



30 January 2014

Elizabeth Broderick
The Sex Commissioner
Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2001

KINGSFORD
LEGAL CENTRE

Dear Commissioner,

Re: Pregnancy and Return to Work National Review

Kingsford Legal Centre (KLC) thanks you for the opportunity to provide a submission on the Pregnancy and Return to Work National Review (**the Review**).

Our submission draws on the experiences of our clients and staff in dealing employees who believe they have been treated unfairly by employers while pregnant, on parental leave or when returning to work after taking parental leave. All case studies have been de-identified to protect our clients' confidentiality.

1. Kingsford Legal Centre

KLC is a community legal centre (CLC) which has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas since 1981. KLC provides general advice on a wide range of legal issues, including domestic violence, and undertakes casework for many clients who, without our assistance, would be unable to afford a lawyer.

KLC also has a specialist employment law service, a specialist discrimination law service (NSW wide) and an Aboriginal Access Program. In addition to this work, KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

In 2013 KLC provided 250 advices in relation to discrimination law, which was almost 14% of all advice provided (1804 advices). We also provided 334 advices in relation to employment law, which was almost 19% of all advice provided.

2. Executive summary

Statistics from the AHRC, NSW Anti-Discrimination Board (ADB), the Fair Work Ombudsman (FWO) and KLC confirm that discrimination against pregnant employees and parents seeking to return to work from parental leave continues to be a real and systemic problem in Australia.

Discrimination manifests itself in the form of demotions, being denied opportunities, being denied of rights and entitlements, questionable redundancies and constructive and actual dismissals. It is the gateway to long-term unemployment, increased reliance on social security and economic and social disadvantage. Pregnancy discrimination in the workplace has vast and serious cost implications for the Australian economy.

Systemic discrimination against pregnant employees and parents seeking to take parental leave continues to occur because:

- the entrenched gendered definition of “work” serves to perpetuate discrimination against women and men with caring responsibilities;
- employers are not aware of the legislative framework;
- discrimination law is too complex;
- the federal discrimination system is inadequate; and
- employees have limited access to free legal advice and representation.

Our recommendations propose solutions to these problems and aim to address the significant hidden costs arising from systemic discrimination against pregnant employees and parents seeking to return from parental leave.

3. Recommendations

Recommendation 1: The AHRC and the FWO work together to develop education campaigns and resources targeting employers, particularly labour hire companies. The education campaign should focus on the pregnancy and pregnancy-related rights of employees, particularly casual employees. Education resources should provide practical guidance to employers about how to accommodate requests from employees for a safe job and/or flexible working conditions.

Recommendation 2: Replace the existing definitions of direct and indirect discrimination with a unified definition of discrimination.

Recommendation 3: Greater consistency across federal and state legislation in relation to how discrimination is defined and tested, as long as it does not reduce current protections contained in the adverse action provisions of the *Fair Work Act 2009* (Cth) (**FWA**).

Recommendation 4: Religious exemptions should be removed and religion should instead be introduced as a protected attribute. Alternatively, if exemptions for religious organisations are not removed, then the scope of the religious exemptions be narrowed to allow discrimination only when it is necessary to fulfil the inherent requirements of a position directly associated with the operation of a religion, for example a priest.

Recommendation 5: Complainants be able to make an application directly to a court, for an injunction if necessary, rather than first going through investigation and conciliation by the AHRC.

Recommendation 6: Section 46PO(4) of the *Australian Human Rights Commission Act 1984* (Cth) (**AHRC Act**) be expanded to grant the courts the power to make corrective and preventative orders, including injunctions.

Recommendation 7: Conciliation agreements be able to be registered with a federal court and enforced as court orders.

Recommendation 8: For the purpose of discrimination complaints, the Federal Court and Federal Circuit Court become a no-costs jurisdiction. An exemption should allow for costs in vexatious or frivolous proceedings or for unreasonable conduct during proceedings, in line with state and territory discrimination tribunals.

Recommendation 9: Discrimination Commissioners and the AHRC be given the power to investigate, of their own motion, conduct that appears to be unlawful under discrimination law, and the power to commence court proceedings without having to rely on an individual complaint. The Commissioners should be adequately resourced to perform this role.

Recommendation 10: Organisations and advocacy groups be able to bring complaints to the AHRC and in the Federal Court or Federal Circuit Court on behalf of individuals and in their own right.

Recommendation 11: A specialist low cost division of the Federal Court and Federal Circuits Court be established to hear discrimination law matters

Recommendation 12: Increase funding to CLCs and legal aid commissions to provide advice and representation to complainants in discrimination matters.

4. Prevalence of discrimination

From our extensive experience in discrimination law, discrimination against pregnant employees and parents continues to be a systemic problem in Australia.

4.1 Kingsford Legal Centre data

We analysed our own data between 1 January 2011 and 31 December 2013 for the purpose of determining the prevalence and nature of discrimination in relation to pregnancy at work and returning after parental leave.

Between 1 January 2011 and 31 December 2013 we provided 964 advices in relation to employment law¹ and 598 advices in relation to discrimination law.² Approximately 21% (141 advices) of all discrimination law advice provided during this period was in relation to pregnancy and sex/gender.

We identified that between 1 January 2011 and 31 December 2013 we had provided 63 people (only one of those people was male) with advice about issues relevant to this Review (**people identified**), which accounts for almost 6% of all discrimination and employment advice provided during this period.

Almost 20% (12 people) of the people identified requested flexible working conditions prior to returning from parental leave. Only one of those requests was accepted, on a trial basis, by an employer, with two people being offered positions of lesser status than their pre-parental leave position and the remaining nine requests being refused on the grounds that the position needed to be done by one person on a full time basis.

Almost one third (20 people) of the people identified were either offered or made redundant after they disclosed they were pregnant (5 people), were on parental leave (16 people) or returned from work from parental leave (1 person).

Over 10% (8 people) of the identified people were dismissed (not made redundant) after disclosing they were pregnant (4 people), returning from parental leave (3 people) or had a miscarriage (1 person).

4.2 Fair Work Ombudsman data

FWO is an independent statutory office created by the FWA to promote harmonious, productive and cooperative workplace relations and ensure compliance with Commonwealth workplace laws.³ The FWO is empowered to assist in resolving complaints involving allegations of unlawful discrimination in the workplace.

According to the FWO Annual Report 2012 – 2013:

¹ We provided 318 advices in 2011, 341 advices in 2012 and 305 advices in 2013.

² We provided 194 advices in 2011, 188 advices in 2012 and 216 advices in 2013.

³ FWO <http://www.fairwork.gov.au/about-us/pages/default.aspx> accessed 7 January 2014.

- 28% of all the discrimination complaints were in relation to pregnancy;
- 11% of the discrimination complaints were in relation to family/carer responsibilities; and
- in 2011 – 2012, 21% of the discrimination complaints made to FWO were in relation to pregnancy.⁴

4.3 NSW Anti-Discrimination Board data

According to the ADB Annual Report 2012 – 2013:

- 563 complaints of discrimination received were in relation to discrimination in employment (53.5% of all complaints received);
- 61 complaints of discrimination received were in relation to sex in employment (10.8% of all complaints made in relation to employment and 5.8% of the total complaints received); and
- 26 complaints of discrimination were received in relation to carer's responsibilities in employment (4.6% of all complaints made in relation to employment and 2.5% of all complaints received).

According to the ADB Annual Report 2011 – 2012:

- 649 complaints of discrimination received were in relation to discrimination in employment (52.5% of all complaints received);
- 89 complaints of discrimination received were in relation to sex in employment (13.7% of all complaints made in relation to employment and 7.2% of the total complaints received); and
- 38 complaints of discrimination were received in relation to carer's responsibilities in employment (5.9% of all complaints made in relation to employment and 3.1% of all complaints received).

5. Nature of discrimination

In KLC's experience, the nature of discrimination against pregnant employees and parents seeking to return from parental leave includes:

- assumptions about what duties pregnant employees can perform;
- having shifts reduced, being demoted and being denied training and promotion opportunities, after disclosing they were pregnant;
- being treated unfairly for taking sick leave to attend medical appointments and care for sick children;
- refusing to allow employees to take parental leave or return to their pre-parental leave position;
- refusing to accommodate requests for flexible working arrangements;
- questionable redundancies; and

⁴ FWO Annual Report 2012-2013 p 32 <http://www.fairwork.gov.au/Publications/Annual%20report/Fair-Work-Ombudsman-Annual-Report-2012-13.pdf> accessed 7 January 2014.

- constructive and actual dismissal when requesting to take parental leave and on return from parental leave.

The following case studies were drawn from advice and casework provided to our clients between 1 January 2011 and 31 December 2013. These are actual women's experiences with their names changed to maintain their confidentiality.

5.1 Assumptions about the duties pregnant employees can perform

Employers often make assumptions about the types of duties pregnant employees can perform, including taking employees off certain duties after they disclose they are pregnant and requiring pregnant employees to do unsafe work.

Petra

Petra was promoted after working for the company for three months. After advising her employer she was pregnant, her manager demoted her saying that she could no longer fulfil her new role. Petra's manager later told her she could not continue to perform her role because it would be too stressful for a pregnant woman.

Keeley

Keeley advised her employer that she could no longer perform x-rays because she was pregnant. Her employer insisted that she could, and required her to continue to perform x-rays.

5.2 Demotion and being denied training and promotion opportunities

Employees have reported having their shifts reduced, being demoted and being denied training and promotion opportunities, after disclosing they were pregnant.

Neeta

Neeta was employed as a casual worker in a call centre. Her employer said she would be moved from prospecting into sales a few days after starting the job. Neeta's supervisor told her boss that he thought she was pregnant. Her boss said "if she's pregnant she won't be moving across to sales".

Neeta's supervisor asked her if she was pregnant and she confirmed was four months pregnant. Her supervisor said "you won't be moving across to sales because you're pregnant but I can keep you on full time in prospecting". Neeta would have earned more money working in sales.

Kiah

Kiah began working for her employer in a managerial position. After Kiah told her employer she was pregnant, her managerial responsibilities were taken off her and she was required to do more manual labour. She was also denied training opportunities.

While she was on parental leave she was told her job no longer existed and was offered a job which was a lesser status.

Vani

Vani was employed as a casual waitress working almost full time hours. Vani was promoted a short time after starting due to her good performance. After Vani advised her employer she was pregnant, she was demoted and only offered one shift a week.

5.3 Being treated unfairly for taking sick leave

Employees are often treated unfairly for taking sick leave to attend medical appointments while they are pregnant and to care for their sick children.

Jordan

Jordan believed that her employer tried to performance manage her because she took sick days (within her entitlement of sick days) to care for her children.

Li

When Li advised her employer she was pregnant with her third child, her managers were insensitive and would treat her badly for being sick or attending health check-ups. She was threatened that if she did not work until 9pm to make up for the hours lost, it could be held against her performance.

5.4 Refusing to allow employees to take parental leave or return to their pre-parental leave position

Employers deny employees who are eligible to take parental leave, the right to take parental leave and deny them the right to return to their pre-parental leave position.

Smrithi

Smrithi was initially employed as a casual employee, working regular shifts for her employer and then became a permanent employee. Smrithi had been working for over 12 months when she went on parental leave. When Smrithi sought to return to work her employer told her there was no position to return to and they were not obliged to provide her with a position because she had not been a permanent employee for more than 12 months.

5.5 Refusing to accommodate flexible working arrangements

Employers commonly discriminate against parents seeking to return to work from parental leave by refusing their requests to work part time or flexibly.

Meena

Meena worked in a full time position for 11 years. Meena disclosed she was pregnant and went on parental leave. While on parental leave, she asked to return to work on a part time basis for a time. He employer refused and gave her one week to decide whether she would either return as a full time employee or not at all.

5.6 Questionable redundancies

Employees were often made redundant after they disclosed they were pregnant, while on parental leave or after returning from work from parental leave.

It's very difficult for employees who have been made redundant while on parental leave to know whether the redundancy is genuine, because, despite obligations (often in modern awards) on employers to consult with employees regarding business restructuring, many employers do not communicate effectively with employees on parental leave.

Iona

Iona began working for a government agency in 2008. She entered into a two year contract in November 2009. In June 2010 she told her employer she was pregnant. In August 2010 her employer advised her that position was redundant.

April

April was told that her position no longer existed while she was on parental leave due to the company restructuring. The company offered our client a new role with the same job description but with a significantly reduced salary.

5.7 Constructive and actual dismissal

Many employees were dismissed (not made redundant) after disclosing they were pregnant, after returning from parental leave or after they had a miscarriage. By refusing to accommodate requests for flexible working arrangements, some employees felt they had no other choice but to resign from their position.

Somali

Somali had been employed for 11 years. She requested flexible working arrangements after returning from maternity leave. Her employer suggested she apply for another position within the company that better suited her needs. Somali was forced to resign because her employer couldn't accommodate her flexible working arrangements request.

Ainsley

Ainsley was dismissed shortly after returning from parental leave because "she no longer fit the criteria" for her position.

Ting

Ting returned to work after parental leave to her pre-parental leave position but was told she that she was not doing it properly and was no longer experienced enough for job. Her employer also accused of taking too much leave. For these reasons her employer and asked her to resign. When she refused to resign she was dismissed.

6. Consequences of discrimination

Discrimination against pregnant employees and parents seeking to return to work from parental leave, has devastating effects on employees and can be the gateway to long term unemployment, increased reliance on social security and economic and social disadvantage.

Minna

Minna was employed by a labour hire company on a casual basis working almost full time hours in factories for three years. After Minna advised her employer that she was pregnant,

her employer stopped offering her shifts on the grounds that there was no light work available.

Minna had to move back in with her parents, sell all her belongings and considered having an abortion because she was no longer receiving an income.

Discrimination in the workplace on the basis of pregnancy and pregnant-related entitlements can have a significant impact on an employee's self-esteem. Negative responses to the news that they are pregnant can have a detrimental effect on pregnant employees at what should be a joyous time.

As "Minna's" case demonstrates, women who were independent and self-sufficient may need to turn to their parents or their partner for financial support. Having to do this can be a very demoralising experience. They may be reluctant (and unable) to continue to engage in social activities with friends because they feel ashamed. This can cause women to become isolated and lose self-confidence.

Women may be dissuaded from seeking new employment, because they may fear that they will continue to experience discrimination on the basis of being pregnant or having family responsibilities.

Discrimination in the workplace on the basis of pregnancy or family responsibilities can create a narrow and non family friendly, workplace culture. When employees see other employees being forced to resign when they become pregnant, this may cause them to do the same if they become pregnant, entrenching systemic discrimination.

When employers do not accommodate requests from employees for flexible working conditions, employees are often forced to resign because either the costs of child care outweighs their income and/or they cannot pick up their child from child care in time.

Businesses may not be able to recruit qualified and highly trained staff if there is a perception that they are not a family-friendly workplace.

Systemic discrimination against employees on the basis of pregnancy or pregnancy related entitlements, causes considerable and inevitable costs⁵ to the Australian economy arising from:

- a loss of productivity in the workplace;
- the loss of workforce labour potential;
- increased demand for social security;
- increased demand for social services, such as social housing and housing-related subsidies;
- reduced consumer spending; and
- reduced contribution and participation in communities.

⁵ Hogarth and Elias, Warwick Institute for Employment Research, 'Pregnancy Discrimination at work: Modelling the costs' UK Equal Opportunities Commission (2005). The report provides a model to calculate the economic impact of pregnancy discrimination on an individual (who has perceived that they have experienced discrimination by way of dismissal or being passed over for promotion), the employer and the state in the UK. Whilst the report provides a comprehensive analysis of the economic factors which might arise from an instance of pregnancy discrimination (e.g. turnover costs, legal costs, loss of salary as well as tax revenue and pension contributions), it takes a conservative approach when estimating the actual loss. Using this conservative model, the EOC estimates that pregnancy discrimination generates a loss to employees and employers in excess of £100m (with an upper estimate of £221m).

7. Limitations of the current legislative framework

We acknowledge that the Review focuses on the Federal framework, however we submit that the Review should also take into account state based legislative and policy frameworks relevant to pregnant employees and parents returning from parental leave, because some employees, such as public sector employees, are not covered by the national workplace relations system (with the exception of public sector employees in Victoria, the ACT and the Northern Territory).

As a NSW based organisation we are only in a position to comment on laws relevant to people living in NSW. The FWA, the *Anti-Discrimination Act 1977* (NSW) (**ADA**) and the *Sex Discrimination Act 1984* (Cth) (**SDA**) prohibit discrimination on the basis of pregnancy or pregnancy-related entitlements, however, as the case studies demonstrate, discrimination continues to occur.

The current legislative framework does not adequately protect pregnant employees and parents seeking to return to parental leave from discrimination because:

- the entrenched gendered definition of “work” serves to perpetuate discrimination against women and men with caring responsibilities;
- employers are not aware of the legislative framework, particularly:
 - the rights of casual employees;
 - the obligations of labour hire companies;
 - the right to a safe job and flexible working conditions;
- discrimination law is too complex, due to:
 - the definition of discrimination;
 - inconsistency between legislation;
 - exceptions and exemptions;
- the federal discrimination system is problematic, due to:
 - compulsory conciliation and the lack of preventative remedies;
 - the unenforceability of conciliation agreements;
 - costs;
 - restrictive standing rules;
 - the lack of a specialist discrimination division; and
- employees have limited access to free legal advice and representation.

7.1 Gendered definition of “work”

Work continues to be structured on the idea of, and for the benefit of, the tradition “male breadwinner” who works full time hours in order to provide for his wife who is providing full time care for their children in the home. Caring for children is not considered to be “work” and is not valued as highly as “paid work”.

Therefore women and men who seek to take leave or request to work flexibly in order to care for their children are not valued as highly as the tradition full-time worker, which makes them vulnerable to discrimination by their employers. It is also arguably the reason for why

many employers have difficulty accommodating requests for flexible working conditions because they cannot envision a structure different to the traditional full time worker.

We need to value the importance of child rearing and redefine the traditional definition of “work” in order to address the systemic discrimination against pregnant employees and employees with caring responsibilities.

7.2 Lack of awareness

Some employers appear to be unaware or unable to accommodate the rights and entitlements of pregnant employees and parents seeking to return from parental leave.

We are particularly concerned about the lack of awareness about the rights of casual employees, the obligations of labour hire companies, and the reluctance to accommodate employees who seek to be transferred to a safe job and/or request flexible working conditions.

7.2.1 *Casual employees*

The Australian Bureau of Statistics (**ABS**) indicates that the portion of casual employees has grown over the last two decades from 17% in 1992 to 20% in 2009 of all persons employed.⁶ Of all women who are employed, one quarter are employed on a casual basis.⁷

The National Employment Standards (**NES**) set out minimum standards that apply to the employment of employees which cannot be displaced.⁸ Division 5 of Part 2-2 of the FWA sets out the minimum standards regarding parental leave and related entitlements.

Employees and “long term casual employees” are entitled to leave under the Division if they have completed 12 months continuous service with the employer immediately before the expected date of the birth of their child or the expected day of the placement of an adopted child.⁹

A “long term casual employee” is defined as casual employee who has been employed by their employer on a regular and systematic basis for at least 12 months.¹⁰

However, employers often still believe that pregnant employees employed on a casual basis are not owed the same (or any) entitlements as pregnant employees employed on a permanent basis, even when they work regular and systematic hours, which is demonstrated in “Minna’s” and “Smrithi’s” cases. This may be because there is an ongoing view in the community that casual employees are paid at a higher rate in lieu of having any other entitlements.

7.2.2 *Labour hire companies*

We are also concerned that labour hire companies are failing to recognise the rights and entitlements of pregnant employees, particularly those who are employed on a casual or “on-call” basis.

⁶ABS

[http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1370.0~2010~Chapter~Casual%20employees%20\(4.3.5.4\)#](http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1370.0~2010~Chapter~Casual%20employees%20(4.3.5.4)#)
accessed 7 January 2014.

⁷ Ibid.

⁸ *Fair Work Act 2009* (Cth) section 61(1).

⁹ *Fair Work Act 2009* (Cth) section 67.

¹⁰ *Fair Work Act 2009* (Cth) section 12.

The ABS indicates that in 2008 5% of all people employed (576,700) obtained their job through a labour hire company.¹¹ Of the employees who continued to be paid by the labour hire company (**labour hire workers**) (122,200), over one third (39%) were women and 72% of these women were under the age of 44.¹² Compared to employees generally, labour hire workers were more likely to be employed on a casual basis (79% compared with 23%).¹³ In our experience, labour hire companies have claimed that their workers cease to be employed at the end of every shift they perform, even when they perform regular shifts over long periods of time.

Labour hire companies have also claimed that they do not have the power to compel their clients (the businesses where their employees are performing duties) to provide their employees with entitlements such as a 'safe job' or the right to take and return from parental leave.

7.2.3 *The right to a safe job and flexible working conditions*

We acknowledge that the FWO has produced a number of factsheets and best practice guides, which set out the rights and responsibilities of employers and employees in relation to parental leave related entitlements.

However, many employers and employees are still not aware of the pregnancy and pregnancy-related entitlements, particularly the right to be transferred to a safe job, or be paid no safe job leave and how to accommodate requests from employees for flexible working conditions.

We submit that employers and employees would benefit from further education about their rights and responsibilities employers and employees.

Given the overlap and intersection between federal discrimination law and employment law, the AHRC should work with the FWO to develop education campaigns and resources.

Recommendation 1: AHRC and FWO work together to develop education campaigns and resources targeting employers, particularly labour hire companies.

The education campaign should focus on the pregnancy and pregnancy-related rights of employees, particularly casual employees.

Education resources should provide practical guidance to employers about how to accommodate requests from employees for a safe job and/or flexible working conditions.

7.3 Complexity of discrimination law

The definition of discrimination and the inconsistency between how the SDA, ADA and FWA define discrimination and the exemptions and exceptions inherent in the legislative framework, make it difficult for pregnant employees and parents seeking to return from parental leave to assert their rights.

7.3.1 *Definition of discrimination*

Anti-discrimination law is complex, particularly in relation to the definition of discrimination. In our experience, our clients are readily able to identify that they have experienced

¹¹ (<http://www.abs.gov.au/ausstats/abs@.nsf/featurearticlesbyCatalogue/BE74CE9DE2C7592ACA2576F7001533C5?OpenDocument>) accessed 14 January 2014.

¹² Ibid (9.4% aged between 15 and 24; 31.4% aged between 25 and 34; 31.6% aged between 35 and 44).

¹³ Ibid.

discrimination; however, applying the current legal tests to their experience is often technical and difficult. It is also well documented that the current definitions of direct and indirect discrimination have led to outcomes that are arguably against the objects of anti-discrimination laws.¹⁴

One way to address the complexity of discrimination law is to replace the existing definitions of direct and indirect discrimination with a unified definition of discrimination. An example of a unified definition is section 9 of the RDA.

We acknowledge that the question of whether the existing definitions should be replaced with a unified definition is a difficult one. The advantage of adopting a unified definition is that it eliminates the problem of having to plead direct and indirect discrimination separately and reduces technicality in the law. In our view, a unified definition of discrimination would simplify the application of the SDA and ADA, promote community awareness and education about the nature of unlawful discrimination, and increase accessibility to the law.

However, we recognise that a unified definition may inadvertently lead to a reduction in discrimination protection if it is not sufficiently clear that the law covers indirect as well as direct discrimination. We strongly believe that a unified definition of discrimination must include types of indirect discrimination, such as requirements, conditions and practices which may appear neutral on their face, but which prevent the achievement of equality of particular groups in the community, such as pregnant employees.

We support a unified definition of discrimination but only if it can be drafted so as not to reduce current protections for both direct and indirect discrimination.

Recommendation 2: Replace the existing definitions of direct and indirect discrimination with a unified definition of discrimination.

7.3.2 *Inconsistency*

The interaction between the FWA, the SDA, and the ADA is also considerably complex and unclear. Of particular concern is the interaction between the discrimination law and “adverse actions” under the FWA.

Employers are prohibited from taking “adverse action” against an employee or prospective employee on the grounds of their sex, marital status, pregnancy and family or carer’s responsibilities.¹⁵

An employer takes “adverse action” against an employee if they dismiss them or injury or prejudice their position or discriminate against the employee.¹⁶ An employer takes “adverse action” against a prospective employee if they refuse to employ them or discriminate against them in the terms or conditions on which they offer to employment to them.¹⁷

There have been varying decisions under the FWA, including on the extent to which discrimination law concepts and jurisprudence informs the understanding of adverse actions based on a protected attribute under the FWA.

¹⁴ See Dr. Belinda Smith, *From Wardley to Purvis – How far has Australian anti-discrimination law come in 30 years* (2008) 21(1) *Australia Journal of Labour Law*, 3 – 29. See also, Human Rights and Equal Opportunity Commission, *Submission to the Senate and Constitutional Affairs Committee on the Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality*, 1 September 2008.

¹⁵ *Fair Work Act 2009* (Cth) section 351(1).

¹⁶ *Fair Work Act 2009* (Cth) section 342(1).

¹⁷ *Ibid.*

We believe that it is not desirable to have widely divergent understandings, definitions and tests of discrimination under the Fair Work system and federal discrimination law. We also believe that some concepts of “adverse action” under the FWA are wider than concepts under federal discrimination law, while some concepts are considerably narrower.

Greater consistency across federal and state legislation in relation to how discrimination is defined and tested would ensure better access to justice and increased accessibility in the law.

Recommendation 3: Greater consistency across federal and state legislation in relation to how discrimination is defined and tested, as long as it does not reduce current protections contained in the adverse action provisions of the FWA.

7.3.3 Exemptions and exceptions

The SDA, FWA and ADA contain numerous inconsistent exemptions and exceptions from that make it difficult for rights-holders and duty-holders to understand their rights and responsibilities. Of particular concern are the permanent exemptions available to religious organisations.

The SDA also allows employers who operate organisations or business established to propagate religion to discriminate against people if their conduct conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.¹⁸

The FWA also allows employers to discriminate against employees if they are employed by an institution, which is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed and the conduct taken is taken in good faith and to avoid injury to the religious susceptibilities of adherents of that religion or creed.¹⁹

The ADA also allows employers who operate organisations or business established to propagate religion to discriminate against employees if their conduct conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.²⁰

We understand that some exemptions and exceptions are necessary to ensure a balance between the rights of employers and rights of employees and the availability of special measures. However, we submit that permanent exemptions available to religious organisations are unnecessarily broad.

No human rights are absolute, and when a situation arises where human rights appear to be in conflict, an attempt should be made to strike an appropriate balance between the rights in conflict. We submit that permanent exemptions entrench systemic discrimination, as those who are exempt from anti-discrimination laws are not required to consider whether they could achieve the same objective by non-discriminatory means.

Permanent exemptions compromises rights of vulnerable groups already susceptible to discrimination, such as women, by allowing the right of freedom of religion to prevail over other rights afforded to those individuals by international human rights law, such as the right to live free from discrimination.

¹⁸ *Sex Discrimination Act 1984* (Cth) section 37(1).

¹⁹ *Fair Work Act 2009* (Cth) sections 351(2) and 772(2).

²⁰ *Anti-Discrimination Act 1977* (NSW) section 56(d).

We note that a vast range of public social and welfare services are managed by faith-based organisations. These services include aged-care, education, adoption services, employment assistance and child welfare. Religious organisations receive significant government funding in order to provide these essential services. According to a report by the Centre of Independent Studies, 1,127,014 students attended non-government schools in 2009, and 90% of these students were in religious schools²¹. Also in 2009, approximately \$6.3 billion was budgeted to non-government schools, the vast majority of this funding going to religious schools.²²

By allowing publically funded organisations to discriminate against certain groups, such as pregnant employees, the Government sends a message that discrimination is acceptable in our community, which goes to further entrenching systemic discrimination against vulnerable groups of people.

Recommendation 4: Religious exemptions should be removed and religion should instead be introduced as a protected attribute.

Alternatively if exemptions for religious organisations are not removed, then the scope of the religious exemptions be narrowed to allow discrimination only when it is necessary to fulfil the inherent requirements of a position directly associated with the operation of a religion, for example a priest.

7.4 Federal discrimination system

There are a number of problems with the federal discrimination system, which make it difficult for complainants to pursue discrimination complaints.

7.4.1 *Conciliation*

In the current federal anti-discrimination system, alternative dispute resolution in the form of conciliation is employed at the first instance. The advantage of alternative dispute resolution is that it is a relatively informal process, can be empowering, it allows for flexibility in the resolution of complaints and minimises the expenses to the parties. However, in our experience, the conciliation process can disadvantage the complainant.

There is often a power imbalance between the complainant and the respondent, who, in the case of employees, is frequently a company or a government agency. This power imbalance is even more pronounced when the complainant is not represented, usually due to insufficient resourcing of advocacy and legal organisations.

In many cases conciliation is held months after the woman has had her baby, and when she has abandoned any hope of returning to work for her employer. These matters may settle but often not in a manner that reflects the unlawfulness of the discrimination. What cannot be accurately gauged is how many women lose their employment continuity due to discrimination on the basis of pregnancy, and who remain shut out of the workforce for years afterwards.

However, in some cases, it is clear that the complaint cannot be resolved by conciliation, or that particular respondents have a fixed position in relation to discrimination complaints. In these cases, the AHRC investigation and conciliation process merely delays eventual consideration by a court, causes complainant attrition where the case drags on so long that

²¹ Centre for Independent Studies, Meena Buckingham, *The Rise of Religious Schools*, 2010 at page 3 (<http://www.cis.org.au/images/stories/policy-monographs/pm-111.pdf>)

²² Department of Education, Employment and Workplace Relations, *Financial Assistance Provided to Each State in respect of 2009, 2010* (<http://www.deewr.gov.au/Schooling/RecurrentGrants/NonGovSchools/Documents/GreenReport09.pdf>)

the complainant decides not to continue and may not serve to maintain the employment relationship.

For many women this is not an option within the federal court system due to the inaccessibility and costs associated with the federal court system.

Pregnant employees feel legally vulnerable and want to retain their employment at any costs so they can access parental leave and/or retain some income.

Tarin

Tarin was on parental leave and was due to go back to work. She asked to work less hours on her return due to her new family responsibilities. She was given two options by the company: return to work part time in a similar position with a lower salary or accept a redundancy package equivalent to one week's wage.

Tarin accepted the lower paying position because she needed a job in order to provide for her new family.

In cases of pregnancy discrimination, access to injunctive relief on an urgent basis is often required to preserve the employment relationship. "Tarin" did not have time to go through the AHRC conciliation process because she was due to return to work soon.

If "Tarin" had had the option of applying for an urgent injunction to stop her employer from denying her the right to return to her pre-parental leave position and an order compelling her employer to accommodate her request for flexible working conditions, she would not have had to accept a lower paying position, and would have been in a more empowered position to negotiate a fairer settlement with her employer to address the discrimination.

Although section 46PO(4) of the AHRC Act provides federal courts broad power and a non-exhaustive list of remedies, courts are reluctant to make injunctive orders that prohibit or compel specified conduct. The power to make corrective and preventative orders will assist in addressing systemic discrimination.

Joelene

Joelene had worked for her employer on a permanent full time basis for over a year, however when she sought to take parental leave after disclosing she was pregnant she was told that she had to resign from her position.

She was assured that there would be work available for her when she was ready to return to work, however, she was ultimately only offered a casual position, working two days per week.

If "Joelene" had had the option of applying for an order compelling her employer to allow her to allow her to take parental leave, rather than resign, "Joelene" would have had the right to return to her pre-parental leave position.

Recommendation 5: Complainants be able to make an application directly to a court, for an injunction if necessary, rather than first going through investigation and conciliation by the AHRC.

Recommendation 6: Section 46PO(4) of the AHRC Act be expanded to grant the courts the power to make corrective and preventative orders, including injunctions.

7.4.2 Conciliation agreements

In our experience, although many complainants successfully settle at the AHRC, often the respondents do not comply with the terms of the settlement agreement. This is a significant problem with the federal anti-discrimination system as there is no effective mechanism to enforce conciliation agreements.

There is also no accurate way of determining in how many “settled” matters the respondent fails to fully comply with the agreement. We often spend many months chasing the respondent to ensure compliance. In our experience, many matters that “settled” at the AHRC are never finalised according to the terms agreed.

The effectiveness of discrimination conciliation agreements could be improved if they could be registered with a federal court and enforced as court orders. Many state and territory anti-discrimination statutes provide for a mechanism whereby conciliation agreements are registered with a court or tribunal.²³ The provisions in s 164(3) of the *Anti-Discrimination Act 1991* (Qld) and s 62 of the *Human Rights Commission Act 2005* (ACT) provide good models for the compulsory registration of conciliation agreements. The process of enforcing conciliated agreements should be low-cost and straightforward.

Recommendation 7: Conciliation agreements be able to be registered with a federal court and enforced as court orders.

7.4.3 Costs

In our experience, the most significant barrier for employees experiencing discrimination is the risk of adverse costs orders by pursuing a discrimination complaint in the federal court system.

As a result of the risk of an adverse costs order, many employees are reluctant to even lodge complaints with the AHRC, preferring state-based tribunals where parties bear their own costs.

Where matters are contested at a federal level, our experience is that most cases settle – even very strong discrimination complaints. However, we believe that many settle on terms that do not reflect the seriousness of the discrimination or that result in inadequate compensation to the complainant. Our experience is that compensation offered in conciliation agreements is generally very low (often below \$10,000). The decision to litigate in a costs jurisdiction is made even more difficult when legal costs for the latter could easily be three or four times this amount.

Pregnant women are at a stage of their lives where they already feel economically vulnerable. Having a baby is expensive. Advising a woman that they could be subject to an adverse costs order almost always results in her being unwilling to continue her claim even when the prospects are strong. The stress alone of the potential of adverse costs is enough to dissuade women to pursue this option.

When considering the effectiveness of the current federal discrimination system, the high percentage of conciliated outcomes cannot in itself be seen as a success. In our view, many matters settle because of the costs jurisdiction that complainants must enter if the matter does not resolve at the AHRC. As a result, many complainants settle on terms that do not reflect the merits of their case.

²³ See, s 91A(6), *Anti-Discrimination Act 1977* (NSW); s 120, *Equal Opportunity Act 2010* (Vic); s 164, *Anti-Discrimination Act 1991* (Qld); s 76, *Anti-Discrimination Act 1998* (Tas); s 62, *Human Rights Commission Act 2005* (ACT).

For the purpose of discrimination complaints, the Federal Court and Federal Circuit Court should become a no-costs jurisdiction. An exemption should allow for costs in vexatious or frivolous proceedings, or for unreasonable conduct during proceedings, in line with state and territory discrimination tribunals.

A no-costs jurisdiction would also ensure consistency with adverse action claims under the FWA. This is significant as many discrimination claims relate to employment matters, and so could be brought under the FWA. Therefore it is important to ensure that in relation to costs, the legislative schemes are consistent.

Recommendation 8: For the purpose of discrimination complaints, the Federal Court and Federal Circuit Court become a no-costs jurisdiction. An exemption should allow for costs in vexatious or frivolous proceedings, or for unreasonable conduct during proceedings, in line with state and territory discrimination tribunals.

7.4.4 *Standing*

In addition to costs considerations, there are other barriers to accessing justice within the current discrimination framework – namely, barriers to physical access, and the psychological costs and the time commitment involved in pursuing litigation as discussed above. It is also difficult for people living outside metropolitan areas to commence proceedings in the Federal Court or Federal Circuit Court without a solicitor acting on their behalf.

Tana

Tana was working on a casual basis for a fast food restaurant in western Sydney for two years. She worked regular shifts over this period. When she advised her employer that she was pregnant, her employer stopped offering her shifts. Tana had an abortion because she could not afford to provide for her baby.

Tana lodged a discrimination complaint and accepted a small settlement because she did not want to pursue the matter court due to the psychological stress and time involved in litigating her matter as well as and the adverse costs risks.

The resolution of this matter did not reflect the nature and the consequences of the discriminatory conduct. It would have been in the broader public interest to litigate this matter to raise awareness of the rights of pregnant employees employed on a casual basis and the serious consequences of pregnancy discrimination in the workplace.

However, current Commonwealth anti-discrimination law relies on individual complaints, which are most commonly resolved through private conciliation. The limitations of this system for dealing with repeat discriminators, and for entrenched practices and systemic discrimination, have been widely discussed.²⁴

The current standing rules also contribute to the dearth of decided cases and expertise among the judiciary in this area of law, making it even more difficult for practitioners to provide advice on prospects of success to complainants. This leads to more cases settling and fewer systemic outcomes.

²⁴ See, for example, Australian Senate, *Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (2009), available at http://www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/report/index.htm. See also, Gaze, E., „The Cost of Equal Opportunity – will changes to HREOC solve the problem of anti-discrimination law enforcement?“ (2000) 25:3 *Alternative Law Journal* 125 – 130.

The role and powers of AHRC Discrimination Commissioners should be expanded to increase the role of the AHRC and Commissioners in addressing systemic discrimination. These powers include monitoring of duty holders, commencing complaints, intervening in matters, and reporting annually to Commonwealth Parliament and the public on discrimination matters.

We submit that the various Discrimination Commissioners and the AHRC be given the power to investigate, of their own motion, conduct that appears to be unlawful under discrimination law, and the power to commence court proceedings without having to rely on an individual complaint. The Commissioners should be adequately resourced to perform this role.

We further submit that organisations and advocacy groups should be able to bring complaints in the Federal Court or Federal Circuit Court on behalf of individuals. Additionally, we submit that organisations and advocacy groups should have standing to bring complaints to the AHRC and courts in their own right.

Together, this will assist in addressing systemic discrimination experienced by pregnant employees and parents seeking to return to work from parental leave and take some of the pressure off individual employees who have been subject to discrimination in going through the court process.

Recommendation 9: Discrimination Commissioners and the AHRC be given the power to investigate, of their own motion, conduct that appears to be unlawful under discrimination law, and the power to commence court proceedings without having to rely on an individual complaint. The Commissioners should be adequately resourced to perform this role.

Recommendation 10: Organisations and advocacy groups be able to bring complaints to the AHRC and in the Federal Court or Federal Circuit Court on behalf of individuals and in their own right.

7.4.5 *Specialist division*

As a result of the issues discussed above, courts at the federal level have not developed robust jurisprudence in this area of law. Decisions by the judiciary are critical to the development of discrimination law in Australia, and in discrimination law developing a strong normative and educative role within the community. The system as it presently stands is a war of attrition, where even very strong cases are settled because individual complainants are unable to face the risks and pressure of litigation against well-resourced respondents.

Under the current system, the nature of discrimination complaints are very different to other types of matters dealt with by federal level judges, both in terms of the law and the facts. As highlighted above, a number of barriers exist that constrain complainants' access to the courts and, as a result, Federal Court and Federal Circuits Court judges do not generally develop expertise in this area of law.

Therefore we recommend that in order to promote discrimination law as a recognised area of expertise, consideration should be given to creating a low cost specialist division to hear discrimination matters. Judicial officers should be recruited based on their expertise in discrimination law and should be required to undertake ongoing professional education in the law.

Recommendation 11: A low cost specialist division of the Federal Court and Federal Circuits Court be established to hear discrimination law matters

7.5 Limited access to legal advice and representation

Pursuing a discrimination complaint is a very personal type of litigation that can be emotionally draining and stressful. Pregnant employees and parents seeking to return from parental leave are already busy with medical appointments and family responsibilities and often do not have the capacity to initiate or engage in legal proceedings.

Without legal advice and representation, many complainants simply do not pursue their complaints. CLCs are not able to meet the current demand for representation in discrimination matters and cannot act on behalf of all potential clients.

The challenge for unrepresented complainants is further compounded by the shift towards a more formal style of conciliation. In the past, conciliations may have been more informal, with neither party represented. However, in our experience, respondents are increasingly retaining legal representation at the conciliation phase, which significantly disadvantages unrepresented complainants.

We also note that there is considerable overlap between the ADA, FWA and SDA remedies. This has made it confusing for complainants to work out where to bring proceedings and has made the provision of legal advice in this area more crucial and complex.

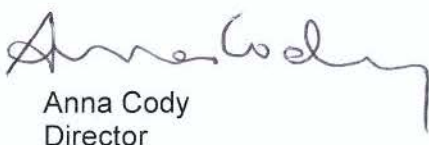
There are limited opportunities for people faced with discrimination in employment to get free legal advice about their options from specialised practitioners familiar with discrimination law. We believe this lack of expertise has resulted in a lack of discrimination complaints under the FWA provisions.


We see that it is a key role of CLCs to be experts in this area and believes that the further funding of employment law and discrimination law services in CLCs is required in order for people to be properly informed and to access their rights under the ADA, FWA and the SDA.

Recommendation 12: Increase funding to CLCs and legal aid commissions to provide advice and representation to complainants in discrimination matters.

Please do not hesitate to call us on (02) 9385 9566 if you would like to discuss the content of our submission further.

Yours faithfully,
KINGSFORD LEGAL CENTRE


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