Submission to the Australian Human Rights Commission - Supporting Working Parents: Pregnancy and Return to Work National Review

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TABLE OF CONTENTS

1 Table of Abbreviations

AHRC	Australian Human Rights Commission
FW Act	*Fair Work Act* 2009 (Cth)
FWC	Fair Work Commission
FWO	Office of the Fair Work Ombudsman
NES	National Employment Standards
SD Act	*Sex Discrimination Act* 1984 (Cth)
The UK Act	*Employment Rights Act* 1996 (United Kingdom)
VCAT	Victorian Civil and Administrative Tribunal
VEOHRC	Victorian Equal Opportunity and Human Rights Commission
Vic EO Act	*Equal Opportunity Act* 2010 (Vic)
The NSW Act	*Industrial Relations Act* 1996 (NSW)
JobWatch TIS	JobWatch Telephone Information Service
PPL Act	*Paid Parental Leave Act* 2010 (Cth)

2 Introduction

Job Watch Inc (**JobWatch**) is pleased to make a submission to the Australian Human Rights Commission (**AHRC**) regarding the prevalence, nature and consequences of discrimination in relation to pregnancy at work and return to work after parental leave.

Pregnancy and related discrimination in employment is a systemic problem.

Women engaged in precarious employment, with little bargaining power are most vulnerable to pregnancy related discrimination and therefore being excluded from participating in the workforce, before, during and after pregnancy.

The above phenomena is of great concern as an increasing number of women are participating or attempting to participate in the workplace out of choice and/or necessity.

Women have been and continue to be an integral part of the workforce and should be encouraged to enter and remain in work rather than excluded due to pregnancy related discrimination.

2.1 About JobWatch

JobWatch is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria. The centre receives State and Federal funding to do the following:

- Provide information and referrals to Victorian workers via a free and confidential telephone information service (TIS);
- Engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other organisations;
- Represent and advise disadvantaged workers; and
- Conduct law reform work with a view to promoting workplace justice and equity for all Victorian workers.

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our TIS and to date we have collected over 160,000 records. JobWatch starts a new record for each new caller or for callers who have called before but who subsequently call about a new matter. Our extensive database allows us to report on our callers' experiences, including on what particular workplace problems they face and what remedies, if any, they may have available to them at any given time.

Traditionally, and up until recently, JobWatch's TIS has taken approximately 20,000 calls per year. Due to a decrease in funding levels, this has fallen to approximately 6,000 calls per year.

The comments in this submission are made both from the perspectives of lawyers who routinely advise and represent clients in discrimination matters and from callers to the JobWatch TIS. Case studies have been utilised to highlight particular issues where we have deemed it appropriate to do so. The case studies which we have used are those of actual but de-identified callers to JobWatch's TIS and/or legal practice clients.

3 Data on Pregnancy and Parental Leave Discrimination

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

Whenever analysing statistics derived from the JobWatch Database it is important to keep in mind that each individual record may canvass multiple workplace problems. In addition to calls involving pregnancy and related discrimination specifically, our database includes a large number of records which are principally about another problem, eg. unfair dismissal, but which also involve discrimination relating to pregnancy and/or returning to work following the taking of parental leave.

JobWatch continues to receive pregnancy related discrimination calls and in fact such calls have doubled in percentage terms over the past 10 years.

In the 2002-2003 financial year pregnancy discrimination calls amounted to 0.99% of the total calls received by the TIS. In the 2011-2012 financial year this figure increased to 1.42% of the total calls received by the service.

A similar trend is evident when studying the number of TIS calls categorised as "maternity" calls. The maternity calls category encompasses calls from those who have experienced difficulties while on parental leave and also when subsequently returning to work. In the 2002-2003 financial year calls in this category comprised 1.83% of total calls to the TIS. This figure rose to 2.29% in the 2011-2012 financial year.

3.1 Case studies of women and men's experiences of discrimination

JobWatch refers the AHRC to a Briefing Note previously submitted to the National Review which contains additional case studies to those now presented.

3.1.1 Case Study 1

Lucy has been working for her employer for around 18 months in a sales position. Lucy is currently 29 weeks pregnant and since informing her employer of her pregnancy she has been bullied incessantly. She believes her employer is treating her this way in order to force her resignation so that they can hire someone new in her role.

3.1.2 Case Study 2

Alana was a casual sales assistant when she requested a reduction in her daily working hours during her pregnancy. As a result her employer asked for her resignation which Alana refused to give although her employer has since reduced her shifts. Alana believes her employment will soon be terminated.

3.1.3 Case Study 3

Luisa was an office assistant whose fixed term contract expired around 9 months prior to her informing her employer of her pregnancy. Upon learning of her pregnancy her employer offered her another fixed term contract which was due to expire in 12 months. Further, Luisa was advised that the contract would not be renewed upon its expiry and that her position would be filled in the interim. Luisa was also bullied in the lead up to her leave, her employer making disparaging remarks about her body shape during her pregnancy.

3.1.4 Case Study 4

Cleopatra was employed as a teacher and worked through several 12 month fixed term contracts at the same school. When she discussed her potential pregnancy she was assured by her employer that her position was secure and plans for the following year were made. Once Cleopatra confirmed that she was pregnant and told her employer she was told that her contract would not be extended as was agreed previously. She was also told that she would only receive paid maternity leave if she agreed to be available to teach casually.

3.1.5 Case Study 5

Rochelle worked for her former employer for 2 years in an I.T Department. Rochelle was several months pregnant when she made a request for parental leave. Shortly thereafter she was advised that there had been a company restructure and that her position would be made redundant. When Rochelle asked her employer why she had been selected for redundancy she was told that it was because her performance was inferior compared to that of her colleagues. There had been no performance review for this year and all of her previous performance reviews had been positive.

3.1.6 Case Study 6

Samantha was 33 weeks pregnant and worked in the hospitality industry. Samantha was in the process of negotiating her parental leave and return to work arrangements with her employer. She had organised to take unpaid parental leave with a return date next year and was also in the midst of organising an application for the national parental leave scheme which would entitle her to paid parental leave. Rather than honour the agreement made, Samantha's employer sent Centrelink a Separation Certificate, citing that insufficient notice was given prior to her taking leave and that they preferred to hire someone else.

3.1.7 Case Study 7

Justine worked for her former employer for 4 years. During this period Justine commenced working part-time following the birth of her first child. It was only after the birth of Justine's second child, in her discussions with her employer regarding her return to work arrangements, did she discover that her pay rate was cut by around $4 an hour dating back to when she initially became a part-time employee.

4 Trends in Pregnancy and Parental Leave Discrimination

Has your organisation observed any trends in relation to discrimination experienced by women at work when they become pregnant and/or men and women who have returned to work after taking parental leave?

JobWatch has observed several trends relating to pregnancy and related discrimination. The most notable are as follows:

- Redundancy is a common mask used to disguise pregnancy and related discrimination. Many women tell of their positions being earmarked for redundancy either soon after advising their employer of their pregnancy or down the track when discussing their return to work arrangements. These redundancies are rarely genuine and consultation, as required by the National Employment Standards (**NES**) and/or an Award or Enterprise Agreement, is seldom undertaken.

- Women rarely have full and comprehensive knowledge of their entitlements in this area although it is their responsibility to approach their employer to organise their parental leave and return to work pursuant to the NES. JobWatch has devised a program to assist women in such situations however have yet to receive funding to implement it. This program is discussed in more detail below. Ultimately, employers rarely have structures in place, policies or otherwise, to assist women in the process of seeking parental leave and negotiating return to work arrangements meaning these important life events are dealt with in an ad hoc and/or unsatisfactory manner leading to unlawful discrimination.
- It is JobWatch's experience that a large proportion of employees on parental leave have only entered into informal parental leave arrangements with their employer (as opposed to the requirements and protections granted by the NES), especially where the employer's business may be characterised as a small to medium enterprise. Anecdotal evidence suggests that this figure would be well in excess of 50% of employees on parental leave that call JobWatch.
- Returning to work following parental leave for many women often involves returning to a different position to that which was held prior to taking parental leave. Despite the return to work guarantee in the NES women commonly find themselves in positions with a lower status and an accompanying wage reduction.

5 Key Challenges in Legislation and Policy

Identify any 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?

5.1 Requests for Flexible Working Arrangements under the FW Act[1]

JobWatch congratulates the Federal Government for expanding the right to request flexible working arrangements in the *Fair Work Act* 2009 (Cth) (**FW Act**). From 1 July 2013 the legislation now covers situations where an employee is a parent, or has responsibility for the care of a child who is *of school age or younger*.

Despite this progress, JobWatch holds the following concerns regarding requests for flexible working arrangements per section 65 of the FW Act.

- The right to request flexible working arrangements only applies to employees with a minimum of 12 months continuous service. Employees with less than 12 months continuous service are not entitled to have their parental responsibilities reasonably accommodated.
- Furthermore, casual employees need to be long term casual employees of the employer immediately before making the request and must also have a reasonable expectation of continuing their employment on a regular and systematic basis.

[1] This part of JobWatch's submission is partly based on JobWatch's Submission (and case studies) to the Review Panel for the Review of the Fair Work Act 2009 (Cth).

5.1.1 Case Study – Flexible Work Arrangements for Employees With Less than 12 Months Service

Judy was employed on a permanent full time basis as a manager in a retail outlet. A couple of months after she commenced employment, she asked her employer for flexible working arrangements to accommodate her family responsibilities. Her employer initially agreed however shortly afterwards he terminated her employment. The reason given for the termination was that he had sold the business however Judy discovered that he had simply replaced her with a new manager who was prepared to work full time hours. Judy was not paid her final wages, notice of termination or accrued annual leave.

6 Recommendation 1:

That the right to request flexible working arrangements be extended to all employees with "carer" responsibilities, regardless of their length of continuous service. Alternatively we recommend that the right to request flexible working arrangements be available to employees who have completed the minimum employment period applicable in the unfair dismissal provisions of the FW Act. That is, 6 months for employees in businesses with 15 or over employees and 12 months for employees in smaller businesses with 14 employees or less.

From 1 July 2013 section 65 of the FW Act was amended to provide some guidance on the definition of what constitutes 'reasonable business grounds'. The relevant subsections state as follows.

(5) The employer may refuse the request only on reasonable business grounds.

(5A) Without limiting what are reasonable business grounds for the purposes of subsection (5), reasonable business grounds include the following:

(a) that the new working arrangements requested by the employee would be too costly for the employer;

(b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;

(c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;

(d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;

(e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

(6) If the employer refuses the request, the written response under subsection (4) must include details of the reasons for the refusal.

JobWatch notes that the only considerations explicitly listed as being 'reasonable business grounds' are solely from the employer's perspective. The definition is

inclusive however and does refer to reasonableness, therefore implying that other considerations are to be taken into account.[2] Despite this, employee considerations are not clearly enunciated and this leaves scope for a narrow interpretation for those so inclined. It sends a message that employee considerations are of secondary importance when an employer assesses whether and how to accommodate an employee's parental responsibility.

JobWatch recommends that the reference to 'reasonable business grounds' be removed and replaced with the lone requirement that a refusal to accommodate an employee's parental responsibilities not be unreasonable in the manner prescribed by the *Equal Opportunity Act* 2010 (Vic) (**Vic EO Act**).

6.1 Lack of enforcement rights

The lack of enforcement rights (currently section 65 is not a civil remedy provision) means that, in practice, an employer need not genuinely consider a request for flexible working arrangements and can make a decision based on unreasonable grounds. Combined, these issues effectively render the right to request flexible working arrangements meaningless.

6.1.1 Case Study - Refusal of Flexible Work Arrangements

Katie works on a casual full time basis as a console operator at a service station. She is a single parent and her child is in day care when she is at work. Katie's child care provider is closed over the Christmas period and as a result she is not able to work because she has to look after her son. The employer has told Katie that if she isn't available on a full-time basis over the Christmas period she is of no use to him and she won't be getting offered shifts in the future.

The employee's right to request flexible working arrangements under section 65 of the FW Act is not a civil remedy provision under Part 4(1). This essentially means that the protection has no effect because neither an individual nor the FWO is able to commence proceedings in relation to a contravention or seek a civil penalty against the employer.

It is JobWatch's understanding that the Office of the Fair Work Ombudsman (**FWO**) does not formally investigate an alleged contravention of section 65 of the FW Act, except possibly where an employer has not provided a written response within 21 days. In reality, even if a contravention letter or compliance notice is issued, the FWO is unable to escalate the matter further where an employer does not respond or take steps to comply with the FW Act.

In order to strengthen the FW Act's flexible working arrangements provisions, JobWatch recommends that the Vic EO Act and the *Employment Rights Act* 1996 (United Kingdom) (**United Kingdom's Employment Act**) be used as models upon which to base change.

6.2 Equal Opportunity Act 2010 (Vic)

Sections 17 and 19 of the Vic EO Act provide good examples of a legislative obligation on employers to reasonably accommodate the parental / carer responsibilities of employees (and also of those whom are offered employment).

[2] Chapman, Anna, "Is the right to request flexibility under the Fair Work Act enforceable?", Australian Journal of Labour Law (2013) 26

Section 19 of the Vic EO Act states as follows:

"19 Employer must accommodate employee's responsibilities as parent or carer

(1) An employer must not, in relation to the work arrangements of an employee, unreasonably refuse to accommodate the responsibilities that the employee has as a parent or carer.

Example:

An employer may be able to accommodate an employee's responsibilities as a parent or carer by allowing the employee to work from home on a Wednesday morning or have a later start time on a Wednesday or, if the employee works on a part-time basis, by rescheduling a regular staff meeting so that the employee can attend.

(2) In determining whether an employer unreasonably refuses to accommodate the responsibilities that an employee has as a parent or carer, all relevant facts and circumstances must be considered, including:-

(a) the employee's circumstances, including the nature of his or her responsibilities as a parent or carer; and

(b) the nature of the employee's role; and

(c) the nature of the arrangements required to accommodate those responsibilities; and

(d) the financial circumstances of the employer; and

(e) the size and nature of the workplace and the employer's business; and

(f) the effect on the workplace and the employer's business of accommodating those responsibilities, including:-

(i) the financial impact of doing so;

(ii) the number of persons who would benefit from or be disadvantaged by doing so;

(iii) the impact on efficiency and productivity and, if applicable, on customer service of doing so; and

(g) the consequences for the employer of making such accommodation; and

(h) the consequences for the employee of not making such accommodation."

Under the Vic EO Act, a complaint in relation to an employer's refusal to accommodate parental responsibilities can be made to the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) (who can hold a voluntary conciliation) and/or an application can be made to the Victorian Civil and Administrative Tribunal (**VCAT**) for determination of the matter.

JobWatch acknowledges that section 66 of the FW Act states that State and Territory laws are not excluded by the application of the FW Act but submits that section 65 should mirror this legislation which provides an actionable right rather than a relatively toothless right to request and also places the onus on the employer to accommodate the request.

7 Employment Rights Act 1996 (United Kingdom)

JobWatch believes that the UK Act also provides a useful model for the right to request flexible working arrangements.

Section 80F of the UK Act provides a statutory right to request a change to certain terms and conditions of employment for any employee with 26 weeks' continuous service who:

(a) has/expects to have parental responsibilities of a child under 17;

(b) has/expects to have parental responsibilities of a disabled child under 18 (who receives a Disability Living Allowance);

(c) is the parent/guardian/special guardian/foster parent/private foster carer of the child or a person who has been granted a residence order in respect of the child or is the spouse, partner or civil partner of the parent/guardian/special guardian/foster parent/private foster carer and are applying to care for the child; and

(d) is a carer who cares, or expects to be caring, for an adult who is a spouse, partner, civil partner or relative; or although not a relation, lives at the same address.

Such a request can be made every 12 months and an employer has a legal obligation to consider the request, which can only be refused on legitimate business grounds.[3] An employee can appeal the employer's decision to refuse a request (within 14 days) and if the matter remains unresolved an employee can use the Advisory, Conciliation and Arbitration Service (ACAS), a voluntary arbitration scheme for the resolution of flexible working disputes. Where an employee believes the employer's decision to reject their request was based on incorrect facts, didn't follow the correct procedure or didn't provide an adequate explanation of their refusal, s/he can make a complaint to the Employment Tribunal.

8 Recommendation 2

That section 65 of the FW Act mirror the flexible work arrangements provisions in the Vic EO Act and/or the United Kingdom's Employment Act.

9 Recommendation 3:

That the factors listed re what is deemed "reasonable business grounds" should include employee considerations such as the nature of their parental responsibilities…or at least it should be made clear that the term "reasonable

[3] www.direct.gov.uk, Who can request flexible working? UK Government, p. 2

business grounds" is not related to the concept of "managerial prerogative" but rather necessitates an objective requirement which is directly related to all circumstances, of both the employer and the employee… or at the very least an objective requirement which is directly related to an employer's business.

10 Recommendation 4:

That the right to request flexible working arrangements be made a civil remedy provision so that it is enforceable.

In the alternative, where a request for flexible working arrangements is refused by an employer, there should at a minimum be a right to have the decision reviewed by the FWC. The FWC should have the power to make binding orders where a request for flexible working arrangements has been denied for reasons which fall foul of the reasonable business grounds standard.

Currently an employee whose request for flexible working arrangements has been unreasonably refused must argue that they have constructively dismissed and, if eligible, make an unfair dismissal claim to get before the FWC.[4] This process is far too risky, costly and inconvenient for most employees to ever consider undertaking.

11 Recommendation 5:

That FWC should have the power to, upon request from an employee, review a decision of an employer to refuse a request for flexible working arrangements and make binding orders on an employer.

Additionally, where a request for flexible working arrangements has been made but the employer fails to respond within the 21 day time frame in accordance with section 65(4), the request should be taken to have been accepted by the employer. If the employer wishes to dispute its ability to accommodate the request on "reasonable business grounds" then it could apply to FWC for a determination.

11.1.1 Case Study – Unreasonable Refusal of Flexible Work Arrangements

Jon has been employed as a bus driver for over 6 years on a permanent full time basis. When he originally went for the job he was told that he would be required to work every second weekend. Jon's employer is now claiming he has to work every weekend. He can't do this as he has custody of his children every second weekend. Jon has asked the employer to explain why the change is required and he has confirmed that he still needs every second weekend off but he has not received any response from the employer.

12 Recommendation 6:

That where a request for flexible working arrangements has been made but the employer fails to respond within the 21 day time frame in accordance with section 65(4), the request should be taken to have been accepted by the employer. If the employer wishes to dispute its ability to accommodate the request on "reasonable business grounds" then it could apply to FWC for a determination.

JobWatch regularly receives queries from employees who are trying to negotiate flexible working arrangements to accommodate their family / carer responsibilities and would like to know their legal options. These callers are fully informed by JobWatch about their rights and entitlements across all jurisdictions (e.g. the right to request

[4] See *Hanina Rind v Australian Institute of Superannuation Trustees [2013]* FWC 3144

flexible working arrangements under both the FW Act and the Vic EO Act). Nevertheless, the practical reality must be that the Vic EO Act is utilised more frequently than the FW Act insofar as requesting flexible working arrangements.

This may be due to several factors including that the Vic EO Act has stronger coverage and protection for employees with parental or carer responsibilities, that a complaint/application regarding this section can be made to the VEOHRC or the VCAT and that it is an enforceable, actionable right (as opposed to the equivalent section under the FW Act).

The experience of JobWatch's legal practice matches that of our TIS. JobWatch's lawyers often use the Vic EO Act to assist employees to negotiate flexible working arrangements to accommodate their family or carers' responsibilities. The relevant provisions under the FW Act are often referred to (for example in correspondence to employers), however as the right is not actionable or enforceable it is of limited assistance.

12.1 Parental Leave and Related Entitlements

JobWatch commends the Federal Government for amendments to the FW Act which mean that the period of simultaneous parental leave which can be taken will be increased from 3 weeks to 8 weeks. Notwithstanding, JobWatch still holds the following concerns in relation to parental leave and related entitlements.

In this respect, JobWatch believes that the UK Act provides a useful model. Under section 77 of the UK Act, an employee who is absent on parental leave is entitled to the benefit of the terms and conditions of employment which would have applied had the employee not been absent, excluding remuneration. This includes matters connected with the employee's employment whether or not they arise under an employment contract. Therefore employees are able to continue to build their entitlements throughout their parental leave period so that, for example, they have paid sick/personal leave and annual leave available to them when they return to work in case of a child's illness etc.

13 Recommendation 7:

That any parental leave (paid or unpaid) should count as service for the purpose of calculating the accrual of entitlements such as annual leave, personal leave and long service leave.

14 Recommendation 8:

That employees be given an automatic right to return to work on a part-time basis after a period of parental leave until the child reaches school age.

14.1 Redundancy

The recent case of *Turnbull v Symantec (Australia) Pty Ltd [2013]* FCCA 1771 (1 November 2013) is illustrative of the difficulties faced by employees returning to work following parental leave. In this case the Applicant claimed that her dismissal was a result of her parental leave in breach of section 84 of the FW Act. Section 84 stipulates that upon ending unpaid parental leave, an employee is entitled to return to work in the same position they held prior to taking their leave. In the event that the position no longer exists, the employee is entitled to work in a similar role and for similar pay.

The Court held that the Applicant's role was not terminated because of the Applicant's parental leave but because it was established that the requirements of her position were distributed to other employees, meaning that her position had been made redundant. It is arguable that the re-allocation of her applicant's duties would not have

taken place had the employee not taken parental leave. But the court found that this "but for" test was not relevant.[5]

15 Recommendation 9:

That it should be unlawful for an employer to make an employee's position redundant when she is on maternity leave because they can or have divided her duties between other employees.

In relation to parental leave (and specifically to section 76(4) of the FW Act, which gives an employer the right to refuse a request for an extension of parental leave on "reasonable business grounds") JobWatch has the same concerns as outlined in section (5 and 6) above. That is we are concerned that:

(a) there is no recourse to the FWC / the FWO by an employee where the request is refused;

(b) an employer is not obligated to genuinely consider such a request;

(c) 'reasonable business grounds' is not defined in relation to an employer refusing a request for an extension of unpaid parental leave (under section 76(4)). However if it is taken to have the same meaning as that in section 65 once again the same considerations apply; and

(d) an employer may base its decision on subjective reasoning.

JobWatch has only received a small number of calls from employees who have expressly used or plan to use the right to request an extension of unpaid parental leave. This may be due to the fact that employees are unaware that this right exists or they lack the option of extending their parental leave for financial reasons. The more common scenario of callers to JobWatch involves employees on unpaid parental leave who are attempting to vary the duration of their parental leave, for example, to return to work early / later but within the 12 month time frame.

JobWatch is concerned that the notice requirements for parental leave under the NES are too onerous for employees. Further, the current wording of section 74(7) of the FW Act allows many employers to simply refuse to allow employees who are on authorised but informal parental leave to return to their pre-parental leave position, which undermines and weakens the entire parental leave entitlements division in the FW Act. This is especially so where there is no obligation on the employer to inform a parental leave replacement employee that they are only employed on a temporary basis.

JobWatch asserts that notice requirements for parental leave should either replicate or incorporate section 67 of the NSW Act which states the following:

> *"67 Employer's obligations*
>
> *Information to employees. On becoming aware that an employee (or an employee's spouse) is pregnant, or that an employee is adopting a child, an employer must inform the employee of:*
>
> *(i) the employee's entitlements to parental leave under this Part, and*

[5] This was specifically unlawful under the *Workplace Relations Act 1996* (Cth)

(ii) the employee's obligations to notify the employer of any matter under this Part."

An employer cannot rely on an employee's failure to give notice or provide particular documents required by this Part unless the employer establishes that this subsection has been complied with in relation to the employee.

A comparable change in the FW Act would place the onus on employers to ensure employees are at least aware of notice and evidence requirements relating to parental leave.

15.1.1 Case study – problem with onus being on employees

Susan had a verbal agreement with her employer regarding parental leave. In her fourth month of leave she was contacted by her employer stating that as her leave had not been finalised in writing she was not actually on parental leave. Susan's employer alleged that she had abandoned her employment as a result.

15.1.2 Case study – informal parental leave

Meredith has been employed on a full time basis as a Manager at a small florist for over 6 years; she is a friend of the owner of the business. Employment arrangements at the workplace have always been fairly informal – for instance there are no written contracts and everything is agreed to verbally. Meredith is currently on maternity leave and before she went on leave she informed the owner that she would like to return to work on a part-time basis when her leave expired. She is due to return from maternity leave in a couple of months' time, when she contacted her employer, she was informed that there may not be any work for her at all (an apprentice was hired in a full-time role and someone was employed on a casual basis when Meredith went on maternity leave).

15.1.3 Case Study – informal parental leave

Kathryn worked for a couple years as a casual full-time kitchen hand before she went on parental leave. Upon commencing her leave she was verbally promised her job upon her return and while on leave she contacted her employer to organise the date of her return. Kathryn was told by her employer that there were no vacancies and she would have to wait until there was a vacancy. She is aware that the employer has taken on 2 new staff since she started her leave.

16 Recommendation 10:

That section 67 of the NSW Act be adopted so that an onus is placed on employers to notify pregnant employees of notice and evidence requirements regarding parental leave. Alternatively, we recommend that section 74(7) of the FW Act be amended so as to better protect employees in circumstances where employers are aware that an employee intends to take parental leave but does not require or seek the employee's compliance with section 74. In such circumstances, employers should be prevented from relying on employees non-compliance with notice requirements to deny their parental leave rights.

It is problematic the fact that an employee's right to apply for an extension of unpaid parental leave under section 76 of the FW Act is not a civil remedy provision under Part 4(1), thereby rendering this section unenforceable. Consequentially, the protection has no effect as neither an individual nor the FWO is able to commence

proceedings in relation to a contravention or seek a civil penalty against employers.

Further, it is JobWatch's understanding that the FWO does not formally investigate alleged contraventions of this section. Even if a contravention letter or compliance notice is issued, the FWO cannot take any further action if the employer does not respond or take steps to comply with the FW Act, which begs questions regarding of the degree of its actual utility.

17 Recommendation 11:

That the right to apply for an extension of unpaid parental leave be made a civil remedy provision so that it is enforceable.

18 Paid Parental Leave under the Paid Parental Leave Act 2010 (Cth)[6]

In order for an employee to access paid parental leave under the PPL Act there are a number of tests that need to be satisfied. One of these tests is the *"work test"*[7], which is composed of a number of different elements, one of which is the potentially exclusionary definition of "*permissible break"*[8].

The work test requires that an employee[9]:

(a) Determine their work test period10. Generally, the work test period is 392 days before the expected date of birth of the child; then

(b) Determine the days in the work test period on which the person has and has not performed "qualifying work"11; then

(c) Determine whether any days on which the person has not performed qualifying work during the work test period fall within a permissible break12; and finally

(d) Determine whether there is a period (a qualifying period) of 295 consecutive days in the work test period that are days:

(ii) On which the person has performed qualifying work; or

(ii) That fall within a permissible break.

If the person has performed at least 330 hours of qualifying work in a qualifying period, the person satisfies the work test.

Under the work test, a permissible break is considered to be no more than 56 consecutive days (8 weeks) away from qualifying work. Qualifying work also includes periods of paid leave and requires an employee to receive at least one hour of "*paid"* work.

The definition of permissible break may leave many Australian employees exempted from being able to access paid parental leave under the Act. This is despite an

[6] This part of JobWatch's submission is partly based on JobWatch's submission (and case studies) to the Department of Families, Housing, Community Services and Indigenous Affairs Review of the Paid Parental Leave Act 2010.

[7] Section 32 the Act

[8] Section 36 the Act

[9] Section 32 the Act

[10] Section 33 the Act

[11] Section 34 the Act

[12] Section 36 the Act

employee satisfying all other elements of the work test. This issue may be prevalent in industries where employees are given more than 8 weeks of "*unpaid leave".* For example, in tertiary institutions, where there is often a 3-month summer break, sessional academics may be on unpaid leave for that period of time. These employees will be worse off through no fault of their own.

19 Recommendation 12:

That the definition of permissible break should be afforded some flexibility to take into consideration absences of more than 56 days that are required as a normal part of an employee's employment.

Another concern that arises are the circumstances in which an employee may fail to qualify for paid parental leave under this Act due to the discriminatory conduct of their employer.

For example, if a person is unfairly dismissed, dismissed in breach of the General Protections in the FW Act or in breach of State / Federal anti-discrimination laws (for example due to pregnancy discrimination), and this prevents them from satisfying the work test they would not be eligible for paid parental leave under the Act. This may be despite satisfying all other eligibility tests.

There is currently nothing in the relevant division of the Act (i.e. Div 3 of Part 2-3) that allows the exercise of discretion by the Secretary to take into account the circumstances of an employee's dismissal when applying the work test. Unfortunately, in JobWatch's experience, pregnancy discrimination is prevalent, meaning employees are missing out on paid parental leave under this Act. This becomes even more of an issue given the phasing out of the Baby Bonus.

JobWatch submits that the Secretary should be authorised to exercise discretion to grant an application that otherwise wouldn't meet the work test where the employee is dismissed due or partly due to their pregnancy and the employee has taken steps to challenge their dismissal, for example by lodging an Unfair Dismissal, General Protections Dispute or Discrimination complaint under State or Federal anti-discrimination law.

19.1.1 Case Study

Sue has worked as a dental nurse for over 6 months with her employer and she has never had any performance related issues. However, after Sue told her employer that she was pregnant her employer's attitude towards her and her performance changed dramatically. She received a warning relating to her performance on the same day she told her employer about her pregnancy. Sue's hours of work were altered and her employer removed her ability to take RDO's. The employer tried to coerce Sue into resigning, but when she would not, she was dismissed.

20 Recommendation 13:

The Secretary should be afforded a degree of discretion in granting an application that would otherwise not meet the 'work test' in circumstances where an employee alleged that they have been dismissed due or partly due to their pregnancy and the employee has taken steps to challenge the dismissal.

21 The Federal Sex Discrimination Act (the SD Act)

There are several gaps present in federal anti-discrimination legislation and its enforcement.

(a) The first and often nominated gap is the inability of the AHRC to investigate complaints of its own accord. Individuals must take it upon themselves to challenge any discrimination they feel they are facing. This structure is problematic as, for women who have experienced pregnancy and related discrimination, the inclination and resources to challenge discrimination are scarce particularly given that the complainant bears the onus of proof. Endowing the AHRC with the power to launch investigations into the SD Act (similar to the VEOHRC in Victoria) would provide an element of deterrence which employers are currently not subjected to. This would help counteract the difficulties experience in challenging this kind of discrimination.

(b) Like the Employment Law Centre of WA, JobWatch also submits that an obligation should be imposed on employers to accommodate pregnant employees via making reasonable adjustments for pregnant employees provided they do not cause unjustifiable hardship.

21.1 Case studies of leading practices and strategies for addressing discrimination

Please provide 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.

As pregnancy related discrimination calls have continued to increase in number much more needs to be done to prevent the extent of this type of discrimination and provide proper avenues of redress. JobWatch has identified through its database and casework practice a pressing need to assist working women and consequentially has developed a program, the Education & Advocacy in the Prevention of Pregnancy Related Discrimination in the Area of Employment (**the Program**)**.** JobWatch has yet to receive funding to implement this program.

The proposed program has 3 major objectives:

1. To prevent pregnancy related discrimination in the area of employment.
2. To improve social inclusion and workplace participation of working women before, during and after pregnancy.
3. To improve access to justice for women before, during and after pregnancy in the area of employment.

Specifically, the program aims to prevent pregnancy related discrimination against working women in Victoria, to ensure their social inclusion and provide them with real access to justice by:

- Educating small business employers about their rights and obligations before, during and after an employee's pregnancy;
- Providing a dedicated phone line for pregnancy related discrimination calls;
- Developing pregnancy related discrimination resource material;
- Providing legal advice; a mediation service; representation at the workplace and courts and tribunals;
- Research of assistance provided to inform law reform and address systemic discrimination.

One aspect of the proposed program is a dedicated advocate and project worker. Their role involves the following:

- Advising employees of their obligations during pregnancy including the

requirement to make a formal maternity leave application;

- Discussing and settling return to work plans with employees;
- Negotiating proposed work plans with employers;
- Advising and negotiating return to work after parental leave for women who are confronted with (sham) redundancy, refusal by the employer to consider them for part-time work and refusal by the employer to consider other reasonable requests for flexible working arrangements relating to family/carer responsibilities under the Vic EO Act 2010;
- Mediating disputes.

JobWatch posits that providing assistance to pregnant women from when they fall pregnant through to their return to work deters employers from attempts to escape affording employees their entitlements and also from discriminatory behaviour.

The program involves a holistic approach to dealing with pregnancy related discrimination. This project is focused on prevention, early intervention, advocacy and representation. It educates, informs law reform and provides real and practical assistance to disadvantaged working women.

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

22 Summary of Recommendations:

1 That the right to request flexible working arrangements be extended to all employees with "carer" responsibilities, regardless of their length of continuous service. Alternatively we recommend that the right to request flexible working arrangements be available to employees who have completed the minimum employment period applicable in the unfair dismissal provisions of the FW Act. That is, 6 months for employees in businesses with 15 or over employees and 12 months for employees in smaller businesses with 14 employees or less.

2. That section 65 of the FW Act mirror the flexible work arrangements provisions in the Vic EO Act and/or the United Kingdom's Employment Act.

3. That what constitutes "reasonable business grounds" should be clearly defined or at least it should be made clear that the term "reasonable business grounds" is not related to the concept of "managerial prerogative" but rather necessitates an objective requirement which is directly related to an employer's business.

4. That the right to request flexible working arrangements be made a civil remedy provision so that it is enforceable.

5. That FWA should, upon request from an employee, have the power to review a decision of an employer to refuse a request for flexible working arrangements and make binding orders on an employer.

6. That where a request for flexible working arrangements has been made but the employer fails to respond within the 21 day time frame in accordance with section 65(4), the request should be taken to have been accepted by the employer. If the employer wishes to dispute its ability to accommodate the request on "reasonable business grounds", then it could apply to FWA for a determination.

7. That any parental leave (paid or unpaid) should count as service for the purpose of calculating the accrual of entitlements such as annual leave, personal leave and long service leave.

8. That employees be given an automatic right to return to work on a part-time basis after a period of parental leave until the child reaches school age.

9. That it should be unlawful for an employer to make an employee's position redundant when she is on maternity leave because they can or have divided her duties between other employees.

10. That section 67 of the NSW Act be adopted so that there be an onus on employers to notify pregnant employees of the notice and evidence requirements regarding parental leave. Alternatively, we recommend that section 74(7) of the FW Act be amended so as to better protect employees in circumstances where an employer knows that an employee intends to take parental leave but does not require or seek the employee's compliance with this section. In these circumstances, employers should be prevented from relying on an employee's non-compliance with the notice requirements to deny the employee the rights associated with parental leave.

11 That the right to apply for an extension of unpaid parental leave be made a civil remedy provision so that it is enforceable.

12. That the definition of permissible break should be afforded some flexibility to take into consideration absences of more than 56 days that are required as a normal part of an employee's employment.

23 Conclusion

JobWatch would welcome the opportunity to discuss any aspect of this submission further. Melissa Favasuli and Ian Scott of JobWatch's Legal Practice can be contacted on (03) 9662 9458 with any queries.

Yours sincerely,

Per:
Job Watch Inc