ELC Employment Law Centre of WA (Inc)
Working for WA Workers
ABN 36 365 876 841

Elizabeth Broderick
National Review Reference Group
Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2001

By email: pregnancyandwork@humanrights.gov.au

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Dear Ms Broderick

Supporting Working Parents: Pregnancy and Return to Work National Review

The Employment Law Centre of Western Australia (Inc) (**ELC**) welcomes the opportunity to make a submission to the Australian Human Rights Commission (**AHRC**) in relation to its national review entitled *Supporting Working Parents: Pregnancy and Return to Work* (**Review**).

ELC is a community legal centre which specialises in employment law. It is the only not for profit legal service in Western Australia offering free employment law advice, assistance and representation. ELC prioritises assisting employees who are in an identifiable group of disadvantage. This includes young people, people with disabilities, people located in a rural, regional or remote location, people from an Aboriginal or Torres Strait Islander background, low income earners and those who have a diminished command of English (either because of literacy issues or because they are from a non-English speaking background). ELC assists over 4,000 callers each year through our Advice Line service and up to 400 employees through further assistance appointments with a lawyer.

Executive summary

There is a high prevalence of pregnancy and pregnancy-related discrimination experienced by Western Australian employees. The nature of the discrimination can be subtle, but its consequences can have both an immediate and long-term impact on employees. Many of ELC's clients who experience pregnancy and related discrimination are subjected to blatant discrimination, including dismissal, demotion and bullying.

ELC identifies several key areas to reform. These include:

- the lack of an enforcement agency to regulate discrimination;
- onerous costs provisions and enforcement process;
- a lack of penalties imposed on discriminatory employers; and
- a lack of assistance from the AHRC where complaints are referred to the courts.

ELC also recommends that several positive obligations be introduced, including an obligation to:

- consult with pregnant employees;
- make reasonable adjustments to accommodate pregnant employees; and
- reasonably accommodate requests for flexible working arrangements by employees with family responsibilities.

PREVALENCE, NATURE AND CONSEQUENCES

Prevalence of pregnancy or pregnancy-related discrimination

1. Next year will mark the 30th anniversary of the *Sex Discrimination Act 1984* (Cth) (**SD Act**) and the *Equal Opportunity Act 1984* (WA) (**EO Act**). In spite of the protection offered by those Acts and the *Fair Work Act 2009* (Cth) (**FW Act**), pregnancy and pregnancy-related discrimination is still present in many workplaces.

2. Between 1984 and 2004, over 13,000 complaints were made under the SD Act. Tellingly, 12,000 of those complaints were in the area of employment.[1]

3. The Australian Bureau of Statistics (**ABS**)'s latest data indicates that around 19% of women experience discrimination in the workplace while pregnant.[2]

4. In 2011-12, 19% of the 2,610 complaints made to the AHRC were lodged under the SD Act. Of the 22,872 issues complained about, 812 related to pregnancy, marital status, family responsibilities, parental status, carer's responsibilities and breastfeeding. Of the complaints received under the SD Act that year, 15% related to pregnancy and 6% to family responsibilities.[3]

5. In the last financial year, of the 22 pregnancy-related complaints made to the Equal Opportunity Commission of WA (**EOC**), 19 complaints were in relation to employment. Nineteen percent of employment complaints lodged under the EO Act in that year were about pregnancy and 13% were about family responsibilities.[4]

ELC client statistics

6. ELC's data also indicates that many vulnerable employees continue to be affected by discrimination. From 1 July 2009 to 30 June 2013, ELC received 2051 calls in relation to discrimination. More than 12% of those calls were about pregnancy and pregnancy-related discrimination.

7. The ELC clients who experienced pregnancy and pregnancy-related discrimination were particularly vulnerable:

   - more than three quarters of these clients earned less than $50,000 per year;
   - 27% earned considerably under the full-time minimum wage;
   - more than a quarter were young workers under the age of 25;
   - 9% were 21 years or younger;
   - 10% were from a non-English speaking background;

- 2% were from an Aboriginal or Torres Strait Islander background; and
- 20% were the sole income earner for their family.

8. Most of the clients who experienced pregnancy and pregnancy-related discrimination worked in administration[5], retail[6] and health/community services[7], industries with high staff turnover, low salaries and where employees can be easily replaced.

9. Seventeen percent of the clients lived in rural, regional or remote areas. As a result, it would likely be more difficult for them to secure alternative employment than those in the metropolitan area.

Nature of the discrimination and trends

10. In larger, more sophisticated workplaces, there is often less blatant discrimination against pregnant women and those returning to work after parental leave. However, in those workplaces, employees who return to work after parental leave may face more subtle forms of discrimination.

11. The 3 most common types of discriminatory treatment experienced by female employees in 2012 were missed opportunity for promotion (34%), missed training or development opportunities (32%) and receiving inappropriate or negative comments from their manager/supervisor (28%).[8]

12. ELC has come across many different types of discrimination faced by employees who are pregnant or who are returning to work after pregnancy. ELC has also assisted employees who have experienced discrimination because of their partners' pregnancies.

13. The following are some examples of discrimination faced by ELC's clients in the last 4 years:

Prospective employment

- Not being hired;
- Having a job offer withdrawn;

Termination of employment

- Being dismissed;
- Being restructured out of a workplace or made redundant while on maternity leave;
- Being forced to resign;
- Being put on a fixed-term contract;
- Not having a fixed-term contract renewed;
- Being forced to terminate an apprenticeship;
- Being banned from working for a particular company (in a labour hire situation);

Inappropriate comments or treatment from manager, supervisor or colleague

- Being told to terminate the pregnancy;
- Being verbally abused for taking sick leave due to the pregnancy;

- Being bullied;
- Receiving inappropriate comments from a colleague after taking time off work to terminate pregnancy;

Terms and conditions of employment during pregnancy

- Being demoted;
- Being refused a maternity uniform and told to wear men's clothes or buy her own maternity clothes;
- Being denied a pay rise;
- Being denied sick leave;
- Being forced to work 12-14 hour days for 12 days straight, resulting in a miscarriage due to stress;
- Not being provided with a safe workplace during pregnancy;

Terms and conditions of employment upon return to work

- Being given more work than other employees upon returning to work;
- Having hours reduced;
- Not being given old position – only being offered a return to work position in a different location, including interstate;
- Being offered a return to work position with a drastically reduced rate of pay and fewer benefits;
- Being made a casual, instead of a permanent employee;

Parental leave

- Being refused unpaid parental leave;
- Being pressured into taking additional maternity leave because of the supposed effect on the employer's corporate image;
- Being denied an extension to parental leave after child was stillborn and employee wanted to try to conceive again;
- Having shifts changed to reduce parental leave pay;
- Having carer's leave revoked (to care for partner who had a caesarean) and told to take unpaid leave instead;

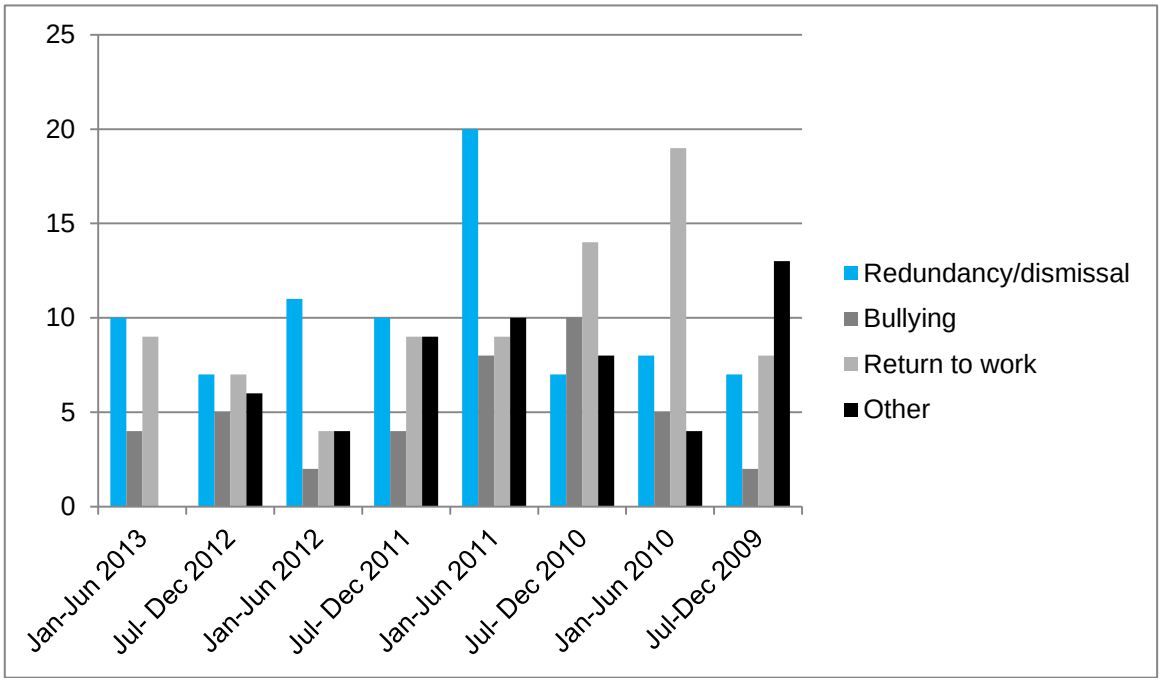
Flexible working arrangements

- Having a request for flexible working arrangements rejected;
- Having a working from home arrangement revoked.

14. ELC has analysed the different types of discrimination faced by our clients. We have divided them into 4 categories: termination of employment, bullying, return to work issues and "other".

15. In the last 4 years, 32% of our clients who experienced pregnancy or pregnancy-related discrimination lost their jobs, 31% faced return to work issues, 16% were bullied during their pregnancy and 21% faced other discrimination, such as being threatened with dismissal, having shifts or hours reduced or having a job offer withdrawn.

Fig 1: ELC client statistics – clients experiencing pregnancy and related discrimination



Consequences of the discrimination

16. Discrimination on the grounds of pregnancy and return to work discrimination can have a significant negative impact on the lives of those who are subjected to it.

17. ELC's clients reported that their confidence was badly affected because of the discrimination they had experienced.

18. Many clients said that it was too difficult to bring a claim against their employer – the enforcement process was too complex, time consuming and stressful.

19. Almost all clients noted that they were at a particular disadvantage because of their circumstances – it was even harder than it would ordinarily be to pursue the matter. They needed to focus their energies on caring for their newborns.

20. Affected women consistently described their experience as incredibly stressful and upsetting. They also spoke about the discrimination damaging their careers. In many instances, it led to them accepting lower paid positions or choosing not to return to work at all.

21. We set out some of their stories below.

I told my employer that I was pregnant in August, at the end of my first trimester. I had been working on a series of 3 month contracts and gotten great feedback from my employer. But at the end of my October contract, my employer told me that I was going to be put on one-month contracts. I wasn't sure why they'd decided to change my employment, but after only one month, they told me that they were restructuring, so my contract would not be renewed and I would be finishing in 2 weeks.

It was heartbreaking. I thought that I was good at my job and that everything was fine, and then suddenly I was sacked. I was still in contact with the girls I worked with and they told me that only a few weeks after they sacked me, they recreated my position and hired someone else.

It was already a tough time for me – I was suffering from depression and battling the hormones that come with pregnancy – and to get the sack on top of all that was just too much.

I didn't make a claim against my employer because, to be honest, I just thought, 'why bother?' This is just how it goes if you're a woman.

I still haven't gone back to work since my dismissal. My confidence was really affected because of what they did to me, and I started to convince myself that maybe it was all my fault. I just couldn't bear to deal with all that self-doubt and trauma again.

- ***Sam***

I started as a full-time contract manager with my employer in 2004. I took maternity leave in 2009, and when I came back in April 2010 I was offered a casual position as an assistant contract manager. I took the job because they allowed me to work 3 days a week, which was important for me.

About 6 months after I came back, my baby became sick and I had to take a week off work as carer's leave. I gave my employer a medical certificate, but when I came into work the following Monday I was dismissed. My employer said that I was only at work 3 days a week when I should have been there full-time. I didn't understand why that was a problem, because they had offered me a job that only required me to work 3 days a week.

After I was dismissed, I thought about making a claim against my employer for discrimination.

In the end, it was too hard for me to do it all by myself when I had a sick child.

Eventually I was able to find work after my dismissal, but wasn't as highly skilled as my previous position. My self-confidence was damaged by what had happened, and I was put off climbing the career ladder for years afterwards.

- ***Susan***

I started working for my employer in February 2009 in a management role. For the first few months I was getting fantastic feedback on my performance – my boss told me several times what an outstanding job I was doing. I had been working there for about 3 months when my husband and I were accepted into an IVF treatment program requiring me to attend twice a week. I confided in my operations manager that I was undergoing IVF, and she told me that it wasn't a problem and any hours I missed at work I could make up at home. She had gone through IVF herself, so I felt like I could trust her.

A week later, one of the owners approached my manager to ask why I was late to work. Once she told him why, everything changed. First, my hours were cut. Then I stopped receiving staff emails and wasn't invited to staff meetings or work functions. Then my working-from-home arrangements were cancelled. Finally, after a month of bullying, I was told by the operations manager and one of the owners that someone else had asked for work and they were giving her my job.

At first, I was fired up and I wanted to hold them to account. I made a claim to the AHRC and they helped me negotiate with my employer. However, my employer rejected every offer they suggested, and my case worker told me I had no other option but to go to court. Given that I was still going through IVF and had lost a child once already, the stress of going to court was too much and I just gave up.

Since I was fired, I haven't gone back to work. I used to be such a confident person, but going through that discrimination at the hands of an employer who once promised me the world really affected my self-esteem.

As a mother returning to work, I am afraid of being discriminated against again.

- ***Lisa***

I was 19 weeks pregnant when I experienced some difficulties in my pregnancy. I was in danger of miscarrying, and so my obstetrician told me I would be confined to the house for the rest of my pregnancy. I applied to start my maternity leave early, and my boss seemed to be okay with it. I gave birth to my child almost 5 months later and contacted my employer to ask if I could extend my maternity leave for another 12 months.

I could tell that my request hadn't gone down well, because my boss just didn't reply to me. I contacted girls at work and they told me I would need to speak to him before anything could be finalised. Eventually he answered one of my calls to tell me that the company had been restructured and my job was being performed by someone else. There was no work for me anymore.

I was particularly shocked by my boss's reaction because he had been an obstetrician himself. He dealt with pregnant women and new mothers every day – I thought he of all people would understand how stressful pregnancy can be, let alone when there are complications!

After I was dismissed, ELC helped me enforce my unpaid entitlements. I thought about making a discrimination claim, but in the end I decided against it.

Having a new baby, I just didn't have the strength or the energy to take my claim any further.

Emotionally, it just would have been too difficult for me. Not only that, but Perth is a small place, and I didn't want to jeopardise my chances of getting more work in this industry by taking him to court.

When I was looking into my options, it was really difficult to know where to go or who could help me. My employer was a small business owner – he had no human resources training or any idea of what my rights were as an employee. Having to find out all this information by myself was really daunting.

After my dismissal, I decided to start up my own bookkeeping company. I had trust issues after the way my employer treated me, and with a family to feed I just couldn't risk being dismissed out of nowhere again.

At least if I worked for myself I knew it wouldn't happen to me again.

- ***Marina***

I worked for my employer as a medical receptionist for 2 years before I fell pregnant in January 2010. My contract was up to be renewed in June, but in May my employer told me they were terminating my employment. I went and spoke to my boss and asked her why I couldn't just apply for maternity leave like my co-workers had done in the past. "That's been a mistake," she told me, "we're not going to do that anymore." I asked her if I could come back to work, even just for a few shifts a week, once my baby was born, but she told me that I couldn't. She said, "You don't know what your baby's going to be like. What if I give you shifts and then your baby is too hard?" She even turned it back on me: "You know, you're the one who went and got pregnant."

I took my fight to the CEO, and was adamant that they couldn't treat me this way. Eventually, they gave me a contract with the lowest hours and worst conditions they could get away with, just to stop me from complaining. As if it wasn't stressful enough being 8 ½ months pregnant and dealing with the financial pressure that a new baby would bring; I then had to deal with a changed contract and less pay.

My son is now 3 years old.

I still work at the same company, and I can't forget the way they treated me when I told them I was pregnant.

No one would stand up for me. No one helped me. I had to fight them on my own.

- ***Amber***

I was completing my apprenticeship as a boilermaker when I fell pregnant. I was due to finish my apprenticeship in July but at the end of March my employer gave me a letter to sign authorising them to finish my apprenticeship early. I signed it because I assumed they would give me a full-time contract straight after like the other apprentice who had been signed off early. Instead, they turned around and told me there wasn't enough work and so there wasn't a job for me.

I wanted to keep going with the apprenticeship for the full 2 years – I needed the training.

I only signed the letter because I was worried they would just terminate my apprenticeship if I didn't, and because of my pregnancy I would never find another employer to take me on to finish it.

- ***Jessica***

GAPS AND LIMITATIONS IN THE EXISTING LEGISLATION AND SUGGESTED REFORMS

22. The continued prevalence of pregnancy discrimination in the workplace suggests that current provisions of the SD Act have had limited success. In our view, this is mainly due to:

- the absence of a regulator with powers to enforce the SD Act provisions;
- the onerous enforcement process and its costs implications for complainants; and
- the narrow range of penalties that can be imposed on employers under the SD Act for unlawful conduct in the workplace.

23. ELC also considers that the SD Act does not go far enough in protecting individuals from pregnancy and pregnancy-related discrimination. In particular, the following reforms are necessary:

- there should be a positive requirement in relation to reasonable adjustments, similar to that in disability discrimination legislation;
- the scope of the protection should be expanded so that a failure to properly consult with a pregnant employee is an act of discrimination; and
- there should be a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangement due to family or carer's responsibilities.

Gaps in the existing legislation

Inadequate regulation

24. Whilst the AHRC has an investigative and advisory role under the SD Act, its powers are limited to:

- inquiring into and attempting to conciliate complaints made to the AHRC;
- requiring parties to attend a compulsory conciliation;
- obtaining documents relevant to the complaint;
- terminating a complaint on various grounds; and
- granting and renewing exemptions from certain provisions of the SD Act.

25. Whereas the Fair Work Ombudsman can investigate and commence proceedings on behalf of employees subjected to unlawful discrimination under the FW Act, the AHRC cannot pursue an action against employers who breach the SD Act.

26. If a complaint of pregnancy discrimination cannot be resolved at the conciliation stage, the complainant must apply to have the matter heard by the Federal Circuit Court or Federal Court. Conversely, if a settlement agreement is reached at conciliation, but the employer later refuses to comply with the agreement, then the employee may only enforce the agreement by applying to the state courts for a breach of contract claim. In either case, applications for relief to the federal courts or state courts are procedurally complex and very

difficult to pursue without the assistance of legal representatives. The effect is that many victims of discrimination have no access to justice, regardless of the severity of the breach and the culpability of the employer.

27. Litigation is inherently stressful, complex and time-consuming. For ELC's clients, these challenges are magnified by the risk that the victim of discrimination may also have to pay the other party's costs.

28. Academic Dr Belinda Smith highlights the weakness of Australian anti-discrimination laws.[9] She states that victims of discrimination are often from disempowered groups, which adds to the weakness of the current system when a complainant is expected to go through a complicated legal process without public assistance.[10] Dr Smith also notes that with public prosecution and assistance for complainants, discrimination could be perceived as more than just a private harm. It could be used for public policy considerations.

29. In light of these issues, we think that the SD Act should be amended to ensure that:

- the AHRC (or another independent regulatory body) can investigate and commence proceedings on behalf of employees. Ideally, the AHRC should be able to seek penalties for breaches of the SD Act (see below), compensation for the victim of the discrimination and punitive damages in circumstances where the discrimination is particularly serious and/or where the unlawful conduct is deliberate; and

- the AHRC can commence proceedings, on its own initiative, to enforce settlement agreements which are later breached by the employer.

30. We think that these amendments would:

- allow the AHRC to commence proceedings against employers who either repeatedly breach the SD Act (but without intent to do so) or who have done so deliberately knowing that they are in breach of the SD Act;

- further deter employers from contravening the pregnancy discrimination provisions of the SD Act because of the threat of litigation;

- increase public awareness of pregnancy discrimination issues due to the publicity surrounding legal action taken by the AHRC; and

- encourage employers to have regard to the AHRC guidelines. The current guidelines are not legally binding and do not provide an incentive for employers to make appropriate changes to their existing policies and practice. We consider that if the AHRC were able to commence proceedings on its own initiative, employers would be more likely to refer to the guidelines to demonstrate compliance with their obligations under the SD Act.

RECOMMENDATION 1: That the SD Act be amended to allow the AHRC (or another independent regulatory body) to investigate and commence proceedings on behalf of employees.

RECOMMENDATION 2: That the SD Act be amended to allow the AHRC to commence proceedings to enforce settlement agreements.

Need for penalties

31. Limited remedies are available for a breach of the SD Act.[11] Unlike other similar regimes, such as under occupational safety and health and workplace relations legislation, no penalties or punitive damages are available for a breach of the SD Act.

32. In contrast, under the FW Act, corporate employers who have engaged in unlawful discrimination can incur a penalty of up to $51,000.[12]

33. In ELC's view, civil penalties should be imposed for breaches of the SD Act. Such penalties should be payable to the victim of discrimination.

34. Guidance could be drawn from the penalties payable under the FW Act in determining the penalties applicable under the SD Act.

35. The imposition of penalties would motivate employers to take the issue of pregnancy discrimination seriously. It would encourage employers to be proactive in preventing pregnancy discrimination in the workplace and to better respond to discrimination complaints.

RECOMMENDATION 3: That the SD Act be amended to provide for civil penalties to be imposed for breaches of the Act, and allow those penalties to be paid to the victim of discrimination.

Education

36. Education could play a significant role in reducing pregnancy and related discrimination in Australian workplaces.

37. Though the AHRC provides Pregnancy Guidelines for employers and employees on its website,[13] they are not legally binding.

38. In ELC's view, the legislation should be amended to allow the AHRC to publish enforceable standards in relation to pregnancy and potential pregnancy.

39. Further, the legislation should be amended to require employers to provide mandated education programs in relation to pregnancy discrimination.

40. The AHRC should have a role in creating and/or approving such programs.

RECOMMENDATION 4: That the AHRC Act be amended to allow the AHRC to publish enforceable standards in relation to pregnancy and potential pregnancy.

Obligation to consult

41. ELC's pregnant clients often report that their employers make assumptions in relation to their working arrangements. Over 85**%** of ELC clients who sought advice about discrimination during pregnancy, while on maternity leave and following their return to work, said that their employers made decisions that impacted on their employment based on a fixed idea about pregnancy.

42. The SD Act should require employers to properly consult with a pregnant employee about her current and ongoing role. Failing to do so should be considered an act of discrimination.

RECOMMENDATION 5: That the SD Act be amended to require employers to properly consult with a pregnant employee about her current and ongoing role, with failure to do so being considered an act of discrimination.

43. There is currently no requirement under the SD Act that employers make reasonable adjustments to accommodate pregnant employees.

44. The SD Act should be amended to require employers to make reasonable adjustments to accommodate pregnant employees, as long as those adjustments would not cause an unjustifiable hardship to the employer.

45. Many of ELC's clients have experienced pregnancy discrimination in the workplace where it would not have caused unjustifiable hardship to the employer to make reasonable adjustments. For example:

    45.1 An ELC client requested that her employer provide her with maternity pants as part of her work uniform. Her employer initially agreed to the request, but later refused to provide maternity pants. The employer told the client that if she wanted to wear maternity pants, she would have to supply them herself. The client ended up resigning because of her employer's behaviour. Purchasing a pair of maternity pants for the client would have been a reasonable adjustment. Had the requirement to make reasonable adjustments been enforceable under the SD Act, the employment relationship would likely have continued.

    45.2 An ELC client performed occasional property inspections as part of her role. During the first few months after her maternity leave, the client had difficulty climbing in and out of the car due to complications during birth. The client requested that she be taken off property inspections for a few months while she recovered. Rather than making the adjustment, the employer changed the client's role so that more than half her work involved property inspections. She was forced to resign because she could not complete the work. In this case, the employer not only refused to make reasonable adjustments, but created circumstances where the client could not complete her work. Had the SD Act contained a requirement to make reasonable adjustments, this may not have occurred.

    45.3 An ELC client performed shift work prior to her pregnancy. On her return from maternity leave, the client asked her employer if she could be moved from night shifts to predominantly morning shifts to assist with her childcare arrangements. The employer said that this could not be done and instead told the client that she would have to take an additional 6 months' unpaid maternity leave until she could find child care for the night shifts. The client could not afford to take another 6 months' leave unpaid and had to find other work. Had the SD Act created an obligation on the employer to make reasonable adjustments, the client would have been able to remain in her employment.

    45.4 An ELC client was working in high-level patient care when she fell pregnant. The client asked her employer to move her to a low-level patient care position for the 10 weeks prior to her maternity leave because her doctor advised her to move to light duties. The employer refused to accommodate this request. Had there been a legislative requirement to accommodate such requests and make reasonable adjustments, the client could have been moved to light duties and been able to work the remaining 10 weeks before her maternity leave started.

45.5 An ELC client who was working a very physical job fell pregnant after a long period of time on IVF. She asked to be transferred to light duties, as another pregnant employee had been able to do. The employer refused her request because she had already taken 2 weeks' sick leave while undergoing IVF and therefore she did not warrant any further 'special treatment'. The client was unable to continue working in her role during the pregnancy. As a result, her employer moved her to casual status and stopped giving her shifts. In this instance, moving the client to light duties would have been a reasonable adjustment, and one the employer could likely have accommodated. If the SD Act were amended, the employer may have agreed to her request and the client's employment could have continued.

RECOMMENDATION 6: That the SD Act be amended to require employers to make reasonable adjustments to accommodate pregnant employees, where those adjustments would not cause unreasonable hardship to the employer.

Flexible working arrangements

46. The SD Act should be amended to impose a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements, to accommodate family or carer's responsibilities.[14]

47. The FW Act currently provides employees with the right to request flexible working arrangements in certain circumstances – for example, where parents have school age children or younger.[15] However, there are some significant limitations on the right to request flexible working arrangements under the FW Act which need to be addressed.

48. For example, the right to request flexible working arrangements is currently of very limited value to employees in the sense that no sanctions apply if the employer refuses the request for reasons other than reasonable business grounds.[16]

49. This right is also limited in that only employees who have completed 12 months of continuous service with their employer are entitled to make a request for flexible working arrangements.[17]

50. In ELC's view, the right to request flexible working arrangements should be strengthened by introducing sanctions where the employer refuses the request other than on reasonable business grounds. Further, it should not be necessary for an employee to have completed 12 months' service before being able to request flexible working arrangements.

RECOMMENDATION 7: That the SD Act be amended to impose a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements to accommodate family or carer's responsibilities.

Limitations on the existing legislation

The complaint process

51. There are a number of key differences between pregnancy and pregnancy-related discrimination complaints made under the SD Act and complaints made under other federal and Western Australian legislation.

52. In ELC's view, several of these differences are likely to deter Western Australian employees from making a discrimination complaint under the SD Act specifically, such as:

- costs;
- the lack of an AHRC office in Perth;
- the fact that no assistance is provided if the matter proceeds to the Federal Circuit Court or Federal Court;
- the length of time taken to deal with complaints; and
- the fact that the complainant bears the onus of proof.

Costs

53. Where a discrimination complaint cannot be resolved through conciliation at the AHRC, the next step for the complainant is to commence proceedings in the Federal Circuit Court or Federal Court.

54. While the AHRC is a no costs jurisdiction, once the matter proceeds to the Federal Circuit Court or Federal Court, it becomes a costs jurisdiction.[18] If the complainant is unsuccessful in establishing a discrimination complaint against the respondent, the complainant is likely to be liable for the respondent's costs.

55. By contrast, under both the EO Act and the FW Act, if a discrimination complaint proceeds beyond conciliation, the standard position is that the parties bear their own costs.[19] In these jurisdictions, costs are rarely awarded. Where the complaint is frivolous or vexatious or the complainant has engaged in some other unreasonable behaviour which has caused the respondent to incur costs unnecessarily, the complainant may be liable for costs.[20]

56. The fact that complaints under the SD Act proceed to a costs jurisdiction is a significant deterrent for employees seeking to address pregnancy or pregnancy-related discrimination. This is particularly so where the complainant is a low-income earner, who cannot risk a costs order, regardless of how meritorious his or her claim may be. ELC rarely advises clients to pursue discrimination complaints under the federal discrimination legislation because of this risk.

57. ELC recommends that the SD Act be amended so that:

- the parties to a pregnancy or pregnancy-related discrimination complaint before the Federal Circuit Court or Federal Court generally bear their own costs; and
- costs can only be awarded in limited circumstances – for instance, where a claim is frivolous, vexatious or has no reasonable prospect of success.

RECOMMENDATION 8: That the SD Act be amended so that parties to a pregnancy or related discrimination complaint before the Federal Circuit Court or Federal Court bear their own costs unless the complaint is frivolous, vexatious or has no reasonable prospect of success.

No AHRC office in Perth

58. The other major deterrent for Western Australian employees in making a pregnancy or pregnancy-related discrimination complaint under the SD Act is the lack of an AHRC office in Perth.

59. We understand that where a Western Australian employee does make a complaint, the AHRC's usual practice is to fly over a conciliator from interstate who deals with a number of different complaints on the same visit.

60. ELC appreciates that the AHRC has limited resources. However, a Western Australian complainant is at a disadvantage compared to someone living in the same location as an AHRC office when trying to progress a claim.

61. ELC recommends that the AHRC establishes an office in Perth and that additional funding be allocated to the AHRC for this purpose.

RECOMMENDATION 9: That the AHRC establish an office in Perth and that additional funding be allocated to the AHRC for this purpose.

No assistance if the matter proceeds to Federal Circuit Court or Federal Court

62. Under the state system, where the EOC refers a discrimination complaint to the State Administrative Tribunal (**SAT**), the EOC is obliged to provide assistance to the complainant in presenting his or her case to the SAT.[21] This means that where a complainant has a meritorious case that cannot be resolved at conciliation, it is likely that he or she will receive assistance throughout the whole complaint process. In this sense, the EOC is a particularly user-friendly jurisdiction that is very well adapted for vulnerable complainants who might otherwise lack the confidence to pursue a complaint.

63. If a complainant is unable to resolve a complaint under the SD Act in the AHRC, the complainant does not receive any assistance in presenting his or her case in the Federal Circuit Court or Federal Court.

64. ELC recommends that the SD Act be amended so that:

- the AHRC can refer a complaint to the Federal Circuit Court or Federal Court; and
- where the AHRC does so, it is obliged to provide assistance to the complainant in presenting his or her case to the AHRC.

RECOMMENDATION 10: That the SD Act be amended so that the AHRC can refer a complaint to the Federal Circuit Court or Federal Court and, where it does so, the AHRC be obliged to provide assistance to the complainant in presenting his or her case.

Time taken to deal with complaints

65. As Figure 2 below sets out, on average it takes 5 months to finalise a matter in the AHRC.[22] In the EOC, it takes on average 4 and half months to finalise a matter.[23] In the Fair Work Commission (**FWC**) in 2011-12, 90% of general protections claims involving dismissal and unlawful termination claims were finalised in FWC within 97 days (i.e. approximately 3 months and one week).[24]

66. From our review of the statistics, it appears that matters are finalised less quickly in the AHRC than in other tribunals. This is consistent with our experience and is likely because the AHRC does not have offices in every State and Territory, as discussed above.

67. In our experience, employees are eager to resolve complaints as quickly as possible, particularly where they wish to continue their employment. Accordingly, we consider the likely timeframe for handling a complaint through the AHRC deters complainants from using this jurisdiction.

RECOMMENDATION 11: That the AHRC review its procedures in dealing with complaints with a view to reducing complaint handling timeframes.

Onus of proof

68. The absence of a reverse onus of proof under the SD Act puts complainants at a significant disadvantage. It is very difficult for a complainant to establish that there was a discriminatory reason for the respondent's behaviour. The complainant does not have access to relevant evidence, while the respondent has a 'monopoly of knowledge' about the decision-making process that led to the complainant's treatment.[25]

69. As noted by Professor Gaze, "proving the reason for an action or decision that exists in another person's mind, where all the evidence is controlled by the other person and they are not required to give any reason, is very difficult."[26]

70. Victoria Legal Aid notes that in its experience, clients who suffer discrimination often decide not to pursue a complaint due to the difficulty in proving the conduct.[27] The effectiveness of anti-discrimination laws is greatly reduced where complainants are discouraged from pursuing claims.

71. The SD Act should be amended to provide for a reverse onus of proof in discrimination complaints, in line with the equivalent provisions in the FW Act.

72. A reverse onus of proof under the SD Act would be in line with the FW Act, the FW Act's predecessor[28] and the approach of the European Union and the United Kingdom.[29] It would allow for a consistent approach in handling discrimination complaints and assist complaints in pursuing their claims.

RECOMMENDATION 12: That the SD Act be amended to provide for a reverse onus of proof in discrimination complaints, in line with the equivalent provisions in the FW Act.

<u>Comments about the Review and its consultation process</u>

73. ELC understands that several community legal centres and many affected individuals who wished to take part in the Perth consultations were unable to do so because of the short timeframe for consultation and the late release of the Review's issues paper.

74. A meaningful review of pregnancy and pregnancy-related discrimination relies heavily on the personal experiences of affected women and men. Though ELC invited hundreds of affected clients to participate in the consultation, very few of them were able to attend. Almost all of them indicated that family responsibilities and inflexible workplaces were the reason why. Many of our clients were disappointed that they were not given more notice and that the consultation was not scheduled outside business hours or on a weekend, when they might have been able to attend.

75. ELC is concerned the Review might be affected by the lack of engagement with parties who have experienced pregnancy and pregnancy-related discrimination in the workplace.

Summary of gaps and limitations in the existing legislation

76. ELC has prepared a table comparing the various pregnancy and pregnancy-related discrimination claims that are available to Western Australian employees under state and federal legislation – refer to **Fig 2** below. We highlight some of the gaps and implementation issues with the current legislative and policy framework.

Fig 2: Some gaps and limitations in the existing legislation

Comparison of pregnancy and pregnancy-related discrimination claims for WA employees under state and federal legislation				
	Claim to AHRC / FCC / FC under *Sex Discrimination Act 1984* (Cth)	**Claim to EOC / SAT under *Equal Opportunity Act 1984 (WA)***	**General protections claim to FWC / FCC / FC under *Fair Work Act 2009* (Cth)**	**Unlawful termination claim to FWC / FCC / FC under *Fair Work Act 2009* (Cth)**
Jurisdiction	Available to all WA employees, whether employed by a constitutional corporation or not.	Available to all WA employees, whether employed by a constitutional corporation or not.	Only available to WA employees who are employed by a constitutional corporation.	Only available to WA employees who are not employed by a constitutional corporation.
Grounds of discrimination	• Pregnancy[30] • Potential pregnancy[31] • Breastfeeding[32] • Marital or relationship status[33] • Family responsibilities[34]	• Pregnancy[35] • Breastfeeding or bottle feeding[36] • Marital status[37] • Family responsibilities[38]	• Pregnancy[39] • Marital status[40] • Family responsibilities[41]	• Pregnancy[42] • Marital status[43] • Family responsibilities[44]
Types of conduct covered	Covers a broad range of conduct including dismissal, demotion, reduction in hours, not promoting an employee, not employing a prospective employee etc.[45]	Covers a broad range of conduct including dismissal, demotion, reduction in hours, not promoting an employee, not employing a prospective employee etc.[46]	Covers a broad range of conduct including dismissal, demotion, reduction in hours, not promoting an employee, not employing a prospective employee etc.[47]	Only covers dismissal;[48] other conduct that falls short of dismissal is not covered, nor is any action taken against a prospective employee.
Costs	The AHRC is a no costs jurisdiction. If the matter proceeds beyond conciliation in the AHRC, the FCC or FC is a costs jurisdiction.[49]	The EOC is a no costs jurisdiction. In the SAT, the starting point is that the parties bear their own costs[50] and the SAT's usual practice is not to order costs.[51]	Generally a no costs jurisdiction, both in FWC and in FCC/FC. Costs can only be awarded if: • claim was instituted vexatiously or without	Generally a no costs jurisdiction, both in FWC and in FCC/FC. Costs can only be awarded if: • claim was instituted vexatiously or without

		However, the SAT has the power to make an order for the payment by a party of all or any of the costs of another party.[52] There are no set considerations that the SAT must take into account in determining whether to order costs. According to one case, the SAT should not generally make an award for costs unless:[53] • a party has conducted itself in such a way as to unnecessarily prolong the hearing; • a party has acted unreasonably or inappropriately in its conduct of the proceedings; • a party has been capricious; • the proceedings in some other way constitute an abuse of process; or • a matter has been brought vexatiously or for improper purposes.	reasonable cause; • a party's unreasonable act or omission caused the other party to incur costs; or • a party unreasonably refused to participate in a matter before FWC.[54]	reasonable cause; • a party's unreasonable act or omission caused the other party to incur costs; or • a party unreasonably refused to participate in a matter before FWC.[55]
Office in Perth	No	Yes	Yes	Yes

Timeliness[56]	The average time for finalising a matter in the AHRC in 2011-12 (from lodgment to finalisation of a complaint) was 5 months.[57]	The average time for finalising a matter in the EOC in 2011-12 was 4 and a half months.[58]	90% of general protections claims involving dismissal and unlawful termination claims were finalised in FWC within 97 days (i.e. approximately 3 months and 1 week).[59]	90% of general protections claims involving dismissal and unlawful termination claims were finalised in FWC within 97 days (i.e. approximately 3 months and 1 week).[60]
Onus of proof	For direct discrimination claims, the onus of establishing the claim falls on the complainant. For indirect discrimination claims, the complainant bears the onus of establishing that a condition, requirement or practice has the effect of disadvantaging people in the complainant's position. Once this is established, the onus shifts to the respondent to prove that the condition, requirement or practice was reasonable.[61] The onus of establishing a defence falls on the respondent.	The onus of establishing the claim falls on the complainant. The onus of establishing a defence falls on the respondent.[62]	Reverse onus – i.e. once applicant alleges that an action was taken due to pregnancy, it is presumed that the action was taken for that reason unless the respondent proves otherwise.[63]	Reverse onus – i.e. once applicant alleges that an action was taken due to pregnancy, it is presumed that the action was taken for that reason unless the respondent proves otherwise.[64]
Filing fees[65]	No fee for lodging a claim with AHRC. $55.00 to lodge a claim in FCC or FC.[66]	No fee for lodging a claim with EOC. No fee for lodging a claim with SAT.[67]	$65.50 to lodge a claim in FWC.[68] $65.50 to lodge a claim in FCC / FC.[69]	$65.50 to lodge a claim in FWC.[70] $65.50 to lodge a claim in FCC / FC.[71]
Assistance provided to complainant	Some initial assistance provided.	Yes EOC officer allocated to	No	No

by tribunal/court	AHRC officer allocated to complaint while matter in AHRC. No assistance provided by AHRC if the complainant chooses to take the matter to FCC / FC.	complaint while matter in EOC. EOC obliged to provide assistance to complainants whose complaints have been referred to SAT.[72]		
Remedies	Such orders as the court thinks fit, including: • compensation; • injunction; • reinstatement; • declaration.[73]	• Compensation not exceeding $40,000; • injunction; • order the respondent to perform any reasonable act or course of conduct to redress any loss or damage • suffered by the complainant; • declare void any contract or agreement made in contravention of the *Equal Opportunity Act 1984* (WA).[74]	Any order the court considers appropriate, including: • compensation; • injunction; • reinstatement; • pecuniary penalties.[75]	Any order the court considers appropriate, including: • compensation; • injunction; • reinstatement; • pecuniary penalties.[76]
Limitation period for commencing claim	No time limit as such, but AHRC President may terminate the complaint if lodged more than 12 months after alleged unlawful discrimination took place.[77]	12 months.[78]	21 days where the employee has been dismissed.[79] 6 years where the alleged discrimination is not dismissal.[80]	Currently 60 days.[81] The limitation period will change to 21 days from 1 January 2014.[82]

Key to abbreviations in the table:

AHRC – Australian Human Rights Commission
EOC – Equal Opportunity Commission of WA
FCC – Federal Circuit Court
FC – Federal Court
FWC – Fair Work Commission
SAT – State Administrative Tribunal of WA

RECOMMENDATIONS

77. ELC recommends:

RECOMMENDATION 1: That the SD Act be amended to allow the AHRC (or another independent regulatory body) to investigate and commence proceedings on behalf of employees.

RECOMMENDATION 2: That the SD Act be amended to allow the AHRC to commence proceedings to enforce settlement agreements.

RECOMMENDATION 3: That the SD Act be amended to provide for civil penalties to be imposed for breaches of the Act, and allow those penalties to be paid to the victim of discrimination.

RECOMMENDATION 4: That the AHRC Act be amended to allow the AHRC to publish enforceable standards in relation to pregnancy and potential pregnancy.

RECOMMENDATION 5: That the SD Act be amended to require employers to properly consult with a pregnant employee about her current and ongoing role, with failure to do so being considered an act of discrimination.

RECOMMENDATION 6: That the SD Act be amended to require employers to make reasonable adjustments to accommodate pregnant employees, where those adjustments would not cause unreasonable hardship to the employer.

RECOMMENDATION 7: That the SD Act be amended to impose a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements to accommodate family or carer's responsibilities.

RECOMMENDATION 8: That the SD Act be amended so that parties to a pregnancy or related discrimination complaint before the Federal Circuit Court or Federal Court bear their own costs unless the complaint is frivolous, vexatious or has no reasonable prospect of success.

RECOMMENDATION 9: That the AHRC establish an office in Perth and that additional funding be allocated to the AHRC for this purpose.

RECOMMENDATION 10: That the SD Act be amended so that the AHRC can refer a complaint to the Federal Circuit Court or Federal Court and, where it does so, the AHRC be obliged to provide assistance to the complainant in presenting his or her case.

RECOMMENDATION 11: That the AHRC review its procedures in dealing with complaints with a view to reducing complaint handling timeframes.

RECOMMENDATION 12: That the SD Act be amended to provide for a reverse onus of proof in discrimination complaints, in line with the equivalent provisions in the FW Act.

Yours faithfully

Toni Emmanuel
Principal Solicitor

References

[1] Human Rights and Equal Opportunity Commission (Cth), *Striking the Balance - Women, men, work and family* (2005), 81 < http://www.humanrights.gov.au/publications/striking-balance-women-men-work-and-family>.

[2] Australian Bureau of Statistics, *Pregnancy and Employment Transitions* (16 November 2012) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4913.0Main+Features1Nov%202011?OpenDocument>

[3] Australian Human Rights Commission, *Annual Report 2011-12* (2012) 126, 128.

[4] Equal Opportunity Commission (WA), *Annual Report 2012-13* (2013), 31.

[5] 26% of ELC clients who experienced pregnancy discrimination in the workplace.

[6] 16% of ELC clients who experienced pregnancy discrimination in the workplace.

[7] 17% of ELC clients who experienced pregnancy discrimination in the workplace.

[8] Australian Bureau of Statistics, above n 2.

[9] Smith, Belinda, 'Not the Baby and the Bathwater: Regulatory Reform For Equality Laws To Address Work-Family Conflict' (2006) 28(4) *Sydney Law Review* 124; Smith, Belinda, 'Fair *and* Equal in the World of Work: Two Significant Federal Developments in Australian Discrimination Law' (2010) *23 Australian Journal of Labour Law* 199.

[10] Smith, 'Fair and Equal in the World of Work', above n 9, 112.

[11] *Australian Human Rights Commission Act 1986* (Cth), s 46PO(4)(d).

[12] *Fair Work Act 2009* (Cth) s 539.

[13] Australian Human Rights Commission, *Pregnancy Guidelines* (2001), <http://www.humanrights.gov.au/publications/pregnancy-guidelines-2001>.

[14] See: Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the* Sex Discrimination Act 1984 *(Cth) in Eliminating Discrimination and Promoting Gender Equity* (2008), xiv [11.34] (Recommendation 14).

[15] *Fair Work Act 2009* (Cth) s 65.

[16] Under the *Fair Work Act 2009* (Cth) s 44, an employer's unreasonable refusal to allow flexible working arrangements cannot be enforced as a contravention of a civil remedy provision. This means that no pecuniary penalty can be ordered against the employer.

[17] *Fair Work Act 2009* (Cth) s 65.

[18] *Federal Circuit Court of Australia Act 1999* (Cth) s 79; Federal *Court of Australia Act 1976* (Cth) s 43; *Hughes v Western Australian Cricket Association (Inc)* (1986) ATPR 40-748, 48-136.

[19] *State Administrative Tribunal Act 2004* (Cth) s 87(1); *Fair Work Act 2009* (Cth) s 611(1).

[20] *State Administrative Tribunal Act 2004* (Cth) ss 87(3), (4); *Fair Work Act 2009* (Cth) s 611(2).

[21] *Equal Opportunity Act 1984* (WA) s 93(2).

[22] Australian Human Rights Commission*, Annual Report 2011-2012* (2012), 67, <https://www.humanrights.gov.au/sites/default/files/content/pdf/about/publications/annual_reports/2011_2012/AHRC_AnnualReport11-12_Final.pdf>.

[23] Equal Opportunity Commission (WA), *Annual Report 2011-2012* (2012), 46, <http://www.eoc.wa.gov.au/Libraries/Annual_reports/2011-12_AR_web_pdf.sflb.ashx>.

[24] Fair Work Commission, *Annual Report 2011-2012* (2012), 26, <http://www.fwc.gov.au/documents/annual_reports/ar2012/FWA_Annual_Report_2011-12.pdf>. This document did not provide information about the *average* amount of time taken to finalise general protections

claims in the FWC, nor did it provide information about how much time it took to finalise general protections claims not involving dismissal.

[25] Laurence, Lustgarten, 'Problems of Proof in Employment Discrimination Cases' (1977) 6 *Industrial Law Journal* 212, 213.

[26] Gaze, Beth, 'Has the Racial Discrimination Act contributed to eliminating racial discrimination? Analysing the litigation track record 2000-2004' (2005) 11(1) *Australian Journal of Human Rights* 171, [50].

[27] Victoria Legal Aid, Submission to The Australian Human Rights Commission, *On Age Barriers To Work In Commonwealth* Laws, 23 November 2012, 1.

[28] *Workplace Relations Act 1996* (Cth) s 170CQ.

[29] *Sex Discrimination Act 1975* (UK) c 65, ss 63A, 66A, The Council of the European Union Directive 97/80/EC and Sex Discrimination (Northern Ireland) Order 1976. NI 15, arts 63A, 66A.

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

[31] *Sex Discrimination Act 1984* (Cth) s 7.

[32] *Sex Discrimination Act 1984* (Cth) s 7AA.

[33] *Sex Discrimination Act 1984* (Cth) s 6.

[34] *Sex Discrimination Act 1984* (Cth) s 7A.

[35] *Equal Opportunity Act 1984* (WA) s 10.

[36] *Equal Opportunity Act 1984* (WA) s 10A.

[37] *Equal Opportunity Act 1984* (WA) s 9.

[38] *Equal Opportunity Act 1984* (WA) s 35A.

[39] *Fair Work Act 2009* (Cth) s 351.

[40] *Fair Work Act 2009* (Cth) s 351.

[41] *Fair Work Act 2009* (Cth) s 351.

[42] *Fair Work Act 2009* (Cth) s 772(1)(f).

[43] *Fair Work Act 2009* (Cth) s 772(1)(f).

[44] *Fair Work Act 2009* (Cth) s 772(1)(f).

[45] *Sex Discrimination Act 1984* (Cth) s 14.

[46] *Equal Opportunity Act 1984* (WA) s 11.

[47] *Fair Work Act 2009* (Cth) s 342.

[48] *Fair Work Act 2009* (Cth) s 772.

[49] *Federal Circuit Court of Australia Act 1999* (Cth) s 79; *Federal Court of Australia Act 1976* (Cth) s 43; *Hughes v Western Australian Cricket Association (Inc)* (1986) ATPR 40-748, 48-136.

[50] *State Administrative Tribunal Act 2004* (WA) s 87(1). See also *Motor Vehicle Industry Board and Dawson* [2006] WASAT 8; (2006) 41 SR (WA) 343 [43] and *Lourey v Legal Profession Complaints Committee* [2012] WASCA 112 at [81], cited with approval in *Quinlivan v Legal Profession Complaints Committee* [2012] WASCA 263(S) at [9].

[51] See e.g. *Greenwood and Western Australian Planning Commission* [2010] WASAT 10 at [53].

[52] *State Administrative Tribunal Act 2004* (WA) s 87(2).

[53] *Chew and Director-General of the Department of Education and Training* [2006] WASAT 248.

[54] *Fair Work Act 2009* (Cth) s 570.

[55] *Fair Work Act 2009* (Cth) s 570.

[56] Note that the time frames provided do not refer to pregnancy or pregnancy-related discrimination matters specifically.

[57] Australian Human Rights Commission*, Annual Report 2011-2012* (2012), 67 <https://www.humanrights.gov.au/sites/default/files/content/pdf/about/publications/annual_reports/2011_2012/AHRC_AnnualReport11-12_Final.pdf>

[58] Equal Opportunity Commission (WA), *Annual Report 2011-2012* (2012), 46, <http://www.eoc.wa.gov.au/Libraries/Annual_reports/2011-12_AR_web_pdf.sflb.ashx>

[59] Fair Work Commission, *Annual Report 2011-2012* (2012), 26, <http://www.fwc.gov.au/documents/annual_reports/ar2012/FWA_Annual_Report_2011-12.pdf>. This document did not provide information about the *average* amount of time taken to finalise general protections claims in the FWC, nor did it provide information about how much time it took to finalise general protections claims not involving dismissal.

[60] Fair Work Commission, *Annual Report 2011-2012* (2012), 26, <http://www.fwc.gov.au/documents/annual_reports/ar2012/FWA_Annual_Report_2011-12.pdf>. This document did not provide information about the *average* amount of time taken to finalise unlawful termination claims in the FWC.

[61] *Sex Discrimination Act 1984* (Cth) s 7C.

[62] *Equal Opportunity Act 1984* (WA) s 123.

[63] *Fair Work Act 2009* (Cth) s 361.

[64] *Fair Work Act 2009* (Cth) s 783.

[65] As at 1 November 2013.

[66] Federal Circuit Court website, http://www.federalcircuitcourt.gov.au/html/fees_general.html, accessed on 7 October 2013; Federal Court website, http://www.fedcourt.gov.au/forms-and-fees/court-fees/fees, accessed on 7 October 2013.

[67] *Equal Opportunity Act 1984* (WA) s 107(5).

[68] Fair Work Commission website, http://www.fwc.gov.au/index.cfm?pagename=disputeapplication, accessed on 7 October 2013. See also *Fair Work Regulations 2009* (Cth) reg 3.07.

[69] Federal Circuit Court website, http://www.federalcircuitcourt.gov.au/html/fees_general.html, accessed on 7 October 2013. See also *Fair Work Regulations 2009* (Cth) reg 3.07.

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[71] Federal Circuit Court website, http://www.federalcircuitcourt.gov.au/html/fees_general.html, accessed on 7 October 2013. See also *Fair Work Regulations 2009* (Cth) reg 3.07.

[72] *Equal Opportunity Act 1984* (WA) s 93(2).

[73] *Australian Human Rights Commission Act 1986* (Cth) s 46PO(4).

[74] *Equal Opportunity Act 1984* (WA) s 127(b).

[75] *Fair Work Act 2009* (Cth) ss 545-546.

[76] *Fair Work Act 2009* (Cth) ss 545-546.

[77] *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1)(b).

[78] *Equal Opportunity Act 1984* (WA) s 83(4).

[79] *Fair Work Act 2009* (Cth) s 366(1).

[80] *Fair Work Act 2009* (Cth) s 544.

[81] *Fair Work Act 2009* (Cth) s 774(1), as at 7 October 2013.

[82] *Fair Work Amendment Act 2013* (Cth) item 1, Schedule 4A, Part 2, item 18.