28 January 2014

Ms Elizabeth Broderick

Sex Discrimination Commissioner

Australian Human Rights Commission

GPO Box 5218

SYNDEY NSW 2001

Dear Commissioner

**Submission on Supporting Working Parents: Pregnancy and Return to Work National Review - Organisations**

I thank you for the opportunity to make a submission on the *Supporting Working Parents: Pregnancy and Return to Work National Review*.

The role of the South Australian Commissioner for Equal Opportunity is to administer the *Equal Opportunity Act 1984* (SA). I am able to accept complaints of discrimination in areas such as employment, goods and services, housing, and education for grounds such as sexuality, chosen gender, marital or domestic partnership status, race, age, sex and disability. The Equal Opportunity Commission (**EOC**) also has a role in providing equal opportunity training and education to the community.

Similar to the *Sex Discrimination Act* (Cth) (SDA), the *Equal Opportunity Act 1984* (SA) makes it unlawful to treat a person unfairly because they are pregnant, potentially pregnant, breastfeeding or have family and caring responsibilities. This includes both direct and indirect discrimination.

In the workplace, this covers situations where a person has been refused employment, dismissed, denied a promotion, transfer or other employment-related benefits, given less favourable terms or condition of employment, or denied equal access to training.

Women have the right to work while pregnant and to be treated the same as other workers unless there are valid medical reasons for different treatment.

Please find our submission attached and if you would like any further information regarding the above submission, please do not hesitate to contact Cecilia White, white.cecilia@agd.sa.gov.au.

Your sincerely



**ANNE GALE**

**COMMISSIONER FOR EQUAL OPPORTUNITY**

**Equal Opportunity Commission South Australia - Submission on Supporting Working Parents: Pregnancy and Return to Work National Review - Organisations**

**Data** **on the prevalence, nature and consequences of discrimination experienced by women when they became pregnant at work and/or men and women who have returned to work after taking parental leave**:

The EOC receives a number of employment complaints and enquiries from working parents, pregnant women and women on maternity leave.

***Enquiries***

Enquiries related to working parents have been broken down into three different tables below. Table A: Pregnancy related enquiries in employment, Table B: Maternity leave and Table C: Advice to employer/ human resource enquiries related to pregnancy, return to work and breastfeeding. As indicated in Table D (Total Combined Enquiries) these types of enquiries generally equate to 4% -5% of the total enquiries received by the EOC.

**Table A: Pregnancy Related Enquiries in Employment 2010 -2013**

|  |  |
| --- | --- |
|  | **number** |
| **2010-11** | **47** |
| % of all | 2.9% |
| **2011-12** | **45** |
| % of all | 2.9% |
| **2012-13** | **33** |
| % of all | 2.2% |
| **Total** | **125** |

**Table B: Caring Responsibility Related Enquiries (Maternity Leave) in employment 2010- 13**

|  |  |
| --- | --- |
|  |  |
|  | **number** |
| **2010-11** | **20** |
| % of all | 1.3% |
| **2011-12** | **20** |
| % of all | 1.3% |
| **2012-13** | **26** |
| % of all | 1.7% |
| **Total** | **66** |

**Table C: Advice to employer/ Human Resources enquiries 2010 -13 (related to pregnancy, return to work and breastfeeding)**

|  |  |
| --- | --- |
|  | **number** |
| **2010-11** | **9** |
| % of all | 0.6% |
| **2011-12** | **9** |
| % of all | 0.6% |
| **2012-13** | **6** |
| % of all | 0.4% |
| **Total** | **24** |

**Table D: Total combined enquiries**

|  |  |
| --- | --- |
|  | **number** |
| **2010-11** | **76** |
| % of all | 4.8% |
| **2011-12** | **74** |
| % of all | 4.8% |
| **2012-13** | **65** |
| % of all | 4.3% |
| **Total** | **215** |

***Complaints:***

A person who chooses to seek recourse under the *Equal Opportunity Act 1984* (SA) must lodge a written complaint with the EOC. Section 93 sets out the informal procedure for the making of complaints.

There is a 12 month time limit from the last act of discrimination within which to make the complaint.

If, on the face of it, discrimination appears to have occurred, the complaint will be accepted by the EOC and a conciliation process between the complainant and the person, or organisation, complained about will commence.

The process is impartial and confidential and the Equal Opportunity Commissioner cannot make a judgement as to whether discrimination has occurred.

There are four possible complaint outcomes:

1. Settlement and withdrawal of the complaint;
2. The Equal Opportunity Commissioner withdraws the EOC from the process where the complaint lacks substance, is misconceived, frivolous or vexatious; or
3. Conciliation is achieved.
4. When a complaint is unable to be resolved by conciliation, it can be referred to the Equal Opportunity Tribunal for hearing under section 95D *Equal Opportunity Act 1984* (SA). The powers of the tribunal to make provide certain remedies are outlined under section 96.

The number of actual complaints lodged with the EOC on the grounds of pregnancy and caring responsibility discrimination, as with all areas under the *Equal Opportunity Act 1984* (SA), are much lower than enquiry numbers. This is the result of a number of factors including:

* expired time limits;
* the difficulty of successfully linking alleged discriminatory treatment to a prescribed ground of discrimination under the *Equal Opportunity Act 1984* (SA);
* expectations from enquirers not being met by the EOC process, including an expectation that the EOC will make a legal judgement on an employer’s behaviour or deliver a binding order against them;
* enquirers opting to take a “self-help” option where they use information or advice provided by the EOC to resolve the matter themselves, without lodging a formal complaint;
* fear of victimisation or detrimental consequences if a complaint is lodged; and
* the feeling that making a complaint and going through the complaints process may be too stressful or time consuming (particularly for those with a new baby or young baby to care for).

As seen in Table’s E, F and G the total number of complaints lodged with the EOC varies annually, however, a relatively high take up rate of complaints in this area remains a consistent trend. Conciliation rates in this area are around 40%.(Table H). The alleged events outlined in the complaints received are listed in Table I, with loss of conditions being the highest type of complaint, closely followed by reduction in hours, bullying and harassment and issues negotiating a return to work agreement.

**Table E: Pregnancy Related Complaints in Employment 2010 -2013**

|  |  |  |
| --- | --- | --- |
|  | **lodged** | **accepted** |
| **2010-11** | **13** | **8** |
| % of all | 5.3% | 6.2% |
| **2011-12** | **9** | **7** |
| % of all | 2.3% | 3.0% |
| **2012-13** | **2** | **1** |
| % of all | 0.8% | 0.8% |
| **TOTAL** | **24** | **16** |

**Table F: Caring Responsibility Related Complaints (Maternity Leave) in employment 2010- 13**

|  |  |  |
| --- | --- | --- |
|  | **lodged** | **accepted** |
| **2010-11** | **5** | **5** |
| % of all | 2.0% | 3.8% |
| **2011-12** | **1** | **1** |
| % of all | 0.3% | 0.4% |
| **2012-13** | **0** | **0** |
| % of all | 0.0% | 0.0% |
| **Total** | **6** | **6** |

**Table G: Total combined complaints**

|  |  |  |
| --- | --- | --- |
|  | **lodged** | **accepted** |
| **2010-11** | **18** | **13** |
| % of all | 7.3% | 10.0% |
| **2011-12** | **10** | **8** |
| % of all | 2.6% | 3.4% |
| **2012-13** | **2** | **1** |
| % of all | 0.8% | 0.8% |
| **Total** | **30** | **22** |

**Table H: Complaint outcomes for above complaints:**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Outcome** |  | **2010-11** | **2011-12** | **2012-13** | **Total** | **as % of total preg/mat leave complaints** |
| **Conciliated** | | 9 | 2 | 1 | **12** | 40.0% |
| **Declined** | | 2 | 1 |  | **3** | 10.0% |
| **Referred** | | 1 | 2 |  | **3** | 10.0% |
| **Withdrawn** | | 5 | 4 |  | **9** | 30.0% |
| **Not initiated** | | 1 | 1 | 1 | **3** | 10.0% |
| **Total** | |  |  |  | **30** |  |

**Table I: Alleged events for above complaints 2010 - 13**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Events** |  | **2010-11** | **2011-12** | **2012-13** | **Total** | **as % of total preg/mat leave complaints** |
| **Dismissed / made redundant** | | 4 | 1 | 1 | **6** | 20.0% |
| **Hours reduced** | | 4 | 3 | 2 | **9** | 30.0% |
| **Loss of conditions (e.g., put in lower role)** | | 6 | 4 | 0 | **10** | 33.3% |
| **Failure to accommodate (hrs, breast-feeding, etc.)** | | 2 | 3 | 0 | **5** | 16.7% |
| **Issues with reaching RTW agreement** | | 5 | 3 | 0 | **8** | 26.7% |
| **Harassment / bullying** | | 3 | 3 | 2 | **8** | 26.7% |
| **Promotion / recruitment** | | 2 | 0 | 0 | **2** | 6.7% |
| **Other** | | 2 | 0 | 0 | **2** | 6.7% |

1. **Case studies** **and trends:**

The Paid Parental Leave Scheme has been effective in addressing some aspects of discrimination and in supporting parents to balance their work and family commitments. However, discrimination in employment for pregnant women, women on or returning from maternity leave, and working parents continues to be a significant issue.

The enquiries and complaints received by the EOC indicate that discrimination cuts across all stages of a person’s working life, including obtaining employment, job retention, job satisfaction and career development.

Some examples of experiences that we hear from enquirers and complainants include:

* employers or managers refusing part-time or flexible work, on the basis that there is a business need that all staff work full-time;
* unfair treatment (e.g., bullying) by managers or co-workers;
* being overlooked for or refused development opportunities, such as training or promotions;
* being dismissed, bullied or inappropriately performance managed ;
* experiencing unwanted changes in their duties, roles, salaries, or working hours;
* being refused changes in their duties, roles or working hours to accommodate their needs related to pregnancy or child care; and
* unfair assumptions made about their physical health or capacity due to their pregnancy

Complainants and enquirers also indicated that discrimination occurs during the actual pregnancy, whilst on maternity leave and on return to work. Experiences of discrimination prior to becoming pregnant, for example where a woman expresses a desire to become pregnant, or discloses to an employer that she is on IVF, have also been reported to the EOC. Women also continue to experience discrimination simply because there is a potential for them to get pregnant, or because there is an expectation that due to their age or stage in life, they will get pregnant and leave the business.

The overall impact of this treatment is highly detrimental, both for the individual, and for the broader goal of gender equality in the workforce.

At an individual level women affected by pregnancy and caring responsibilities discrimination report:

* increased emotional, mental ,financial stress;
* loss of trust in the employer;
* loss of confidence in one’s own capacity;
* loss of ambition; and
* stall in career progression.

At a societal level discrimination in the workplace contributes to broader issues of gender inequality in employment, including equal remuneration, equal participation, full and genuine access to all occupations, industries and levels of employment.

***Recruitment:***

The EOC has received a number of pregnancy and carers enquiries and complaints related to recruitment. Recruitment, however, is a notoriously difficult area to in which to bring a successful action of discrimination. Women often report to us that they have a feeling or sense that the reason they are unsuccessful in employment applications is that they revealed their pregnancy or caring responsibilities. However, most recruiters will cite other reasons to unsuccessful applicants to avoid discrimination complaints (such as a more qualified candidate was preferred). Without further information that supports suspected discrimination, it can be very difficult to bring a complaint within the ambit of the Act.

Below are some examples of enquiries and complaints made to the EOC:

Case study: *Potential pregnancy:*

Female caller went for an interview with a large organisation. Along with commenting on the way she looked the manager questioned whether she would get pregnant. She was upset about these comments as she is a qualified and experienced and these questions were not relevant to the job.

Case study: *Recruitment while pregnant*

Caller is pregnant and unemployed. Her job network provider told her they wouldn't bother passing on her name for a job because they didn’t have any jobs appropriate for someone who is pregnant.

Case study: *Recruitment and caring responsibilities*

Caller has a young child. Caller applied for a job starting at 3:30 as her partner finishes work at 2.30 and can take over caring responsibilities from that time. She informed her prospective employer that she would not be able to start before 3:30 because of this reason.

Initially her prospective employer was fine with this. However, her employer later advised that as she has a baby she would be unreliable if the child became ill and hence they would not be hiring her.

***Bullying and Harassment:***

There have been several examples of bullying behaviour experienced by women whilst pregnant. Perpetrators of these behaviours included both employers and colleagues. Incidents reported to the EOC often involved comments around the individual’s work ethic, and work capacity. Women who claimed to have experienced this behaviour alleged that there were no issues raised about their performance prior to disclosing their pregnancy.

Below are some examples of enquiries and complaints made to the EOC:

Case study: *While Pregnant*

Caller is alleging bullying and harassment at work. She claims harassment started since she became pregnant.

Forms of harassment claimed include: making comments with regards to her work capacity, making comments about her pregnancy, putting in bold letters next to her name on the roster ‘don't be late' so that all staff can see.

Case study: *While Pregnant*

Caller alleges that since becoming pregnant and advising her boss of her pregnancy she has been bullied and harassed at work about her pregnancy and the problems that her having a baby and going on parental leave will create for the business. Her employers have yelled at her and have made statements to her such as "now that you’re pregnant and will have to have time off who is going to make money for us?"

This culminated in her boss telling her to "get out if she didn't like it" when she made a complaint about her treatment.

She left the workplace and hasn't gone back.

***Loss of opportunity:***

The loss or denial of opportunities to advance one’s career is a common theme observed by the EOC. Pregnant women, and women returning from maternity leave are often denied promotions, or actively discouraged from applying for higher roles by their employers or managers. Access to training opportunities offered by employers are also often denied to pregnant women, and new parents.

Case Study: *While Pregnant*

Female caller is pregnant. Since becoming pregnant has had negative comments made at work about her pregnancy, and her taking maternity leave. She recently missed out on a promotion opportunity. She was told she didn't get the promotion because she is going on maternity leave.

Case study: *While on Maternity leave*

Caller is currently on maternity leave. The new CEO has informed her that they are restructuring her area and her manager is being made redundant. As a result of the restructure there will be a new position created that is a higher level than caller’s current position but lower than her previous manager's position, in whose position the caller has acted in the past. Caller expressed an intention to apply for the higher role but the CEO informed her not to saying she "needed to stay home to look after her child".

Case study: *Caring responsibilities*

Caller needed to take three days carers' leave to care for her ill child. She has no personal leave left (took time off for hospitalisation earlier in the year). The company would not pay her for the time off or let her take it as annual leave. Her employer said it was not enough notice to take annual leave. Before this occurred she was told she was receiving a pay rise. Due to taking the time off they have now said she will not receive the pay rise and that she has let the team down.

***Unwanted change:***

In many of the complaints and enquiries we receive, the discrimination relates not to what a person can or cannot do but what their employer or manager assumes they can or cannot do. In many cases, employers are not “willing to take the risk,” and form assumptions about the capacity of the person to continue to adequately perform their job, and about that person’s ongoing commitment to their employer. Often this results in women being given a lower-skilled or lower-paid job on return to work after maternity leave, as well as a forced reduction in hours or days worked.

Unwanted changes also result from employers looking to casualise or get rid of a pregnant employee in order to discharge financial responsibility for that person. Reasons for doing so include employers wanting to avoid maternity leave costs, reluctance to hold on to a particular position for an employee, and reluctance to employ a person who has caring responsibilities.

*In hours and working days:*

Case study: *While pregnant*

Caller is a full-time employee and has told her manager that she is pregnant. Her manager is insisting that she is dropped to part-time because she is pregnant.

Case study: *While pregnant*

Caller is a female who worked as a casual shop assistant for her employer. Caller alleges that since she told her employer that she was pregnant she has not been offered any more shifts at work at all. Caller states that she has contacted her employer but they have not returned her calls.

Case study: *While pregnant*

Caller works in retail on a permanent part time basis. She told her employer that she is pregnant and two weeks later had one of her shifts cut. Her employer keeps making comments that she can't afford to pay her maternity leave, the pregnancy is making things difficult etc.

Case study: *Returning to work from maternity leave*

Caller took time off work to spend with her children and is returning to work. She was previously working Monday, Tuesday and Wednesdays. She is now looking to return and has been told that she needs to work Wednesday, Thursday and Friday each week. She has already arranged child care according to her previous days and cannot get child care on these days.

*In role, salary or duty:*

Case study: *While pregnant*

Caller is a specialist in her field. When she was pregnant with her second child last year, her workplace requested she get a doctor’s clearance to continue working. She got a clearance from her obstetrician but they still refused to let her do her normal duties and, despite union involvement, put her in a different role until she went on maternity leave. She is due to return soon from maternity leave and is also worried that they may demand she works shifts that she is unable to due to her caring responsibilities.

Case study: *While pregnant*

Caller is pregnant and works as an accounts manager. She was recently taken out of her role as it is very mobile. She was okay with that and agreed to them also taking away her $5,000 petrol allowance. Now they have said they are taking $10,000 off her wages plus demoting her to telephonist and have told her to sign a new contract.

Case study: *While pregnant*

Caller told her boss she was pregnant and wanted to take 12 months maternity leave and then come back part time. She asked if he needed her to advise in writing and was told ‘no’. Caller alleges that she continued to request meetings to discuss arrangements for maternity leave and part time return, but boss kept putting off saying he would do it closer to the time. Then one day, without discussing the issue with her first, he announced to her in front of other staff that she would be resigning and coming back as a casual for 20% less pay.

Case study: *Return from Maternity leave*

Caller worked as a manager for several years before falling pregnant. She took maternity leave and upon returning to work was told that her position had changed. All management responsibilities had been removed from her job and person specification. Caller felt that this was unfair and spoke to her manager about it. She alleged that she was told ‘not to take it personally but her priorities had changed’.

Case study: *Return from Maternity leave*

Caller went on maternity leave while on leave. Employer has advised her that her position has changed and no longer exists. However all that has occurred is they have made permanent the temp worker that was acting her in role and changed the name of the role. Caller alleges that apart from name of the position, duties of role are substantially the same and in essence her role still exists.

Case study: *Return from Maternity leave*

Caller was due to return to work soon from maternity leave. Employer informed her that he thinks she will be distracted with her caring responsibilities to properly fulfil her previous role, even though she will be returning full-time and has care arranged for her child. Work has offered her a different position, which is lower, as an alternative.

Case study: *Return from Maternity leave*

Caller returned to work after maternity leave and was demoted. Caller has asked for her old position back but the board have said they believe the person in the position now is better suited because there are after hours requirements and she doesn't have two young children to look after.

***Refusal to accommodate:***

*Hours:*

Complaints and enquiries around a refusal to accommodate are common.

In relation to hours worked, the EOC often receives complaints and enquiries from women looking to reduce the hours spent at work in order to accommodate caring responsibilities for their children. Issues often arise when women are trying to negotiate their return to work after maternity leave.

The EOC has also received complaints and enquiries related to employers’ refusal to change roles or duties of an employee. Where performing those roles or duties are considered unsafe for that particular pregnant employee, this can be a particular issue.

Case study: *Negotiating return to work*

Female caller who is pregnant and about to go on maternity leave says she has been trying to negotiate a return to work on a part time basis with her employer and they are saying she can only return to work on a full time basis despite her putting forward what she believes are a number of reasonable options about how part time might work.

Case study: *Return from Maternity leave*

Caller has been on maternity leave. While on leave there was a restructure and her role was abolished. She was told she could be placed in a lower level job or apply for a higher level job. The higher level jobs were all full time roles, so she inquired about whether it was possible to work part time. She was informed that although she met the criteria and had skills and experience, only full time candidates would be considered.

Case study: *Caring responsibilities*

Caller alleged that her employer had not given consideration to her request to reduced hours because of caring responsibilities. Caller said that her daughter attended school and that the out of school hours care program was full, and as a result parents were only being offered a maximum of 3 nights per week. Caller said that she asked her employer if she could finish early two days a week to enable her to collect her child but her employer has declined her request.

Case study: *Caring responsibilities*

Caller's employer has changed the rostering system. Caller is now expected to work 12 hours a week. She is happy to work this amount but can only work between 9-2.20pm due to having to pick her children up from school at 3.00pm. This has always been accommodated in the past under her old manager. She advised the new regional manager of this, however, she has been rostered on to work 12-3pm shifts. Caller spoke to her manager who told her that she could not change this and she would not be allowed to leave at 2.45. Caller informed manager she would be happy to start earlier at 11.45 to make up the extra 15 minutes. Employer informed caller she would need to take the shifts off as annual leave if she cannot do them.

*Role, or duty:*

Case study: *While pregnant*

Caller is a personal trainer and has requested change in duties as she won't be able to train for her entire pregnancy asked for some front desk shifts. Most of the managers are supportive but one has commented that ‘it would not a good look to have a pregnant person on the front desk,’ and therefore would not going to support the request.

Case study: *While pregnant*

Caller is pregnant and has a medical condition. Part of her role is to take X-Rays and diagnose from these. Doctor advised her while she was pregnant not to take X-Rays. There is some information to suggest that radiation could exacerbate the caller’s medical condition causing harm to the baby during pregnancy. Her employer has refused this request stating that she would have to go on early leave if she will not take X-Rays

***Termination:***

One common form of discrimination expressed to the EOC was being dismissed or made redundant as a result of a pregnancy (or potential pregnancy), maternity leave or as a result of a caring responsibility. In such situations, employers rarely directly stated the pregnancy as being the reason for termination, instead citing ‘poor work performance’ or ‘company restructures’ as the reason for the termination. This has increased the difficulty of linking the employers’ behaviour with pregnancy discrimination. Those on casual contracts tended to be the most vulnerable to dismissal.

Case study: *Possibility of becoming pregnant:*

Female caller informed her boss that she would be undergoing IVF treatment. The next day her employment was terminated.

Case study: *Informing employer of pregnancy*

Caller was fired from her employment one day after informing her manager of her pregnancy, she strongly believes she lost her job because of her pregnancy.

Case study: *Informing employer of pregnancy*

Caller is 22 weeks pregnant working as a temp for a government department. She did not disclose pregnancy her prior to starting the role, but did so upon starting the role. Her manager reacted to the news and the next day the caller was contacted by recruitment agency who implied she would no longer be suitable for the role due to her pregnancy.

Case study: *Informing employer of pregnancy*

Caller was 5 months into a 9 month probation period at work when she announced she was pregnant. Two days later she was dismissed. Her employer claimed it was because of her work performance.

Case study: *Informing employer of pregnancy*

Caller is 2 months into a 12-month probationary period. She just informed her employer that she is pregnant and the employer has said that he is going to offer her position to another staff member because he "can't afford to pay two people". He will only continue to employ her if the other person declines the position.

Case study: *Prior to leaving on maternity leave*

Caller is a few weeks away from having a baby and was looking to return to her position, after she finished her maternity leave but her employer has now said that there is not likely to be a job for her to return to.

Case study: *Returning to work after maternity leave*

Caller, who was in a job share position fell pregnant and took up 6 months maternity leave with her job sharing colleague taking over the role full time whilst she was away. One month before the caller was due to return to work she was informed that her job sharing colleague had quit and that her workplace now wanted to hire someone full time to fill the position. Her employer was not willing to hire somebody else to job share with her.

Case study: *Returning to work after maternity leave*

When caller advised she was pregnant she was asked to sign a new contract as a casual but was told she could return to her position when she was ready after the baby was born. When she advised she wanted to return, she was told that they had replaced her.

Case study: *Caring responsibilities*

Caller was called by her employer and told she would be given no further work because she was "too unreliable" because she has had two weeks off to care for her children when they have been sick and unable to attend childcare.

***Lack of Breast feeding provisions and policies:***

A lack of appropriate facilities and policies in the workplace to enable women returning to work from maternity leave to continue to breastfeed continues to be a reoccurring theme. The EOC continues to hear stories of women returning to work facing difficult and even hostile conditions on their return to work, including being forced to express in uncomfortable and inappropriate locations such as toilets and cars.

Case study: *Return to work*

Caller has taken 12 months maternity leave and recently returned to work. Prior to taking leave, and many times during her maternity leave she let her manager know that she would need to express breast milk on return to work. She stated that she would require a private room for this. On returning to work two weeks ago the only option that she was provided with was to use the disabled toilet. She feels that this isn't very hygienic.

***Males:***

In support of the research which consistently indicates that women take on the majority of the caring responsibilities in Australia[[1]](#footnote-1), the majority of the EOC’s enquiries and complaints in relation to issues of return to work, parental leave and caring responsibilities (for children) have come from women. However, as indicated in the cases below men are also subject to incidents of discrimination in the workplace directly related to their responsibilities for their children.

Case study: *Caring responsibilities and hours*

Caller works for fast food chain. He has separated from wife and now wants to spend more time with children when able too, and is therefore no longer able to come in for extra shifts when called in at short notice. He still does all his rostered 40 hours. Since his caring responsibilities increased he alleges has been picked on at work and bullied. His employer still asks him to come in at short notice and gets annoyed when he cannot do so.

Case study: *Caring responsibilities and role*

Caller has caring responsibilities for 2 young children and has been seeking part-time work at the school where he teaches for some time. The principal has refused saying that this is not a practice that the school approves of and part-time work can only be offered to specialist teachers and on merit. As a result, he has had to take long service leave but has been told he must come back next year full-time.

Case study: *Caring responsibilities and Termination*

Caller was dismissed 2 days ago because he was not flexible enough with his shifts due to having children. He was told that he "had to decide where his priorities lay".

1. **Limitations or gaps in the legislative and policy framework** **in relation to pregnancy discrimination and return to work.** **What are the key challenges in the relevant legislative and policy framework?**

***Fair Work Act* 2009 (Cth):**

The Commonwealth *Fair Work Act* *2009* provides eligible employees with the right to request flexible working arrangements. Under that Act, requests may only be refused based on reasonable business grounds. The Act also provides a remedial avenue for employees who have been unfairly dismissed. In the EOC’s experience there are certain gaps in the legislation including:

* In South Australia, State public sector and local government employees are not covered by the national workplace relations system and remain under the South Australian State system, namely the *Fair Work Act 1994* (SA) and *Public Sector Act 2009* (SA).[[2]](#footnote-2) Whilst Schedule 1, part 1 *Public Sector Act 2009* (SA) allows for the Commissioner for Public Sector Employment to make determinations relating to leave and working arrangements, including flexible working arrangements, the express right to request flexibility is absent from the *Public Sector Act 2009*.
* *Minimum employment periods:* The EOC has received a number of complaints and enquiries from women who fall short of the ‘minimum employment period’ for claiming unfair dismissal, and are thus left without recourse under the *Fair Work Act 2009* (Cth). If a complainant has not worked for their employer for the 'minimum employment period', then they are not eligible to make an unfair dismissal application to the Fair Work Commission. For employers with 15 employees or more, this period is 6 months, for small businesses this period is one year.

Case study: *Informing employer of pregnancy*

Enquirer told employer she was pregnant, and was made redundant soon afterwards, one week before it could be considered unfair dismissal according to Fair Work Act. She was emailed by her boss explaining that the business had gone through recent changes in employment structures, but she has seen advertisements for her job since.

Case study: *Caring responsibilities and Termination*

Caller was dismissed 3 weeks ago because he was unable to cover a shift due as he was caring for his two children. He alleges he told his employer that he couldn't work because of a family issue and that his employers were aware that he had children to care for. Fair Work were unable to take up an unfair dismissal case because he was just short of his 6 months service.

**Anti-Discrimination Law**

Despite the differences of detail between each Australian jurisdiction, legislation dealing with discrimination in Australia is designed around a similar framework, that is to identify unlawful discrimination with the purpose of reducing discrimination. However, as highlighted during the consultation process surrounding the proposed Consolidation of the Commonwealth Anti-Discrimination Laws many gaps in coverage still exist. Although Consolidation of the Federal Anti-Discrimination legislation has not come to fruition the key insights arising from the process remain relevant and highlight some of the challenges that exist in countering discrimination in this area. These include:

* The nature of the legislation which proscribes certain types of behaviors as discriminatory, and ultimately limits those who fall under the Act
* Narrow and inconsistent construction of Anti-discrimination laws by the courts, which further limits those who are protected under those laws, and which has resulted in a history of low compensation outcomes.
* A reliance on an individual complaints system, which limits the ability to address systemic discrimination and structural causes and also exposes individual complainants to potential victimisation, particularly in cases involving their employers, where individuals remain reliant on their discriminator for their livelihood.

***Workplace Gender Equality Act 2012* (Cth):**

The recent introduction of the *Workplace Gender Equality Act 2012* (Cth) (WGEA) has been a significant achievement and is an important step in moving towards greater gender equality in the workplace. Under the WGEA relevant employers are required to report against a set of six standardised gender indicators including:

* gender equality indicators including the gender composition of the workforce;
* the gender composition of governing bodies of relevant employers;
* equal remuneration between women and men;
* the availability and utility of employment terms, conditions and practices relating to flexible working arrangements supporting employees with family or caring responsibilities
* consultation and employees on issues concerning gender equality in the workplace; and
* any other matters specified by the Minister in a legislative instrument.

Under WGEA relevant employers are also required to comply with all notification and access requirements.

However, the WGEA remains limited in its scope. As indicated above WGEA only applies to relevant employers, which is defined in the legislation as ‘all non-public sector employers with 100 or more employees.’ This effectively means that the public sector and all private sector employers with fewer than 100 employees are exempt from reporting obligations under the WGEA.

The EOC suggests that the Public Service should be an exemplar of best practice and lead by example in the area of anti-discrimination and equal participation of women in the workplace. A recent study released by the ANZSOG Institute for Governance at the University of Canberra, *Not yet 50/50: Barriers to the Progress of Senior Women in the Australian Public Service[[3]](#footnote-3)* provides a brief insight into gender inequity within the Commonwealth public service. The report states that:

* despite 57% of the APS workforce being comprised of women, less than 40% of its senior executives were women.’
* Only four out of 20 departments are headed by women and three of those are departments were represented by traditionally strong female representation: education, health, and human services.
* In traditionally male dominated areas women were poorly represented at senior levels - 26% in Treasury and 27% in the Department of Defence.

These figures seem to indicate a real need for public sector reporting obligations around the criteria set by WGEA for the public service.

**Case studies of** **leading practices and strategies** **for addressing discrimination in the workplace in relation to pregnancy, parental leave or return to work that you can share with the National Review**

***The Equal Opportunities - Flexible Workplace Futures Project:***

The EOC is currently leading the Flexible Workplace Futures Project, a cross government initiative aimed at ensuring the South Australian public sector is a leader and adopts best practice in order to increase workforce participation rates (including participation rates of working parents); to prepare for an ageing population and increased caring responsibilities; to enable people to work longer; and to address changing workforce and sector requirements.

This contributes to a more agile and sustainable South Australian workforce with the public sector leading by example as an employer of choice.

The South Australian public sector already has policy and guidelines for the use of flexible working arrangements, and there are good practice examples of flexible work throughout the public sector. However, anecdotal evidence suggests that there is inconsistency in application across the sector.

The project aims to increase the consistency in the availability of and approach to working arrangements in the South Australian public sector, and to ensure greater transparency in workplace flexibility practices. Success will necessitate changing the attitude of the decision makers i.e. the managers and supervisors. The project aims to educate, train and change the language around flexible work for employers and decision makers. The key message: balancing the needs of the business with that of the individual. The challenge is not simply making policy clearer, but also having a real positive impact on public sector workplaces and culture.

Improving the consistency in the practice of flexible work across the public sector is intended to create a more dynamic workplace and workforce prepared for the future. In the long term, creating a more flexible, diverse and inclusive South Australian public sector workforce will generate productivity, increase workforce participation and improve workforce culture.

Deliverables from this project have included:

* An information package including:
  + Economic arguments for flexible work, including myths
  + Legislation, standards and agreements that affect flexible work
  + An updated Commissioner’s guideline
  + An implementation and action guide
  + Management ‘tools’ to assist in implementing flexible work - discussed below
  + Management conversation tools
  + Case studies
* Tools have been developed to support managers and staff in understanding and negotiating flexible working arrangements to balance organisation needs with personal circumstances and choices.
  + an E-Request/application form - to assist with data collection also;
  + training for managers and supervisors as key decision makers
  + a managers ‘app’ to support managers
* Pilot sites include various work types i.e. service oriented and central offices and include::
  + Safe Work SA(Department of Premier and Cabinet);
  + Department of Correctional Services;
  + Department of Communities and Social Inclusion
  + South Australia Police; and
  + South Australia Health

*Importance for parents returning to work: Flexibility is about equal opportunity in life style:*

Flexible work is about equal opportunity of lifestyle. There is more than just the individual employee’s own circumstances in question in each case, there are those who are embedded in the individual’s life that also must be taken into consideration. For example, if someone has a partner and children, not allowing that person flexibility to work around his or her partner’s employment or caring needs, could significantly impact or end the partner’s career.

The application of particular work practices in the organisation will have ‘knock-on’ implications for employees’ partners, related carers (i.e. grand-parents) and the dependants (i.e children, relatives or parents). This ‘knock-on’ effect is particularly prevalent for the female spouse (especially if they are a mother) of a male employee. The uptake of flexible work by the male employee enables the female spouse options to engage better with employment and career opportunities and conversely enables males to take on carer roles in balance with women. Therefore, the application of flexible work arrangements as simply a tool for women in the work place is detrimental. In a world that values equal opportunity it needs to be seen as a workplace policy that recalibrates the balance between men and women in carer and ‘bread-winning’ roles.

Flexible work needs to be applied with an understanding of the impact upon work colleagues, families and institutional constraints. It needs to be understood within the context of a system. Further, it needs to be understood that flexible is not a management overhead, but rather it can generate increased productivity, less absenteeism, greater staff commitment and therefore economic gain.

**What sorts of outcomes or recommendations would you like to see from this National Review?**

Education and Promotion:

As stated, the role of the EOC is to handle complaints of discrimination but also to promote equal opportunity and reduce discrimination by education and through other initiatives. Discrimination is a significant issue for pregnant women and for parents who are carers and the EOC considers that it is vital that organisations be better informed about how to avoid discriminating against both women and men with families looking to re-enter/ remain within the workforce. Employers should also be made aware of the importance of having policies and procedures to assist them and their staff to avoid discriminating when recruiting and managing staff.

Education, not only about the benefits of having a diverse workforce, is vitally important. The EOC has heard from enquirers that organisations are sometimes provided with advice from business advisors or industry associations that may conflict with discrimination law.

The EOC would also recommend promotion of positive case studies, and sharing of resources. These should include case studies of both men and women to increase recognition and understanding that child care is a shared responsibility.

Changing discussions from a women’s issue to a “whole of work” issue :

Work being done, documents being produced and language being used by the Workplace Gender Equality Agency provide good examples of how this can be done. The challenge now is how to change discussions around caring responsibilities, and gender inequity to become a “whole of work” issue, and not just ‘women’ or an individual ‘woman’s’ problem.

This requires attitudinal change across the whole of society, but changes in the workplace can support the process. Some possible steps that could be taken include:

* Introducing ideas of anti-discrimination, gender equality and flexible work into the workplace induction process;
* providing training to managers and staff;
* supporting men and women to take flexible leave;
* exemplifying and highlighting positive leadership in these areas;
* having consistency in policies;
* using networks of champions; and
* providing childcare options through the workplace.

Clear guidelines, policies and procedures:

Clear guidelines for both businesses and individuals about their rights and responsibilities, including information about legislative protections for pregnant women, parents on paternity leave and parents looking to re-enter or remain in the workforce are important.

The EOC resolves approximately half of the complaints that fall within *Equal Opportunity Act 1984* (SA) through conciliation. The EOC often finds that through bringing the parties together in a conciliation conference, relatively minor adjustments and compromise can result in a positive outcome for both employers and employees. In the EOC’s experience, a more flexible mindset, and better internal avenues for negotiation within workplaces, can play a significant role in improving employment outcomes and workplace equality.

**Summary**

The EOC through its role in administering the *Equal Opportunity Act 1984* (SA) and in promoting equality in the workplace, comes into contact with a number of people who allege workplace discrimination as a result of their pregnancy or caring responsibilities. The enquiries and complaints received by the EOC indicate that discrimination cuts across all stages of a person’s working life, and has serious effects both for the individual, and for the broader goal of gender equality in the workforce.

This discrimination has continued despite a growing body of legislation enacted to prevent such behaviours, indicating that there remains a need to do more in this area.

Supporting working parents to participate in the workplace requires a “whole-of-working-life” approach. There is also a continued commitment to raise awareness and acceptance of pregnancy, and caring responsibilities in the workplace, and to changing the discourse around child rearing from a women’s issue to a whole of work issue.

1. ABS (2013), *Gender Indicators, Australia, Aug 2013,* cat no 4125.0, viewed 25 October 2013, http://www.abs.gov.au/ausstats/abs@.nsf/mf/4125.0 [↑](#footnote-ref-1)
2. Safe Work SA, ‘What workplace system am I covered by’ http://www.safework.sa.gov.au/show\_page.jsp?id=112409 (last updated 11 January 2013) [↑](#footnote-ref-2)
3. Edwards, Meredith, Burmester, Bill, Evans, Mark, Halupka, Max and May, Deborah (2013) *Not yet 50/50: Barriers to the Progress of Senior Women in the Australian Public Service,* ANZSOG Institute for Governance at the University of Canberra [↑](#footnote-ref-3)