(b), 17(2)(b) *Sex Discrimination Act 1984* (Cth).

¹⁵⁰ ss 14(1)(c), 15(1)(c), 16(a), 17(1)(b), 17(2)(b) *Sex Discrimination Act 1984* (Cth).

¹⁵¹ ss 14(2)(a), 15(2)(a), 16(a) *Sex Discrimination Act 1984* (Cth).

¹⁵² ss 14(2)(b), 15(2)(b), 16(c), 17(3)(a) *Sex Discrimination Act 1984* (Cth).

¹⁵³ ss 14(2)(c), 15(2)(c), 16(b), 17(3)(b) *Sex Discrimination Act 1984* (Cth).

¹⁵⁴ ss 14(2)(d), 15(2)(d), 16(d), 17(3)(c) *Sex Discrimination Act 1984* (Cth).

- 6.5 These provisions are sufficiently broad to encompass a wide range of inappropriate behaviour. Discrimination in employment as provided above can be either direct or indirect. Chapter 4 provides further information on direct and indirect discrimination.

Terms and conditions of employment

- 6.6 The phrase “terms and conditions of employment” is not specifically defined by the SD Act.¹⁵⁵ Rather, it encompasses a wide range of agreements, policies and practices, either expressed by the parties or implied by the law. Included are the matters discussed in a contract of employment or appointment, and the terms documented in awards, certified agreements or Australian Workplace Agreements.¹⁵⁶ It also includes an employment policy,¹⁵⁷ such as a policy on uniforms,¹⁵⁸ and day to day decisions made by an employer,¹⁵⁹ about the workplace and individual employees, commission agents, contract workers and partners.¹⁶⁰

Denial or limitation of access to benefits

- 6.7 The SD Act makes it unlawful to discriminate against employees, commission agents, contract workers or partners on the basis of pregnancy or potential pregnancy in determining who should have access to benefits associated with employment, or by limiting that access.¹⁶¹
- 6.8 The SD Act identifies opportunities for promotion, transfer or training as some of these benefits. The term “benefits” has been defined broadly to include voluntary benefits that may not be enforceable at law. For example, an employer who voluntarily provides severance payments to retrenched employees would generally need to do so in a manner that complies with the SD Act.¹⁶² Benefits associated with employment have been determined under Victorian anti-discrimination legislation to include tangible benefits such as opportunities for promotion, transfer and training as well as intangible benefits such as freedom from physical intrusion or harassment.¹⁶³
- 6.9 An early case heard under New South Wales anti-discrimination legislation indicated that it is not necessary to prove that the pregnant or potentially pregnant employee would have received a particular benefit, such as a

¹⁵⁵ The phrase is used in ss 14 to 20 *Sex Discrimination Act 1984* (Cth).

¹⁵⁶ See ch 8 for a discussion of workplace relations issues.

¹⁵⁷ *Appeal by the Commissioner of Police* (1984) EOC 92-017.

¹⁵⁸ See para 12.62.

¹⁵⁹ In this context, an employer would include an individual granted the right to represent the mind and will of the employer, such as a supervisor or manager.

¹⁶⁰ *O’Callaghan v Loder & Anor* (1984) EOC 92-023.

¹⁶¹ ss 14(2)(b), 15(2)(b), 16(c), 17(3)(a) *Sex Discrimination Act 1984* (Cth).

¹⁶² See for example, *Finance Sector Union v Commonwealth Bank of Australia* (1997) EOC 92-889. See also *Stoker v Kellogg (Aust) Pty Ltd* (1984) EOC 92-021 which involved an action brought under the *Anti-Discrimination Act 1977* (NSW) which contains a provision similar to s 14(2)(b) *Sex Discrimination Act 1984* (Cth).

¹⁶³ *R v Equal Opportunity Board & Anor; ex parte Burns & Anor* (1984) EOC 92-112, 95 VR 317.

promotion, if the discrimination had not occurred. It is enough to show that the opportunity to apply for the benefit was denied, to show that discrimination had occurred.¹⁶⁴

- 6.10 For example, where performance review is linked to salary increases or promotional opportunities, failing to provide a pregnant employee with a performance review at the same time as other staff on the basis that the pregnant employee will be commencing maternity leave soon, may be unlawful discrimination. If the employee is on maternity leave when performance reviews are conducted, failing to make arrangements to assess the portion of the annual review period that the employee worked, on either their return or during maternity leave, may also equate to unlawful discrimination.
- 6.11 Consultations and submissions detailed many experiences that amounted to denial of benefits.

Before I became pregnant my position was temporary...with the understanding that a permanent position was coming up. Once it was common knowledge that I was pregnant a permanent part-time position became available one month before I was due to go on leave. I didn't get the position!¹⁶⁵

My ex-employer gave me an undertaking that the permanent position would only be advertised internally, therefore if I still wanted the job permanently at the time it would be mine. This was re-confirmed to me by my ex-employer on a few occasions. My ex-employer's assertions however changed when I informed him that I was pregnant. The position was then advertised externally and I was not successful in the interview.¹⁶⁶

Respondents to our phone interview claimed that they were not considered for training because they were pregnant. This action made them less able to compete for promotional opportunities...Transfer to other sections or agencies was also discouraged when women were pregnant as it was perceived that as they were pregnant they would be leaving soon on maternity leave and thus the training on and off the job would be wasted.¹⁶⁷

- 6.12 The Human Rights and Equal Opportunity Commission (HREOC) considers that, in most cases, it should be quite clear where an action denies or limits access to benefits for the purposes of these provisions. However, the provisions are quite broad and the Guidelines will include some advice and assistance in defining their parameters.

Dismissal

- 6.13 Under the SD Act it is unlawful for an employer to discriminate against an employee on the grounds of pregnancy or potential pregnancy by dismissing an employee.¹⁶⁸ It is also unlawful to terminate the engagement of a commission

¹⁶⁴ *Harrison v Dept of TAFE* 19 June 1979 EOT NSW (unreported). See also *Glynn v Gillette Australia Pty Ltd* EOT NSW No 13/1996 (unreported).

¹⁶⁵ Australian Nursing Federation (Submission no 45).

¹⁶⁶ Australian Nursing Federation (Submission no 45).

¹⁶⁷ Community and Public Sector Union (Submission no 53).

¹⁶⁸ s 14(2)(c) *Sex Discrimination Act 1984* (Cth).

agent,¹⁶⁹ to not allow a contract worker to work or continue to work¹⁷⁰ or to expel a partner from a partnership¹⁷¹ on the ground of pregnancy or potential pregnancy.¹⁷²

- 6.14 It would not be discriminatory for an employer, due to genuine financial or operational reasons, to retrench an employee. However, it is inappropriate to take into account pregnancy or potential pregnancy in considering dismissal or retrenchment. If an employee's pregnancy is one of the reasons for a dismissal or retrenchment, even though it may not be the dominant reason, the employer has engaged in an act of discrimination.¹⁷³ Similarly, an employer cannot retrench a female employee on the basis that the employee may fall pregnant in the future, or because she has indicated an interest in having a child.

A woman who worked in male dominated workplaces where women were concentrated in the human resources area, stated that during the course of her first pregnancy, the organisation embarked upon a selection process of downsizing. She stated that male managers used criteria such as "who might be pregnant; who is pregnant" to identify the positions that would be made redundant. She stated that one manager stated that "we don't need to worry about them – because they won't return to work".¹⁷⁴

- 6.15 The Queensland Chamber of Commerce and Industry pointed out that

[i]n relation to retrenching employees for financial reasons...many employers do not know how to approach the situation when it comes to dealing with pregnant employees. In these situations, all things being equal, pregnant employees should not be given any special treatment in this respect.¹⁷⁵

- 6.16 However, other submissions indicated that the dismissal of pregnant employees is not uncommon and that it occurs in circumstances that may amount to unlawful discrimination. HREOC received details of personal experiences where employers attempted to dismiss employees shortly after they had announced their pregnancy.¹⁷⁶
- 6.17 Concerns were also raised about the failure to renew fixed term contracts. Failure to renew a woman's contract because of her pregnancy is unlawful. However, it may not be discriminatory if the contract was only intended to be renewed for a short period of time and the woman intended to be absent for a significant part of that time.

¹⁶⁹ s 15(2)(c) *Sex Discrimination Act 1984* (Cth).

¹⁷⁰ s 16(b) *Sex Discrimination Act 1984* (Cth).

¹⁷¹ s 17(3)(b) *Sex Discrimination Act 1984* (Cth).

¹⁷² s 170K(2)(f) *Workplace Relations Act 1996* (Cth) also provides that it is unlawful to terminate employment on the ground of pregnancy in most instances. The relationship between the Acts is discussed further in ch 8.

¹⁷³ s 8 *Sex Discrimination Act 1984* (Cth).

¹⁷⁴ Western Australian Equal Opportunity Commissioner (Submission no 100).

¹⁷⁵ Queensland Chamber of Commerce and Industry (Submission no 5).

¹⁷⁶ See for example, Confidential (Submission no 2); Confidential (Submission no 15); Job Watch Inc (Submission no 60).

In the public sector, termination in relation to pregnancy is less likely. However, the increase in the use of contracts has enabled employers to refuse to renegotiate the contract once it has expired if the woman is pregnant. This action is discriminatory if the woman's work has been satisfactory and particularly if another person is engaged to perform the same functions shortly after the woman's contract was not renewed.¹⁷⁷

An employee aged 20-30 working for [a government department] at the time advised her department of her pregnancy one week before her contract was due for renewal. The department advised her they would not be renewing her contract, and immediately hired someone else for her position.¹⁷⁸

- 6.18 Discriminatory dismissals are a common source of sex discrimination complaints made to HREOC under the SD Act, and the most common basis for complaints of discrimination is on the ground of pregnancy.
- 6.19 In one case heard by HREOC, the complainant's treatment at work deteriorated rapidly after she announced that she was pregnant. She was dismissed from service shortly thereafter by the manager who commented that "[w]e were hoping that you would resign when you told us you were pregnant and we've just been putting off sacking you". The employment separation certificate she was given stated that her dismissal was due to shortage of work. HREOC found that there was no shortage of work, nor had there ever been any complaint about the complainant's work, and that the complainant had been dismissed on the basis of her pregnancy. The respondent was ordered to pay \$10,334 to the complainant.¹⁷⁹
- 6.20 HREOC, when investigating complaints lodged under the SD Act, acknowledges an employer's need to make commercial decisions recognising both genuine redundancies and termination on the basis of poor performance. Complaints heard by HREOC concerning discriminatory dismissal due to pregnancy would be unsubstantiated if it were found that the dismissal was due to a genuine redundancy or an employee's documented continual poor work performance rather than by reason of the pregnancy itself.
- 6.21 In a 1993 case heard by HREOC, the complainant had been employed as a legal secretary. She demonstrated difficulty in undertaking her tasks, to which the employer responded by counselling her and providing her with further training. However, according to the respondent, the quality of the complainant's work did not improve and she received a written and an oral warning. The complainant told her employer that she was pregnant. Shortly thereafter she was dismissed. HREOC found that the evidence presented supported an unsatisfactory work performance by the complainant. It also found that the pregnancy was not a factor the respondent relied on in deciding to dismiss the complainant. The complaint was dismissed.¹⁸⁰

¹⁷⁷ Community and Public Sector Union (Submission no 53).

¹⁷⁸ Community and Public Sector Union (Submission no 53).

¹⁷⁹ *Sutton v Ultimate Manufacturing & Ors* (1997) EOC 92-891.

¹⁸⁰ *Kelly v De Mestre* (1993) EOC 92-506.

- 6.22 However, through formal complaints, it has become evident that some employers attempt to utilise redundancy and misrepresent commercial decisions to unlawfully terminate the employment of staff because they are pregnant. HREOC has also handled cases where poor work performance has been manufactured and/or exaggerated in an attempt to dismiss a pregnant employee.
- 6.23 There are often cases where confusion about the motives for dismissal of a pregnant employee lead to an allegation of discrimination. This can be the result of poor management practices, for example, where an employee with an unsatisfactory work performance was not made properly aware of performance issues prior to the pregnancy and/or dismissal. Where an employee is performing poorly it is sensible to inform the employee directly and conduct regular performance reviews. Conducting the first such review after the employee announces her pregnancy may lead to considerable misunderstanding if adverse action follows the review.
- 6.24 An alternative to the current provisions of the SD Act would be to adopt into Australian law the European Council Directive on the burden of proof in cases of discrimination based on sex.¹⁸¹ The Directive requires members of the European Community to implement in national legislation the requirement, that in cases of direct or indirect sex discrimination, it is for the respondent to prove that there has been no breach of anti-discrimination laws. Member countries have until January 2001 to implement the directive.
- 6.25 HREOC considers that the provisions of the European Community Directive represent one effective way to deal with problems of evidence in complaints of discriminatory dismissal in the European context. In Australia, evidentiary problems could be minimised with adequate guidelines (legislative and non-legislative) and education on anti-discrimination laws. In any event, HREOC will monitor the operation of the Directive in various European Community member states as it is implemented and put into practice, with the view of reviewing the operation of the SD Act over the next few years.¹⁸²
- 6.26 It is evident from the inquiry that employees and employers are in need of clear guidelines and education when it comes to the dismissal of pregnant employees. Increased education will help to ensure that employees and employers are also aware of the specific requirements of the SD Act in such circumstances.

Any other detriment

- 6.27 The SD Act also makes it unlawful to discriminate against pregnant or potentially pregnant employees, commission agents, contract workers or

¹⁸¹ Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, Official Journal L 014, 20/01/1998 p.0006-0008. See also Women's Legal Services Network (Submission no 94).

¹⁸² See also paras 13.79 – 13.81.

partners by subjecting them to “any other detriment”.¹⁸³ “Detriment” is not defined in the SD Act.

- 6.28 A similar provision in the *Equal Opportunity Act 1995* (Vic) has been interpreted broadly to include a disadvantage of any kind so long as it is not a trivial disadvantage.¹⁸⁴
- 6.29 Many submissions commented on the uncertainty of the scope of “detriment” and requested that it be clarified through guidelines¹⁸⁵ or legislative amendment.¹⁸⁶ In particular, submissions by trade unions and other organisations providing advice to employees indicated a significant lack of understanding of the term, noting that clarification would be very useful.
- 6.30 The submission from the Queensland Nurses’ Union stated that it believed employers lacked a clear understanding of how they can discriminate by subjecting an employee to detriment.

The focus of the employer is often the extent to which the pregnancy is causing detriment or inconvenience to them! Clearer guidelines on the nature of “detriment” and communication of these to employers are required as a matter of urgency.¹⁸⁷

- 6.31 The Finance Sector Union submission requested that this provision of the SD Act be defined and illustrated to inform employers and employees of their rights and responsibilities.¹⁸⁸
- 6.32 Submissions from employers also indicated a frustration and confusion with the scope of the term “detriment”.

There is wide confusion surrounding what is meant by the term “other detriment” in the context of the Act. There are widely reported instances... where there has been concern that reasonable and legitimate requests made by supervisors/managers for an employee to “get on with their work” may constitute harassment (other detriment). The meaning of the term needs to be made more explicit and understanding could be improved by the use of examples of what constitutes a detriment and what does not in the employment context.¹⁸⁹

¹⁸³ ss 14(2)(d), 15(2)d), 16(d), 17(3)(c) *Sex Discrimination Act 1984* (Cth). State and territory anti-discrimination Acts, other than the New South Wales and Tasmanian Acts, include a provision in relation to “any other detriment”.

¹⁸⁴ *Leonard v Youth Hostels Association of Australia* (1995) EOC 92-763 at 78,651. See also *O’Callaghan v Loder & Anor* (1984) EOC 92-023; *Langley v University of New South Wales* (1984) EOC 92-018.

¹⁸⁵ For example, Queensland Nurses’ Union (Submission no 37); Families At Work (Submission no 40); Australia Post (Submission no 44); Finance Sector Union of Australia (Submission no 51); Australian Council of Trade Unions (Submission no 59); Shop Distributive and Allied Employees’ Association (Submission no 74); Australian Chamber of Commerce and Industry (Submission no 84); Working Women’s Centres (Submission no 88); New South Wales Government (Submission no 99).

¹⁸⁶ Community and Public Sector Union (Submission no 53); Women’s Action Alliance Australia (Submission no 62); Townsville Community Legal Service (Submission no 78).

¹⁸⁷ Queensland Nurses’ Union (Submission no 37).

¹⁸⁸ Finance Sector Union of Australia (Submission no 51).

¹⁸⁹ Australia Post (Submission no 44).

6.33 The Australian Chamber of Commerce and Industry questioned

[i]s it in fact the case that an employer is required to offer different forms of contract of employment, such as part-time work or full-time work or some other form of work such as seasonal, fixed term or casual employment, to avoid an allegation that an employee has suffered “any other detriment”?¹⁹⁰

6.34 In *Hill v Water Resources Commission*, the Equal Opportunity Tribunal of New South Wales found that the detriment suffered by an employee consisted of loss of salary, denial of promotion as well as consequences to her health and well being.¹⁹¹ Actions of the employer which have adverse consequences on the health and well being of the employee or her child, may be seen as detriment.

6.35 The loss suffered need not relate to economic loss such as lost salary or promotional opportunities. Damages have been awarded for non-economic loss such as loss of reputation, injury to feelings and humiliation and distress.¹⁹²

6.36 Often, unlawful discrimination under other provisions of the SD Act will also amount to detriment. For example, sexual harassment which is unlawful under the SD Act can also amount to detriment.¹⁹³ As examples provided in a submission illustrate, many pregnant women are subject to a range of bullying, harassing and humiliating behaviour that could fall under the definition of “any other detriment” if the employer was responsible or failed to take reasonable steps to ensure that the behaviour did not occur.

We have been contacted by women regarding treatment by their employers which could be seen to cause detriment to them, including verbal abuse and harassment, inappropriate comments (including references to abortion), a changed relationship with the boss after they were informed of the pregnancy and direct threats of sacking for the time off because of illness related to pregnancy. Hours being cut back without reason, roles changed, status diminished, the employer refusing to communicate with the employee, or comments being made to other workers about the pregnant worker making it clear that the employer planned to “get rid of” them from the workplace.¹⁹⁴

6.37 A female employee who receives less than male employees in equivalent circumstances receive, may be able to show that she has suffered discrimination on the basis of discriminatory access to benefits and detriment.¹⁹⁵

6.38 Difficulties with the concept of “detriment” arise when a pregnant or potentially pregnant employee or others on her behalf view her treatment as causing detriment, but the employer does not. Cases which have considered the role of personal preference in determining whether less favourable treatment has occurred have held that, in some instances, the personal preference of an

¹⁹⁰ Australian Chamber of Commerce and Industry (Submission no 84).

¹⁹¹ *Hill v Water Resources Commission* (1985) EOC 92-127.

¹⁹² See for example, *Hickie v Hunt & Hunt* (1998) EOC 92-910.

¹⁹³ *O’Callaghan v Loder & Anor* (1984) EOC 92-023.

¹⁹⁴ Working Women’s Centres (Submission no 88). See also Finance Sector Union of Australia (Submission no 51). See also paras 9.12 – 9.15; 12.111 – 12.115 for a discussion of harassment.

¹⁹⁵ *Stoker v Kellogg (Aust) Pty Ltd* (1984) EOC 92-021.

employee is relevant.¹⁹⁶ Thus, an employee's objection to being transferred to a new position during her pregnancy may be relevant in determining if the employee has suffered detriment. However, each case must be considered in light of the individual circumstances.

- 6.39 HREOC supports a broad definition of detriment, in accordance with federal and state/territory case law in this area. Each case must be considered individually. Examples of detriment will be provided in the Guidelines. They will also detail the fact that fair and reasonable responses or actions by an employer in relation to their economic circumstances or to legitimate performance difficulties with an employee are not unlawful.

Pregnancy Guidelines 9: That the Guidelines provide assistance with what could constitute discrimination suffered by employees within sections 14 to 17 of the *Sex Discrimination Act 1984* (Cth) on the basis of pregnancy or potential pregnancy. In particular, Guidelines should cover what could constitute unlawful

- limiting or denying access to benefits;
- dismissal or termination; and
- any other detriment.

Examples

- 6.40 The submission lodged by the New South Wales Government provided a list of loss and damage experienced by pregnancy discrimination complainants to the New South Wales Anti-Discrimination Board. This list provides a helpful guide to actions which could also be covered under sections 14 to 17 of the SD Act.

- Financial loss through denial of promised promotion/pay increase;
- Financial loss through denial of casual shifts or denial of overtime;
- Financial loss and loss of status through demotion upon return to work
- Termination of employment;
- Loss of status and career development through denial of opportunity to teach advanced classes;
- Personal inconvenience/additional costs through transfer to work location further from complainant's home;
- Financial loss through demotion and enforced part time work;
- Loss of status/career advancement through demotion/relegation to less interesting and fulfilling "back room" duties;
- Apprehension of personal danger through transfer to position involving dangerous late night duties on return to work;
- Withdrawal of offer of employment;
- Exclusion from consideration for promotion/permanent employment.¹⁹⁷

- 6.41 In addition to those listed in the New South Wales Government submission, HREOC is of the view that the following non-exclusive list of behaviour may

¹⁹⁶ *Dopking v Department of Defence* (1995) EOC 92-669; *Sullivan & Ors v Department of Defence* (1992) EOC 92-421.

¹⁹⁷ New South Wales Government (Submission no 99). This list applies only to complaints of pregnancy discrimination. If post-pregnancy issues were included the list would expand considerably.

under some circumstances amount to actions prohibited under sections 14 to 17 of the SD Act.

- Unreasonable refusal to consider a pregnant employee's request to work part time.
- Scheduling a regular group meeting at a time when a pregnant employee must attend a regular medical appointment.
- Bullying, harassment and humiliating behaviour, acts and gestures which create a hostile work environment.
- Alteration of the terms and conditions of the job without consultation with the employee.
- Unreasonable transfer or redeployment to a position of lower status, either with or without consultation.
- Failure to accommodate the physical requirements of a pregnant employee, for example, the provision of adequate seating or a maternity uniform.
- A standard policy that all pregnant workers move to "light duties" irrespective of individual circumstances.

Chapter 7 - Relationship with state and territory laws

Introduction

- 7.1 The vast majority of people in Australian workplaces are covered by the *Sex Discrimination Act 1984* (Cth) (SD Act), or a state/territory anti-discrimination Act.
- 7.2 Sections 10 and 11 of the SD Act provide that the SD Act is not intended to exclude or limit the operation of a state/territory law¹⁹⁸ that is capable of operating concurrently with the SD Act.¹⁹⁹ Section 11 also requires that the state/territory law further the objects of the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW).²⁰⁰ Those sections make clear that the SD Act is not intended to cover the field of sex discrimination law.²⁰¹ This means that where provisions of the SD Act and state/territory anti-discrimination Acts are similar, and can operate together, both will apply.
- 7.3 Where a state/territory anti-discrimination Act covers an area that the SD Act does not, then it is probable that the state/territory provision will apply to Commonwealth actions in that state/territory.²⁰² However, where the legislation is inconsistent, the SD Act, as a federal Act, generally prevails.²⁰³

¹⁹⁸ A state/territory law means "...a law of a State or Territory that deals with discrimination on the ground of sex...pregnancy or potential pregnancy": s 10(2) *Sex Discrimination Act 1984* (Cth).

¹⁹⁹ s 10 preserves state/territory laws operating in the same way as the *Sex Discrimination Act 1984* (Cth) applies without reliance on the *Convention on the Elimination of all Forms of Discrimination Against Women* GA Res 180 (XXXIV 1970), 19 ILM 33 (1980). s 11 preserves the concurrent operation of state/territory laws in the areas in which the *Sex Discrimination Act 1984* (Cth) applies with reliance on CEDAW and provides that for the concurrent state/territory law to be protected it must further the objects of CEDAW.

²⁰⁰ *Convention on the Elimination of all Forms of Discrimination Against Women* GA Res 180 (XXXIV 1970), 19 ILM 33 (1980). s 11 *Sex Discrimination Act 1984* (Cth) relates specifically to those cases of discrimination that are brought under the Act because of the operation of CEDAW (s 9(10) *Sex Discrimination Act 1996* (Cth)).

²⁰¹ The forerunner of these provisions is s 6A *Racial Discrimination Act 1975* (Cth) which was inserted to overcome the decision in *Viskauskas v Niland* (1983) 153 CLR 280 where the High Court said that, while there was no inconsistency between the *Racial Discrimination Act 1975* (Cth) and the *Anti-Discrimination Act 1977* (NSW) in the sense that the particular provisions were capable of operating together, the New South Wales provisions were nevertheless invalid (by virtue of s 109 of the Constitution) because the two legislatures had legislated upon the same subject and the Commonwealth Act covered the field.

²⁰² This is provided that the legislation is not inconsistent (ie provided the *Sex Discrimination Act 1984* (Cth) does not cover the area because of a specific exemption). It is likely that a state law that provides coverage of an area which the *Sex Discrimination Act 1984* (Cth) does not (for example, the employment provisions of the *Equal Opportunity Act 1984* (SA) applies to voluntary workers but the *Sex Discrimination Act 1984* (Cth) provisions probably do not) will apply in relation to that area to Commonwealth employees and institutions within that state; see *Re Residential Tenancies Tribunal of New South Wales v Henderson & Anor; Ex Parte The Defence Housing Authority* (1997) 190 CLR 410, where the High Court found that the NSW Residential Tenancies Tribunal had jurisdiction over the Defence Housing Authority (a Commonwealth body).

²⁰³ Subject to the provisions of ss 10(3) and 11(3) *Sex Discrimination Act 1984* (Cth).

Understanding what are inconsistencies is a difficult area²⁰⁴ and it is of particular concern in state/territory jurisdictions. The Human Rights and Equal Opportunity Commission (HREOC) understands that this is a matter that will be canvassed by the New South Wales Law Reform Commission in its imminent report on the *Review of the Anti-Discrimination Act 1977(NSW)*. HREOC awaits that report with considerable interest.²⁰⁵

- 7.4 Generally, however, there is a high degree of consistency between the legislation and the practical application of the legislative arrangements causes little confusion.
- 7.5 Although the focus of this inquiry is generally on federal legislation, the interaction of federal and state/territory legislation is an important aspect of the examination of pregnancy and potential pregnancy workplace rights in Australia. This chapter briefly examines how state/territory legislation operates in conjunction with the SD Act. Some of the major gaps and inconsistencies in the operation of anti-discrimination legislation at the federal and state/territory levels are also discussed.
- 7.6 Table 7.1²⁰⁶ shows the similarities and differences between the legislation. The coverage of the SD Act is discussed in detail at Chapters 4 to 6.
- 7.7 It appears clear that, despite the existence of broad ranging legislation at federal and state/territory levels, there remain some workers who, in some circumstances, are not protected by prohibitions on discrimination on the ground of pregnancy or potential pregnancy.

Pregnancy discrimination in state and territory legislation

- 7.8 Anti-discrimination legislation in all states and in the Australian Capital Territory and Northern Territory prohibits discrimination on the ground of pregnancy. In New South Wales only direct discrimination is covered, as explained below.²⁰⁷ In all other anti-discrimination legislation both direct and indirect discrimination are covered.
- 7.9 The state/territory legislation is

New South Wales Anti-Discrimination Act 1977
South Australia Equal Opportunity Act 1984
Western Australia Equal Opportunity Act 1984

²⁰⁴ As discussed, for example, in G McCarry, "Landmines Among the Landmarks: Constitutional aspects of anti-discrimination laws" (1989) 63 *Australian Law Journal* 327-342.

²⁰⁵ The intention of the New South Wales Law Reform Commission to examine the matter of inconsistencies between federal and New South Wales anti-discrimination legislation is foreshadowed in the Commission's Discussion Paper: *Review of the Anti-Discrimination Act 1977 (NSW)* Discussion Paper 30 NSW LRC Sydney 1993, 19-26. At the time HREOC was finalising this report, the New South Wales Law Reform Commission was finalising its report on the review of the *Anti-Discrimination Act 1977 (NSW)*.

²⁰⁶ At p 84.

²⁰⁷ See paras 7.12 – 7.15.

Australian Capital Territory *Discrimination Act 1991*
 Queensland *Anti-Discrimination Act 1991*
 Northern Territory *Anti-Discrimination Act 1992*
 Tasmania *Sex Discrimination Act 1994*
 Victoria *Equal Opportunity Act 1995*.²⁰⁸

Direct discrimination in Western Australia

- 7.10 In Western Australia, direct discrimination on the ground of pregnancy is defined in the same way as in the SD Act²⁰⁹ except for the addition of a requirement that the less favourable treatment, which constitutes the discrimination, "...is not reasonable in the circumstances". A similar restriction in the definition of direct discrimination in the SD Act was removed in 1995.²¹⁰
- 7.11 In Western Australia, the reasonableness test does not apply to direct discrimination on other grounds covered by the Act such as sex, marital status and family responsibility. The reasonableness test adds a layer of difficulty to the issue of inconsistency between federal and state legislation, although it was not identified as a significant problem in consultations.²¹¹ Other state/territory legislation does not have this restriction in the definitions of direct discrimination either.

Indirect discrimination in New South Wales

- 7.12 In New South Wales, unlike the other states/territories and the SD Act, pregnancy is not a separate ground of discrimination. The New South Wales Act says that the fact that a woman is or may become pregnant is a characteristic that appertains generally to women.²¹² Having such a characteristic is a part of the definition of direct discrimination²¹³ but not part of the definition of indirect discrimination.²¹⁴ This means that, under the New South Wales *Anti-Discrimination Act 1977*, direct discrimination on the ground of pregnancy and potential pregnancy is unlawful, but indirect discrimination is probably not unlawful on that ground.

²⁰⁸ In South Australia and Victoria, the anti-discrimination legislation referred to replaces earlier legislation, first enacted in 1977 and 1984, respectively. In Tasmania there is a new *Anti-Discrimination Act 1998*, which has yet to be proclaimed. The provisions of that Act dealing with pregnancy are similar to the current *Sex Discrimination Act 1994* (Tas) – the current Act is considered in this chapter.

²⁰⁹ The definition of direct and indirect discrimination is discussed in detail in ch 4.

²¹⁰ *Sex Discrimination Amendment Act 1995* (Cth).

²¹¹ An example of the application of the provision is *Allegretta v Prime Holdings Pty Ltd T/A Phoenix Hotel & Anor* (1991) EOC 92-364 where a pregnant woman was dismissed from her position as bar attendant because her employer was concerned about the danger to her of the slippery floors. The Western Australian Tribunal said that was not reasonable; what was reasonable was to fix the danger and alleviate the risk of injury.

²¹² s 24(1B) *Anti-Discrimination Act 1977* (NSW).

²¹³ s 24(1A) read with s 24(1)(a) *Anti-Discrimination Act 1977* (NSW).

²¹⁴ s 24(1)(b) *Anti-Discrimination Act 1977* (NSW).

- 7.13 The New South Wales Anti-Discrimination Board in its submission to the New South Wales Law Reform Commission's current *Review of the Anti-Discrimination Act 1977* commented that

[a]lthough pregnancy is mentioned in the definition of direct discrimination it is not included specifically in the definition of indirect discrimination. Consequently, if a requirement or condition affects a substantially higher proportion of pregnant women than other women or men, it may be difficult to prove indirect sex discrimination because the pregnant woman needs to be able to show that a substantially higher proportion of men compared to women can comply with the requirement.²¹⁵

- 7.14 It might be arguable that the failure of the legislation to specifically include pregnancy in indirect discrimination while specifically including it in direct discrimination is a clear indication that it is not intended to be part of indirect discrimination. However, as indirect discrimination on the ground of pregnancy has usually been considered to be covered by indirect discrimination on the ground of sex, any difference arising from the drafting of the provision does not appear to be significant.²¹⁶

- 7.15 The inquiry found that some people were confused by the differences in the scope of the definitions and other instances where federal and state/territory law differed. The Guidelines will provide advice and assistance about the practical operation of the two systems.

Potential pregnancy discrimination in state and territory legislation

- 7.16 As discussed at paras 4.1 – 4.5, the SD Act specifically makes it unlawful to discriminate on the ground of potential pregnancy. Under state/territory anti-discrimination legislation, potential pregnancy is not a separate ground of discrimination, although in the Northern Territory²¹⁷ and Tasmania²¹⁸ “child bearing capacity” is specifically included in the definition of pregnancy.
- 7.17 As previously discussed, the New South Wales Act²¹⁹ incorporates discrimination on the basis of a woman’s potential to become pregnant into the broader interpretation of discrimination on the ground of sex, by specifically defining the potential to become pregnant as a characteristic that appertains generally to women.²²⁰

²¹⁵ New South Wales Anti-Discrimination Board *Balancing the Act: A Submission to the NSW Law Reform Commission’s review of the Anti-Discrimination Act 1977 (NSW)* NSW ADB Sydney 1994, 62.

²¹⁶ In *Bear v Norwood Private Nursing Hospital* (1984) EOC 92-019, the South Australian Sex Discrimination Board took the view (at p 75,476) that “whilst not all women are or can be pregnant, the condition of pregnancy when it occurs is a characteristic which generally appertains (and in fact always appertains) to the female sex”. It rejected the argument (at p 75,477) that because the applicant, a pregnant woman, was dismissed and replaced by another woman that discrimination on the ground of sex had not occurred. See also paras 4.6 – 4.17.

²¹⁷ s 4 *Anti-Discrimination Act 1992* (NT).

²¹⁸ s 3 *Sex Discrimination Act 1994* (Tas).

²¹⁹ s 24(1B) *Anti-Discrimination Act 1977* (NSW).

²²⁰ The New South Wales Government Submission notes that the Anti-Discrimination Board’s Submission to the New South Wales Law Reform Commission’s *Review of the Anti-Discrimination*

- 7.18 While the other Acts make no specific mention of the potential to become pregnant, the definition of sex discrimination in those Acts would more than likely cover potential pregnancy.²²¹
- 7.19 For example, in Victoria, in the case of *Wardley v Ansett*, the Victorian Anti-Discrimination Board held that Ansett had discriminated against a woman, on the ground of her sex, by refusing to offer her a position as a trainee pilot because of her child-bearing potential.²²² Similarly, the then South Australian Discrimination Board took the view in *Bear v Norwood Private Nursing Hospital* that "...whilst not all women are or can be pregnant, the condition of pregnancy when it occurs is a characteristic which generally appertains (and in fact always appertains) to the female sex".²²³

The operation of legislation and exemptions

- 7.20 The fact that federal legislation and its state/territory counterparts are generally consistent and able to operate side by side regarding pregnancy is particularly important for the business community. The inquiry has established and emphasised that national organisations, as well as organisations housed in one state that service clients across the country, value a clear seamless legislative framework.
- 7.21 It was also evident through submissions and consultations that national organisations seek to comply with federal legislation and use it as an overriding framework. Submissions and consultations to the inquiry indicated that, as the definitions of discrimination in relation to pregnancy differ little in practice, the business community generally has been interpreting them as being similar or basically the same. Hence, where both federal and state/territory legislation operate, and people are aware of the legislation, confusion appears to have been minimal.
- 7.22 The Australian Business and the Newcastle and Hunter Business Chamber Women's Forum submission noted that "...there is a common purpose in both federal and state equal opportunity laws, that is, the protection of human rights of employees and others".²²⁴ However, concern was expressed that the

...duplication of government agencies at federal and State and Territory levels in this area is costly and unnecessary. The existence of two sets of remedies for employees gives rise to

Act 1977 (NSW) "...argued for the establishment of pregnancy as a separate ground in the *Anti-Discrimination Act 1977* including both actual and potential pregnancy" (Submission no 99, p 16).

²²¹ s 7(2) *Equal Opportunity Act 1995* (Vic); s 8 *Anti-Discrimination Act 1991* (Qld); s 29(2)(c) *Equal Opportunity Act 1984* (SA); s 8(1)(b)(c) *Equal Opportunity Act 1984* (WA); s 7(2) *Discrimination Act 1991* (ACT). See also para 4.17.

²²² *Wardley v Ansett Transport Industries (Operations) Pty Ltd* (1984) EOC 92-002. A similar view was reached in *Marshall v Marshall White & Co Pty Ltd & Anor* (1990) EOC 92-304 where the Board treated the interpretation as well established. Cases in Victoria are now determined by the Anti-Discrimination Tribunal.

²²³ *Bear v Norwood Private Nursing Hospital* (1984) EOC 92-019 at 75,476.

²²⁴ Australian Business and Newcastle and Hunter Business Chamber Women's Forum (Submission no 90).

opportunities for “forum shopping” and “double dipping” which can cause hardship for employers.²²⁵

- 7.23 It should be noted that, while there are circumstances where federal and state/territory anti-discrimination Acts can operate together and there is dual coverage with a choice of law for complainants, the SD Act does prevent “double-dipping”. This is done by stating that where a complaint has been made, proceedings instituted or any other act taken under a state/territory law, a complaint in the same terms cannot also be made under the SD Act.²²⁶
- 7.24 Submissions and consultations revealed that generally it is only in some cases where legislation provides different coverage, and where different exemptions operate, that confusion arises with respect to provisions relating to pregnancy and potential pregnancy.
- 7.25 Reflecting on the difficulties that emerged in such scenarios, the Australian Law Reform Commission in its report, *Equality Before the Law: Justice for women*, recommended the repeal of a number of the SD Act exemptions.²²⁷ In its submission to this inquiry, the Australian Law Reform Commission noted that in its report it had
- ...found that, despite the existence of legislation in the area of sex discrimination in each State and Territory, there was some concern about the extent of protection provided by some of the legislation...
- This is of particular concern for those persons covered by the exemptions of the SDA, and therefore provided only with the protection of the State or Territory law. It should be noted that in some cases the State or Territory legislation provides wider protection than the federal SDA.²²⁸
- 7.26 The following discussion of differences between federal and state/territory legislation indicates how gaps and inconsistencies can cause difficulties. The merits of exemptions in the SD Act in relation to pregnancy and potential pregnancy are dealt with at Chapter 5.

²²⁵ Australian Business and Newcastle and Hunter Business Chamber Women’s Forum (Submission no 90).

²²⁶ ss 10(4) and 11(4) *Sex Discrimination Act 1984* (Cth). Similarly, ss 170HB and 170HC *Workplace Relations Act 1996* (Cth) provide, in effect, that proceedings because of dismissal on the ground of pregnancy cannot be brought under that Act if they have already been commenced under the *Sex Discrimination Act 1984* (Cth) or state or territory legislation. Unlike ss 10(4) and 11(4) *Sex Discrimination Act 1984* (Cth), the prohibition in the *Workplace Relations Act 1996* (Cth) expressly ceases to apply if the first proceedings have been discontinued by the applicant or have failed for want of jurisdiction: see paras 8.112 – 8.113. The interpretation of the term “taken any other action” in ss 10(4)(b) and 11(4)(b) of the *Sex Discrimination Act 1984* (Cth), however, does not appear to have been tested and may not prevent alternative proceedings being taken under the *Sex Discrimination Act 1984* (Cth) where the first action failed for want of jurisdiction, for example.

²²⁷ Australian Law Reform Commission *Equality Before the Law: Justice for women* Report 69(1) ALRC Sydney 1994 paras 3.68-3.89.

²²⁸ Australian Law Reform Commission (Submission no 21).

The effect of definitions of pregnancy and potential pregnancy on the operation of exemptions

- 7.27 In those jurisdictions where pregnancy and/or potential pregnancy are included within the broad ground of sex,²²⁹ the exemptions, which apply to the ground of sex, will also automatically exempt discrimination on the ground of pregnancy and potential pregnancy.
- 7.28 For example, the exemption in the SD Act for employment to perform domestic duties in a private household²³⁰ only applies in relation to the ground of sex specifically and not to marital status, pregnancy or potential pregnancy. However, in New South Wales, where pregnancy and potential pregnancy are covered under the general prohibition on sex discrimination, a similar exemption for discrimination on the ground of sex in employment in a private household will also pick up discrimination on the ground of pregnancy and potential pregnancy.²³¹ In Western Australia, the exemption for domestic duties applies only in relation to sex discrimination.²³² This raises the possibility that, in Western Australia, discrimination in this area on the ground of pregnancy would be unlawful but it would not be unlawful on the ground of potential pregnancy (which is treated as included within the ground of sex).²³³
- 7.29 There was minimal discussion in submissions and consultations about the effects of this type of inconsistency regarding different exemptions between the jurisdictions. It is relatively clear that the Western Australian exemption intended to address issues relating to sex (ie, gender) and has little relevance to issues of pregnancy or potential pregnancy but in practice this may not be the outcome. Specific separation in the SD Act of the definitions of the ground of pregnancy and potential pregnancy from that of sex has allowed for clear targeting of exemptions. While this example highlights the utility of separating the grounds of discrimination, it also exemplifies the point made by submissions and consultations that business is best served by clear legislation and exemptions.

Recruitment of pregnant women

- 7.30 The New South Wales *Anti-Discrimination Act 1977* provides that it is not unlawful discrimination to fail to provide employment to a woman if, at the date of the interview or application for a position, the woman was pregnant.²³⁴ The New South Wales Act also provides that dismissal or subjecting an employee to other detriment on the ground of pregnancy is not in breach of the Act if the employee concerned was pregnant when she applied for, or was

²²⁹ See table 7.1 at p 84.

²³⁰ s 14(3) *Sex Discrimination Act 1984* (Cth).

²³¹ s 25(3)(a) *Anti-Discrimination Act 1977* (NSW). s 40(3)(a) of the New South Wales Act also exempts discrimination on the ground of marital status in employment in a private household.

²³² s 11(3) *Equal Opportunity Act 1984* (WA).

²³³ Another example is s 33(1) *Equal Opportunity Act 1984* (WA) which provides an exemption on the ground of sex for the employment for residential care of children.

²³⁴ s 25(1A) *Anti-Discrimination Act 1977* (NSW).

interviewed for, that employment, unless she did not know and could not reasonably have been expected to have known that she was pregnant.²³⁵

- 7.31 The SD Act does not have this requirement. The result is that where the SD Act applies to recruitment processes in New South Wales, the New South Wales provision would, in practice, generally have no effect. It is only in the limited areas where the SD Act does not apply, for example in state government employment, that the New South Wales exemption would operate.²³⁶
- 7.32 This specific inconsistency between federal and New South Wales legislation was raised in submissions and consultations. Some employers, employment agencies, recruitment consultants and prospective employees demonstrated a lack of awareness that they are bound by the SD Act even where state legislation does not cover the conduct complained of, and that pregnancy and potential pregnancy discrimination remains unlawful.
- 7.33 Advertising and recruitment processes are dealt with in more detail at Chapter 11.

Small business

- 7.34 The pregnancy and potential pregnancy discrimination prohibitions that govern the recruitment of employees under the SD Act do not treat businesses differently according to their size or industry.
- 7.35 The New South Wales *Anti-Discrimination Act 1977* and the Victorian *Equal Opportunity Act 1995* exempt pregnancy discrimination where the number of persons employed by the employer does not exceed five.²³⁷ The New South Wales Government submission reflected on the historical reasons behind this exemption, noting that it was incorporated into the Act over 20 years ago due to a concern that the legislation may require small business establishments to provide separate toilet facilities.²³⁸
- 7.36 A high proportion of complaints under anti-discrimination legislation concern small business.²³⁹
- 7.37 Recommendations in relation to this issue varied. The submission from the Australian Business and Newcastle and Hunter Business Chamber Women's Forum, for example, suggested that

²³⁵ s 25(2A) *Anti-Discrimination Act 1977* (NSW).

²³⁶ Although see para 7.1 – 7.3 for a discussion of the meaning of “inconsistency”.

²³⁷ Excluding any persons employed within the employer's private household: s 25(3)(b) *Anti-Discrimination Act 1977* (NSW). See also Australian Business and Newcastle and Hunter Business Chamber Women's Forum (Submission no 90).

²³⁸ New South Wales Government (Submission no 99).

²³⁹ See paras 13.19 – 13.24 for details of complaints about small business under the *Sex Discrimination Act 1984* (Cth). See also New South Wales Government (Submission no 99).

...in order to avoid this situation the federal SDA should be amended to include exceptions in similar terms to those contained in paras 25(1A) and (2A) of the NSW Act.²⁴⁰

- 7.38 The same submission, criticising the lack of a similar exemption in the SD Act, noted that the lack of such an exemption "...means that no flexibility is afforded to small employers whose business may suffer considerable hardship resulting from the appointment of a pregnant employee".²⁴¹
- 7.39 However, there was more general agreement from contributors to the inquiry that states and territories needed to amend their legislation to cover small business, aligning their legislation to the SD Act. Arguments in support included that consistency was important for those involved in the employment relationship. HREOC is of the opinion that, as a high proportion of women in the workforce are employed in small business, denying those women the protection of anti-discrimination legislation because of the size of the business they work in would be unreasonable.

Other legislation inconsistent with the *Sex Discrimination Act 1984*

- 7.40 Another significant difference between the SD Act and state/territory legislation is that most state/territory Acts contain an exemption for inconsistent legislation.
- 7.41 For example, the Queensland *Anti-Discrimination Act 1991* provides an exemption to enable a person to "...do an act that is necessary to comply with, or is specifically authorised by..." a provision of another Act that was in force when the *Anti-Discrimination Act 1991* (Qld) came into operation.²⁴²
- 7.42 As passed in 1984, the SD Act did exempt inconsistent state legislation. Section 40(1) of the Act originally provided as follows.

Nothing in Division 1 or 2 affects anything done by a person in direct compliance with –

- (a) any other Act, any State Act, or any law of a Territory, in force at the commencement of this Act;

- 7.43 The section went on to say that, except in relation to a small list of federal legislation, that paragraph shall, "...except to the extent that regulations made

²⁴⁰ Australian Business and Newcastle and Hunter Business Chamber Women's Forum (Submission no 90).

²⁴¹ Australian Business and Newcastle and Hunter Business Chamber Women's Forum (Submission no 90).

²⁴² s 106(1)(a) *Anti-Discrimination Act 1991* (Qld). The legislation, whatever it may be, which is exempted by that provision is not exempt from the *Sex Discrimination Act 1984* (Cth). Similar provisions exist in other state/territory anti-discrimination legislation: s 54(1) *Anti-Discrimination Act 1977* (NSW); s 69 *Equal Opportunity Act 1984* (WA); s 30 *Discrimination Act 1991* (ACT); s 53 *Anti-Discrimination Act 1992* (NT); s 69(1) *Equal Opportunity Act 1995* (Vic); s 23 *Sex Discrimination Act 1994* (Tas) but not in the *Equal Opportunity Act 1984* (SA).

for the purposes of this sub-section otherwise provided, cease to be in force at the expiration of two years after the commencement of this Act”.²⁴³

- 7.44 Prior to the expiration of that deadline, federal and state/territory legislation was reviewed and regulations were made. These ceased in 1991. The federal Government described the reason and consequences as follows.

[The] process of exemption by Regulation continued until introduction and passage of the *Sex Discrimination Amendment Act 1991* which was passed on 6 June 1991 and received the Royal Assent on 25 June 1991.

...

The *Sex Discrimination Amendment Act 1991* removed from the SDA the power to make further regulations to exempt inconsistent Commonwealth, State and Territory legislation. It provided for indefinite exemptions for certain Commonwealth legislation and for the *Social Services Act 1980* of Norfolk Island. Consequently, other legislation previously exempted by Regulation or in the SDA but not specified in the Amendment Act as continuing to be exempt, ceased to be exempt from the SDA upon expiry of the Regulations in force at the time (that is, 31 July 1991).²⁴⁴

- 7.45 The original SD Act exemption did not attempt to cover legislation enacted after the commencement of the Act.²⁴⁵ The assumption clearly was that legislation being considered for passage after that time should be carefully looked at to ensure that it was consistent with the SD Act. In accordance with normal constitutional and statutory interpretation rules, federal legislation that was directly inconsistent with the SD Act and passed after the SD Act would prevail over the SD Act but state/territory legislation passed after the SD Act which was directly inconsistent with the SD Act would not.
- 7.46 No significant problem appears to have arisen although there are concerns about the relationship between occupational health and safety legislation and the SD Act. These are discussed in Chapter 9 of this report.

Other issues raised concerning exemptions

- 7.47 The New South Wales Government submission²⁴⁶ pointed out that the exception relating to private educational authorities under the New South Wales *Anti-Discrimination Act 1977* is broader than that in the SD Act exemption for educational institutions established for religious purposes.²⁴⁷ The New South Wales Government submission noted that “[t]he 1991 NSW Pregnancy Discrimination Inquiry heard evidence of discriminatory treatment of

²⁴³ s 40(2) *Sex Discrimination Act 1984* (Cth), as originally provided.

²⁴⁴ Attorney-General and Minister for Justice, the Hon Daryl Williams AM QC MP, *Section 40A Federal Sex Discrimination Act 1984 : Review of the Operation of Subsections 40(2) and 40(3) of the Federal Sex Discrimination Act 1984* Canberra 1996, 4-5.

²⁴⁵ The Act commenced operation in 1984.

²⁴⁶ New South Wales Government (Submission no 99).

²⁴⁷ See s 38 *Sex Discrimination Act 1984* (Cth).

women in, or seeking, employment in these areas”.²⁴⁸ The coverage of the exemption in the SD Act referred to is discussed in more detail at paras 5.49-5.56.

- 7.48 Federal and state/territory legislation also differs in the extent of their coverage of some particular groups of workers. For example, voluntary/unpaid workers are a significant component in the charitable/non-profit sector, but only in South Australia, Tasmania, Queensland and the ACT are workers in that sector who are pregnant or potentially pregnant explicitly protected against discrimination in relation to their engagement, dismissal and the benefits, disadvantages, terms and conditions under which they work.²⁴⁹ The coverage of unpaid workers under the SD Act is discussed at paras 5.25-5.31.

Uniformity and education

- 7.49 The examples of inconsistency discussed above illustrate the interpretation problems that the co-existence of federal and state/territory legislation presents, namely, not just establishing the initial question whether a matter is discrimination within federal or state/territory legislation, but then whether there are relevant exemptions applying in either or both jurisdictions.
- 7.50 In practice a complainant will not usually need to resolve those interpretation questions but rather will have them resolved by HREOC or a state/territory anti-discrimination body.²⁵⁰
- 7.51 However, the situation differs for employers wishing to avoid an act of discrimination in the first place. Employers currently need to be aware of the different coverage of federal and state/territory legislation, not just in anti-discrimination legislation²⁵¹ but in workplace relations legislation,²⁵² occupational health and safety legislation²⁵³ and in other regulatory legislation

²⁴⁸ New South Wales Government (Submission no 99). See also New South Wales Anti-Discrimination Board *Why Don't You Ever See a Pregnant Waitress? Report of the Inquiry into Pregnancy Related Discrimination* NSW ADB Sydney 1993.

²⁴⁹ See definition of “employment” in s 5 *Equal Opportunity Act 1984* (SA), in s 3 *Sex Discrimination Act 1994* (Tas) and in s 4 *Discrimination Act 1991* (ACT) and the definition of “work” in s 4 *Anti-Discrimination Act 1991* (Qld).

²⁵⁰ See paras 13.39 – 13.41 for a discussion of the role of HREOC in providing information to complainants.

²⁵¹ *Sex Discrimination Act 1984* (Cth); *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA); *Anti-Discrimination Act 1991* (Qld); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1992* (NT); *Sex Discrimination Act 1994* (Tas) and *Equal Opportunity Act 1995* (Vic).

²⁵² *Workplace Relations Act 1996* (Cth) (also covers Victoria, Australian Capital Territory and Northern Territory); *Industrial Relations Act 1996* (NSW); *Workplace Relations Act 1997* (QLD); *Industrial and Employee Relations Act 1994* (SA); *Industrial Relations Act 1979* (WA); *Industrial Relations Act 1984* (Tas) and related legislative requirements (eg *Workplace Agreements Act 1993* (WA)).

²⁵³ *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth); *Occupational Health And Safety Act 1983* (NSW); *Occupational Health and Safety Act 1985* (Vic); *Occupational Safety and Health Act 1984* (WA); *Occupational Health, Safety and Welfare Act 1986* (SA); *Workplace Health and Safety Act 1995* (Qld); *Workplace Health and Safety Act 1995* (Tas); *Work*

such as the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (Cth).

- 7.52 Submissions and consultations consistently highlighted the importance of education and information, in particular through guidelines such as those proposed in the terms of reference for the inquiry. A number of submissions also suggested changes to the exemptions in order to reduce the problems of inconsistency that, it was suggested, hindered business and industry.
- 7.53 In this context three arguments regarding proposed recommendations emerged: the “back to basics” argument, the “consistency will make life easier” argument and the “competing rights” argument.
- 7.54 The “back to basics” argument was illustrated in the submission from the Queensland Anti-Discrimination Commission that, in relation to the exemption of state government employment from the SD Act,²⁵⁴ observed that
- [w]hilst the gaps are in effect filled by State anti-discrimination legislation, it is not appropriate that the Commonwealth Act which gives effect to Australia’s obligations under the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), should maintain such a significant exclusion.²⁵⁵
- 7.55 The “consistency will make life easier” approach stressed the inconsistencies that made the management of pregnancy and potential pregnancy at work difficult.
- 7.56 The “competing rights” argument called for different coverage for small businesses within anti-discrimination legislation nationally.²⁵⁶
- 7.57 Views supporting each of these positions go beyond the discussion of discrimination on the ground of pregnancy and potential pregnancy; they encompass all the grounds of discrimination under the SD Act. To remain within the scope of this reference, this discussion considers the options only in relation to pregnancy and potential pregnancy.
- 7.58 A number of submissions addressed the question of uniformity, with one suggesting
- ...that federal, State and Territory governments throughout Australia should work towards developing a common standard of equal opportunity laws contained in one federal Act

Health Act 1986 (NT); *Occupational Health and Safety Act 1989* (ACT) and various regulations and subordinate instruments under these Acts (eg *Occupational Health and Safety (Hazardous Substances) Regulation 1996* (NSW)) and related legislative requirements (eg maternity leave provisions in the *Factories, Shops and Industries Act 1962* (NSW)).

²⁵⁴ ss 12(1) and 13 *Sex Discrimination Act 1984* (Cth).

²⁵⁵ Anti-Discrimination Commission Queensland (Submission no 68).

²⁵⁶ See paras 12.101 – 12.110.

which applies to all employees, the terms of which would be implied into all awards and agreements.²⁵⁷

7.59 The Australian Reproductive Health Alliance submission noted that

[w]hile the more broad ranging federal legislation operates concurrently with state and territory legislation, and federal law prevails in the event of inconsistencies between it and state/territory laws, it would be preferable if all the legislation were uniform and based on the most widely applicable version.²⁵⁸

7.60 On the other hand, the New South Wales Anti-Discrimination Board in its submission to the New South Wales Law Reform Commission's *Review of the Anti-Discrimination Act 1977* commented

[t]he Board's view is that there should be both federal and State laws on discrimination, particularly while the Constitution gives only limited powers to the Federal Government to legislate in this area. The State's power to legislate...is not fettered in this way...

[w]hile the repeal of NSW legislation in areas covered by federal discrimination legislation appears attractive on the surface there are some significant problems with that proposal...²⁵⁹

7.61 It concluded that

[a]s a matter of principle the *Anti-Discrimination Act* should ideally mirror the federal anti-discrimination law unless it goes further in protecting human rights and equal opportunity principles.²⁶⁰

Is increased uniformity a possibility?

7.62 HREOC is of the opinion that consistency in the terms of state/territory and federal anti-discrimination legislation should not necessarily be considered an aim in itself. It is only where the legislative coverage causes confusion or difficulty that the issue of consistency needs to be addressed. As discussed in this chapter, while in general the operation of both state/territory and federal legislation does not cause undue concern in practice, there are some aspects of the system that can cause problems.

7.63 There are several means by which to promote and possibly achieve increased uniformity.

²⁵⁷ Australian Business and the Newcastle and Hunter Business Chamber Women's Forum (Submission no 90).

²⁵⁸ Australian Reproductive Health Alliance (Submission no 22).

²⁵⁹ New South Wales Anti-Discrimination Board *Balancing the Act: A Submission to the NSW Law Reform Commission's review of the Anti-Discrimination Act 1977 (NSW)* NSW ADB Sydney 1994, 12-13.

²⁶⁰ New South Wales Anti-Discrimination Board *Balancing the Act: A Submission to the NSW Law Reform Commission's review of the Anti-Discrimination Act 1977 (NSW)* NSW ADB Sydney 1994, 12-13.

- 7.64 One is that the states/territories refer power to the Commonwealth to legislate exclusively in the area of discrimination. Alternatively, each jurisdiction could legislate, as in the Corporations Law, to ensure that its legislation mirrors that in the other jurisdictions. These options which relate to anti-discrimination legislation in its entirety are broader than the terms of reference for this inquiry and require additional debate in the community.
- 7.65 A third, more specific, option to increase uniformity, which does fall within the terms of reference of this inquiry, would be for the Commonwealth, states and territories to develop a joint code of practice for the management of pregnancy and potential pregnancy at work.
- 7.66 Successful models of codes are found in the occupational health and safety arena where relevant bodies have chosen to deal with concerns about lack of uniformity by working together to develop national codes in certain areas. These codes of practice deal with a variety of areas such as manual handling and hazardous substances. They provide advice on how to meet legislative requirements and, although not legally enforceable in their own right, they can be used in courts as evidence that legal requirements have or have not been met.
- 7.67 The New South Wales Government is independently in the process of developing a code covering occupational health and safety issues for pregnant workers that also is concerned with anti-discrimination legislation and industrial relations legislation for New South Wales.²⁶¹
- 7.68 There is nothing within the SD Act that prevents the development of a national code; however, the SD Act does not contain any provision to give weight to such a code. It would be advantageous for a code to have a semi-regulatory status. This issue is discussed at paras 1.18 – 1.27.
- 7.69 A final alternative to increase uniformity is to promote community awareness of the varying provisions in anti-discrimination legislation concerning pregnancy and potential pregnancy nationally by way of the Guidelines that are to follow this report. The Guidelines will provide advice and assistance in managing some of the practical difficulties that may arise in complying with both state/territory and federal anti-discrimination legislation.

Pregnancy Guidelines 10: That the Guidelines provide practical assistance in managing some of the major discrepancies between state/territory and federal anti-discrimination legislation.

²⁶¹ WorkCover New South Wales *Draft Code of Practice and Guidelines on Pregnancy and Work* WorkCover Sydney 1998.

Chapter 8 - Relationship between anti-discrimination and workplace relations systems

Anti-discrimination and the workplace relations system

- 8.1 All parties to the employment relationship must operate within both the workplace relations and the anti-discrimination systems in Australia. It is therefore important that they operate together as harmoniously and simply as possible.
- 8.2 The Human Rights and Equal Opportunity Commission (HREOC) recognises a considerable degree of common ground between the workplace relations and the anti-discrimination systems; both systems aim to assist the fair and equitable operation of employment relationships in Australia, and establish auditing functions. In a less regulated system, these audit functions play an increasingly important role in preventing inequitable outcomes. In this regard, the Sex Discrimination Commissioner can be considered to have an important role in the workplace relations system and, in part, the *Workplace Relations Act 1996* (Cth) (WRA) operates as anti-discrimination legislation.
- 8.3 HREOC is of the view that the existing relationship between the two regimes should be formally acknowledged and, where appropriate, strengthened.

The new workplace relations environment

- 8.4 A principal object of the WRA is to ensure that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace, or enterprise, level.
- 8.5 While the award structure remains as a “safety net” providing minimum entitlements for employees, there is increased emphasis in the workplace relations system on agreement making. The WRA provides for two types of formal agreements.

Certified Agreements – which are made between employers and employees (who may choose union representation on an individual basis) or between employers and unions. Each agreement is then certified by the Australian Industrial Relations Commission (AIRC) if it meets certain criteria; and

Australian Workplace Agreements (usually referred to as AWAs) – which are made directly between employers and employees, although employees can appoint a bargaining agent of their choosing, including a union. AWAs, which are approved by the Employment Advocate, can be reached individually or collectively, but must be signed individually.

- 8.6 Submissions and consultations to the inquiry detailed how the new agreement-based workplace relations environment had provided some flexibility but had

also generated some concerns about the extent of the protection now afforded against discrimination on the ground of pregnancy and potential pregnancy. Concerns were also raised about the effects of other workplace relations changes, in particular award simplification and the removal of restrictions on the employment of casuals, in relation to the management of pregnant and potentially pregnant employees.²⁶²

- 8.7 This chapter describes the current workplace relations requirements and discusses the protections against discrimination on the ground of pregnancy available under the WRA – how they are perceived in practice and how they relate to the *Sex Discrimination Act 1984* (Cth) (SD Act). It considers whether any changes, including in the linkages between the Sex Discrimination Commissioner and the workplace relations system, are needed.

Key anti-discrimination provisions of the *Workplace Relations Act 1996*

- 8.8 A number of provisions in the WRA are concerned with discrimination against pregnant and potentially pregnant employees in the workplace.²⁶³
- 8.9 For example, the principal object of the WRA is to “...provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia...” including by
- ...respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination [including] on the basis of sex, family responsibilities, [or] pregnancy.²⁶⁴
- 8.10 In addition, the WRA contains a general requirement that the AIRC take account of the principles embodied in the SD Act relating to discrimination in employment.²⁶⁵ It requires the AIRC to have regard to the need to prevent and eliminate discrimination on specified grounds including sex and pregnancy in the performance of its dispute prevention and settlement functions.²⁶⁶ It states that employers may not generally terminate the employment of an employee for reasons including sex, family responsibilities or pregnancy.²⁶⁷ There are also provisions that allow the referral of matters by the Sex Discrimination Commissioner to the AIRC.²⁶⁸

²⁶² Casuals are discussed at paras 5.8 – 5.9; 10.5 – 10.39; award simplification is discussed at paras 8.18 – 8.45.

²⁶³ Discrimination on the ground of sex under the *Workplace Relations Act 1996* (Cth) may cover discrimination on the ground of potential pregnancy. Prohibitions on discrimination are subject to exemptions for inherent requirements of the job and for employment in religious institutions: s 170LU(6) *Workplace Relations Act 1996* (Cth).

²⁶⁴ s 3(j) *Workplace Relations Act 1996* (Cth).

²⁶⁵ s 93 *Workplace Relations Act 1996* (Cth).

²⁶⁶ s 88B(3)(e) *Workplace Relations Act 1996* (Cth).

²⁶⁷ s 170CK *Workplace Relations Act 1996* (Cth).

²⁶⁸ s 50A *Sex Discrimination Act 1984* (Cth) and s 111A *Workplace Relations Act 1996* (Cth). See para 8.94 – 8.106.

- 8.11 There are several functions in the exercise of which the AIRC must take account of anti-discrimination principles, namely
- dispute handling and settlement, in particular by the making of new awards;
 - review of existing awards;
 - certification of agreements;
 - handling of complaints of discrimination arising because of the discriminatory nature of awards or agreements; and
 - handling of complaints about dismissal from employment.
- 8.12 These are all discussed in this chapter.
- 8.13 In assessing the significance of how awards and certified agreements operate in an anti-discrimination context, it is important to note that the SD Act exempts acts done in direct compliance with awards and certified agreements from its prohibitions on unlawful discrimination.²⁶⁹ Complaints about discriminatory awards or agreements may be made to the Sex Discrimination Commissioner, however. The treatment of such complaints is discussed in more detail at paras 8.94 – 8.106.

Awards and agreements

Making new awards

- 8.14 Awards set out the rights and obligations of employees and employers in relation to rates of pay and conditions of employment. They operate across industries and/or occupations and may cover all or some employees within that industry or occupation. The AIRC makes awards for the federal jurisdiction, which includes employees in Victoria and in territories except for local public servants. State industrial instruments are made by the equivalent state bodies, again except for Victoria and the territories which are covered by the federal WRA.²⁷⁰
- 8.15 The WRA requires the AIRC to ensure that the new awards it makes, and orders affecting awards, do not discriminate because of, or for reasons including, pregnancy.²⁷¹
- 8.16 However, that prohibition on discrimination is subject to exemptions for discrimination
- on the basis of the inherent requirements of the employment; or

²⁶⁹ s 40(1)(e) *Sex Discrimination Act 1984* (Cth) exempts “...an order or award of a court or tribunal having power to fix minimum wages and other terms and conditions of employment” and s 40(1)(f) exempts certified agreements.

²⁷⁰ The Victorian Government has referred Victoria’s industrial powers to the federal Government, consequently employees in Victoria are covered by the *Workplace Relations Act 1996* (Cth).

²⁷¹ s 143(1C)(f) *Workplace Relations Act 1996* (Cth).

- in respect of employment as a member of staff of a religious institution where the discrimination is in good faith and on the basis of the teachings and beliefs of that particular religion.²⁷²

8.17 The exemption for the inherent requirements of a particular job, which is drawn from International Labour Organisation Convention No 111,²⁷³ has no equivalent in the SD Act, in relation to discrimination on the ground of pregnancy.²⁷⁴

Allowable award matters and review of existing awards

8.18 From 1 July 1998, existing awards ceased to have effect to the extent to which they covered matters other than 20 allowable award matters and provisions which are incidental to an allowable matter and necessary for the effective operation of the award.

8.19 The allowable award matters include rates of pay, leave (including maternity and adoption leave) and types of employment.²⁷⁵

8.20 The introduction of the WRA required the AIRC to review each award to simplify it and to remove any provisions that had ceased to have effect at 1 July 1998 as a result of the introduction of the 20 allowable matters provisions of the WRA. The AIRC was required to restrict awards to the 20 allowable matters. When awards are reviewed as part of this simplification process the AIRC is also required to determine, among other things, whether each award contains provisions that discriminate against employees because of, or for reasons which include, pregnancy. If it so determines, the AIRC is required to take whatever steps it considers appropriate to facilitate variation of the award to remedy this.²⁷⁶

²⁷² s 170LU(6) *Workplace Relations Act 1996* (Cth). A further exemption allows the payment of junior rates of pay.

²⁷³ art 1 *Discrimination (Employment and Occupation) Convention, 1958* (ILO No 111) provides that “[a]ny distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination”. In *Christie v QANTAS Airways Ltd* (1996) EOC 92-827, the Federal Court said that an inherent requirement of a job is “...something that is essential to the position, rather than being imposed on it” (per Gray J at 32). QANTAS appealed the decision to the High Court, where the meaning of “inherent requirement of a job” was again considered. The High Court found generally that the Federal Court had construed the meaning of “inherent requirements of a job” too narrowly. Brennan CJ found that “...the question whether a requirement is inherent in an employee’s position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs...” at 366; see also Gaudron J at 374-6, McHugh J at 383-8, Gummow J at 392-5 and Kirby J at 414-5.

²⁷⁴ It is potentially a broader exemption than the nearest equivalent in the *Sex Discrimination Act 1984* (Cth), for genuine occupational qualifications, which applies only in relation to discrimination on the ground of sex: s 30 *Sex Discrimination Act 1984* (Cth). See para 5.58 for a discussion of this concept in relation to the *Sex Discrimination Act 1984* (Cth).

²⁷⁵ s 89A(2) *Workplace Relations Act 1996* (Cth) lists the 20 allowable award matters.

²⁷⁶ These requirements are not included in the *Workplace Relations Act 1996* (Cth) but are in transitional provisions to be found in item 51 sch 5 *Workplace Relations and Other Legislation Amendment Act 1996* (Act No 60 of 1996).

8.21 This process of review is called “award simplification”.

Simplification of awards is intended to not only reduce the matters covered in awards to those that are allowable (or incidental or necessary), but also to meet a number of other criteria such as making them simpler, more flexible, and easier to understand, and ensuring that they do not hinder productivity or efficiency.²⁷⁷

8.22 This process is ongoing, and the Department of Employment, Workplace Relations and Small Business advised the inquiry that about 300 awards have now completed the simplification process.²⁷⁸ As well as existing awards, new awards will be limited to the 20 allowable matters.

8.23 It is intended that other matters would be determined by agreement at the enterprise or workplace level, whether in formal agreements or informally.²⁷⁹ Awards are intended to operate as a safety net in order to ensure fair minimum wages and conditions and, in this regard, are particularly relevant to the application of the “no-disadvantage” test to the certification of agreements by the AIRC and the approval of AWAs by the Employment Advocate.²⁸⁰

8.24 The WRA states that the restriction of awards to allowable matters does not prevent the AIRC from including a model anti-discrimination clause in an award.²⁸¹ Accordingly, the AIRC Full Bench *Award Simplification Decision* of December 1997 specified that the AIRC, when varying an award, should seek to ensure that the award contains the following anti-discrimination provision.

1. It is the intention of the respondents to this award to achieve the principal object in s.3(j) of the Workplace Relations Act 1996 through respecting and valuing the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
2. Accordingly, in fulfilling their obligations under the dispute avoidance and settling clause, the respondents must make every endeavour to ensure that neither the award provisions nor their operation are directly or indirectly discriminatory in their effects.
3. Nothing in this clause is taken to affect:
 - 3.1 any different treatment (or treatment having different effects) which is specifically exempted under the Commonwealth anti-discrimination legislation;
 - 3.2 junior rates of pay, until 22 June 2000 or later date determined by the Commission in accordance with s.143(1E) of the Act;

²⁷⁷ Department of Employment, Workplace Relations and Small Business (Submission no 83).

²⁷⁸ Department of Employment, Workplace Relations and Small Business (Submission no 83).

²⁷⁹ Explanatory Memorandum to the *Workplace Relations and Other Legislation Amendment Bill 1996* (May 1996), sch 5 para 5.2. There are also several laws that continue to apply, such as those concerning occupational health and safety matters.

²⁸⁰ The “no disadvantage” test is discussed at paras 8.48 – 8.50 and the AWA approval process is discussed at paras 8.60 – 8.61.

²⁸¹ s 89A(8) *Workplace Relations Act 1996* (Cth).

- 3.3 an employee, employer or registered organisation, pursuing matters of discrimination in any State or federal jurisdiction, including by application to the Human Rights and Equal Opportunity Commission; or
- 3.4 the exemptions in s.170CK(3) and (4) of the Act.²⁸²
- 8.25 The inquiry noted some concern that the model anti-discrimination clause does not go far enough to prevent discrimination. The Australian Council of Trade Unions submission to the inquiry pointed out that
- [a]lthough in theory it might be possible to prosecute an employer who had failed to make every endeavour to ensure that neither the award nor its operations were directly or indirectly discriminatory, this would be a difficult case to make out, to say the least. The intention of the clause was to alert parties to the need to remove discriminatory provisions rather than to provide for enforceable equity requirements.²⁸³
- 8.26 However, the Australian Chamber of Commerce and Industry argued that the workplace relations amendments
- ...do adequately allow for a consideration of the rights and needs of pregnant and potentially pregnant employees in both awards and agreements. They apply to both. The model anti-discrimination award clause, developed on a tripartite basis with HREOC cooperation, and endorsed by the Australian Industrial Relations Commission, does operate to address these issues.²⁸⁴
- 8.27 HREOC notes that the AIRC is not limited to inserting into awards the model anti-discrimination clause as it is presently drafted. The AIRC is free to amend that clause and it can also insert other provisions to prevent discrimination or promote equity, provided that they fit within the 20 allowable matters. However, there were numerous and significant concerns raised during this inquiry about the effects of the simplification process on pregnant and potentially pregnant employees. Some of these concerns are discussed below.

Impact of award simplification

- 8.28 A number of submissions raised concerns about the effects of award simplification and the limitations of allowable award matters with respect to the management of workplace pregnancy.

Although directly discriminatory provisions have been removed from federal awards, indirect discrimination still exists, and is not addressed by the award simplification process.²⁸⁵

- 8.29 The Queensland Anti-Discrimination Commission noted that

²⁸² The clause was first established by the AIRC in 1995 and was revised in the 1997 decision: Decision 1533/97 Print P7500. Such a clause is permitted by s 89A(8) *Workplace Relations Act 1996* (Cth).

²⁸³ Australian Council of Trade Unions (Submission no 59).

²⁸⁴ Australian Chamber of Commerce and Industry (Submission no 84).

²⁸⁵ Australian Council of Trade Unions (Submission no 59).

...the flexibility required by employers is often in conflict with the nature of the flexibility required by workers with family responsibilities.²⁸⁶

The reduction in the role of the Industrial Relations Commission, the deregulation of part-time and casual work and the award simplification process all have potential for negative impact on women.²⁸⁷

The stripping back of awards to twenty allowable matters impacts on workers who lack the knowledge and bargaining power to negotiate agreements above the very basic safety net.²⁸⁸

8.30 The Shop, Distributive and Allied Employees' Association submission argued that

[a]ward processes...and awards do not allow for the adequate consideration of the needs of pregnant and potentially pregnant employees and therefore do not provide adequate protection for them. Although the Industrial Relations Commission requires all awards to include a model anti-discrimination clause...it is minimalist and offers little direction to employers. The clause states that discrimination is illegal but gives no suggestion of positive action.

Anti-discrimination is not an allowable award matter. The model anti-discrimination clause...doesn't allow the Commission to go to the practical aspects of anti-discrimination and thereby allow for the consideration of the rights and needs of pregnant and potentially pregnant employees.²⁸⁹

If awards were able to deal with these issues, it would enable the parties to positively focus on these matters.²⁹⁰

8.31 The submission went on to recommend that a new allowable award matter be introduced which would allow for the industrial parties to deal comprehensively with the subject of anti-discrimination.

8.32 On 6 May 1999, the Minister for Employment, Workplace Relations and Small Business released a Discussion Paper that proposed that further changes be made to tighten the allowable matters provisions with the aim that awards would "...principally be a safety net for the low paid and for those employers and employees who are not in a position to use the agreement-making system".²⁹¹ Amongst other things, the proposed legislation would

...tighten the allowable matters provisions to clarify the original intent of the legislation and maintain their statutory rigour, and also remove elements which duplicate other legislative entitlements, or are more appropriately decided at the workplace (eg tally provisions, jury

²⁸⁶ Anti-Discrimination Commission Queensland (Submission no 68).

²⁸⁷ Anti-Discrimination Commission Queensland (Submission no 68).

²⁸⁸ Anti-Discrimination Commission Queensland (Submission no 68).

²⁸⁹ Shop, Distributive and Allied Employees' Association (Submission no 74).

²⁹⁰ Shop, Distributive and Allied Employees' Association (Submission no 74).

²⁹¹ Minister for Employment, Workplace Relations and Small Business *The Continuing Reform of Workplace Relations: Implementation of "More Jobs, Better Pay"* Implementation Discussion Paper Minister for Employment, Workplace Relations and Small Business Canberra 1999, 12.

service, union picnic days, long service leave, superannuation and trade union training leave).²⁹²

- 8.33 The Discussion Paper proposed tightening the definitions and specifications of the various allowable award matters. It also proposed restricting matters incidental to allowable award matters or necessary for the effective operation of the award only to those matters of an administrative nature.²⁹³
- 8.34 Any existing intention to make changes to anti-discrimination provisions (for example removal of the model anti-discrimination clause) were not evidenced in the Discussion Paper. The Department of Employment, Workplace Relations and Small Business has since advised the current protections will be retained in full in any proposed legislation arising out of the Discussion Paper.²⁹⁴
- 8.35 HREOC is adamant that the simplification process should ensure the award safety net provides adequate protection from discrimination. HREOC considers it is important that this requirement is specifically addressed.

Recommendation 12: That the Minister for Employment, Workplace Relations and Small Business specifically consider the position of pregnant and potentially pregnant employees in any future workplace relations reform to ensure that such employees are not exposed to the possibility of direct or indirect discrimination.

Awareness of minimum safety net entitlements

- 8.36 Evidence to the inquiry noted that some employers and employees are ignorant of award and legislative coverage. The submission from consulting firm, Families At Work, noted that
- [n]umerous employees when contacting Families At Work will ask our consultants what their entitlements are within their own organisation. They appear to be unaware of who to contact or where to go to find information on their rights and responsibilities.²⁹⁵
- 8.37 In a related example, the 1995 Australian Workplace Industrial Relations Survey asked employees, in workplaces with 20 or more employees, whether they would be able to get maternity or paternity leave if they needed it. The results of that survey question indicated that many employees remain unaware of their legislative and award entitlements.²⁹⁶

²⁹² Minister for Employment, Workplace Relations and Small Business *The Continuing Reform of Workplace Relations: Implementation of "More Jobs, Better Pay"* Implementation Discussion Paper Minister for Employment, Workplace Relations and Small Business Canberra 1999, 12.

²⁹³ Minister for Employment, Workplace Relations and Small Business *The Continuing Reform of Workplace Relations: Implementation of "More Jobs, Better Pay"* Implementation Discussion Paper Minister for Employment, Workplace Relations and Small Business Canberra 1999, 13. See s 89A(6) *Workplace Relations Act 1996* (Cth).

²⁹⁴ Comments from the Department of Employment, Workplace Relations and Small Business dated 15 June 1999 on confidential draft copy of this report.

²⁹⁵ Families At Work (Submission no 40).

²⁹⁶ 47.6% answered yes, 11.9% answered no, 26.7% said it was not relevant to them and 13.6% said they did not know: A Morehead et al *Changes at Work: The 1995 Australian Workplace Industrial*

8.38 The Women's Legal Services Network recommended

...that the WRA should impose a clear duty on the employer to inform all employees, including casual employees, of their statutory and other employment rights.²⁹⁷

8.39 The Department of Employment, Workplace Relations and Small Business advised the inquiry that, through a network of regional and district offices, it provides advice to employers and employees about awards through inquiry, compliance and educative services. Those educative services include seminars, which address, among other issues, pregnancy and unfair dismissal and maternity leave.²⁹⁸

8.40 The nature of a more deregulated environment requires that workplace participants are made aware of their entitlements and obligations, plus where to seek help and assistance. This inquiry has emphasised the need for on-going deregulation and award simplification to be accompanied by an information campaign designed to inform pregnant and potentially pregnant workers and their respective employers of the relevant entitlements and obligations. Significant numbers of women workers would benefit from such an initiative. HREOC recommends that the Minister for Employment, Workplace Relations and Small Business ensure the development of such a campaign and that adequate resources are devoted to this end.

8.41 Awareness of pregnancy and potential pregnancy discrimination issues in the workplace relations context appears to need particular attention.

8.42 The Western Australian Commissioner for Equal Opportunity and the Australian Bureau of Statistics recently surveyed employers in the Perth metropolitan area to ascertain employer awareness of discrimination on various grounds such as sex, race and family responsibilities. The findings were released in December 1998 in a report that concluded that knowledge of equity and discrimination issues varied dramatically between industries and also depended upon employer size.²⁹⁹

8.43 Some decreases in what is explicitly covered in awards may increase the risk of direct or indirect discrimination on the ground of pregnancy or potential

Relations Survey Longman South Melbourne 1997, 115-116. For a discussion of maternity leave entitlements, see paras 12.4 – 12.26.

²⁹⁷ Women's Legal Services Network (Submission no 94).

²⁹⁸ Department of Employment, Workplace Relations and Small Business (Submission no 83).

²⁹⁹ The Construction and Utilities industries displayed least understanding about equity issues, while Mining, Business Services and Hospitality had a much better understanding in most areas. Larger employers (50+) and small employers (10-19) displayed the most knowledge about equity issues, and medium sized employers (20-49) displayed the least knowledge. Employers of large businesses (81.2%) were more likely to know that discrimination on the ground of pregnancy is unlawful than employers of small (62%) and medium (67.9%) sized business. The levels of awareness in industries such as Construction and Utilities (58.3%), Wholesale (57%) and Retail (59.4%) were comparatively low: Commissioner for Equal Opportunity *Private Sector Employers and Equal Opportunity* CEO Perth 1998, 13. See also Affirmative Action Agency (Submission no 76).

pregnancy, depending on the particular provision concerned and the nature of the change. As one submission noted,

[t]he unfortunate fact is that the Workplace Relations Act is itself contributing to the difficulties and discomfort experienced by pregnant women in the workplace. Formal legislative prescription in one part of the Act is worth little if other parts of the Act remove or undermine existing support systems....Whilst awards may be unlikely now to contain blatantly discriminatory provisions, the discrimination against pregnant workers is often by omission.³⁰⁰

- 8.44 Risks of discrimination may be increased particularly where the reduction in coverage is not picked up in the agreement making process, for example in workplaces where knowledge or understanding of direct and indirect discrimination is low amongst employees and management or where employers ignore the law relying on employee ignorance, or where it is agreed to trade off some of those provisions for immediate benefits.³⁰¹
- 8.45 While this inquiry has demonstrated that the Guidelines resulting from this report will specifically need to address the anti-discrimination parameters of workplace relations legislation, the workplace relations system also has a responsibility in this regard. HREOC agrees with the following comment, from the Women's Legal Services Network submission.

We support the concept of a legal framework that provides scope for workplace or industry bargaining above minimum standards, but minimum standards must be set at an adequate level and all the players must be aware of their legal rights and obligations.³⁰²

Certified Agreements

- 8.46 Certified Agreements are made between employers and employees (who may choose union representation) or between employers and unions. Each agreement is then certified by the AIRC.
- 8.47 The AIRC must refuse to certify an agreement if the agreement fails to meet a number of conditions, in particular, if the agreement would be inconsistent with the unlawful termination provisions of the WRA or if it discriminates against an employee on grounds including sex and pregnancy.

The Commission must refuse to certify an agreement if it thinks that a provision of the agreement discriminates against an employee, whose employment will be subject to the agreement, because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.³⁰³

³⁰⁰ Women's Legal Services Network (Submission no 94). Although see for example, Council for Equal Opportunity in Employment Ltd, which refers to a finance sector award "...that appears to exclude women on maternity leave from redundancy," which would, on its face, be directly discriminatory. (Submission no 104).

³⁰¹ See paras 8.75 – 8.77.

³⁰² Women's Legal Services Network (Submission no 94).

³⁰³ s 170LU(5) *Workplace Relations Act 1996* (Cth).

- 8.48 Generally, agreements will displace award provisions to the extent of any inconsistency, unless the agreement explicitly declares itself to be comprehensive. However, the AIRC must not certify any agreement that fails the “no-disadvantage” test.³⁰⁴ An agreement passes the no-disadvantage test if it does not disadvantage employees in relation to their terms and conditions of employment.³⁰⁵
- 8.49 This means that the terms and conditions of an agreement must be at least as good as the overall terms and conditions of the award and any relevant laws. For those employees not covered by an award, the AIRC will use an appropriate award as a benchmark to ensure the agreement meets the no-disadvantage test.³⁰⁶
- 8.50 Being “at least as good as” an award does not necessarily mean that all the benefits in an award would be reflected, as it is the overall package which is important to the no disadvantage test. It is, at least in theory, possible to trade off benefits in favour of other benefits.
- Whilst agreements must not result in employees being worse off overall compared to their pre-existing award entitlements, the “no disadvantage” test allows award entitlements to be traded off and repackaged. Employers and employees can make genuinely innovative and flexible agreements without artificial restrictions.³⁰⁷
- 8.51 Certified agreements prevail over state laws (with certain exceptions), federal and state awards and state employment agreements.³⁰⁸
- 8.52 The Department of Employment, Workplace Relations and Small Business noted that examples of flexible or family friendly practices include negotiable working hours, flexible start and finish times, additional parental leave entitlements, and home-based work following childbirth. Tables 8.1 to 8.3 contain data provided by that Department on the frequency of flexible and family friendly provisions in certified agreements.³⁰⁹

³⁰⁴ s 170LT(2) *Workplace Relations Act 1996* (Cth). However, that section provides an exemption if all other conditions are met and certifying is not contrary to the public interest, for example where the agreement is part of a reasonable strategy to deal with a short term crisis in, and to assist in the revival of, the single business or part: s 170LT(3) and (4) *Workplace Relations Act 1996* (Cth). The “no disadvantage” test is dealt with in Part VIE *Workplace Relations Act 1996* (Cth).

³⁰⁵ s 170XA *Workplace Relations Act 1996* (Cth).

³⁰⁶ s 170XF *Workplace Relations Act 1996* (Cth).

³⁰⁷ Minister for Workplace Relations and Small Business *Flexibilities Available in Agreement-Making* Ministerial Discussion Paper Minister for Workplace Relations and Small Business Canberra 1998, 3.

³⁰⁸ ss 170LY and 170LZ *Workplace Relations Act 1996* (Cth). s 170LZ(3) allows concurrent operation of state laws providing protection against harsh, unjust or unreasonable termination of employment.

Agreements enable a wide range of changes to working conditions. For example, as noted in a recent Ministerial Discussion Paper, where state legislation does not permit the cashing-out of entitlement to long service leave, a federal certified agreement prevails over the state legislation: Minister for Workplace Relations and Small Business *Flexibilities Available in Agreement-Making* Ministerial Discussion Paper Minister for Workplace Relations and Small Business Canberra 1998, 26.

³⁰⁹ Department of Employment, Workplace Relations and Small Business (Submission no 83, Appendix B).

8.53 The 1997 report *Agreements under the Workplace Relations Act* indicated that women remained underrepresented in agreements.³¹⁰ For those women who were covered by certified agreements, nearly 80% were covered by agreements that identified leave provisions of some type, compared to only 70% of men covered by agreements.³¹¹ Further the incidence of leave provisions within an agreement increased with the concentration of women within an agreement. The report concluded that, "...on average, the inclusion of leave provisions in Certified Agreements is of greater importance to females than to males".³¹² The report did not provide information about wage or income related provisions by gender.

8.54 Part 2 of ADAM Report 16³¹³ examined developments in family friendly measures in enterprise agreements.

An examination of information from the Australian Workplace Industrial Relations Survey (AWIRS '95) shows that despite governments' efforts to stimulate employer interest in improving the ability of workers to better integrate their home and work commitments, 27% of employees in Australia indicated that their satisfaction with the balance of family and work life had gone down compared to a year ago.

The ADAM data shows there is still very little evidence of comprehensive family friendly measures being used in enterprise agreements. An examination of the frequency of nine types of family friendly measures in agreements on the ADAM database reveals that only 10% of currently operative agreements contain a provision covering at least one family friendly measure. These measures include paid maternity and paternity leave, paid and unpaid leave for those caring for family members, career break schemes, and employer provided or sponsored child care services, job-sharing and work from home schemes.³¹⁴

8.55 A report by the Australian Chamber of Commerce and Industry suggested that 31% of non-construction private sector agreements addressed issues, which could broadly be considered "work and family" provisions. It indicated that 5%

³¹⁰ A Hawke, F Robertson and J Sloan *1997 Report: Agreement-making under the Workplace Relations Act* Department of Workplace Relations and Small Business Canberra 1998, 61.

³¹¹ A Hawke, F Robertson and J Sloan *1997 Report: Agreement-making under the Workplace Relations Act* Department of Workplace Relations and Small Business Canberra 1998, 73.

³¹² A Hawke, F Robertson and J Sloan *1997 Report: Agreement-making under the Workplace Relations Act* Department of Workplace Relations and Small Business Canberra 1998, 73.

³¹³ The ADAM database contains information on over 5000 registered federal and state agreements: Australian Centre for Industrial Relations Research and Training *Agreements Database And Monitor (ADAM)* Report No 16 ACIRRT Sydney 1999.

³¹⁴ The ADAM Report notes that: "[t]he data reveals that four industry sectors are the leaders in providing family friendly measures: Public Administration, Community Services, Financial Services and Wholesale/Retail Trade (12.4%). Information from AWIRS '95 on workplaces with twenty or more employees reveals that workplace practices tend to vary from formal entitlements. For example, even in those workplaces where there was no specific provision covering absences to care for family members (personal leave), only 1% of managers said that there was no leave available for this purpose. Employees reported that the sorts of leave that were most commonly used to cover such absences were annual leave (78%) or unpaid leave (72%). Although family friendly measures may have been introduced through other mechanisms, enterprise agreements have by and large not been used as a vehicle for implementing such provisions". Australian Centre for Industrial Relations Research and Training *Agreements Database And Monitor (ADAM)* Report No 16 ACIRRT Sydney 1999, 30.

of those agreements addressed job sharing and 68% addressed family leave/personal carers leave.³¹⁵

Australian Workplace Agreements

- 8.56 Australian Workplace Agreements (AWAs) are made directly between an employer and an employee, although employees can appoint a bargaining agent of their choosing, including a union. AWAs, which are approved by the Employment Advocate, can be reached individually or collectively, but must be signed individually.³¹⁶
- 8.57 Before an employee signs an AWA,³¹⁷ the employer must give the employee an information statement prepared by the Employment Advocate. The statement must include information about Commonwealth statutory entitlements, occupational health and safety law, services provided by the Employment Advocate, and bargaining agents and may include other information.³¹⁸
- 8.58 Because an AWA is an individual contract and cannot of itself provide differential terms and conditions of employment for different employees, an employer must also ensure that the AWA includes the following provisions relating to discrimination.

The parties to this AWA agree that:

- (a) it is their intention to achieve the principal object in paragraph 3(j) of the *Workplace Relations Act 1996*, which is to respect and value the diversity of the work force by helping to prevent and eliminate discrimination at their enterprise on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and
- (b) ...
- (c) nothing in these provisions allows any treatment that would otherwise be prohibited by anti-discrimination provisions in applicable Commonwealth, State or Territory legislation; and
- (d) nothing in these provisions prohibits:

³¹⁵ Australian Chamber of Commerce and Industry *Federal Enterprise Agreement Report Fourth Quarter 1998* ACCI Melbourne 1999, 24.

³¹⁶ The most recent statistics on approval of AWAs (as at 30 April 1999) are

Status	Coverage	
	Employers	Employees
Approved by Employment Advocate	1,436	55,548
Refused		1,160
Approved by AIRC		488
Being assessed against legislative requirements		4,938

Source: Office of the Employment Advocate's website (www.oea.gov.au).

³¹⁷ An AWA may be made before the commencement of the employment: s 170VF *Workplace Relations Act 1996* (Cth).

³¹⁸ s 170VO *Workplace Relations Act 1996* (Cth).

- (ii) any discriminatory conduct (or conduct having a discriminatory effect) that is based on the inherent requirements of a particular position; or
- (iii) any discriminatory conduct (or conduct having a discriminatory effect) if:
 - (A) the employee is a member of staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed; and
 - (B) the conduct was in good faith to avoid injury to the religious susceptibilities of that religion or creed.³¹⁹

- 8.59 If the AWA does not in fact include those provisions, the AWA is taken to include them.³²⁰
- 8.60 AWAs are approved by the Employment Advocate. In performing his or her functions, the Employment Advocate is required to have particular regard to the needs of workers in a generally disadvantaged bargaining position, assisting workers to balance work and family responsibilities and promoting better work and management practices.³²¹ There are no formal or legislative links between the Sex Discrimination Commissioner and the Office of the Employment Advocate.
- 8.61 The Employment Advocate must approve an AWA if it meets the no-disadvantage test and additional requirements such as genuine consent.³²²
- 8.62 An AWA operates to the exclusion of any federal or state award, prescribed Commonwealth laws, state agreements or state laws – other than laws dealing with occupational health and safety, workers' compensation, apprenticeship or prescribed laws – that would otherwise apply to the employee's employment.³²³ AWAs are also subject to the provisions of federal or state/territory anti-discrimination legislation that would otherwise apply.

Strengths and weaknesses of the agreement making process

- 8.63 While the processes of negotiation and formalisation of certified agreements and AWAs differ, HREOC considers that some of the strengths and weaknesses of the processes are quite similar and may be discussed together.
- 8.64 The federal Government has stated its position in relation to AWAs as follows.

The capacity to inject greater flexibility into working arrangements through the use of AWAs is often of particular relevance to those working women and men who are looking

³¹⁹ sch 8 Workplace Relations Regulations 1996 (Cth).

³²⁰ s 170VG(1) *Workplace Relations Act 1996* (Cth); and Reg 30ZI(1) and sch 8 Workplace Relations Regulations 1996 (Cth).

³²¹ s 83BB(2) *Workplace Relations Act 1996* (Cth).

³²² s 170VPB *Workplace Relations Act 1996* (Cth). The additional requirements are listed at s 170VPA. For those employees not covered by an award, the Employment Advocate will use an appropriate award as a benchmark to ensure the agreement meets the no-disadvantage test.

³²³ ss 170VQ and 170VR *Workplace Relations Act 1996* (Cth). However, note that the making of AWAs is subject to some limitations of federal constitutional power (as set out in s 170VC) so there are a number of employment relationships where AWAs cannot be made.

for ways to better manage their work and family responsibilities. For example, AWAs can be used to provide tailored flexibility in individual employees' working hours, pay arrangements, leave provisions and mode of work, such as job sharing or home based work.³²⁴

8.65 One major employer organisation suggested that HREOC's inquiry should

...examine the role of agreement making in educating employees about their entitlements and providing for opportunities for more tailored and relevant standards, on both a workplace or individual basis.³²⁵

8.66 After reflecting on the content of submissions, HREOC agrees with this suggestion with specific reference to issues of pregnancy and potential pregnancy.

8.67 The process of negotiation of agreements can be used to educate workplaces. One submission received described difficulties encountered by a woman at a processing plant. The work at the plant was seasonal. The company employed up to 250 people of whom about 85% were women. At the time of the woman's first pregnancy, her supervisor had been helpful – she was the first person to take maternity leave and return to full time work – but at the time of her second pregnancy a new supervisor was unhelpful. The supervisor put her on a heavy shift roster and rallied support against her among other workers. This resulted in considerable stress, high blood pressure and an early emergency caesarean birth. When two months after the birth of her child, she informed the company of her impending return to work, the supervisor informed her that “...they had filled my job on the assumption that I would not bother returning to work now that I had 2 kids to look after”. With her trade union's help, the woman returned to work. The submission noted that the union had

...been successful in educating the work force of the rights of pregnant women. The current [enterprise agreement] now provides that employees are entitled to: 8 weeks paid leave that may be accessed by one, or shared by both parents. Casual employees with a total of 2 years service are also eligible.

Clearly recognition of rights and obligations through education has attributed to the successful negotiation of the Agreement.³²⁶

8.68 A recent report commissioned by federal Government noted that

[t]he ability to set standards is viewed extremely positively across all demographic groups ...the Government's power to set standards for decent wages and safety, among other issues

³²⁴ *Delivering on our Commitments for Women* Statement by Senator the Hon Jocelyn Newman Minister for Family and Community Services and Minister Assisting the Prime Minister for the Status of Women Canberra May 1999, 1-16.

³²⁵ Business Council of Australia (Submission no 52).

³²⁶ Australian Manufacturing Workers' Union, Sydney Office (Submission no 35).

is comforting to workers generally and reassures them that economic stability in Australia will continue.³²⁷

- 8.69 A number of concerns were raised with HREOC during the inquiry about the potential for at least some pregnant or potentially pregnant women to be disadvantaged by agreement making processes. Specific concern was expressed that the level of scrutiny by the AIRC or the Office of the Employment Advocate may not be sufficient to ensure that provisions do not have a discriminatory effect (be it direct or indirect). In relation to AWAs, there is no requirement that the Office of the Employment Advocate consider any discriminatory effects in comparison to other employees in a workplace.

Although the Industrial Relations Commission must refuse to certify an agreement that contains a discriminatory provision, a discriminatory effect or consequence is not always apparent on the face of the agreement. Indirect discrimination is often more complex and difficult to detect at first glance.³²⁸

- 8.70 One submission noted that

[s]ection 170VPG(4) of the Workplace Relations Act allows the [Australian Industrial Relations Commission] to approve an AWA even where it is absolutely clear that the AWA fails the “no disadvantage” test. We are aware that the Commission has used this clause on several occasions. In such a way AWAs can disadvantage employees against existing award entitlements.³²⁹

- 8.71 There is some concern that discrimination may particularly become an issue where neither an award nor an agreement explicitly prohibits discrimination in a particular area.³³⁰ The argument is that silence on an issue is as likely to deliver a discriminatory effect as is a specific provision to allow discrimination.

- 8.72 For example, one submission stated that

[t]he issue of uniforms is frequently raised. Many workplaces still do not provide uniforms to fit pregnant workers, effectively a form of indirect discrimination.³³¹

- 8.73 Some particular concerns that have been raised with the inquiry in this regard are the treatment of part time or casual workers and requirements in relation to the spread of hours to be worked.³³² A submission noted that

³²⁷ Australasian Research Strategies Pty *Employee Attitudes to Workplace Reform* Australian Labour Ministers Council Canberra 1999, 18. (Also available at www.dewrsb.gov.au/ministers/reith/employee.pdf).

³²⁸ Anti-Discrimination Commission Queensland (Submission no 68).

³²⁹ Shop, Distributive and Allied Employees’ Association (Submission no 74). See also Families At Work (Submission no 40).

³³⁰ The Department of Employment, Workplace Relations and Small Business asserted in its supplementary submission, however, that the provision for the insertion of anti-discrimination clauses and the process of review and simplification of awards should address any concerns: (Submission no 101).

³³¹ Anti-Discrimination Commission Queensland (Submission 68).

³³² On the other hand, the Australian Chamber of Commerce and Industry expressed the view that the rules governing the various types of employment had already been “...exhaustively reviewed in the

[a]nother example is the prohibition in the WR Act [s 89A(4)] on award provisions setting minimum or maximum hours for part-time employees or restricting the proportion of the workforce to be employed on a part-time basis...employers are free to reduce employees' hours of work with minimal notice, with the real risk that this will be used to discriminate against pregnant women, or women who are perceived to be potentially pregnant, and therefore of less value.³³³

8.74 One union submission particularly raised this as an issue in relation to pregnancy and potential pregnancy, stating that

...health and safety within awards have been removed as an allowable matter...Hence awards are limited in providing protection for pregnant and potentially pregnant employees, and in further expanding this area.

While there is no limitation in dealing with these matters in certified agreements and AWAs, the practical impact is that these are generally not issues raised at the workplace level in bargaining negotiations.

Difficulties exist in dealing with such issues within agreements in that the parties tend not to negotiate about events which may or may not happen (such as pregnancy) and agreements cannot be easily changed during their lifetime.³³⁴

8.75 Concern was expressed that, particularly in male dominated or sex segregated workforces, there may be a tendency to trade-off family friendly provisions or those that may benefit pregnant or potentially pregnant women.

The current industrial relations environment poses some real problems for women. There is a tendency in negotiating agreements for some unions and their members to trade off conditions, including particular leave provisions and shorter working days – which have benefited women – in return for pay increases, or to use conditions that benefit women as negotiable items.³³⁵

8.76 Further, parties may overlook the opportunity to introduce provisions to assist women employees who face a unique situation. Industrial systems and workplace negotiations are still dominated by men who never personally face pregnancy and work issues and thus have a clear lack of first hand experience in the area.

In gender segregated workplaces the majority vote may not take into account the needs of women or workers with family responsibilities.³³⁶

proceedings which led to the *Award Simplification Decision* (1997) AIRC 1533/97 M Print P7500. The decision and resulting order dealt with all the equity and other allegations raised by the parties, and established what the AIRC considered to be appropriate regulation of each of these forms of work. It is not necessary for this to be again reviewed.” (Submission no 84).

³³³ Australian Council of Trade Unions (Submission no 59). See also Women’s Legal Services Network (Submission no 94) which raised issues such as access to first aid kits, casualty officers, and amenities for rest and first aid.

³³⁴ Australian Liquor, Hospitality and Miscellaneous Workers Union (Submission no 32).

³³⁵ Women’s Electoral Lobby Australia (Submission no 97).

³³⁶ Anti-Discrimination Commission Queensland (Submission no 68).

The failure to take account of women's differences, and to provide the same leave entitlements and working arrangements for women and men is a form of indirect discrimination. Providing the same leave entitlements to men and women, such as sick leave and parental leave, appears to be a fair deal. The reality is, though, that this fails to take account of the fact that women have additional physical demands, such as sicknesses that are directly related to pregnancy, and may encounter complications during and after the pregnancy. Current Certified Agreements and Awards fail to take account of these differences.³³⁷

8.77 Another submission noted

[p]regnant women, and those planning pregnancies, in particular, are very often in a minority – even in female dominated unions their needs may not be addressed. Women are also less likely to speak up when their issues are in a minority, especially in regards to pregnancy, and are sometimes further prevented from doing so from fears that their jobs or careers will be jeopardised.³³⁸

8.78 A related issue concerns the relative bargaining power of the parties to agreements. The agreement making process

...relies upon an assumption that the parties at the bargaining table are of equal power and that all bargaining occurs in good faith. The reality as demonstrated by many complaints lodged with the ADCQ, is that there are workers who are vulnerable and lacking in power who are less able to enforce rights or argue against reduced conditions of work and who are unlikely to be organised for effective bargaining.³³⁹

Employers are refusing to discuss non-allowable matters such as family friendly practices, with employees. In effect they are being removed from the Industrial Relations Agenda.³⁴⁰

In the making of AWAs the power imbalance means there is no practical opportunity for an alternate view to be put to an employer. As such, AWAs which the [Shop, Distributive and Allied Employees' Association] has sighted, normally represent the wishes of the employer.³⁴¹

In terms of AWAs women's bargaining power is likely to be further eroded, given the unequal power relationships that often exist between employer and employee.³⁴²

8.79 A 1998 values research project, commissioned by the Minister for Employment, Workplace Relations and Small Business, which explored employee attitudes to workplace reform, found

[t]he strongest driver of employee attitudes to the prospect of negotiating individually with their employer is the positive value of accomplishment... The main perceived drawback of workplace agreements is that if workers do not have the ability or bargaining power to

³³⁷ Women's Electoral Lobby Australia (Submission no 97).

³³⁸ Women's Electoral Lobby Australia (Submission no 97).

³³⁹ Anti-Discrimination Commission Queensland (Submission no 68).

³⁴⁰ Shop, Distributive and Allied Employees' Association (Submission no 74).

³⁴¹ Shop, Distributive and Allied Employees' Association (Submission no 74).

³⁴² Women's Electoral Lobby Australia (Submission no 97). That submission went on to point out that inequality of bargaining position is not always the case, however.

adequately communicate their position in a negotiation, they may be taken advantage of and their self-esteem damaged.³⁴³

8.80 The report found that

...nearly all employees feel they are not as good at negotiating as they would like to be or feel they should be....Communication skills, although mentioned by a significant portion of respondents are almost invariably mentioned in a negative light (that is inability to negotiate properly). This inability to communicate properly leads to the sense that workers are being taken advantage of and subsequently there are bad feelings.

However they are still pleased that they have the capacity to negotiate on their own behalf.³⁴⁴

8.81 Communication problems and strength of bargaining position may be particularly an issue for new employees who are asked to sign an individual AWA.³⁴⁵ One submission noted that

[w]omen on individual contracts may not wish to raise potential pregnancy with an employer during the bargaining process. This is particularly the case in relation to AWAs entered into by new employees at the point of engagement - and it is our experience that a significant number of AWAs occur at this point.³⁴⁶

8.82 Submissions reflected the fear associated with alerting employers to the possibility of pregnancy. In this context the reality seems to be “say nothing and hope for the best” or suffer the culturally condoned negative consequences of alerting the employer and fellow employees to the possibility of pregnancy. Neither scenario is conducive to effective workplace participation. Men do not suffer disadvantage in this way and women have an industrial right to be treated equitably.

8.83 One submission commented that

...the needs of pregnant women are not adequately safeguarded under the Agreement making provisions of the Act. This is particularly so in relation to AWAs where a potentially pregnant or pregnant worker...may not be able to anticipate her needs before entering an agreement or is reluctant to raise the possibility of pregnancy for fear of discrimination.³⁴⁷

8.84 Another submission pointed out that AWAs

³⁴³ Australasian Research Strategies Pty *Employee Attitudes to Workplace Reform* Australian Labour Ministers Council Canberra 1999, 6. (Also available at www.dewrsb.gov.au/ministers/reith/employee.pdf)

³⁴⁴ Australasian Research Strategies Pty *Employee Attitudes to Workplace Reform* Australian Labour Ministers Council Canberra 1999, 20-21 (Also available at www.dewrsb.gov.au/ministers/reith/employee.pdf).

³⁴⁵ See for example Anti-Discrimination Commission Queensland (Submission no 68).

³⁴⁶ Australian Liquor, Hospitality and Miscellaneous Workers Union (Submission no 32).

³⁴⁷ Finance Sector Union of Australia (Submission no 51).

...are not public documents and so it is not possible to judge overall how they meet the needs of pregnant employees.³⁴⁸

- 8.85 Submissions made a number of recommendations to address these concerns.
- 8.86 First, in a less regulated workplace relations context, it is important that all workplace participants are well educated about how the system operates. They need to be made aware of their rights and responsibilities. HREOC is of the view that education about the system in reference to pregnancy and potential pregnancy is crucial. HREOC can contribute to the process of education through the Guidelines. However, it is appropriate and important that the Minister for Employment, Workplace Relations and Small Business ensure that sufficient funds and attention are devoted to this end. Other participants in the workplace relations system could play a part in providing information to employees and employers about rights and responsibilities. For example, information could usefully be disseminated by the Office of the Employment Advocate.³⁴⁹
- 8.87 A recent report noted that employees considered that governments and unions both had roles to provide information on rights, entitlements and responsibilities. In particular, the primary positive value seen in unions in the workplace stems from their ability to represent members.
- “The union is there for you, they are there to give you advice and information, they can get legal advice for you, they are there to represent you.”
 - “[The unions] are making sure employees are aware of their rights.”³⁵⁰
- 8.88 HREOC believes that there is a key role for unions in making sure that accurate information about rights, entitlements and responsibilities of pregnant and potentially pregnant workers is provided to employees. Unions can also bring their corporate history and experience to bear in identifying issues that have particular impact on pregnant and potentially pregnant workers.
- 8.89 Similarly, community advice, referral and advocacy centres such as the Working Women's Centres in several states/territories, Jobwatch Inc in Victoria and community legal centres, provide an important service, particularly to those women in particularly vulnerable workplace situations who may lack an alternative voice.

³⁴⁸ Shop, Distributive and Allied Employees' Association (Submission no 74). See also Women's Legal Services Network (Submission no 94).

³⁴⁹ Perhaps in information sheets required, by section 170VO(1) *Workplace Relations Act 1996* (Cth), to be provided to employees before an AWA is signed. See Women's Electoral Lobby Australia (Submission no 97). See also Women's Legal Services Network (Submission no 94) on the need for information and monitoring generally.

³⁵⁰ Australasian Research Strategies Pty *Employee Attitudes to Workplace Reform* Australian Labour Ministers Council Canberra 1999, 17 (Also available at www.dewrsb.gov.au/ministers/reith/employee.pdf).

8.90 Many submissions to the inquiry recognised the importance of ensuring that information about the process and outcomes of bargaining is available and accessible. Further, there was support for formal interaction between the Office of the Employment Advocate and the Sex Discrimination Commissioner in order to monitor and assess progress in this area.

8.91 Submissions made recommendations in this regard including that

...the Office of the Employment Advocate should report to the Sex Discrimination Commissioner on the contents of AWAs particularly as they relate to pregnancy, maternity leave and return to work.³⁵¹

[T]he impact of Certified Agreements and AWAs on the employment entitlements of pregnant women and mothers should be properly monitored and researched...³⁵²

[T]he Sex Discrimination Commissioner's powers [should be strengthened] to enable her to inquire into workplace agreements and intervene to ensure that pregnant women and mothers are not disadvantaged by proposed terms and conditions.³⁵³

[t]he Employment Advocate...should be required to liaise with the Sex Discrimination Commissioner...³⁵⁴

8.92 This inquiry has confirmed that, while there is some information publicly available about the terms and conditions included in certified agreements,³⁵⁵ this information is far less accessible in relation to AWAs.³⁵⁶ HREOC considers more, and more regular, information could be published detailing trends and outcomes of AWAs approved by the Office of the Employment Advocate in relation to pregnancy and family responsibilities.

8.93 Information published concerning the provisions of agreements indicates that the specific needs of pregnant or potentially pregnant employees do not appear to be reflected in agreements. While there is evidence that general family friendly or flexible work provisions are appearing in a limited way in some agreements, there is little evidence that many of these provisions are specifically directed at clarifying or improving the terms and conditions of pregnant or potentially pregnant employees with a view to eliminating discrimination from their employment.³⁵⁷ This inquiry was urged to establish "best practice" or

³⁵¹ Finance Sector Union of Australia (Submission no 51).

³⁵² Women's Legal Services Network (Submission no 94).

³⁵³ Women's Legal Services Network (Submission no 94).

³⁵⁴ Women's Electoral Lobby Australia (Submission no 97).

³⁵⁵ For example the reports published pursuant to s 358A *Workplace Relations Act 1996* (Cth), the first of which is A Hawke, F Robertson and J Sloan *1997 Report: Agreement-making under the Workplace Relations Act* Department of Workplace Relations and Small Business Canberra 1998.

³⁵⁶ s 83BB(1)(h) *Workplace Relations Act 1996* (Cth) confers on the Employment Advocate the function of "providing aggregated statistical information to the Minister", but this does not require reports to be provided at any particular intervals or to contain any particular information.

³⁵⁷ See tables 8.1 – 8.3.

model clauses to deal specifically with pregnancy issues for consideration in agreement making.³⁵⁸

Recommendation 13: That the Minister for Employment, Workplace Relations and Small Business and the Office of the Employment Advocate ensure that information is available to all workplace participants in relation to their rights and responsibilities in relation to pregnancy and potential pregnancy under the *Workplace Relations Act 1996* (Cth), awards, and in relation to making certified agreements or AWAs.

Recommendation 14: That information provided by the Employment Advocate pursuant to section 170VO *Workplace Relations Act 1996* (Cth) include information about anti-discrimination laws and the role of the agreement making process in achieving a workplace free from discrimination and harassment. The information should include particular reference to discrimination on the ground of pregnancy and potential pregnancy.

Recommendation 15: That the Minister for Employment, Workplace Relations and Small Business fund each Working Women's Centre to provide specific advice and education about pregnancy and work, specifically targeting employees in small business.

Recommendation 16: That the Office of the Employment Advocate be required to collect and regularly publish information about the provisions in AWAs concerning pregnancy and maternity issues.

Recommendation 17: That the Office of the Employment Advocate undertake a research initiative in close consultation with the Sex Discrimination Commissioner to assess the progress of AWAs in contributing to the prevention and elimination of discrimination in the workplace in relation to pregnancy and potential pregnancy.

Pregnancy Guidelines 11: That the Guidelines specifically canvass some of the benefits of establishing pregnancy and related family friendly work practices.

Pregnancy Guidelines 12: That the Guidelines include examples of provisions in agreements that have worked well and could be adapted for use in other agreements to assist in preventing or eliminating discrimination on the ground of pregnancy or potential pregnancy in the workplace.

³⁵⁸ See for example Australian Liquor, Hospitality and Miscellaneous Workers Union (Submission no 32).

Recommendation 18: That the Department of Employment, Workplace Relations and Small Business establish a regular consultative network comprising that Department, the Affirmative Action Agency, Office of the Employment Advocate, the Attorney-General's Department, the Sex Discrimination Commissioner's policy unit and the Office of the Status of Women to exchange data and review trends in relation to systemic sectoral and industry specific discrimination in AWAs, certified agreements and awards in relation to pregnancy and potential pregnancy and maternity leave issues, with a view to policy development and monitoring of workplace relations reform.

Discriminatory awards or certified agreements

- 8.94 While actions done in compliance with awards or certified agreements cannot amount to unlawful discrimination under the SD Act,³⁵⁹ this exemption does not prevent a person from lodging a complaint under the SD Act that someone has done a discriminatory act under an award or certified agreement. If such a complaint is lodged with HREOC, the Sex Discrimination Commissioner must refer that award or agreement to the AIRC if the Commissioner is of the opinion that the act in question appears to be discriminatory.³⁶⁰
- 8.95 If an award or agreement is referred to the AIRC, the Commission must then convene a hearing to review the award or agreement and determine whether it is discriminatory within the meaning of the SD Act.³⁶¹
- 8.96 If it considers that the award or certified agreement is discriminatory, the AIRC must take the necessary action to remove the discrimination.³⁶² In the case of a certified agreement, the AIRC must first give the parties an opportunity to amend the agreement.³⁶³

³⁵⁹ s 40(1)(e) *Sex Discrimination Act 1984* (Cth).

³⁶⁰ s 50A(3) *Sex Discrimination Act 1984* (Cth). The Commissioner need not refer the award or agreement if the Commissioner is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance. If the Commissioner decides not to refer the award or agreement, the complainant may ask the Commissioner to refer that decision to the President of HREOC for review: s 50B *Sex Discrimination Act 1984* (Cth).

³⁶¹ s 111A(1) *Workplace Relations Act 1996* (Cth). s 111A(2) provides that the parties to the review in the case of an award are the parties to the proceeding in which the award was made and, in the case of a certified agreement, the persons bound by the agreement and the employees whose employment is the subject of the agreement. In either case, the Sex Discrimination Commissioner is also a party.

s 46 *Workplace Relations Act 1996* (Cth) gives the AIRC power to refer a question of law arising in a matter before it to the Federal Court and, when the Court determines the question, the AIRC is to vary any award, order or decision it has already made in the matter to be consistent with the Court's opinion. Where it has not made an award, order or decision, the AIRC must do so in a manner that is not inconsistent with the Court's opinion. A discriminatory award or agreement is defined by reference to what would be unlawful discrimination under the *Sex Discrimination Act 1984* (Cth): s 113(5) *Workplace Relations Act 1996* (Cth). The AIRC considers the award or agreement. It does not consider the particular complaint concerning discrimination.

³⁶² Under s 113(2A) *Workplace Relations Act 1996* (Cth) the AIRC must remove the discrimination by setting aside, setting aside the terms of, or varying, the award or agreement.

³⁶³ s 113(2C) *Workplace Relations Act 1996* (Cth).

- 8.97 Because section 50A of the SD Act is concerned with a discriminatory provision or effect, this may require the AIRC to look at more than the face of the award or agreement and look to whether the award or agreement has discriminatory effects.
- 8.98 To date the section 50A referral power has not been used.
- 8.99 The Department of Employment, Workplace Relations and Small Business suggested the reasons for this could be either that the dispute resolution procedures in awards and agreements are being successfully used or that workplace participants may be unfamiliar with their award or agreement or unaware that written complaints of discrimination to HREOC must be made before a referral to the AIRC can be made.³⁶⁴
- 8.100 Several submissions supported the suggestion that workplace participants may not be sufficiently aware of the legislation to take advantage of these provisions in order to seek redress where appropriate. They suggested that the Sex Discrimination Commissioner be given a more proactive role in referring discriminatory awards and agreements to the AIRC.

The ability of the Sex Discrimination Commissioner to refer discriminatory awards or agreements for review has been of limited value because of the requirement that there be a complaint regarding a discriminatory action done pursuant to the award or agreement.

The ACTU recommends that the SDA be amended to provide that the Commissioner can refer an award or agreement to the Industrial Relations Commission if satisfied that direct or indirect discrimination has occurred pursuant to that award or agreement.³⁶⁵

- 8.101 Another submission noted

[d]iscriminatory awards are substantial systemic barriers to equality of opportunity and the Commissioner should be able to proactively take up these issues.³⁶⁶

- 8.102 HREOC is also of the opinion that the referral provisions are under-utilised because of a lack of awareness of the provisions on the part of unions. A recommendation was made to the inquiry that “[i]mplementation of an education process involving unions which may be more likely to identify and act upon systemic discrimination in awards than individuals...”, should be undertaken.³⁶⁷ HREOC considers that the Guidelines should go some way to performing that function.

- 8.103 The Affirmative Action Agency’s submission raised another suggestion.

The Independent Committee’s report on the recent regulatory review of the Act recommended that the Director of the AA Agency be able to refer certain systemic, sectoral

³⁶⁴ Department of Employment, Workplace Relations and Small Business Supplementary Submission (Submission no 101).

³⁶⁵ Australian Council of Trade Unions (Submission no 59).

³⁶⁶ Anti-Discrimination Commission Queensland (Submission no 68).

³⁶⁷ Anti-Discrimination Commission Queensland (Submission no 68).

or occupational sex-based discrimination issues, which may properly be the subject of an inquiry or report, to the Sex Discrimination Commissioner for consideration. The Government Response noted that there is presently nothing to prevent such referral, and that it may give further consideration to providing an explicit legislative basis for referral. The Agency considers it would also be useful for the Sex Discrimination Commissioner to refer an industry or occupational matter to the Director of the AA Agency for further investigation or educational assistance.³⁶⁸

8.104 This issue is dealt with further at paras 13.71 – 13.74.³⁶⁹

8.105 One submission to the inquiry opposed HREOC having a role in this area, arguing that it would constitute dual regulation.³⁷⁰ Other comments to the inquiry supported the following comments, which strongly urged

...the maintenance of the integrity and effectiveness of HREOC but do not support HREOC being used as an excuse to reduce workers' award entitlements. Pregnancy discrimination must be able to be dealt with in an industrial relations context as well as in a discriminatory context.³⁷¹

8.106 HREOC considers that providing the Sex Discrimination Commissioner access to the AIRC as suggested would lead to a more seamless and better integrated system of audit and protection for workplace participants. It may in fact reduce the likelihood of dual regulation if all issues of concern, under both the anti-discrimination and workplace relations systems, can be dealt with in the one jurisdiction.

Recommendation 19: That the *Sex Discrimination Act 1984* (Cth) be amended to allow the Sex Discrimination Commissioner to refer discriminatory awards or agreements to the Australian Industrial Relations Commission of her own initiative without the requirement to receive a written complaint.

³⁶⁸ Affirmative Action Agency (Submission no 76). The report referred to is *Unfinished Business: Equity for Women in Australian Workplaces* Final Report of the Regulatory Review of the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* Department of Workplace Relations and Small Business Canberra 1998. The Affirmative Action Agency also noted in its submission to the inquiry that “[a]s an outcome of the regulatory review of the Act, the Agency will develop educative guidelines to help employers meet their legislative requirements. Such guidelines could also help employers meet their requirements under anti-discrimination legislation. In this respect, continued collaboration between the Agency and the Sex Discrimination Unit would be valuable” (Submission no 76).

³⁶⁹ See also recommendations 40 and 41.

³⁷⁰ Australian Chamber of Commerce and Industry (Submission 84).

³⁷¹ Shop, Distributive and Allied Employees' Association (Submission no 74).

Unfair/unlawful dismissal from employment

- 8.107 The WRA provides that termination of employment on the ground of, or for reasons including, sex or pregnancy is prohibited.³⁷² Termination on the ground of absence from work during maternity leave is also prohibited.³⁷³
- 8.108 A number of categories of employment are excluded from the termination of employment provisions of the WRA. These include trainees whose traineeship is for a specified period and casual employees engaged for short periods. However, casual employees are not excluded from the provisions if they have been engaged by a particular employer on a regular and systematic basis for a sequence of periods over at least 12 months and had a reasonable expectation of continuing employment.³⁷⁴
- 8.109 An eligible employee, whose employment has been terminated for the reason of sex, pregnancy or absence from work during maternity leave, may apply to the AIRC for relief.³⁷⁵
- 8.110 In the AIRC, costs can be awarded against applicants for vexatious or unreasonable applications or if parties act unreasonably in not agreeing to a settlement or discontinuing an application.³⁷⁶ The Federal Court's power to award costs is similarly limited.³⁷⁷
- 8.111 Thus, an employee who is dismissed because of her pregnancy can either take her complaint to HREOC or to the AIRC to be dealt with under the WRA.
- 8.112 However, the WRA prevents a person from bringing proceedings under more than one Act in relation to the same matter. Therefore proceedings because of termination of employment on the ground of pregnancy³⁷⁸ cannot be brought under the WRA if they have already been commenced under the SD Act or

³⁷² This is subject to the exemption for the inherent requirements of particular employment and the exemption in respect of employment in religious institutions: s 170CK(2)(f), (3) and (4) *Workplace Relations Act 1996* (Cth).

³⁷³ s 170CK(2)(h) *Workplace Relations Act 1996* (Cth). The exemptions mentioned in fn 111 above apply to this ground also.

³⁷⁴ Other categories of employees excluded are those under a contract of employment for a specified period or a specified task, employees serving a period of probation or qualifying period of less than 3 months (unless a longer period is reasonable having regard to the nature and circumstances of the employment) and employees who are not employed under award conditions and who are employed on piece rates or commission at above a specified rate. s 170CC *Workplace Relations Act 1996* (Cth) and Reg 30B *Workplace Relations Regulations 1996* (Cth) provide more detail on the excluded categories.

³⁷⁵ s 170CE *Workplace Relations Act 1996* (Cth). An application can be made on more than one ground. If a union's rules allow it to represent an employee terminated on such grounds, it may apply to the Australian Industrial Relations Commission on the employee's behalf. reg 30BD of the *Workplace Relations Regulations 1996* (Cth) provides that a fee of \$50 (subject to an exemption for serious hardship) is payable on lodging an application.

³⁷⁶ s 170CJ *Workplace Relations Act 1996* (Cth).

³⁷⁷ s 170CS *Workplace Relations Act 1996* (Cth).

³⁷⁸ Or potential pregnancy to the extent to which this might fit within termination for reason of sex.

state/territory anti-discrimination or other legislation.³⁷⁹ Similarly, proceedings begun under any of those other laws prevent proceedings being brought under the WRA.

8.113 In most states, a choice is generally available between pursuing a complaint as an anti-discrimination matter or a workplace or industrial relations matter. For example, in Queensland an employee complaining of unfair dismissal on the ground of pregnancy can choose whether to take the complaint to the Queensland Anti-Discrimination Commissioner or the Industrial Relations Commission. If the complainant chooses the Queensland Anti-Discrimination Commissioner, then the industrial option is closed. However, a complaint under the Queensland *Workplace Relations Act 1997* does not prevent a later application under the Queensland *Anti-Discrimination Act 1991*.³⁸⁰

8.114 The general interaction and relationship within state/territory jurisdictions is a matter beyond the scope of this inquiry.

8.115 However, to the extent that confusion and overlap occur in relation to pregnancy or potential pregnancy between the federal and state/territory jurisdictions, it is a matter for this inquiry and, as a number of submissions noted, it needs to be explained. The submission from the New South Wales Government noted that these interrelationships

...are complex and confusing for many people, including human resources, affirmative action and industrial relations managers, unions, non-government organisations and government agencies - as well as employees.³⁸¹

8.116 The following example raised in the submission from an employer organisation illustrates the issue.

[A]n employer may have no option but transfer a pregnant woman to a lower level job in order to prevent risk of injury to the woman or to her unborn child. Should the employee disagree with this action and make a complaint of discrimination under the NSW Act, the employer could rely on its compliance with the *Occupational Health and Safety Act* and invoke the sec 54 exception as a defence to the employee's complaint. (The employer could also rely on sec 70 of the *NSW Industrial Relations Act*, which provides for the transfer of a pregnant worker to a safe job where there is a risk to the employee's health.)

...the problem for employers is that the federal SDA does not contain a similar exception.³⁸²

8.117 HREOC considers that, in general, the anti-discrimination and workplace relations systems operate together in relation to unfair or unlawful dismissals

³⁷⁹ s 170HC (and s 170HB in relation to the harsh, unjust or unreasonable ground) *Workplace Relations Act 1996* (Cth). This prohibition ceases to apply if the first proceedings have been discontinued by the applicant or have failed for want of jurisdiction. See also paras 7.22 – 7.23.

³⁸⁰ s 153 *Anti-Discrimination Act 1991* (Qld).

³⁸¹ New South Wales Government (Submission no 99).

³⁸² Australian Business and Newcastle and Hunter Business Chamber Women's Forum (Submission no 90). See also paras 12.47 – 12.50 for a discussion of transfers to alternative duties.

with minimal disruption or inconvenience to any party and that the two systems of regulation have similar practical effects. For example, the practical effect of the SD Act and the NSW *Industrial Relations Act 1996* is the same, as section 70, referred to in the comment at para 8.116 above, requires any transfer of duties to be made as far as possible without loss of pay or status. This is compatible with the requirements of the SD Act. Nevertheless, some practical advice and assistance on the operation of the two systems will be provided in the Guidelines.

Pregnancy Guidelines 13: That the Guidelines provide information on the interrelationship between federal anti-discrimination and workplace relations jurisdictions as they relate to pregnancy and potential pregnancy.

Closer links between the two systems

8.118 Based on the issues and concerns raised in this chapter, HREOC has concluded that the workplace relations and anti-discrimination systems are able to operate harmoniously, particularly if formal links and increased levels of contacts between the two systems are developed. This is a conclusion supported by several submissions to the inquiry. The Queensland Anti-Discrimination Commission noted that

[a] Taskforce has recently reviewed the industrial relations legislation in Queensland and the final report has recommended that a President's Advisory Council and the Industrial Relations Advisory Council, as described in current workplace relations legislation, be retained, with the addition of a representative from ADCQ.

The Taskforce reported that it believes this would result in the development of stronger links between the discrimination jurisdiction and the industrial one.³⁸³

8.119 The Queensland Commission submission went on to recommend that it would be of assistance to establish

...protocols for information sharing and exchange of expertise between the Industrial Relations Commission and the Sex Discrimination Commissioner to strengthen and operationalise the links between the two jurisdictions.³⁸⁴

8.120 HREOC supports the establishment of consultative networks on these issues.

³⁸³ Anti-Discrimination Commission Queensland (Submission no 68) reporting on Industrial Relations Taskforce *Review of Industrial Relations Legislation in Queensland* Qld Department of Employment, Training and Industrial Relations Brisbane 1998, 149-150.

³⁸⁴ Anti-Discrimination Commission Queensland (Submission no 68).

Recommendation 20: That the Sex Discrimination Commissioner and the Australian Industrial Relations Commission establish formal links and protocols for information sharing and exchange of expertise, with specific reference to sex and pregnancy discrimination issues.

Selected Workplace Agreement Database (WAD) Tables**Table 8.1 Workplace Agreement Database (WAD) - Frequency of family-friendly provisions in certified agreements from 1.9.97 to 30.6.98**

FAMILY-FRIENDLY PROVISIONS	NO. OF AGREEMENTS	%
Flexible working hours	4749	49
Family Carer's leave	2867	29
Paid maternity leave	639	29
Paid paternity leave	249	3
Paid adoption leave	111	1
Single day use of annual leave	534	6
Career breaks and purchased leave	127	1
Regular part-time work	1712	18
Job sharing	210	2
Home based work	114	1
Child care provisions	175	2
Family responsibility provisions	243	3
TOTAL AGREEMENTS FROM 1/1/97 TO 30/6/98	9749	

Table 8.2 Workplace Agreement Database (WAD) - Frequency of flexible working hour provisions in certified agreements from 1.9.97 to 30.6.98

FAMILY-FRIENDLY PROVISIONS	NO. OF AGREEMENTS	%
Time off in lieu at ordinary time rates	903	9
Time off in lieu at penalty rates	653	7
Hours averaged over extended period	360	4
Compressed working week	162	2
Start and finish times flexible	573	6
Flexitime system in operation	584	6
Hours of work may be negotiated by employees	604	6
Hours of work decided by majority of employees	990	10
Make-up time	568	6
Banking/accrual of rostered days off	2760	28
TOTAL AGREEMENTS IN PERIOD 1/1/97 TO 30/6/98	9749	

Table 8.3 Workplace Agreement Database (WAD) - Paid maternity and paternity leave in certified agreements from 1.9.97 to 30.6.98

NUMBER OF WEEKS	NUMBER OF AGREEMENTS	
	<i>Paid maternity leave</i>	<i>Paid paternity leave</i>
0.2	-	1
0.4	-	1
0.5	-	2
0.6	3	9
1	65	160
2	276	53
3	3	2
4	12	5
5	-	1
6	108	12
7	1	-
8	4	-
9	4	1
12	160	2
14	1	-
18	2	-
NO. AGREEMENTS WITH PAID PARENTAL LEAVE	639	249
%	7	3

Chapter 9 - Occupational health and safety

Introduction

- 9.1 Employers have an obligation to ensure the health, safety and welfare of employees at work. Legally, this obligation arises from occupational health and safety (OH&S) legislation that applies throughout Australia.³⁸⁵ The employer's role is complemented by workplace health and safety committees responsible for monitoring health, safety and welfare issues.³⁸⁶ These committees must be consulted on matters such as proposed changes to the workplace, existence of hazards and the development of OH&S policies and practices.
- 9.2 Federal, state and territory occupational health and safety bodies also work together to establish standards and codes of practice for workplaces.³⁸⁷ A standard sets the required level of preventive action, and usually relates to a specific workplace hazard. A code of practice generally sets out the best way to achieve the standard.³⁸⁸ The National Code of Practice for Manual Handling requires employers to take account of special needs such as pregnancy in the risk assessment process.³⁸⁹ The National Standard for the Control of Inorganic Lead at Work lists pregnancy as a criterion for exclusion from a lead-risk job.³⁹⁰

³⁸⁵ *Occupational Health and Safety Act 1983* (NSW); *Occupational Safety and Health Act 1984* (WA); *Occupational Health and Safety Act 1985* (Vic); *Occupational Health, Safety and Welfare Act 1986* (SA); *Workplace Health and Safety Act 1995* (Qld); *Workplace Health and Safety Act 1995* (Tas); *Work Health Act 1986* (NT); *Occupational Health and Safety Act 1989* (ACT) and regulations under these Acts. The *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth) provides for employer and employee responsibilities in relation to occupational health and safety in Commonwealth workplaces. See also *National Occupational Health and Safety Commission Act 1985* (Cth). Common law also affects OH&S obligations: Labour Ministers Council *Comparison of Occupational Health and Safety Arrangements in Australian Jurisdictions* Department of Employment, Workplace Relations and Small Business Canberra 1999 (available from www.dewrsb.gov.au/group_rd/lmc/cpm/reports/index.htm).

³⁸⁶ OH&S legislation generally requires the establishment of these committees. However, this may be subject to exemption: for example, in New South Wales, such a committee need only be established if the employer has 20 or more employees and a majority of these request the establishment of the committee or otherwise if WorkCover directs the employer to establish a committee: s23(1) *Occupational Health And Safety Act 1983* (NSW); in the ACT the limit is 10 or more employees: s 36 *Occupational Health and Safety Act 1989* (ACT); and, in Western Australia, an employer who is requested by an employee to have such a committee but considers it is not necessary can refer that request to the WorkSafe Western Australian Commissioner for decision: s 36 *Occupational Safety and Health Act 1984* (WA).

³⁸⁷ For example, the National Occupational Health and Safety Commission (which comprises federal, state and territory governments and employer and employee representatives) has declared National Model Regulations for the Control of Workplace Hazardous Substances and a National Code of Practice for the Control of Workplace Hazardous Substances. National standards are declared by the National Commission under s 38(1) *National Occupational Health and Safety Commission Act 1985* (Cth) and most deal with the specific workplace hazards. It is expected that national standards/codes of practice would be adopted nationally and the state and territory legislation facilitates this.

³⁸⁸ As defined in *A Short Guide to The Employer's Duty of Care under the Occupational Health and Safety (Commonwealth Employment) Act 1991* (available through the Comcare website at www.comcare.gov.au/ohs/3/dutyofcare/fs-doc.html).

³⁸⁹ National Occupational Health and Safety Commission: 2005 (1990) February 1990 section 4.44:

- 9.3 Consultations and research undertaken during this inquiry indicated clearly that pregnancy, and in some cases potential pregnancy, can pose particular challenges for ensuring compliance with both OH&S and anti-discrimination legislation.
- 9.4 It is clear that, while employers and employees should consider the management of pregnancy and potential pregnancy in the context of the general obligation to ensure health, safety and welfare, some do not do so. Risks to pregnant and potentially pregnant employees should be assessed objectively, free from discriminatory assumptions and/or stereotypes.
- 9.5 Chapter 12 deals in some detail with the particular steps that may be taken to accommodate risks to pregnant or potentially pregnant employees.

Workplace risks for pregnant employees

- 9.6 In some working environments, pregnant and/or potentially pregnant employees are exposed to particular risks not faced by other workers. Submissions and consultations to the inquiry supported the findings of published research in this regard.
- 9.7 There are some hazardous substances, such as chemicals, metals or gases, to which a pregnant or breastfeeding woman, or her child, are particularly susceptible.³⁹¹ There are also biological hazards that pose particular risks for women who are pregnant or breastfeeding, men and women who are intending to reproduce, or foetuses. Such biological hazards include exposure to rubella, listeria or toxoplasmosis.³⁹²

Doctors don't seem to have a lot of knowledge of the issues around Toxoplasmosis. There needs to be more awareness as the risk is not just restricted to during pregnancy.³⁹³

- 9.8 Some pregnant workers may also have occupational health and safety concerns where physical tasks, such as heavy lifting or standing for long periods of time, become difficult to perform safely. Of relevance is a recent Danish study that

In some instances, employees may have special needs that require consideration in the risk assessment process. These needs may be permanent or temporary, for example, returning to work from an illness or extended leave of absence, pregnancy, specific disability, etc.

³⁹⁰ National Occupational Health and Safety Commission: 1012 (1994) October 1994 section 14(1).

³⁹¹ It has been estimated that, of the approximately 60,000 chemical substances currently used in industry, only 3,000 have been investigated for reproductive effect: JS Feinberg and CR Kelley "Pregnant Workers: A physician's guide to assessing safe employment" (1998) 168(2) *Western Journal of Medicine* 86-92 at 88.

³⁹² As discussed, for example, in R Kenen *Reproductive Hazards in the Workplace: Mending jobs, managing pregnancies* Haworth Press New York 1993; WorkCover New South Wales *Draft Code of Practice and Guidelines on Pregnancy and Work* Sydney WorkCover 1998, 33.

³⁹³ [Taronga Park Zoo \(Focus Group, 2 February 1999\)](#).

suggests that working on one's feet for prolonged hours during pregnancy decreases birthweight for gestational age.³⁹⁴

9.9 Focus group members presented a range of concerns during inquiry consultations.

Few allowances are made for pregnant teachers. A good example is having to be on playground duty on hot days. Some teachers have to juggle classes to avoid stairs or swap playground duty with other teachers as their pregnancy advances. Access to toilet breaks during class is also an issue.³⁹⁵

A current issue is passive smoking at [a] casino. About 70% of their employees are between 25 and 35, so pregnancy is an issue. The casino has improved ventilation but if the employee is standing in a 'pit' with 20 smokers around them they cannot avoid breathing in second hand smoke. The macho atmosphere of the workplace prevents complaints. Employees fear that if a complaint was made it would be used as an excuse to get them out.³⁹⁶

How responsible is the zoo for the pregnant worker? For example if a pregnant employee doesn't feel safe with an animal can she ask to be moved?³⁹⁷

[N] is a pregnant zoo worker and one of the 64% of women who are keeping staff. Although she has had support with lifting there are few staff to assist when she needs it. Duties such as cleaning enclosures, emptying waste buckets and dragging hoses around are jobs that just have to be done. "I've been moved from elephants to carnivores so the physical load is a little lighter".³⁹⁸

Work in the botanic estate is physical, labour intensive and hard. In the vet block you just call out "I can't do this" and women support each other.³⁹⁹

9.10 Some risks to pregnant or potentially pregnant employees, such as those arising in workplaces where hazardous materials are used, may be clear and well established. However, risks are not always apparent and, as identified by submissions and consultations, they can be exacerbated by poor communication and poor management.

9.11 The interactions of OH&S and anti-discrimination regimes in addressing these workplace hazards are discussed throughout this chapter.

³⁹⁴ TB Henriksen, M Hedegaard and NJ Secher "Standing and Walking at Work and Birthweight" (1995) 74 *Acta Obstetrica et Gynecologica Scandinavica* 515. See also TB Henriksen et al "Standing at Work and Preterm Delivery" (1995) 102 *British Journal of Obstetrics and Gynaecology* 198.

³⁹⁵ [Labor Council of NSW \(Focus Group, 2 February 1999\).](#)

³⁹⁶ [Australian Council of Trade Unions \(Focus Group, 18 September 1998\).](#)

³⁹⁷ [Taronga Park Zoo \(Focus Group, 2 February 1999\).](#)

³⁹⁸ [Taronga Park Zoo \(Focus Group, 2 February 1999\).](#)

³⁹⁹ [Taronga Park Zoo \(Focus Group, 2 February 1999\).](#)

Harassment is a workplace hazard

- 9.12 Unhealthy levels of stress and inappropriate attitudes and behaviour pose workplace hazards.⁴⁰⁰ A union submission outlined a range of concerns in this regard.

There is a great deal of badgering of women regarding whether they should continue working, whether they are doing the best/right thing by their baby and negative comments about their ability to return to work. Women find this justifiably distressing.⁴⁰¹

Women also experience a number of personal comments made about their change of body shape as well as comments such as “I know what you’ve been up to.”⁴⁰²

Pregnant women often experience well meaning, but insensitive, treatment such as people touching their stomachs which they find irritating and intrusive.⁴⁰³

- 9.13 Constant references to the pregnancy (some of which are sexual), inappropriate touching of the employee’s stomach (which would not have happened if she were not pregnant), badgering the employee about whether she is coping, when she is leaving and whether she “really” intends to come back to work can cause distress and often equate to harassment of the pregnant employee. It may also contribute to low workplace morale. In extreme cases, it may pose risks to the health, safety and welfare of the harassed employee.⁴⁰⁴

- 9.14 The submission from the Working Women’s Centres reported that

[w]e have been contacted by women regarding their treatment by their employers which could be seen to cause detriment to them, including verbal abuse and harassment, inappropriate comments (including references to abortion), a changed relationship with the boss after they were informed of the pregnancy and direct threats of sacking for time off because of illness related to pregnancy.⁴⁰⁵

- 9.15 HREOC agrees with a submission from a national trade union that recommended educational material regarding sexual harassment include specific information about harassment of pregnant employees.⁴⁰⁶

⁴⁰⁰ See also paras 12.111 – 12.115.

⁴⁰¹ Shop, Distributive and Allied Employees’ Association (Submission no 74).

⁴⁰² Shop, Distributive and Allied Employees’ Association (Submission no 74).

⁴⁰³ Shop, Distributive and Allied Employees’ Association (Submission no 74).

⁴⁰⁴ See, for example S Fitzgerald “Games People Play: The high cost of bullying and harassment in the workplace” (Dec 1998) 2 *CCH’s Australian OHS* 10-14.

⁴⁰⁵ Working Women’s Centres (Submission no 88).

⁴⁰⁶ Shop, Distributive and Allied Employees’ Association (Submission no 74). The National Occupational Health and Safety Commission, with the assistance of the New South Wales Anti-Discrimination Board, has released a fact sheet on Harassment at Work including harassment because of pregnancy – available on the National Occupational Health and Safety Commission website (www.worksafe.gov.au/worksafe/09/fsheets/haras1.htm).

The role of medical advice

- 9.16 The identification and proper handling of OH&S risks for pregnant and potentially pregnant women should be worked out between the employer and employee with the benefit of medical advice.
- 9.17 This necessarily means that the medical practitioner (or medical adviser) providing medical advice in relation to managing the pregnancy has a responsibility to identify risks and base decisions and recommendations on available scientific material. Where the woman is potentially pregnant, the medical practitioner's responsibility would usually depend on the woman raising the issue of OH&S risks.
- 9.18 Unless the medical practitioner's advice is requested, the responsibility for identification of risks falls back on the employer and employee who would have to do their own research and may be without the experience to properly assess any material they find.⁴⁰⁷ Employers who are responsible for high risk work environments will usually be aware, and should be aware, of what those risks are. However, there are many risks which may not be clear and in those areas, in particular, medical advice is most important.
- 9.19 One submission from a national union informed the inquiry that it
- ...has had experience where requests by employers for the provision of medical certificates concerning the pregnancy can be a means of harassment. The timing of these requests can be inconvenient and costly. An example is when a request for a medical certificate is made after the woman has seen her doctor at which appointment she did not obtain a certificate because she did not realise one would be requested. Another example is when repeated requests for medical certificates are made with undue cause. These have been associated with intimidation and questions, when the woman is perfectly healthy, such as "Are you sure you're doing the right thing by your baby by continuing to work?" "Don't you think you should be home resting?" which are designed to push the woman out of the work force.⁴⁰⁸
- 9.20 There was concern detailed in submissions and during consultations that some doctors were unaware of workplace requirements and the legislative frameworks of OH&S and anti-discrimination law.
- Medical certificates often poorly define the capacity of the employee. Employers usually need more detailed advice yet doctors rarely return phone calls, let alone release information on a patient. Guidelines for doctors are needed, perhaps with a standard checklist, with employee consent.⁴⁰⁹
- 9.21 It is obviously desirable if employee and employer could discuss what information the medical certificate should provide prior to the employee's visit to the doctor for the certificate. Employees could then provide a release for

⁴⁰⁷ Although see s 70 *Industrial Relations Act 1996* (NSW).

⁴⁰⁸ Shop, Distributive and Allied Employees' Association (Submission no 74).

⁴⁰⁹ [Council for Equal Opportunity in Employment Ltd \(Focus Group, 15 December 1998\).](#)

information so that doctors were not bound by the confidentiality that may create the frustration noted in the comments above. This is not always possible but employers should address this area of concern in their policies and information available to staff about terms and conditions of work.

- 9.22 Timely and effective medical advice is of vital importance to all pregnant and potentially pregnant employees and their employers, particularly in small businesses. Small business employers may have less experience in workplace management of pregnancy. Nor do they have an obligation to establish a workplace health and safety committee to assist in gathering relevant data.⁴¹⁰
- 9.23 Where medical advice is available and the employer is made aware of it but does not follow it, the employer may be liable for any damage that occurs as a result of failing to follow that advice.
- 9.24 Where there is a health risk that a medical practitioner or adviser should have identified and did not identify then that medical practitioner or adviser may be at risk of a malpractice or negligence action.
- 9.25 The New South Wales Labor Council advised the inquiry that
- [d]espite the employer's duty of care, many workers seem more aware than their bosses of potential harm to themselves or their unborn babies caused by their work environment and have had to not only bring it to their employer's attention, but also to impress upon their doctors the need for tests to let them know the results of exposure to possible harmful diseases or chemicals. The big concern here was that the women wanted to know before they got pregnant what they should be doing to minimise risks and, although they seemed incredibly well-briefed, had to take time to research their conditions themselves. There was no official information available at the workplace - just what they learned from each other. This ignorance often extends to doctors, where women in specialist industries - for example, in hospitals exposed to x-rays or anaesthetic gases, or working with animals, or chemicals, or in gardens, often had to bring up the possibility of exposure and were met by blank stares from their doctors.⁴¹¹
- 9.26 Generally, increasing the understanding of medical practitioners and advisers, particularly those external to the work environment, was strongly supported by submissions to the inquiry.
- 9.27 Pregnant and potentially pregnant employees wishing to work were considered to be entitled to concise and accurate OH&S data about their working environments.

⁴¹⁰ See fn 2 above.

⁴¹¹ Labor Council of NSW (Submission no 41). The Labor Council of NSW's submission was based on focus groups held with affiliates and union members. See also M Wallace "*OHS Implications of Shiftwork and Irregular Hours of Work*" National Occupational Health and Safety Commission Sydney 1997 (also available at www.worksafe.gov.au/worksafe/10/shiftwork/review.html); P Wadhwa et al "The Association Between Prenatal Stress and Infant Birth Weight and Gestational Age at Birth: A prospective investigation" (1993) 169 *American Journal of Obstetrics and Gynecology* 858.

- 9.28 Submissions and consultations exemplified the need for a multi-disciplinary approach to assess the reproductive risks, if any, for pregnant or potentially pregnant workers. Clearly medical practitioners and advisers need to be aware of possible risks, identify and quantify risks, and effectively counsel patients according to the industry in which the worker is employed. While counselling may alleviate unnecessary fears, it may also involve intervening when risks are present in order to control or prevent hazard. There was a view that medical practitioners and advisers should attempt to understand the possible hazards unique to a particular occupational environment in order to assess the risk their patients may be exposed to. There was also a firm call for employers to be knowledgeable about their working environments and the particular OH&S issues for pregnant and potentially pregnant workers.
- 9.29 An understanding of workplace hazard can reduce and even eliminate risks for pregnant workers. Education of employees about known hazards and risk reduction through safe work practices was supported and deemed to be effective by contributors to the inquiry.
- 9.30 Medical practitioners and advisers were considered to have a responsibility to both employers and their patients when providing information.⁴¹² Decisions regarding the continuation of employment or the type of employment during pregnancy should be thorough. Decisions should be based on scientific merit and well understood by employee and employer. Some felt this was often not the case. A relevant article suggests that better care of pregnant workers may lead to greater productivity by reducing the number of lost workdays.⁴¹³
- 9.31 HREOC considers that there would be merit in developing health care material that addresses the possible range of risks which pregnant and potentially pregnant employees might face in the workplace. This material could explain how risks can be identified, how information about avoiding or limiting risks can be obtained and how employers, medical practitioners and employees can work successfully together to manage workplace pregnancy in a safe and non-discriminatory way.

Recommendation 21: That the Department of Health and Aged Care, in consultation with the National Occupational Health and Safety Commission and HREOC, develop an education campaign that reflects the expectations and needs about the type of information and advice employees and employers want and need to ensure better care of pregnant or potentially pregnant employees.

Duty of care in OH&S legislation

- 9.32 Federal OH&S legislation, which applies in Commonwealth workplaces, and state/territory OH&S legislation, which applies to other employees, all require

⁴¹² See also paras 12.77 – 12.90 and Pregnancy Guidelines recommendation 31.

⁴¹³ JS Feinberg and CR Kelley “Pregnant Workers: A physician’s guide to assessing safe employment” (1998) 168 *Western Journal of Medicine* 2, 86.

employers to ensure the health, safety and welfare at work of their employees.⁴¹⁴

- 9.33 In some cases, this is expressed as a general duty of care placed on employers but most of the legislation provides a list of specific duties, failure to discharge any of which is a breach of the employer's overall duty of care. These duties of care include the duty to ensure safety and absence of risks in use, handling, storage or transport of plant and substances,⁴¹⁵ the duty to provide training to ensure employees are safe from injuries and risks to health⁴¹⁶ and the duty to ensure that visitors to the workplace are aware of safety requirements and abide by them.⁴¹⁷
- 9.34 OH&S legislation rarely deals with specific conditions such as pregnancy. One exception is the various legislation dealing with lead, which is discussed under the case study on lead at paras 9.71 – 9.84.⁴¹⁸
- 9.35 Another important exception is the *Draft Code of Practice and Guidelines on Pregnancy and Work*.⁴¹⁹ At the time this report was being written, the New South Wales Government had released the draft code and guidelines for public comment. Incorporating information and advice on OH&S, industrial relations and anti-discrimination law, the main purpose of the *Draft Code of Practice and Guidelines on Pregnancy and Work* was expressed to be

...to set out and explain legal obligations as they have been defined in statutes and in case law, and providing guidance in ensuring work and workplaces are safe, fair and consistent with the entitlements of pregnant women and new mothers, including being able to continue in paid work.⁴²⁰

⁴¹⁴ s 15 *Occupational Health and Safety Act 1983* (NSW); s 19 *Occupational Safety and Health Act 1984* (WA); s 21 *Occupational Health and Safety Act 1985* (Vic); s 19 *Occupational Health, Safety and Welfare Act 1986* (SA); s 28 *Workplace Health and Safety Act 1995* (Qld); *Workplace Health and Safety Act 1995* (Tas); s 29 *Work Health Act 1986* (NT); *Occupational Health and Safety Act 1989* (ACT) and regulations under these Acts. The *Occupational Health and Safety (Commonwealth Employment) Act 1991* provides for employer and employee responsibilities in relation to occupational health and safety in Commonwealth workplaces. In some instances more specific requirements exist through adoption by the states and territories of national Codes of Practice dealing with a variety of areas such as manual handling and hazardous substances.

⁴¹⁵ s 15(2)(b) *Occupational Health and Safety Act 1983* (NSW).

⁴¹⁶ s 19(1)(c) *Occupational Health, Safety and Welfare Act 1986* (SA).

⁴¹⁷ s 29(2)(e) *Work Health Act 1986* (NT).

⁴¹⁸ Other exceptions, in related legislation, are concerned with maternity leave such as s 50 *Factories, Shops and Industries Act 1962* (NSW) which makes it an offence for a woman to work during the six weeks immediately after the birth of her child.

⁴¹⁹ WorkCover New South Wales *Draft Code of Practice and Guidelines on Pregnancy and Work* WorkCover NSW Sydney 1998.

⁴²⁰ WorkCover New South Wales *Overview of Draft Code of Practice and Guidelines on Pregnancy and Work* WorkCover Sydney 1998, section 2.

- 9.36 The document explains that the OH&S aspects are intended to be an industry code of practice under the New South Wales *Occupational Health and Safety Act 1983*.⁴²¹ This code is the subject of recommendations 22 and 23.
- 9.37 OH&S and anti-discrimination legislation must be dealt with simultaneously. The obligation under OH&S legislation to ensure a safe place of work for employees means that each employer has to take account of the particular characteristics of the workforce and the OH&S needs of pregnant and potentially pregnant workers. Submissions and consultations indicated that this was not always happening, or even recognised, in some cases.

OH&S in anti-discrimination legislation

- 9.38 Some state/territory anti-discrimination legislation provides that discrimination on the ground of pregnancy is not unlawful where it is based on the woman's ability to perform certain work.
- 9.39 The South Australian *Equal Opportunity Act 1984* provides that it is not unlawful to discriminate on the ground of pregnancy if
- a) the discrimination is based on the fact that the woman is not, or would not be, able
 - (i) to perform adequately, and without endangering herself, the unborn child or other persons, the work genuinely and reasonably required of her;
 - or
 - (ii) to respond adequately to situations of emergency that should reasonably be anticipated in connection with her duties;
 and
 - (b) in the case of discrimination arising out of dismissal from employment, there is no other work that the employer could reasonably be expected to offer the woman.⁴²²
- 9.40 In Victoria a person may discriminate on the ground of pregnancy if the discrimination is reasonably necessary to protect the health or safety of any person (including the person discriminated against).⁴²³ A similar exemption applies in Queensland.⁴²⁴
- 9.41 The Victorian *Equal Opportunity Act 1995* also provides an exemption which may be applicable to pregnant women in certain circumstances. It states that an

⁴²¹ s 44A *Occupational Health and Safety Act 1983* (NSW) provides that a person is not liable for breaching a code. However, a person's failure to observe the code is admissible as evidence to prove a contravention or failure to comply with the Act (s 44B) and Improvement or Prohibition Notices setting out measures necessary to comply with the Act may adopt the requirements of a code (s 31T).

⁴²² s 34(3) *Equal Opportunity Act 1984* (SA).

⁴²³ s 80(2) *Equal Opportunity Act 1995* (Vic).

⁴²⁴ s 108 *Anti-Discrimination Act 1991* (Qld).

employer may set reasonable terms or requirements of employment, or make reasonable variations to those terms or requirements, to take into account

- (a) the reasonable and genuine requirements of the employment;
- (b) any special limitations that a person's impairment or physical features⁴²⁵ imposes on his or her capacity to undertake the employment;
- (c) any special services or facilities that are required to enable him or her to undertake the employment or to facilitate the conduct of the employment.⁴²⁶

9.42 The Northern Territory *Anti-Discrimination Act 1992* contains a general obligation to accommodate any special needs that a person has because of an attribute such as pregnancy.⁴²⁷ However, there is an exemption in section 58 of that Act to enable discrimination if the accommodation of that special need would require special services or facilities that it would be unreasonable to require a person to provide. In Tasmania, a person may discriminate against a woman on the ground of pregnancy if the woman requires special services and facilities the supply of which would impose unjustifiable hardship.⁴²⁸

9.43 While these provisions may assist to allay concerns about inconsistency between OH&S needs and anti-discrimination legislation, difficulties may be experienced in practice in finding the correct balance between the competing issues. There is also the issue of OH&S and state/territory exemptions being inappropriately utilised to remove pregnant workers.

9.44 The *Sex Discrimination Act 1984* (Cth) (the SD Act) contains an exemption to allow discrimination on the ground of sex in employment where being a person of a particular sex is a genuine occupational qualification.⁴²⁹

9.45 The exemption for the inherent requirements of a particular job contained in ILO Convention No 111⁴³⁰ has no equivalent in the SD Act.

9.46 The federal *Disability Discrimination Act 1992* contains an exemption from the prohibition on discrimination in employment where a person because of his or her disability

⁴²⁵ s 4 *Equal Opportunity Act 1995* (Vic) defines "physical features" as meaning "a person's height, weight, size or other bodily characteristics".

⁴²⁶ s 23 *Equal Opportunity Act 1995* (Vic).

⁴²⁷ s 24 *Anti-Discrimination Act 1992* (NT).

⁴²⁸ s 27 *Sex Discrimination Act 1994* (Tas).

⁴²⁹ s 30 *Sex Discrimination Act 1984* (Cth).

⁴³⁰ art 1 International Labour Organisation Convention No 111 Concerning Discrimination (Employment and Occupation) provides that "[a]ny distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination".

- (a) would be unable to carry out the inherent requirements of the particular employment; or
- (b) would, in order to carry out those requirements, require services or facilities that are not required by persons without the disability and the provision of which would impose an unjustifiable hardship on the employer.⁴³¹

9.47 This can be compared to the exemption for discrimination including on the ground of pregnancy in the *Workplace Relations Act 1996* (Cth) where discrimination is permissible if it is on the basis of the inherent requirements of the employment.⁴³²

Theoretical tension between anti-discrimination and OH&S regimes

9.48 The relationship between anti-discrimination and OH&S legislation was considered in the case of *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd & Others*.⁴³³

9.49 The case concerned a proposed standard and code of practice for the lead industry developed by the National Occupational Health and Safety Commission. The proposed standard defined the criteria for exclusion from working in a lead-risk job to include "...such other bases as may be permitted under relevant anti-discrimination legislation". The proposed code noted that National Occupational Health and Safety Commission had been advised by the Human Rights and Equal Opportunity Commission (HREOC) of the possible need for employers to seek exemptions under the SD Act. Mount Isa Mines, a producer of lead, took action in the Federal Court alleging that the standard and code would be invalid if adopted as National Occupational Health and Safety Commission appeared to have abrogated part of its function to HREOC by accepting that HREOC should by exemption establish proper health and safety standards for the lead industry. It asserted that the National Occupational Health and Safety Commission appeared to have been overborne by consideration of matters with which the SD Act was concerned and thereby failed to develop a proper and adequate code.

9.50 While the trial judge accepted these arguments, the judgment was overturned by the majority of the Full Court of the Federal Court on appeal. The Full Court took the view that it was the task of the National Occupational Health and Safety Commission to declare national standards and codes but that it should point out that adoption might involve a contravention of the SD Act unless exemptions were obtained. The Full Court also found that the National Occupational Health and Safety Commission was mistaken in its assumption that it was precluded from performing part of its functions by the SD Act.

⁴³¹ s 15(4) *Disability Discrimination Act 1992* (Cth).

⁴³² s 170LU(5) *Workplace Relations Act 1996* (Cth).

⁴³³ (1993) 118 ALR 80.

When a body such as the commission is performing a statutory function it has an obligation to examine other relevant law....It must not contravene the SDA, but it must recognise its presence and alert relevant persons, particularly employers to it and its pitfalls....But the commission must never lose sight of the fact that it is its function and not the function of the HREOC or any other body to decide what it regards in the interests of occupational health and safety as appropriate standards and codes of practice...⁴³⁴

- 9.51 As a result of this decision the Preface of the current National Lead Standard⁴³⁵ advises of the existence of federal and state/territory anti-discrimination legislation and discusses the Federal Court decision noting that employers who exclude women from lead-risk jobs in accordance with the national standard may need to seek exemption from the relevant sex discrimination legislation.⁴³⁶
- 9.52 The National Lead Standard currently lists the criteria for exclusion from working in a lead-risk job as
- (a) personal medical condition;
 - (b) pregnancy; and
 - (c) breast-feeding.⁴³⁷
- 9.53 The submission to this inquiry from the Australian Mines and Metals Association noted the apparent conflict between the standard and code and the provisions of the SD Act on the ground of pregnancy. It suggested that in practice employers may not be able to comply with both and would have to seek an exemption from one or the other. The submission asserted that the *Mount Isa Mines* case had not established a workable precedent for employers.⁴³⁸

Practical tension between the OH&S and anti-discrimination regimes

- 9.54 Many submissions to the inquiry expressed concern that, at times, dual obligations arising under OH&S and anti-discrimination provisions may be difficult for employers to reconcile.
- 9.55 Real and specific concerns were evidenced in this regard.

In practice the major difficulties would be experienced in the acceptance of different workplace and process requirements for an individual/group of individuals in the provision of a safe workplace. There may be instances in which changes for one group/individual in response to the sex discrimination

⁴³⁴ *HREOC v Mount Isa Mines Ltd & Others* (1993) 118 ALR 80 at 106-107 per Lockhart J.

⁴³⁵ *National Standard for the Control of Inorganic Lead at Work* National Occupational Health and Safety Commission: 1012 (1994) October 1994. See paras 9.71 – 9.84 for a more detailed discussion of lead-related industries.

⁴³⁶ HREOC was involved in the development of the National Lead Standard.

⁴³⁷ *National Standard for the Control of Inorganic Lead at Work* National Occupational Health and Safety Commission: 1012 (1994) October 1994 section 14.1.

⁴³⁸ Australian Mines and Metals Association (Submission no 43).

requirements may prove adverse to other members of staff from an OH&S viewpoint.⁴³⁹

- 9.56 The Queensland Chamber of Commerce and Industry submission said that “[i]t is difficult to reconcile both pieces of legislation....”⁴⁴⁰

Complying with both pieces of legislation can be confusing, especially in relation to “reasonable requirements” [in the definition of indirect discrimination]. Employers have a duty of care to employees under the *Workplace Health and Safety Act 1995* and as such, must comply with the provisions of this Act.⁴⁴¹

- 9.57 There was quite a marked attitudinal divide in the submissions which dealt with this issue. Some submissions agreed with the following statement.

Logic would suggest that OH&S considerations should over-ride discrimination issues, as not aware of anyone who has been killed directly by discrimination.⁴⁴²

- 9.58 Others made comments as follows.

Broad arguments about workplace health and safety are often raised as a defence to complaints when in fact there is a structural problem of health and safety for all workers in the workplace, not just the pregnant worker.⁴⁴³

Some employers in the retail industry believe that it is easier to remove the pregnant woman from the workplace than it is to address the workplace hazards that may provide a risk to her. It is then that the conflict with discrimination laws occurs.⁴⁴⁴

We have numerous examples where managers have claimed occupational health and safety reasons to “encourage” employees to either reduce their hours or start maternity leave earlier than planned because they do not have a “safe job” for them. There is often no risk assessment performed or consultation with the employee and her medical practitioner. It is simply a knee jerk reaction that a pregnant woman represents a risk of litigation against the employer if she were to injure herself or her unborn child.⁴⁴⁵

⁴³⁹ Confidential (Submission no 47).

⁴⁴⁰ Queensland Chamber of Commerce and Industry (Submission no 5).

⁴⁴¹ Queensland Chamber of Commerce and Industry (Submission no 5).

⁴⁴² Summary of comments from an employer responding to the survey of clients made by Australian Mines and Metals Association (Submission no 43).

⁴⁴³ Anti-Discrimination Commission Queensland (Submission no 68). The Commission refers, as an example, to the case of *Allegretta v Prime Holdings Pty Ltd T/A Phoenix Hotel & Anor* (1991) EOC 92-364. In that case, a pregnant woman was dismissed from her position as bar attendant because her employer was concerned about the danger to her of the slippery floors. Two male employees had already been injured. The woman’s discrimination complaint was upheld. The Tribunal said that the appropriate action was not to dismiss her but to remove the danger.

⁴⁴⁴ Shop, Distributive and Allied Employees’ Association (Submission no 74).

⁴⁴⁵ Shop, Distributive and Allied Employees’ Association (Submission no 74).

We have encountered cases of pregnant women workers who have had their hours of work decreased by their employers, with the reason given that it was to ensure the safety of the employee, that the work involved may be dangerous for a pregnant woman to undertake. The workers believe that the employer has used the safety issue as an excuse for discriminatory behaviour. Or has the employer misunderstood the OH&S duty of care obligation, and applied their own interpretation (without the benefit of medical opinion of the woman's doctor) in an overly cautious way and without offering the employee alternative work?⁴⁴⁶

9.59 The Australian Mines and Metals Association told the inquiry that it had

...occasionally needed to provide supervisors with guidance in this area, mainly in relation to not "parking" a pregnant employee in a non-productive job in the belief that they are just biding their time until they go on leave. We have also done some recent work in providing a parental leave planner for employees and supervisors to use as a guide and checklist.⁴⁴⁷

Reconciling OH&S and anti-discrimination systems

9.60 It should be noted that not all differential treatment constitutes discrimination within the meaning of the SD Act. The definition of discrimination requires less favourable treatment.⁴⁴⁸

9.61 The SD Act specifically provides that it is not unlawful to discriminate against a man on the ground of his sex by reason only of the fact that rights or privileges are granted to a woman in connection with pregnancy or childbirth.⁴⁴⁹

9.62 In general, it should be possible for arrangements to be made at the workplace to treat pregnant women differently, if necessary, without treating them less favourably, or disadvantaging them; in fact many employers do so successfully. Transferring employees from unsafe jobs to other areas after consultation without loss of pay, status or career opportunity, is a viable option that should generally be made available where possible in order to maintain and ensure the workplace complies with OH&S requirements as well as federal and state/territory anti-discrimination legislation.

9.63 A sound example of an employer taking appropriate action in this regard can be found at Sydney's Taronga Park Zoo. A focus group with employees, management and union representatives during the inquiry clearly indicated that the zoo had improved markedly in reconciling OH&S and anti-discrimination requirements in an area of employment that provides challenges.⁴⁵⁰

⁴⁴⁶ Working Women's Centres (Submission no 88).

⁴⁴⁷ Australian Mines and Metals Association (Submission no 43).

⁴⁴⁸ See paras 4.27 – 4.28.

⁴⁴⁹ s 31 *Sex Discrimination Act 1984* (Cth).

⁴⁵⁰ Taronga Park Zoo (Focus Group, 2 February 1999).

9.64 It is when non-discriminatory options such as this are overlooked that difficulties can arise.⁴⁵¹ The Queensland Anti-Discrimination Commission observed that

[i]t is the ADCQ's experience that the relationship between occupational health and safety and anti-discrimination laws is widely misunderstood. In fact employers frequently claim the two jurisdictions are in conflict with one another when in fact, both pieces of legislation should be regarded as tools of good management practice.⁴⁵²

9.65 Several submissions to this inquiry agreed that employers should understand their obligations under both anti-discrimination and OH&S laws.⁴⁵³

More education for employers about how they can fulfil their obligations towards their women workers in regards to OH&S, whilst preserving their rights under the various pieces of anti-discrimination legislation and the development of guidelines in some form to explain rights and responsibilities of employers, employees and governments (or their agencies) would help clarify the situation.⁴⁵⁴

9.66 HREOC acknowledges the issues raised and supports the view that reconciliation between anti-discrimination and OH&S systems is possible. Such reconciliation does, however, rely on sound management practices and the development of solutions tailored to the individual circumstances of each case.

9.67 One large employer noted

[t]here is no reason why the two types of legislation (ie OH&S and Sex Discrimination) cannot be complied with simultaneously, excepting those difficulties, which may be experienced within individual compliance.⁴⁵⁵

It has been found that the two Acts do not meld successfully, where a prescribed solution is put forward, without giving due regard to the individual needs specific to each instance. One such example, is where the provision of seating at checkouts is preferred as a positive option on OH&S grounds, for those employees who are pregnant. Like all other employees, pregnant employees require frequent post changes, being seated for extended periods, places undue and increased pressure on the lumbar spine and joints, leading quickly to muscle fatigue.⁴⁵⁶

The most appropriate solution is that each instance, whereby discrimination may be a current or emerging issue (ie pregnant employees), should be assessed in conjunction with their work environments on an individual basis.

⁴⁵¹ See ch 12 for a discussion of specific accommodations for pregnancy in the workplace.

⁴⁵² Anti-Discrimination Commission Queensland (Submission no 68).

⁴⁵³ See for example, Victoria Police (Submission no 13); Queensland Nurses' Union (Submission no 37); Labor Council of NSW (Submission no 41); Australian Council of Trade Unions, Queensland Branch (Submission no 50).

⁴⁵⁴ Working Women's Centres (Submission no 88).

⁴⁵⁵ Confidential (Submission no 47).

⁴⁵⁶ Confidential (Submission no 47).

Appropriate solutions to this assessment should then be implemented with individual and temporary solutions being implemented wherever appropriate.⁴⁵⁷

- 9.68 The Australian Mines and Metals Association undertook a survey of its members on some of the matters raised in the HREOC Issues Paper produced as part of the inquiry. A variety of positive and negative experiences were reported. The following comments taken from that survey illustrate some of the positive ways in which employers have managed the relationship between OH&S and anti-discrimination laws.⁴⁵⁸

Adopt the OH&S as the minimum requirement. Any decision made from the OH&S requirements are also passed through the anti-discrimination laws to ensure compliance.

Policies are written to ensure conformance to current legislation.

Pregnant employees are considered for any promotional opportunities based on their performance. When on maternity leave, [the employee] is kept informed on any developments within the company and any changes that may affect their job.

Pregnant employees are offered alternative roles for the duration of their pregnancy, if their normal role presents a potential risk to either the employee or unborn child (eg Lifting).

Where practical the job is redesigned so that the person can do the job.

[A] plan of progressively lighter duties prior to the cessation of employment has been agreed to. This has been arranged in consultation with the employee's medical practitioner.

- 9.69 As evidenced, education and good management can go a long way towards addressing the challenges posed by the requirements of the anti-discrimination and OH&S regimes.

- 9.70 After consideration HREOC agrees with the comment made in one submission that "[t]he requirements of both pieces of legislation, whilst not altogether complementary are certainly not conflicting".⁴⁵⁹ Nevertheless, all parties to the employment relationship would benefit from greater clarification and simplification wherever possible. The Shop, Distributive and Allied Employees' Association submission noted that

...health and safety laws across Australia do not contain specific provisions regarding the health, safety and welfare of pregnant employees or the right of pregnant employees to transfer to a safe job....Ideally all regulations in all States should contain such provisions but the process of achieving this would

⁴⁵⁷ Confidential (Submission no 47).

⁴⁵⁸ Australian Mines and Metals Association (Submission no 43).

⁴⁵⁹ Confidential (Submission no 47).

make this a very long term and uncertain course of action although nonetheless worthy.⁴⁶⁰

Pregnancy Guidelines 14: That the Guidelines clarify the relationship of obligations under anti-discrimination and OH&S legislation.

Recommendation 22: That the National Occupational Health and Safety Commission make available on the national OH&S database all available practical advice on risk control issues surrounding pregnancy at work. Such material could include the New South Wales *Draft Code of Practice and Guidelines on Pregnancy and Work* when adopted in that state and relevant excerpts of the Guidelines.

Recommendation 23: That the National Occupational Health and Safety Commission, Comcare and state/territory Occupational Health and Safety Commissions work with HREOC and other relevant agencies and organisations to review the New South Wales *Draft Code of Practice and Guidelines on Pregnancy and Work*, once that Code is finalised, with a view to implementing such a Code nationally.

Lead - A particular example

- 9.71 Lead, like many other workplace substances, is known to have adverse reproductive, developmental and/or physiological effects in humans.⁴⁶¹
- 9.72 The adverse effects of lead on reproduction can happen in two ways: either by accumulating in the reproductive organs of either parent and in the tissue of the developing foetus or by impairing the physiological functions involved in reproduction.⁴⁶² This can happen in both men and women⁴⁶³ and damage to a foetus can happen through contamination of either or both parents.⁴⁶⁴
- 9.73 Current state and federal lead regulations are inconsistent so that compliance with one may still mean contravention of the other. For example, the National Lead Standard requires that if an employee advises her employer that she is pregnant or breastfeeding, the employer must immediately remove her from her lead-risk job.⁴⁶⁵ The Victorian Lead Control Regulation, however, does not

⁴⁶⁰ Shop, Distributive and Allied Employees' Association (Submission no 74). Some maternity leave legislation provides that, on the advice of a doctor about risks and hazards of her job, a pregnant worker must be transferred to a safe job: for example, cl 7 sch 1A *Workplace Relations Act 1996* (Cth).

⁴⁶¹ Human Rights and Equal Opportunity Commission *Discrimination Against Women in the Lead Industry* Occasional Paper No 5 HREOC Sydney 1990, 37.

⁴⁶² Human Rights and Equal Opportunity Commission *Discrimination Against Women in the Lead Industry* Occasional Paper No 5 HREOC Sydney 1990, 37.

⁴⁶³ Human Rights and Equal Opportunity Commission *Discrimination Against Women in the Lead Industry* Occasional Paper No 5 HREOC Sydney 1990, 37.

⁴⁶⁴ Human Rights and Equal Opportunity Commission *Discrimination Against Women in the Lead Industry* Occasional Paper No 5 HREOC Sydney 1990, 29.

⁴⁶⁵ s 15(25) National Standard for the Control of Inorganic Lead at Work National Occupational Health and Safety Commission: 1012 (1994) provides that if "...an employee advises the employer that she is pregnant or is breast feeding, the employer shall immediately remove the employee from

currently require this.⁴⁶⁶ The New South Wales Occupational Health and Safety (Hazardous Substances) Regulation 1996 (the New South Wales Hazardous Substances Regulation) stipulates different requirements again, requiring a full assessment of the workplace, including air monitoring. Where this assessment identifies risks, the employer is responsible for organising health surveillance under the supervision of a medical practitioner approved by WorkCover and in consultation with employees. The employer is advised by the medical practitioner of any necessary action which should be taken.⁴⁶⁷ Removal under the New South Wales Hazardous Substances Regulation is therefore not automatic, as it is under the National Standard.⁴⁶⁸

- 9.74 Secondly, the National Lead Standard provides for the removal of women employees of reproductive capacity from lead industry jobs at lower blood/lead levels than for men or women not of reproductive capacity.⁴⁶⁹ The Victorian Lead Control Regulation currently makes no distinction between employees on the basis of gender or reproductive capacity in any of its removal requirements. This means that, while the current Victorian Lead Control Regulation does not on its face discriminate on the basis of sex, pregnancy or potential pregnancy in its removal requirements, the National Lead Standard may be discriminatory on the basis of sex, pregnancy and potential pregnancy.⁴⁷⁰
- 9.75 Employees should not be retained in positions in which they are at proven risk from lead exposure. Nonetheless any removal policies should be informed by an appreciation of anti-discrimination issues and legislation.
- 9.76 Rather than adopting unequal removal standards for potentially pregnant, pregnant or breast-feeding women at any stage in the future, it is preferable to see the lead industry continue to improve control measures at workplaces, thereby reducing the blood/lead levels of all employees.

the lead-risk job to a job that is not a lead-risk job". s 17(4) provides that "...an employee knowingly pregnant or breast feeding shall advise the employer as soon as practicable".

⁴⁶⁶ However, Victorian WorkCover Authority proposes to adopt the removal provisions in the National Lead Standard.

⁴⁶⁷ ss 25 and 26 Occupational Health and Safety (Hazardous Substances) Regulation 1996 (NSW).

⁴⁶⁸ s 15(24) National Standard for the Control of Inorganic Lead at Work National Occupational Health and Safety Commission: 1012 (1994).

⁴⁶⁹ s 15(24) National Standard for the Control of Inorganic Lead at Work National Occupational Health and Safety Commission: 1012 (1994) provides that "...if the results of biological monitoring reveal that the confirmed blood lead level is at or above...

2.41 µmol/L (50µg/dL) - for males and females not of reproductive capacity,

2.41 µmol/L (50µg/dL) - for males of reproductive capacity,

0.97 µmol/L (20µg/dL) - for females of reproductive capacity,

0.72 µmol/L (15µg/dL) - for females who are pregnant or breast feeding,

or the employer or employee considers that an excessive exposure to lead has occurred, the employer shall:

(a) immediately remove the employee from the lead-risk job to a job that is not a lead-risk job;

(b) arrange for the employee to have a medical examination by an authorised medical practitioner within seven days; and

(c) provide the authorised medical practitioner with a copy of the form in Schedule 4 with Part A filled in, signed and dated by the employer.

⁴⁷⁰ WorkCover New South Wales *Draft Code of Practice and Guidelines on Pregnancy and Work* WorkCover Sydney 1998, 33.

- 9.77 Temporary exemptions which HREOC has the power to grant on a case by case basis,⁴⁷¹ are only granted in exceptional circumstances. HREOC recognises that some situations in lead industry workplaces may constitute “exceptional circumstances” in terms of exemptions under the SD Act, and that some lead industry workplaces may indeed require exemptions while they reduce the incidence of lead in the workplace and initiate non-discriminatory workplace practices where removal from lead-risk jobs is absolutely necessary.
- 9.78 A comparison of international developments relating to workplace hazardous substances is worthwhile in order to get a full picture of the lead industry's treatment of the issue.
- 9.79 Unlike the position in Australia, under the decision by the USA Supreme Court in *UAW v Johnson Controls*,⁴⁷² the position remains that an employer cannot prevent a pregnant woman from working with dangerous substances, but must inform her of the risks of doing so and allow her to make her own decision. Nonetheless, should the unborn child suffer any damage due to the mother's exposure to the hazardous substance, he or she may sue the employer at some stage in the future.⁴⁷³
- 9.80 Australian and English common law does, however, where the rights of the foetus can be backdated, permit a born child to sue for damages sustained pre-conception or pre-birth.⁴⁷⁴ This position in itself should provide an incentive to employers to understand and react appropriately with regard to the OH&S hazards and risks associated with their workplace environments.
- 9.81 Within the European Union, Directives provide for the establishment of guidelines on hazardous substances in the workplace to enable employers to assess the degree, nature and duration of exposure of workers to risk.⁴⁷⁵ The employers must then assess the risk and decide what measures to undertake,

⁴⁷¹ s 44 *Sex Discrimination Act 1984* (Cth).

⁴⁷² *Union of Automobile Workers (UAW) v Johnson Controls* (1991) 113 L Ed 158.

⁴⁷³ In *Mikala Snyder v Michael's Stores Inc* the Supreme Court of California held that children who have been injured as a result of the negligent conduct of employers who expose pregnant mothers to hazards in the workplace are now entitled to bring a direct action against the mother's employer. *Snyder* overrules an earlier decision, *Bell v Macey* 212 Cal App 3d 1442, on the basis that it was incorrectly decided, having been based on the Labor Codes rather than the Civil Codes. The *Snyder* decision found that a child in the womb was not an employee (and, therefore, contra *Bell*, does not fall under California's Labor Code, ss 3600 & 3602) and that any injury inflicted upon a child by the mother's employer is actionable to the same extent as any non-employee's direct injury by the employer. See also A Johnston “‘Foetal Rights’: Control of the pregnant woman” (1994) *ALSA Academic Journal* 109-118.

⁴⁷⁴ *Elliot v Joicey* (1935) SC (HL) 57; *Watt v Rama* [1972] VR 353; *Samuel Shang Ren v Biswanath Mukerjee* No SC440 of 1989 [1996] ACTSC 119 (12 December 1996), in which case a child sued the delivering obstetrician and hospital in negligence for injury sustained before birth.

⁴⁷⁵ International Labour Organisation *Maternity Protection at Work: Revision of the Maternity Protection Convention (Revised), 1952, (No 103) and Recommendation, 1952 (No 95), Report V(1)* International Labour Conference [87th: 1999: Geneva Switzerland] 1997, 86.

and inform the employees of the outcome.⁴⁷⁶ The outcome could include adjusting the workplace and/or hours to avoid exposure or, if this is not practicable, moving the worker to another job or giving the worker leave for the duration of the risk.⁴⁷⁷

- 9.82 Internationally it is now being recognised that policies prohibiting women from undertaking lead-risk work are not only discriminatory but ineffective in light of the adverse reproductive effects of paternal exposure.⁴⁷⁸ According to the International Labour Organisation's Revision of the Maternity Protection Convention (No 103), such policies may need to be reassessed, with the future aim likely to be the regulation of reproductive health of both sexes and the elimination of risk overall or to the greatest extent possible, thereby increasing the level of protection for all workers.⁴⁷⁹

The lead exemptions have expired

- 9.83 The lead exemptions granted by HREOC have expired. Neither business nor industry have sought new exemptions and thus may have placed themselves in a questionable position. Some employers may have introduced work practices or technological developments that allow them to comply with both OH&S and anti-discrimination obligations, but HREOC is aware that others have not. It

⁴⁷⁶ International Labour Organisation *Maternity Protection at Work: Revision of the Maternity Protection Convention (Revised), 1952, (No 103) and Recommendation, 1952 (No 95), Report V(1) International Labour Conference [87th: 1999: Geneva Switzerland] 1997, 86.*

⁴⁷⁷ International Labour Organisation *Maternity Protection at Work: Revision of the Maternity Protection Convention (Revised), 1952, (No 103) and Recommendation, 1952 (No 95), Report V(1) International Labour Conference [87th: 1999: Geneva Switzerland] 1997, 86.*

⁴⁷⁷ International Labour Organisation *Maternity Protection at Work: Revision of the Maternity Protection Convention (Revised), 1952, (No 103) and Recommendation, 1952 (No 95), Report V(1) International Labour Conference [87th: 1999: Geneva Switzerland] 1997, 86.*

⁴⁷⁸ International Labour Organisation *Maternity Protection at Work: Revision of the Maternity Protection Convention (Revised), 1952, (No 103) and Recommendation, 1952 (No 95), Report V(1) International Labour Conference [87th: 1999: Geneva Switzerland] 1997, 86.*

⁴⁷⁹ International Labour Organisation *Maternity Protection at Work: Revision of the Maternity Protection Convention (Revised), 1952, (No 103) and Recommendation, 1952 (No 95), Report V(1) International Labour Conference [87th: 1999: Geneva Switzerland] 1997, 86.*

appears that some employers are uninterested in pursuing further exemptions. It is neither HREOC's role nor responsibility to suggest that further exemptions be applied for; this is a decision for business and industry. However, concerned about the focus of business and industry in this area, the Sex Discrimination Commissioner did use this inquiry to raise the issues with business and industry.

- 9.84 It should be noted that without a current exemption, any lead related complaints will be treated according to the direct and immediate intention of the SD Act.

Recommendation 24: That business and industry take the opportunity provided by this inquiry to consider closely the need for any further lead exemptions under anti-discrimination legislation and to take appropriate action in this regard.

Table 7.1 Coverage of pregnancy and potential pregnancy discrimination in federal and state/territory anti-discrimination

	SDA	NSW	Vic	Qld	SA	WA
Coverage of pregnancy and potential pregnancy discrimination	Both grounds included in s7 <i>Sex Discrimination Act 1984 (Cth)</i>	Pregnancy and potential pregnancy included in sex discrimination s 24(1B) <i>Anti-Discrimination Act 1977</i>	Pregnancy covered; potential pregnancy part of sex discrimination s 6 <i>Equal Opportunity Act 1995</i> ⁴⁸¹	Pregnancy covered; potential pregnancy assumed to be part of sex discrimination s 7 <i>Anti-Discrimination Act 1991</i>	Pregnancy covered; potential pregnancy assumed to be part of sex discrimination s35 <i>Equal Opportunity Act 1984</i>	Pregnancy covered; potential pregnancy assumed to be part of sex discrimination s 10 <i>Equal Opportunity Act 1984</i>
Employment related exemptions for discrimination						
in work on voluntary or unpaid basis ⁴⁸²	no specific mention	no specific mention	exempt: s4 definition of "employment"	not exempt: s4 definition of "work"	not exempt: s5 definition of "employment"	no specific mention

⁴⁸⁰ This refers to current Tasmanian legislation (the Sex Discrimination Act 1994). The Anti-Discrimination Act 1998 has yet to

⁴⁸¹ See also *Wardley v Ansett Transport Industries (Operations) Pty Ltd* (1984) EOC 92-002.

⁴⁸² It is assumed, where the matter is not specifically mentioned, that voluntary/unpaid work is not employment as no employment note that the state and territory anti-discrimination legislation does not exclude casual workers from the protection of the legislation: (includes casual work; WA (definition of "employment" s4) includes part time and temporary employment; Tas (definition of "employment" s4) includes casual work; NSW, Vic and ACT don't mention casuals but their definitions are clearly broad enough to include this category.

⁴⁸³ However, it may be arguable that voluntary/unpaid workers are covered by the NT Act as that Act defines "work" rather than

Pregnant and Productive Report of the National Inquiry into Pregnancy and Work

in employment by State government or instrumentality of a State	s13					
against a partner or potential partner where the partnership is less than 6 people	s17	s27A(1)	s30 less than 5	s16 - s18	no numerical restriction s33	s14
in employment in a private household	s14(3) for domestic duties where employer resides	s25(3)	s16 for domestic/ personal services in, or in relation to, a person's home	s 26 for domestic services, and s27 for childcare, at a person's home	s34	ss11& 13 for domestic duties where employer resides & s 33(1) sex - for childcare, at the child's home
where the number of persons employed (disregarding any persons employed within the employer's private household) does not exceed 5		s25(3)	s21(2) also exclude relatives			
by an employer limiting employment to persons who are his or her relatives			s20			

in selection for participation in religious observances, appointment of ministers etc	s37	s56	s75(1)	s109	s50(1)	s72
any act or practice of a religious body that conforms to the religious doctrines or is necessary to avoid injury to the religious susceptibilities of adherents of that religion	s37	s56	s75(2) and s77 re personal religious beliefs	s109	s50(1)	s72
in employment in educational institutions established for religious purposes	s38	S25(1A)(2A) and (3)	s75(2), (3) & s76(2)			s73
employment in a private educational authority		s25(3)	schools under control or direction of religious bodies s75(2), (3) & s76(2)	institution under control or direction of religious body s29(1)		

employment in certain health-related institutions				s29(1) in work in or partners' operating institution under control or direction of religious body		
where employment involves care, instruction or supervision of children & genuinely or reasonably believed necessary			s25(1)			
employment for welfare services for persons with a particular attribute (including sex/pregnancy) if those services can be provided most effectively by people with that attribute			s19			

<p>employer can set reasonable terms/requirements of employment taking into account reasonable and genuine requirements of employment, special limitations of a particular attribute (including sex/pregnancy) and special services and facilities required</p>			<p>s23 & s33 (for partnerships)</p>			
<p>if special services and facilities are required the supply of which would impose unjustifiable hardship</p>						
<p>if woman would not be able to adequately perform work genuinely or reasonably required of her without endangering herself, the child or other persons</p>					<p>s34(3)</p>	

if woman would not be able to respond adequately to situations of emergency that should reasonably be anticipated in connection with her duties					s34(3)	
where it is reasonably necessary to protect the health or safety of any person (including the person discriminated against)			s80(2)	s108 applies to places of work s107 acts to protect public health		
if, in the case of dismissal, there is no other work that the employer could reasonably be expected to offer the woman					s34(3)	
acts done in direct compliance with a determination or decision of HREOC;	s40(1)(c)					

acts done in direct compliance with a an order of the [anti-discrimination] Tribunal;		s54(1)	s70			s69
acts done in order to comply with a requirement of an Act or any regulation, ordinance, by-law, rule or other instrument made under an Act	S 40 in relation to the Acts specified in that section	s54(1) any Act, whether passed before or after	s69(1)	s106(1)		s69 subject to limitation by regulation
acts done in direct compliance with - an order of a court; or - an order or award of a court or tribunal having power to fix minimum wages and other terms and conditions of employment;	S 40(1)(d) & (e)	s54(1) covers order of a court but excludes a wage fixing or employment court or tribunal	s70 covers order of any tribunal or any court	s106(1)		s69

Pregnant and Productive Report of the National Inquiry into Pregnancy and Work

acts done in direct compliance with - a certified agreement (within the meaning of the <i>Workplace Relations Act 1996</i>)				an industrial agreement under Qld legislation s106(1)		
requesting or requiring a person who is pregnant to provide medical information concerning the pregnancy.	s27(2)		s100 & s101. Cannot do so unless required for non-discrimination purpose.	s124 Cannot do so unless required by law, industrial agreements, orders of court or tribunal or a non-discrimination purpose		s23(2)
by an employer if at the date of application, or interview, for a job the applicant was pregnant		s25(1A)				

Pregnant and Productive Report of the National Inquiry into Pregnancy and Work

by an employer who dismisses a pregnant woman if, at the date of her application, or interview, for that employment the woman was pregnant, unless she did not know and could not reasonably have been expected to know she was pregnant		s25(2A)				
on the basis of physical features in dramatic, artistic, photographic or modelling work			s17(4)			
genuine occupational requirements		s31- may cover pregnancy	s17(1) - sex only	s25		s27 - sex only
providing rights or privileges to a woman in connection with pregnancy or childbirth	s31	s35	s82(2)		s46	s28
act/scheme to benefit a group which is disadvantaged or has a special need						
special measures taken for the purpose of achieving equality	s7D & s40(6)	s126A must be certified by the Minister		s105(1)	s47 (in relation to sex)	s31

temporary exemptions may be sought	s44 up to 5 years and can be renewed	s126 up to 10 years and can be renewed	s83 up to 3 years and can be renewed	s113 up to 5 years and can be renewed	s92 up to 3 years and can be renewed	s135 up to 5 years and can be renewed
Defences						
advertising - no offence if defendant proves he/she took reasonable precautions and exercised due diligence to prevent the publication or display			s196	defence if took reasonable precautions s127(2) & (3)		
advertising - no offence if defendant proves he/she believed on reasonable grounds that the publication of the advertisement was not an offence		s51(4)				
principal or employer not liable for discrimination by agent or employee if they took all reasonable steps to stop the agent or employee from contravening the Act	s106(2)	s53(3) or s53(1) if principal/ employer did not authorise the agent/employee expressly or by implication to do the act.	s103	no specific provision but see s123	s91(3) if exercised all reasonable diligence	s161(2)

Pregnant and Productive Report of the National Inquiry into Pregnancy and Work

June 1999