Law Council
OF AUSTRALIA

National Review on the Prevalence, nature and consequences of discrimination in relation to pregnancy at work and return to work after parental leave

Australian Human Rights Commission

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Introduction

1. The Law Council of Australia is pleased to provide the following comments to the Australian Human Rights Commission ('AHRC') as part of its national review on the prevalence, nature and consequences of discrimination in relation to pregnancy at work and return to work after parental leave ('the National Review').

2. The Law Council is concerned by the significant number of complaints received by the AHRC and Fair Work Australia that indicate that discrimination against pregnant employees and against men and women returning to work after taking parental leave continues to be a problem in Australian workplaces.

3. The Law Council considers that discrimination on these grounds is unacceptable and must be addressed. It commends the AHRC for undertaking the National Review, which will provide invaluable quantitative and qualitative data to assess the prevalence of such discrimination, and useful insights into the type of action that should be taken to remove discrimination on these grounds.

4. The National Review aligns well with the Law Council's own efforts to identify barriers to women's full participation at all levels of the legal profession, and to obtain information from the profession as to what efforts could be adopted by employers to ensure that those who leave to undertake parenting responsibilities are able to successfully return to the workplace without fear of discrimination.

5. During 2013 the Law Council commenced a National Attrition and Re-engagement Study ('NARS') to address diversity within the legal profession and to examine, among other matters, the barriers women and men face when leaving and re-entering the profession to have or raise children. The Law Council is hopeful that the results of this study will lead to the identification of practical measures which can be implemented to address the causes of high attrition rates among women lawyers, and re-engage lawyers who have left the profession. It is also hoped that the results of the study will help guide future policy directions on how the profession can better retain its members. It is anticipated that this study will be relevant to the current inquiry. Further information on the status of this study is outlined below.

6. The Law Council also considers that the existing legislative and policy framework could be improved to address gaps in the legal protections currently available to address discrimination on the grounds of pregnancy and return to work following paid parental leave. This issue, addressed in Topic 6 of the AHRC's Issues Paper, forms the focus of the Law Council's submission. Comments are also provided in respect of Topics 4 and 5 from the perspective of a number of the Law Council's Constituent Bodies.

7. The Law Council notes that this submission does not contain case studies of examples of discrimination experienced on the grounds of pregnancy or return to work following parental leave. The Law Council has encouraged its Constituent Bodies (comprising the Law Societies and Bar Associations around the country and the Large Law Firm Group) and their respective Committees to provide such case studies directly to the AHRC either through its online submission process or via one of the community consultations held during October and November 2013. The Law Council was pleased that representatives from the legal profession were able to participate in a number of community consultations and thanks the AHRC for the opportunity to contribute to the National Review in this way.

8. The Law Council also notes that the Women's Lawyers Association of South Australia, who provided comments in respect of this submission, also intends to provide a separate submission to the National Review which will include case studies from its members who have experienced discrimination in the workplace due to pregnancy and return to work after parental leave. The Law Council also understands that the Women Lawyers of Western Australia intends to provide a submission to the inquiry, building upon the contributions made at the Perth community consultation, which was also attended by representatives of the Law Society of Western Australia.

TOPIC 4 What do we know about discrimination experienced by pregnant employees and women and men returning to work after taking parental leave?

Q4.1 What discrimination do employees face in the workplace related to pregnancy, parental leave or on returning to work after parental leave?

9. In answering this question, the Law Council refers to two past relevant inquiries:
    - 2012 the Victorian and Equal Opportunity Commission's ('VEOHRC') Women in the Law project, which saw the publication of the Changing the Rules: Experiences of Female Lawyers in Victoria report ('VEOHRC Report'); and
    - the 2008 Senate Committee on Legal and Constitutional Affairs Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act at eliminating sexual discrimination and promoting gender equality ('the 2008 SDA Inquiry').[1]

10. It also refers to the current research being undertaken by the Law Council as part of its NARS project, and to the work being done in this area by the Law Society of New South Wales ('LSNSW') advancement of women in the legal profession project.

11. Despite these and other important efforts to capture information, the Law Council notes that there remains lack of comprehensive data relating to the discrimination experienced by pregnant employees and women and men returning to work after taking parental leave. It welcomes the current National Review process as a critical mechanism to address this gap in information and also hopes the Law Council's NARS project will assist in providing information relevant to the legal profession.

Changing the Rules: Experiences of Female Lawyers in Victoria

12. During 2012, the Law Institute of Victoria ('LIV') was involved in the VEOHRC Women in the Law project, which saw the publication of the *Changing the Rules: Experiences of Female Lawyers in Victoria* report ('VEOHRC Report'). This project surveyed female lawyers in Victoria regarding their experiences in the legal profession. The report found a high prevalence of pregnancy related discrimination in the Victorian legal profession.[2]

13. One of major findings in the VEOHRC Report was that female lawyers commonly experience discrimination of some kind, with 40 per cent of respondents in the study reporting that they had experienced some form of discrimination during their legal career.[3]

14. The VEORHC Report found that discrimination against female lawyers occurs in several ways which include being:

[1] Senate Legal and Constitutional Affairs, Inquiry into the effectiveness of the *Commonwealth Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality (2008) http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/2008-10/sex_discrim/index (the 2008 SDA Inquiry)
[2] Victorian and Equal Opportunity Commission's *Changing the Rules: Experiences of Female Lawyers in Victoria* Report (30 November 2012) ('VEORHC Report') available at: http://www.humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/reports/item/487-changing-the-rules-%E2%80%93-the-experiences-of-female-lawyers-in-victoria
[3] VEORHC Report, p12.

- asked discriminatory questions in a job interview and not getting the position;
- denied a promotion;
- denied training and development opportunities;
- denied networking or other opportunities for advancement;
- subject to a hostile work environment;
- unreasonably refused flexible working arrangements;
- subject to workplace bullying;
- given an unfair work allocation;
- demoted;
- transferred to another section/unit;
- paid less than the male equivalent;
- made redundant; and
- dismissed.

15. Of relevance to the National Review, 21 respondents reported that they were discriminated against because they were pregnant, 6 respondents reported they were discriminated against because they were breastfeeding, 48 respondents reported that discrimination occurred because they have children and 12 respondents reported that discrimination had occurred because they had carer responsibilities.[4]

16. Of the survey results, 40 per cent of respondents indicated that the discriminator was their immediate supervisor/manager and 55 per cent indicated that it was their employer or a partner in the firm.[5]

17. One of the many issues of concern arising from the report is the finding that many female lawyers who have experienced discrimination do not make complaints, which suggests that the prevalence of discrimination against women in the Victorian legal profession could be significantly under reported.[6]

18. The Law Council and the LIV commends the VEORHC Report to the AHRC, which contains a number of recommendations relevant to the National Review, including recommendations relating to developing and promoting education programs for female lawyers and workshops to assist employers and employees to manage prolonged absences from the workplace. It is suggested that these recommendations could be adapted more broadly to workplaces beyond the legal profession.

Current Experiences of female lawyers in Victoria

19. Although the LIV does not collect data on the prevalence and nature of discrimination in relation to pregnancy at work and returning after parental leave, it has been provided with data from JobWatch and the VEOHRC which signifies that

[4] VEOHRC Report p.14-15.
[5] VEOHRC Report p.18.
[6] VEOHRC Report p.18.

discrimination on the basis of pregnancy is a common issue that is arising in the workplace. For example, data provided by JobWatch to the LIV suggests that over the last 10 years the number of pregnancy related discrimination calls has doubled. The LIV notes that the VEOHRC in its 2012/2013 Annual Report reported there were 54 pregnancy discrimination complaints made with respect to employment in the 2013/2013 financial year.[7] It also notes that recent statistics released by the Fair Work Ombudsman contained in the 2012/2013 Annual Report suggest that for the first time, pregnancy discrimination is the most common complaint made to the Ombudsman, overtaking disability discrimination.[8]

Law Society of New South Wales' Advancement of Women in the Legal Profession Project

20. Another Law Council Constituent Body, the LSNSW, also has a strong history of supporting the advancement and retention of women in the legal profession, including through its flagship thought leadership project on the advancement of women in the profession. Following the publication of the first report in December 2011, the LSNSW has worked to implement a series of recommendations intended to have a positive impact on the experiences of women solicitors in NSW, including the initiatives in relation to flexible working arrangements and returning to work after parental leave, which are relevant to the following question in the National Review Issues Paper relating to the policies or programs that assist in the retention of employees while pregnant and on return to work after taking parental leave (discussed later in this submission).

21. More information about the Law Society's work on the advancement of women in the profession, including the flexible working and return to work resources, is available online at www.lawsociety.com.au/advancementofwomen.

2008 Senate Committee on Legal and Constitutional Affairs Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act ('the 2008 SDA Inquiry').[9]

22. The 2008 SDA Inquiry was a broad ranging inquiry that included consideration of: the scope of the SDA, and the manner in which key terms and concepts are defined; the extent to which the SDA implements the non-discrimination obligations of the Convention for the Elimination of Discrimination against Women ('CEDAW') or other international instruments; and the consistency of the SDA with other Commonwealth and state and territory discrimination legislation, including options for harmonisation.

23. The Law Council and the New South Wales Bar Association ('the NSW Bar') made a joint submission to 2008 SDA Inquiry. The Law Council also gave evidence at the public hearing of the Inquiry.[10] In its submission the Law Council and the NSW Bar

[7] VEOHRC 2012/2013 Annual Report p. 44, Table of Enquiries received by issue for 2011/12 and 2012/13 available at www.humanrightscommission.vic.gov.au.
[8] Fair Work Ombudsman 2012/2013 Annual Report p. 32 available at http://www.fairwork.gov.au/Publications/Annual%20report/Fair-Work-Ombudsman-Annual-Report-2012-13.pdf.
[9] Further information about this inquiry, the Report and Recommendations, the Law Council's submission and the Government's response to the Senate Committee's recommendations, is available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2008-10/sex_discrim/index.htm.
[10] Further information about this inquiry, the Report and Recommendations, the Law Council's submission and the Government's response to the Senate Committee's recommendations, is available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2008-10/sex_discrim/index.htm. A copy of the Law Council's submission is available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=6A23F6BD-1C23-CACD-2250-807AF545B13D&siteName=lca.

commented on the effectiveness of the SDA in removing barriers to women's sustained participation and progress in the legal profession.

24. The submission noted that the legislative framework created by the SDA has over the past twenty four years significantly reduced overt unlawful sexual discrimination in Australia. It also noted that the gap in disparity of incomes, education and labour market participation suggests that gender bias has in Australia been substantially reduced relative to the position in the 1960's and 1970's[11] and that labour market reforms in Australia (and overseas) have fostered women's greater participation in the workforce, including the formerly male dominated legal profession.

25. However, the submission also noted that there are ongoing concerns for the status of women involved in the law, including the gender income disparity and female under representation within the senior ranks of the practising profession and judiciary and the less favourable treatment they receive which hinders women's progression in the law, it is also believed to contribute to the high attrition rates of female practitioners.

26. Many of the experiences and considerations identified in this submission as impeding the effectiveness of the SDA at eliminating sexual discrimination, also apply to the experiences of discrimination on the grounds of pregnancy or return to work after parental leave.

27. For example, the submission noted that a body of jurisprudence has developed that provides an insight into the discrimination that many women lawyers face as they attempt to balance work life and family responsibilities. The submission included commentary on *Hickie v Hunt and Hunt* [12] where it was held in *Hickie* that the requirement for a "contract" partner (salaried rather than equity) in a law firm to have to work fulltime upon her return from maternity leave amounted to indirect discrimination. The fact that Hickie was pregnant when she was appointed was known to the firm. She returned from leave to work part time, however her practice had run down. Hickie claimed to have been the victim of discrimination based on the firm's failure to properly support her practice during her absence and her later period of part time work. She claimed the decision not to renew her contract in the circumstances, amounted to unlawful discrimination based on her being treated less favourably on grounds of sex, marital status, pregnancy, potential pregnancy and family responsibilities. Presiding over the hearing, the [then] Human Rights and Equal Opportunity Commissioner Elizabeth Evatt held that the requirement to work full time would inevitably disadvantage women practitioners who, like all women, carry the majority of family carer responsibility.

28. The submission also referred to a decision of June 2008 where the Federal Court recognised the ongoing and historical "disadvantage of women in the legal industry" was recognised. In *Victorian Women Lawyers Association Inc v Commissioner of Taxation*,[13] the Federal Court was invited to take judicial notice of the "disadvantage" of women practitioners in the legal profession. In accepting this as a matter of "common knowledge…generally" and taking it on judicial notice, Justice French observed (at [116]):

[11] F Argy Equality of Opportunity in Australia Myth or Reality; the Australia Institute Discussion Paper Number 85 April 2006 p15.
[12] *Hickie v Hunt and Hunt* [1998] EOC 92-910.
[13] [2008] FCA 983 (27 June 2008). This decision involved an application by the Victorian Women Lawyers Association Inc (VWL) to the Commissioner of Taxation for a private ruling that VWL was exempt from any obligation to pay income tax on the basis that it is a charitable institution or an association established for community service purposes. The Commissioner of Taxation refused to make such a ruling and the VWL successfully appealed to the Federal Court.

… VWL, in its written submissions, identified the social fact for which it contended. … The social fact propounded was the historical and persisting disadvantage of women in relation to their participation and career advancement within the legal profession. At that level of generality there was no dispute. I am prepared to take judicial notice of it.

29. His Honour further observed that the SDA and CEDAW can be taken as:

…indicative of a now long standing social norm or community value that attaches public benefit to the removal of barriers to the advancement of women, on an equal basis with men, in all fields of human endeavour, including participation in the professions and in public life.[14]

30. The 2008 SDA Inquiry made a number of recommendations for reform to the SDA and other relevant legislative provisions, many of which are relevant to the current inquiry and some of which are discussed in further detail below.

Law Council's National Attrition and Re-engagement Study

31. Research shows that although women are graduating with law degrees and entering legal careers at higher rates than men, there are significantly fewer women continuing their legal careers into senior positions within the legal profession. Representative statistics of women in senior positions within the legal profession indicate the women hold approximately 22 per cent of the most senior positions in law firms (as partners, principals, directors or in sole practice); 19 per cent of the Australian Bar population; and 6 per cent of all Queen's Counsel and Senior Counsel positions.

32. The Law Council moved to examine and act on the issue of the high attrition rates of women in the law through its Strategic Framework for the Recruitment and Retention of Women Lawyers, which was developed in consultation with the Law Council's Equal Opportunity Committee and Recruitment and Retention of Lawyers Working Group. The Framework aims to reduce the attrition rate through a range of initiatives including a National Attrition and Re-engagement Study ('NARS').

33. The objective of the NARS is to obtain quantitative data and confirm trends in progression of both male and female lawyers and produce a report outlining practical measures which can be implemented to address the causes of high attrition rates among women lawyers, and re-engage women lawyers who have left the profession. These measures will encompass strategies targeted at different cohorts of women lawyers, including:

(a) women working in small, medium and large law firms;

(b) women in early, mid and later stages of their career as a legal practitioner;

(c) former, current and aspiring women barristers; and

(d) women who have left private practice (to encourage re-engagement with the legal profession).

The study involves an online survey of lawyers to obtain quantitative data on drivers of attrition, career progression and re-engagement among female and male lawyers, and in-depth interviews with survey participants and key stakeholders to further explore the underlying reasons behind these trends.

The 15-20 minute online survey was launched on 6 May and remained in the field for four week ending 31 May 2013 to over 59,000 practising and non-practising lawyers through:

[14] *Victorian Women Lawyers Association Inc v Commissioner of Taxation* [2008] FCA 983 at [122].

(e) the Law Council's constituent bodies;

(f) key stakeholders, including heads of selected legal Government departments and representatives from State and Territory women lawyers' groups; and

(g) Research Now, online fieldwork specialists who provide high quality research-only online panel samples.

34. The response rate to the survey was excellent, well surpassing the numbers required for a statistically significant and representative sample of the population surveyed. The survey total responses and jurisdictional breakdowns of participants are produced in the tables below.

Jurisdiction	*% of total*
Australian Capital Territory	3.6%
New South Wales	51.7%
Northern Territory	2.0%
Queensland	8.5%
South Australia	2.4%
Tasmania	2.9%
Victoria	16.1%
Western Australia	11.3%
Outside Australia	1.4%
Total	100.0%

	Total responses	*Total female responses*	*Total male responses*	*Survey participants who self-nominated to participate in a follow-up interview*
Lawyers holding a practicing certificate	3 801	2,754	1,047	1 251
Lawyers who are no longer practising	83	71	13	32
Lawyers who have never practised	75	53	22	32

35. A total of 80 in-depth interviews were subsequently conducted by phone with self-nominated survey participants and stakeholders, including lawyers who are currently practising, lawyers who have left the private profession or Bar and law graduates who have never practised.

36. The survey included a number of questions around the personal experiences of participants in the workplace in relation to discrimination due to pregnancy, gender, age and family or carer responsibilities. The survey asked participants a number of questions regarding their experiences in accessing varied types of flexible working arrangements. This included asking participants whether they accessed any of a number of types of flexible working arrangements, and the reasons behind why they did or did not choose to do so. Participants were also asked detailed follow-up questions about how the arrangements worked in practice, including the support received within their organisation and the outcomes of how it impacted their career path and opportunities for promotion.

37. The Law Council looks forward to the release of the final report and measures to guide future policy directions on how to address the attrition of women lawyers and re-engage lawyers who have left the profession. The launch of the final report is anticipated to take place in early 2014 and the Law Council would be pleased to provide the Commission with a copy once this is available.

TOPIC 5: What concerns employees?

38. The LIV has provided the following comments in response to the questions in topic 5 relating to the challenges employers face in accommodating pregnant employees and women and men returning to work after parental leave, from the perspective of law firms and employees in Victoria.

39. The LIV is of the view that many employers do not necessarily understand their legal obligations to accommodate pregnant employees and employees returning to work after parental leave. It also observes that small business may struggle with their legal obligations as they do not have dedicated human resources staff to assist. On this basis, the LIV suggests that there is a need for greater education for employers in relation to their obligations in this area.

40. Similar comments were outlined by the Law Council and the NSW Bar Association in the submission to the 2008 SDA Inquiry and noted by the Australian Law Reform Commission ('ALRC') in its 1994 inquiry on the discriminatory effect of Australian laws on women's full equality the ALRC considered the role played by discrimination, sexual harassment and barriers of a structural and cultural nature to this state of affairs. Observing that anti-discrimination and affirmative legislation alone were unlikely to address the deep seated causes of discrimination, the ALRC called for professional associations to institute a range of measures including assuming an educative role on the obligations for legal firms under the federal SDA.[15]

41. The ALRC recommended that material on feminist legal theory and on women's experiences be integrated into the curricula materials of both undergraduate law students and graduates undertaking pre-admission requirements.[16] Similar recommendations were made for the addition of gender bias content into continuing professional development and specialist accreditation coursework materials.

42. The Law Council and the NSW Bar Association have previously submitted that legal education could play a pivotal role in developing lawyers that are sensitive to and intolerant of gender bias, thereby assisting in removing the barriers to women's sustained participation in the legal industry. These submissions apply equally to address disadvantage or discrimination experienced by male employees returning to work after parental leave.

[15] Australian Law Reform Commission's Inquiry on the Discriminatory Effect of Australian Laws on Women's Full Equality (1994) ALRC 69 Part 1 Chapter 3 at 3.2.
[16] ALRC Report 69 Part 1 Chapter 8.

TOPIC 6: What is the current national legal and policy framework relevant to the rights of pregnant employees and women and men returning to work after taking parental leave?

43. The AHRC's Issues Paper summarises the current national legal and policy framework relevant to the rights of pregnant employees and women and men returning to work after taking parental leave as follows:

- The *Sex Discrimination Act* (Cth) ('SDA') – which makes it unlawful to treat a person unfairly because they are pregnant, potentially pregnant, breastfeeding or have family responsibilities. It 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 conditions of employment; or denied equal access to training opportunities. It provides that women who are pregnant should be able to continue to work in the same way and under the same conditions as other employees, unless there are valid medical, safety, or pregnancy-related reasons.
- The *Paid Parental Leave Act 2010* (Cth), which established Australia's first paid parental leave scheme.
- The *Fair Work Act 2009* ('FW Act') which sets out minimum terms and conditions of employment in Australia through the National Employment Standards ('NES'). Under the NES, most employees who have completed 12 months service have a right to unpaid parental leave and to return to work after taking parental leave. Many employees may request flexible working arrangements, such as a change in hours, patterns or locations of work from their employer. In addition, employees returning to work after taking parental leave are entitled to return to the same position they held before they commenced their period of parental leave, provided that position still exists. However, if that position no longer exists, an employee is entitled to return to an available position for which they are qualified and suited nearest in status and pay to the pre-parental leave position.
    - A pregnant employee who has completed 12 months service and can show that she is fit for work, but that it is inadvisable for her to continue in her present position because of illness, or risks arising out of her pregnancy, or hazards connected with that position, is entitled to be transferred to an appropriate "safe job". If there is no appropriate "safe job" available, the employee may be entitled to paid or unpaid "no safe job leave" for the period of risk.
    - Employers must seriously consider a request for flexible working arrangements but may refuse on reasonable business grounds. Factors that may be relevant include: the effect on the workplace such as financial, efficiency, productivity and customer service impact; inability to organise work among existing staff; inability to recruit a replacement employee or organise practical arrangements to accommodate the employee's request.

44. The Law Council is grateful for this summary of the relevant legislative framework, and provides the following comments in response to the relevant questions outlined in Topic 6 of the Issues Paper.

45. In making these comments, the Law Council acknowledges the extensive previous work undertaken by the AHRC and other bodies that may be relevant to this section of the inquiry including the:

- Australian Law Reform Commission's Inquiry on the Discriminatory Effect of Australian Laws on Women's Full Equality (1994) ALRC 69;
- AHRC's Report Pregnant and Productive: It's a right not a privilege to work while pregnant (1999);[17] or
- 2008 SDA Inquiry.

46. The Law Council also notes that not all of the recommendations made during these inquiries have been implemented, which has lead to continued gaps in the current legislative and policy framework that have previously been identified as contributing to experiences of discrimination against women, but also in particular, discrimination against pregnant women and men and women who return to work after parental leave.

Q6.2.1 Does the law adequately protect pregnant employees and parents returning to work after taking parental leave against discrimination?

47. There are many features of the current legislative framework that are designed to protect pregnant employees and parents returning to work after taking parental leave against discrimination

48. For example, reforms introduced by the *Sex and Age Discrimination Legislation Amendment Act 2011*, which:

- ensure that protections from sex discrimination apply equally to women and men;
- extend existing protections from discrimination on the grounds of family responsibilities to both women and men in all areas of work;
- establish breastfeeding as a separate ground of discrimination;[18]

49. Amendments were also by the *Fair Work Amendment Act 2013* to extend measures in the *Fair Work Act 2005* (Cth) designed to assist pregnant employees and parents returning to work, for example changes that mean that:

- special maternity leave taken no longer reduces the period of parental leave, allowing women who suffer illness during their pregnancy to access unlimited unpaid leave during pregnancy without there being any impact on their parental leave period;
- concurrent parental leave for employee couples is now able to be taken for up to 8 weeks and in "separate periods", rather than in a single 3 week period;

[17] A copy of this report is available at https://www.humanrights.gov.au/publications/pregnant-and-productive-its-right-not-privilege-work-while-pregnant-1999.
[18] SDA s7AA.

- the right to request flexible working arrangements has been extended to parents of school age children, rather than only to parents of children under school age; and

- transfer to a safe job is now an entitlement for all pregnant employees, regardless of their access to parental leave. Where there is no entitlement to parental leave, then "unpaid no safe job leave" will be provided to those employees.

50. Despite these welcome reforms, key gaps in protections against discrimination on the grounds of pregnancy and return to work remain, as do questions and challenges relating to the implementation of policies designed to assist pregnant employees and parents returning to work. Some examples of the identifiable gaps in legislative protections and implementation challenges are outlined below.[19]

FW Act and Flexible Work Arrangements

51. The FW Act contains a number of important protections against unfair or discriminatory treatment in the work place. For example the FW Act*:*

- provides that an employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.[20] Significantly, there is a reverse onus of proof for such claims. This means that where an employee alleges that they have been the subject of prohibited adverse action by their employer, it is presumed that the action was taken for that reason or with that intent unless the employer proves otherwise;
- includes caring responsibilities as a ground for unlawful termination claims;[21]
- contains civil remedy provisions and penalties dealing with unlawful discrimination,[22]
- contains expanded equal remuneration provisions, which enable Fair Work Australia to make orders to ensure that there will be equal remuneration for work of equal or comparable value.[23] Equal remuneration orders can be sought on the application of an affected employee, an employee organisation representing affected employees, or the Sex Discrimination Commissioner; and
- provides the Fair Work Ombudsman with significant powers to investigate non-compliance with the provisions of the *Fair Work Act,* including, for example, the powers to initiate an investigation into adverse action taken by an employer

[19] The Law Council notes that although its comments focus on the relevant provisions of the *Fair Work Act 2009* (Cth) ('FW Act') and the SDA, gaps may also persist in other relevant laws.
[20] See FW Act s351. The acts which may constitute "adverse action" against an employee or prospective employee are set out at FW Act s342. For adverse action to constitute 'unlawful discrimination' under the Act there must be a connection between the adverse action taken and the attributes set out in s351. That is, the adverse action must have occurred because of a person's or group's; race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
[21] FW Act s772 (1)(f).
[22] FW Act s539.
[23] FW Act s302. The Law Council notes that the meaning, scope and application of this provision is currently being considered by Fair Work Australia in the Fair Work Australia Equal Remuneration Case 2010 (C2010/3131). For further information on this case, including submissions, statements and decisions, and transcripts, can be found at http://www.fwa.gov.au/index.cfm?pagename=remuneration&page=introduction.

against an employee on a prohibited ground, without requiring a complaint to be made.[24]

52. Section 65 of the FW Act also affords employees who have completed 12 months of service with the right to request flexible work arrangements where that employee is a parent or has carer responsibility for a child that is under school age or is under 18 years of age and has a disability. However, an employer may deny a request for flexible working arrangements on the basis of "reasonable business grounds". In 2013 a provision was inserted into the FW Act which provides some guidance as to what "reasonable business grounds" includes (discussed further below).

53. The Law Council welcomed the introduction of the FW Act flexible work provisions and, as discussed below, has also expressed support for the inclusion of a positive obligation on employers to accommodate an employee's reasonable request for flexible work arrangements, such as that found in section 19 of the *Equal Opportunity Act* 2010 (Vic) (EO Act (Vic)).

54. Unlike the FW Act flexible work provisions, section 19 of the EO Act (Vic) provides factors which will be considered to determine whether an employer has unreasonably refused to accommodate parental or carer responsibilities which include amongst other things: the nature of the role being offered, the financial circumstances of the employer, the size and nature of the workplace and the employer's business, and the number of persons who would benefit from or be disadvantaged by accommodating the responsibilities.

55. In its previous advocacy on the EO Act (Vic), the LIV has recognised that there is no cause of action available to an employee if an employer makes the decision to deny a flexible working arrangement, other than pursuing a claim of discrimination (if an attribute exists) or adverse action.

56. In February 2012, the LIV provided a submission to the Fair Work Act Review Panel.[25] In the submission, the LIV advocated for a civil remedy for breach of section 65 of the FW Act. The LIV contended that having a civil remedy would ensure that there was a mechanism to challenge an employer's refusal of the request when purportedly based on "reasonable business grounds".

57. In April 2013, the LIV provided a submission to the Senate Standing Committee on Education, Employment and Workplace Relations regarding the Fair Work Amendment Bill 2013.[26] The LIV raised concerns with respect to the right to request flexible work arrangements in light of the broadening of the categories in which flexible work could be requested. The LIV suggested that the amendments may create an incorrect impression in the mind of the employee that they are entitled to flexible work, rather than entitled to be considered for flexible work arrangements. The LIV considered that this may largely depend on how these amendments are communicated, as the wording of the amendments themselves do not detract from the current position that this involves a "right to request".

[24] *Fair Work Act 2009* (Cth) s682(1)(c). For more information on the functions and powers of the Fair Work Ombudsman see *Fair Work Act 2009* (Cth) Part 5-2, see also http://www.fairwork.gov.au/about-us/pages/default.aspx .
[25] Submission available here: http://www.liv.asn.au/getattachment/69ab9c96-5f06-49d9-ab16-a9182f631b6e/Review-of-the-Fair-Work-Act.aspx.
[26] Submission available here: http://www.liv.asn.au/getattachment/ec1bb498-30ed-41e2-8a44-03c33ed806b9/Inquiry-into-the-Fair-Work-Amendment-Bill-2013.aspx.

58. The LIV again submitted that the FW Act should provide civil remedies for statutory redress in circumstances where an employee's request for flexible work arrangements is refused on "reasonable business grounds". The LIV expressed the view that civil remedies for statutory redress provide impetus for employers to not only consider the importance and relevance of flexible workplace arrangements in their workplaces but to give proper and thorough consideration to a request for flexible work arrangements through active consultation with employees. These reforms are discussed in further detail below.

59. LIV members have also raised concern over employees being made redundant whilst on maternity leave. The LIV notes that the FW Act's National Employment Standards (NES) provides the minimum standards that employers must abide by with respect to redundancy,[27] however there appears to be a lack of understanding on the part of employers of their obligation to follow genuine redundancy processes including the requirement to consult with employees and offer redeployment opportunities, or risk claims of discrimination, unfair dismissal, adverse action or constructive dismissal.

2013 Amendments to the FW Act

60. As noted above, a number of measures contained in the FW Act which assist pregnant employees and parents returning to work were altered or extended by the *Fair Work Amendment Act 2013* ('FW Amendment Act') which was assented to on 28 June 2013.

61. The LSNSW's Employment Law Committee ('the LSNSW Committee') has considered these amendments in detail and provides the following comments and raises the following questions on changes relating to: special maternity leave; concurrent parental leave; right to request flexible work arrangements; and transfer to a safe job.

Special maternity leave

62. The FW Amendment Act removed the mechanism which reduced the amount of parental leave available by the same amount of special maternity leave taken by the employee. As a practical matter for employers, this has the effect of providing unlimited unpaid leave for pregnant employees for the duration of their pregnancy.

63. For employers this means there is a reduced ability to budget for the total cost impact of the pregnancy on their business as there is no longer a single maximum period of leave, but rather a combination of special maternity leave and parental leave.

64. During pregnancy a sick employee appears to have the option to take special maternity leave or personal/carer's leave. The LSNSW Committee notes that it is unclear whether this is the case for any illness that a women suffers while she is also pregnant, or only for pregnancy-related illnesses. It suggests that this issue should be clarified to strengthen the operation of these provisions.

65. The LSNSW Committee also notes that before taking special maternity leave there is no requirement for an employee to first exhaust all accrued paid personal/carer's leave (as is the case with access to unpaid carer's leave under section 103(3) of the FW Act). It queries why special maternity leave should be different from unpaid carer's leave in that accrued personal/carer's leave should not first be exhausted to access it.

[27] See for example http://www.fairwork.gov.au/factsheets/FWO-Fact-sheet-Notice-of-termination-and-redundancy-pay.pdf.

66. The LSNSW Committee also notes that during a period of special maternity leave the employee will not accrue leave requiring adjustments to be made to the accruals register for that period.

67. From an employee's perspective this measure should provide greater access to special maternity leave, without impacting on the period of time allowed to be taken as parental leave. The LSNSW Committee considers this to be an enhanced flexibility measure that will assist in the management of an employee's pregnancy where there is an illness and transfer to a safe job is not an option.

68. The LSNSW Committee notes that providing increased access to special maternity leave allows paid personal/carer's leave to be rationed out by the employee at their own election and alleviates the financial implications for that employee where there are a number of anticipated absences during a more complicated pregnancy.

Concurrent parental leave

69. The FW Amendment Act also increased access to concurrent parental leave (both adoption and birth) for employee couples, with the following significant consequences for employers and employees, including:

(a) an increase in the concurrent leave that is allowed to employee couples of more than double the existing amount – from three weeks to eight; and

(b) the periods (other than the initial period) may be taken at any time during the primary carer's parental leave period at the election of the employee who must only provide notice to, rather than seek the agreement and approval of, the employer.

70. Under the FW Amendment Act, the notice required to be given to an employer that periods of concurrent leave will be taken (other than the initial period), if not provided in advance, can be provided as soon as practicable (similarly to personal/carers leave). In the case of concurrent leave there is no guidance as to what sorts of circumstances might make the immediate taking of such leave acceptable. The LSNSW Committee suggests that this increases the lack of clarity for all parties and reduces the employer's ability to adequately plan for the leave.

71. The LSNSW Committee further notes that under the FW Amendment Act, there may be between one and four periods of concurrent leave that the employer must make alternative arrangements for, of at least two and at most eight weeks. For employee couples the increase in allowable periods of concurrent leave is a significant improvement and has the practical effect of promoting equity in responsibility for the care of children. The changes promote the important role played by both parents in raising a child and also support the health of the primary carers during a high risk period.

72. The LSNSW Committee considers that the clarity now provided for employee couples highlights the absence of clarity regarding the operation of concurrent leave for non-employee couples. For example, under the FW Act as currently drafted, it is unclear:
    - what the position is where the employee is, for instance, the partner of a woman who has given birth;
    - what obligations are imposed on that employer to provide unpaid leave to such an employee on a concurrent basis; or

- whether the employer is able to refuse a two week period of parental leave (after the initial period) where the employee provides their employer with the relevant notice and it is within the eight week total, and if not, what sorts of reasons will be acceptable for the employee in the same circumstance giving no notice.

Right to request flexible working arrangements

73. Amendments to section 65 of the FW Act made by the FW Amendment Act have expanded the access to the right to request flexible working arrangements to more groups of employees. Prior to the recent amendment, the right to request flexible working arrangements was limited to a parent of a child under school age. The FW Amendment Act extended this right to request flexible working arrangements to a parent of a school age child, or younger.

74. Section 65(1B) of the FW Act also expressly provides that an employee who is a parent or has responsibility for the care of a child and is returning to work after taking leave in relation to the birth or adoption of the child may request to work part-time to assist the employee to care for the child.

75. Employers may refuse a request for flexible working arrangements only on "reasonable business grounds". Section 65(5A) of the FW Act sets out a list of what may constitute "reasonable business grounds":

> *(5A) Without limiting what are reasonable business grounds for the purpose of subsection (5), reasonable business grounds include the following:*
>
> *that the new working arrangements requested by the employee would be too costly for the employer;*
>
> *that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;*
>
> *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;*
>
> *that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;*
>
> *that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service."*

76. The LSNSW Committee observes that it is apparent that the list at s 65(5A) of the FW Act is not exhaustive but it specifies the kind of grounds by inclusion. There is a qualitative judgment to be made as to whether the circumstances of the kind listed are met; for instance, whether the new working arrangements are "too costly" or would result in "a significant loss in efficiency or productivity" or have "a significant negative impact on customer service". In the LSNSW Committee's view, consideration could be given to adding a temporal element to the grounds. For example, a proposal might be affordable in the very short term but too costly if in place for a longer period.

77. The LSNSW Committee observes that for employees, it is likely their requirement for flexible work arrangements will change considerably over the pre-school and the early

school life of their child or children. It is possible that any single employee could make a number of requests in the course of his or her employment and each such request would be the exercise of a workplace right and be within the general protection afforded by s 340 of the FW Act.

Transfer to a safe job

78. The FW Act now incorporates the concept of "unpaid no safe job leave" for those employees who do not otherwise have access to parental leave.

79. The implications for employers are essentially that now all pregnant employees must be considered for transfer to a safe job, not just those who have an entitlement to parental leave. The only difference is whether or not the employee will be paid while on no safe job leave. For employers who traditionally do not have employees who would ordinarily gain access to parental leave, especially those with a reliance on casual, seasonal or fixed-term arrangements, this will increase the compliance burden where employees exercise their rights under these amendments. The LSNSW Committee warns that without appropriate education this change could result in an increase in termination or adverse action type claims where proper process is not followed.

80. The LSNSW Committee observes that pregnant employees in more flexible, casual or short term employment situations will have greater access to opportunities for employment and income during their pregnancy, and increased protection from being removed from a roster or otherwise affected in their employment when their pregnancy makes it inadvisable to perform certain tasks.

81. There is however significant uncertainty in relation to this measure and the LSNSW Committee suggests that consideration should be given to clarification of:

(a) Whether written notice should be provided to the employer by the employee in order to enliven the access to transfer to a safe job or no safe job leave. Currently, it is only necessary that the employee provide "evidence that would satisfy a reasonable person that she is fit for work, but that it is inadvisable for her to continue in her current position." This could give rise to a great many circumstances where it may be clear to one party but not the other, either at the time or in hindsight, that such access should have been given. For instance, a pregnant woman could complain about swollen feet to her employer. If she is in a standing centric role, then this may be sufficient for the provision to apply, however if she is in a desk job then it is unlikely that any further accommodations can be made. In both situations the comment and evidence (pointing to the swollen feet) would have been provided. A requirement for a written request, similar to the request for flexible working arrangements, may assist in resolving this issue.

(b) The definition of an appropriate safe job. Further details as to the nature of what an alternative "safe job" might be would assist parties to understand what sorts of measures should be put in place to enable the transfer to take place. For example, whether there are any other suitable ways for performing the employee's work which might reduce or remove the hazard. Alternatively, whether there is a different position in the employer's business that does not require the employee to be exposed to the hazard.

(c) Whether there should be a requirement for the employee to define what specifically they have been advised would be safe, and not safe, to assist the

employer in determining whether there are any appropriate safe jobs within the workplace.

(d) What would happen to the employee's entitlements if the appropriate safe job was a "higher duty" rather than the assumed lesser role. While there is protection for the employee's wages when placed on lower duties for the risk period, there is no corresponding entitlement to any higher duties pay if the appropriate safe job was a "higher duty" position.

82. The LSNSW Committee is of the view that each of these measures would support pregnant employees and parents returning to work. However it also suggests that consideration be given to the possible impact on female workers of a reproductive age competing in the job market. For example, two candidates who differ only on gender will present a different potential cost to the prospective employer. In order to encourage the objects of the measures, education and support will be needed so that the consequence of the measures is not to ultimately make the hiring of female employees of a reproductive age financially or administratively undesirable for some employers.

Sex Discrimination Act

83. In its submission to the 2008 SDA Inquiry,[28] the Law Council and the NSW Bar submitted that although the SDA has been an important legislative initiative to eliminate sex discrimination and sexual harassment and has shifted perceptions about the role of women in the workplace and public life, a range of factors operate to impede the effectiveness of the SDA. These include: the use of complex concepts, including the "comparator test" for direct discrimination; technical language, the inadequate treatment of "multiple discriminations"; and the lack of consistency between the SDA and relevant State and Territory laws.

84. Following the inquiry, the Senate Committee made 43 recommendations for amendments to the SDA. These recommendations included: ensuring that the SDA is interpreted in accordance with the full range of relevant international conventions which Australia has ratified; amending key definitions, such as "marital status" in order to provide protection to same-sex couples from discrimination on the basis of their relationship status; and amending the test for direct discrimination in sections 5 to 7A of the Act to remove the requirement for a comparator and replace this with a test of unfavourable treatment similar to that in paragraph 8(1)(a) of the *Discrimination Act 1991 (ACT)*.

85. It also recommended that:
    - the SDA be amended to make breastfeeding a specific ground of discrimination (Recommendation 12);
    - the prohibition on discrimination on the grounds of family responsibilities under the Act be broadened to include indirect discrimination and discrimination in all areas of employment (Recommendation 13); and
    - the Act be amended to impose a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements, to accommodate family or carer responsibilities, modelled on section 14A of the *Equal Opportunity Act 1995 (VIC)* (Recommendation 14).

[28] A copy of this submission is available at http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/corporate/CthSexDiscrimActInquiryAug08FINAL.pdf.

86. As part of its response to these recommendations, the Commonwealth Government introduced the *Sex and Age Discrimination Legislation Amendment Bill 2010* (the 2010 Bill), which established breastfeeding as a separate ground of discrimination and provided greater protection from sexual harassment for students and workers. The Government also indicated that it would consider a number of other recommendations as part of its broader commitment to streamline and harmonise Commonwealth anti-discrimination laws.

Inadequate protection against discrimination on the grounds of family responsibilities

87. Under the SDA only "direct discrimination" regarding family responsibilities is unlawful.

88. "Direct discrimination" currently involves an employer treating a person with family responsibilities less favourably than a person without such responsibilities. "Indirect discrimination" relating to attributes such as sex is currently defined as imposing or proposing to impose a condition, requirement or practice that has or is likely to have the effect of disadvantaging persons of the same sex.[29]

89. This creates a significant gap in the protection available to employees with family responsibilities, including pregnant women and parents returning to work after taking parental leave.

90. Efforts were made to address this gap by the introduction of the 2010 Bill which sought to ensure that the protections in respect of discrimination on the grounds of family responsibilities extend to indirect discrimination and apply to all areas of employment. This Bill would have inserted a new section 7A into the SDA which would have provided that:

> *(1) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person's family responsibilities if, by reason of:*
>
> *(a) the family responsibilities of the aggrieved person; or*
>
> *(b) a characteristic that appertains generally to persons with family responsibilities; or*
>
> *(c) a characteristic that is generally imputed to persons with family responsibilities;*
>
> *the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or not materially different, the discriminator treats or would treat a person without family responsibilities.*
>
> *(2) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person's family responsibilities if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons with family responsibilities.*
>
> *(3) This section has effect subject to sections 7B and 7D.*

91. This amendment was intended to address Recommendation 13 of the 2008 Senate Inquiry, which provides:

[29] SDA, s5.

The committee recommends that the prohibition on discrimination on the grounds of family responsibilities under the Act be broadened to include indirect discrimination and discrimination in all areas of employment.[30]

92. The Law Council strongly supported this amendment, and was concerned when this aspect of the 2010 Bill failed to pass both Houses of Parliament and was later amended to remove proposed subsection 7A(2) which would have extended protections against discrimination the grounds of family responsibilities to indirect discrimination.[31]

93. The Law Council remains of the view that protection against indirect discrimination on the grounds of family responsibilities is urgently needed and should be included in the SDA.

94. As it noted in its submission to the 2008 SDA Inquiry, the limited operation of the family responsibilities ground of discrimination in the SDA is one of the most significant deficiencies of the legislation. One of the immediate problems which results from the fact that indirect family responsibilities discrimination is not a ground of discrimination under the SDA, is that applicants making such claims are forced to formulate them as a species of indirect sex discrimination under section 5(2) of the SDA. This is problematic for a number of legal and policy reasons.

95. In its submission to the 2008 SDA Inquiry, the Law Council noted that claims of indirect sex discrimination by reason of family responsibilities discrimination made under section 5(2) of the SDA necessarily require the court to make a finding, or accept on the basis of "judicial notice", that women are the primary carers of infants and children.[32] While this may historically have been accurate, and may remain the case for a large number of women, it perpetuates the stereotype that only or primarily women have or ought to have the care and responsibility for infants and children. As a result, the courts have been prepared to find that it is a characteristic that appertains to women that women are the carers of children.[33] The Law Council expressed concern that this interpretation may result in the SDA being a vehicle for perpetuating adverse discrimination against women by allowing a view that it is only women who have the responsibility of children and it is only women who require part time work.

96. In light of these concerns, the Law Council welcomed the amendments enacted in 2011 that amend sections 5 and 7A of the SDA to provide that protections from sex discrimination and direct discrimination in relation to family responsibilities apply equally to women and men. These amendments go some way to addressing the stereotype that only or primarily women have or ought to have the care and responsibility for infants and children will persist. However, without protections against indirect discrimination on the grounds of family responsibilities, the Law Council is concerned that men and women experiencing this form of discrimination will continue to be reliant on establishing a claim of indirect sexual discrimination under section 5(2) of the SDA.

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[30] See 2008 Senate Inquiry Recommendation 13.
[31] For the legislative history of the Bill, see http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4459.
[32] See for instance *Hickie v Hunt & Hunt* [1998] HREOCA 8; *Escobar v Rainbow Printing Pty Ltd (No.2)* [2002] FMCA 122 at [37]; *Mayer v ANSTO* [2003] FMCA 209; *Howe v Qantas Airways Limited* (2004) 188 FLR 1 at [106].
[33] See for instance the findings of Driver FM in *Mayer v ANSTO* [2003] FMCA 209; *Howe v Qantas Airways Limited* (2004) 188 FLR 1.

97. In its 2008 submission the Law Council also noted that mixed interpretations of section 5(2) of the SD Act have arisen in the course of judicial examination as to whether this provision is capable of sustaining claims of indirect family responsibilities discrimination, which give rise to the need for legal clarity in the form of legislative amendment.[34]

98. The Law Council also notes that further protections against discrimination on the grounds of family responsibilities were identified as needed by the 2008 Senate Inquiry into the SDA, which recommended that the SDA also be amended to:

> *impose a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements, to accommodate family or carer responsibilities, modelled on section 14A of the* Equal Opportunity Act 1995 (VIC)*.*

99. This recommendation was supported by HREOC (now the AHRC) which submitted that:

> *... the imposition of a positive obligation on employers would involve "a subtle re-positioning of the SDA, rather than a dramatic change" because the prohibition on indirect [sex] discrimination [in s7B] already prohibits "the unreasonable imposition of barriers that disadvantage, for example, women with family responsibilities." Nevertheless ... the change would be an important one:*
>
> *Firstly, the current obligation is merely implied and may not be immediately apparent to employers and others unless they or their advisers have considerable experience in the operation of the SDA. By making the obligation clear and mandatory, respondents are therefore on clear notice of what they are required to do, rather than having to fathom their obligations from the case law.*
>
> *Secondly, repositioning the obligation as a positive duty is an important statement of principle that employers must actually take steps to redress discrimination. It is a clear call to action, rather than a muffled warning that doing nothing carries a liability risk*[35]

100. The imposition of a positive obligation on employers to accommodate an employee's reasonable request for flexible work arrangements has also been included as a recommendation in the AHRC's *2010 Gender Equality Blueprint*, where it has been observed that:

> *In many workplaces, caring is still seen as an individual choice. Workplaces do not adequately support employees who have caring roles. Many workers are not able to obtain the flexible work arrangements they need. When it gets too hard to juggle their various responsibilities, some have no option but to resign.*
>
> *There has been a lot of talk about the importance of 'flexible work' and getting the 'work-life balance' right.*
>
> *However, the simple reality is that quality flexible working arrangements are still not common in Australian workplaces. Where flexible work policies are available,*

[34] See for example *Escobar v Rainbow Printing Pty Ltd (No.2)* [2002] FMCA 122 at [37]; *Kelly v TPG Internet* [2003] FMCA 584 at [71]-[72]; *Mayer v ANSTO* [2003] FMCA 209; *Howe v Qantas Airways Limited* (2004) 188 FLR 1 at [106].

[35] HREOC, *Submission 69*, pp 104-109. See also Community and Public Sector Union - State Public Services Federation, *Submission 24*, p. 3; Human Rights and Equal Opportunity Commission, *It's About Time: Women, men, work and family,* Sydney, March 2007, pp 60-65.

unsupportive workplace cultures mean that many workers – and men in particular – report being reluctant to use them. … While women report having better access to family friendly employment conditions, using these often comes at the expense of job quality, pay, satisfaction with hours worked and career progression.

To be effective, flexible work arrangements need to be an accepted part of all Australian workplaces. They need to be available to both men and women and cover all forms of caring responsibilities, not just young children.[36]

101. The *Equal Opportunity Act 1995* (Vic), referred to as an appropriate model for this type of provision by the 2008 Senate Inquiry, has since been replaced by the *Equal Opportunity Act 2010* (Vic). A provision has been included in the EO Act (Vic) to protect against discrimination on the grounds of family responsibilities for persons at the time employment is offered,[37] however, the general provision protecting against discrimination on the grounds of family responsibilities (formerly section 14A) remains largely unchanged,[38] and is now contained in section 19 of the 2010 Act 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;

[36] Australian Human Rights Commission's *2010 Gender Equality Blueprint* (June 2010) p. 11, see also Recommendation 2.
[37] See *Equal Opportunity Act 2010* (Vic) s17.
[38] Section 19 of the 2010 Act replicates section 14A of the 1995 Act in full, with the addition of subparagraph 19(2)h) as the only amendment.

(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.

102. In response to the Senate Inquiry's recommendation, the Commonwealth Government did not commit to introducing positive obligations in respect of flexible work arrangements into the SDA. Instead it referred to the protections offered by the FW Act and National Employment Standards which "operate together to promote flexible workplaces that balance the need for employees to manage their work and family responsibilities with the genuine requirements of business."[39]

103. While it welcomed the FW Act reforms, the Law Council considers that there remains a need for a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements, to accommodate family or carer responsibilities, modelled on section 19 of the EO Act (Vic).

104. The Law Council notes that amendments to sections 5 and 6 of the *Disability Discrimination Act* 1992 (Cth), which took effect on 5 August 2009,[40] impose an obligation to make reasonable adjustments for a person with disability, where the failure to make such adjustments has, or would have, the effect that the person with disability is treated less favourably than a person without disability.[41] These amendments illustrate that Commonwealth legislation has recognised that there are particular circumstances where positive action in the form of reasonable accommodation or reasonable adjustment is needed to eliminate discrimination.

105. Amending the SDA to include a positive duty on employers will ensure that the SDA not only protects against direct and indirect discrimination on the grounds of family responsibilities in all areas of employment, but encourage employers to take positive steps to accommodate an employee's reasonable request for flexible work arrangements and reinforce the protections in industrial relations legislation, which covers most but not all employees.

Inadequate protections against intersecting grounds of discrimination

106. It is widely recognised that people of different sex, gender, ethnic, national and racial backgrounds, and/or people who have disabilities, have different experiences of discrimination and are often subject to multiple "layers" of discrimination. This is also true of women who are pregnant, or in respect of women and men who return to work after a period of parental leave.

107. Because federal anti-discrimination legislation addresses discrimination by way of four different separate pieces of legislation, plus the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), each law is designed to address discrimination on the basis of only one type of "difference" or characteristic (or attribute appertaining to that characteristic).

[39] Government Response to the report on the Sex Discrimination Act 1984 (May 2010) p. 8.
[40] These amendments were introduced by the *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* (the Bill).
[41] *Disability Discrimination Act 1992* (Cth) s5(2). Reasonable adjustments' is defined in subsection 4(1) as adjustments that do not impose an unjustifiable hardship on the person making the adjustments

108. For example, the SDA is formulated to address only discrimination on the basis of sex, marital status, pregnancy, potential pregnancy, family responsibilities and sexual harassment. It is not capable of taking into account any variation of the experience of only sex discrimination, such as discrimination on the grounds of both sex and race or pregnancy and disability.

109. In light of this shortcoming, the Law Council has previously recommended amendment of either the SD Act or section 46PO(4) of the *Australian Human Rights Commission Act 1986* (Cth) so that, in cases where complainants allege discrimination on multiple grounds, such as on the grounds of both race and sex, or on the grounds of both disability and sex, the "multiple discriminations" can be appropriately addressed. The Law Council has suggested that such legislative amendment ought to include guidance to the court to take into account the experience of multiple differences in awarding remedies.

Scope of Existing Exemptions to SDA

110. The Law Council is also of the view that the scope of existing exemptions to the SDA is also negatively impacting upon the ability of the current legislative framework to offer meaningful protection against discrimination on the basis of pregnancy or return to work after parental leave.

111. The current exemptions in the SDA can be characterised into a number of different classes, such as: where the exemption relates to capacity to perform the job (section 30); the particular respondents (sections 36, 37, 38, 39); particular employment issues (sections 34, 35); and then there is the broader exemption in relation to acts done under statutory authority. There are also exemptions relating to insurance and superannuation exemptions, sport, combat duties and the provisions to grant exemptions.

112. The Law Council has previously submitted that the scope of exemptions needs to clarified, and the justification for exempting these acts or respondents from liability for acts of discrimination needs to be continually demonstrated in order to be shown to be a necessary departure from the general prohibition on sexual discrimination.

113. The Law Council notes that the LIV made a submission relevant to this issue to the Victorian Justice Department's review of the exemptions from the Equal Opportunity Act 1995 (Vic) conducted in February 2008 that provide a valuable insight into the Victorian experience in this area.[42]

Differences in State and Territory Anti-discrimination law Regimes

114. Currently, there are important differences between the sex discrimination regimes in force in the different Australian jurisdictions, with inconsistent substantive and procedural requirements under Commonwealth, State and Territory anti-discrimination laws.

115. These differences mean that complainants may be in a position where they must elect the jurisdiction within which to bring a complaint, being either through the AHRC or the relevant State or Territory agency.

[42] The Victorian Department of Justice's final report is available at http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Your+Rights/Equal+Opportunity/JUSTICE+-+Equal+Opportunity+Review+Final+Report:+An+Equality+Act+for+a+Fairer+Victoria.

116. The Law Council notes that the amendments to the SDA made in 2011 resulted in a number of additional protections at the Commonwealth level, such as those relating to family responsibilities, and breastfeeding.

117. These amendments have an impact on whether and when complainants elect to bring a complaint under the SDA or a relevant State or Territory Act, particularly as existing discrimination legislation in a number of jurisdictions also extends to the areas of protection now covered by the SDA.

118. While the Law Council has not commented in any detail on the operation of discrimination regimes in the States and Territories, it has advocated for the Commonwealth Government to utilise the SDA as a best practice model for the prohibition of sexual discrimination and the promotion of gender equality in Australia.

119. The Law Council considers that the Commonwealth legislation should provide a high level of protection, and an effective complaints procedure, for persons experiencing discrimination on the grounds of sex - including discrimination on the grounds of pregnancy and family responsibilities. The Law Council is of the view that the Commonwealth Government is well placed to take the lead in this area. The Law Council has also sought to encourage the Commonwealth Government to pursue options for harmonising anti-discrimination laws across jurisdictions and seek to expedite the harmonisation project formerly considered by the Standing Committee of Attorneys-General.[43]

120. The Law Council also notes while other Commonwealth legislation provides important protections against discrimination, particularly when discrimination occurs in the workplace, for example those contained in the FW Act, it notes that these protections are not in themselves sufficient to deal with all matters relating to sex discrimination.

121. The Law Council has submitted that an improved SDA, with its important normative and symbolic significance, broader coverage beyond the employment environment and particular complaints procedure, is required to provide the strongest legislative protection against sexual discrimination and harassment.

Need for consolidated approach

122. In line with the above advocacy, the Law Council supported the Commonwealth Government's past efforts to harmonise and consolidate Commonwealth anti-discrimination laws.[44]

123. It made submissions in respect to the Exposure Draft *Human Rights and Anti-Discrimination Bill 2012* (Cth) (the Draft Bill)[45] and related Discussion Papers and

[43] On 17 September 2011 the Standing Committee of Attorneys-General was renamed the Standing Council on Law and Justice. For further information see http://www.sclj.gov.au. .
[44] Australia's Human Rights Framework, released on 10 April 2010, available at http://www.ag.gov.au/RightsAndProtections/HumanRights/HumanRightsFramework/Pages/default.aspx . As discussed below, the Draft Bill also forms part of the Government's response to the recommendations following the 2009 National Human Rights Consultation and the Governments response to the Senate Legal and Constitutional Affairs Committee's Inquiry into the effectiveness of the *Sex Discrimination Act 1984* (Cth).
[45] A copy of this submission is available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/2010-13/antidiscrimination2012/submissions.

appeared before the Senate Legal and Constitutional Affairs Committee as part of its inquiry into this proposed reform.[46]

124. The Law Council supported many features of the Draft Bill which sought to extend the scope of protection provided by the existing Commonwealth anti-discrimination regime to cover new attributes, such as sexual orientation and gender identity; and to cover new areas, including all areas of public life, for certain attributes. It also contained a definition of discrimination that applies to all attributes, a streamlined approach to exceptions, including a justifiable conduct exception, and a streamlined complaints process with enhanced powers for the AHRC.

125. The Law Council supported these features of the Draft Bill on the basis that it would provide clarity and certainty in the area of anti-discrimination law, which the Law Council considers to be critical to ensuring that all parties are able to understand and access their rights and comply with their legal obligations.

126. Of particular relevance to the National Review, the Law Council supported those features of the Draft Bill that would expand protection provided regarding the attribute of family responsibilities under the Draft Bill to include ”indirect discrimination” on this ground.

127. The Law Council also recommended changes be made to the Draft Bill, such as changes that would extend coverage so that discrimination in respect of all protected attributes, including on the grounds of family responsibilities, is unlawful in all areas of public life; and extend the duty to make “reasonable adjustments” and the right to equality before the law to all protected attributes.

128. On 21 February 2013 the Committee issued a detailed report on the Draft Bill.[47] The majority of the Committee made 12 recommendations for improvements to the Draft Bill, which included the key changes recommended by the Law Council.[48] A

[46] The Law Council has actively participated in each stage of this process, and has developed a policy position in favour of the proposed consolidation of Commonwealth anti-discrimination laws and recommending that the consolidated Act contain certain key features. The Law Council’s support for a single Commonwealth anti-discrimination Act is prefaced on the basis that the consolidation process enhances existing protections and addresses the gaps in protection such as those relating to discrimination on the grounds of sexual orientation, gender identity and intersex status. The release of the Draft Bill for public consultation in December 2012 attracted considerable controversy, largely directed at those elements of the Bill that related to the scope of the test for discrimination; the onus of proof to be applied; and the exceptions to unlawful discrimination (particularly those relating to religious organisations). Some concerns were raised regarding the scope of the attributes to be protected under the Draft Bill, however there remained strong community support for the inclusion of protections on the grounds of sexual orientation, gender identity and intersex status. The Draft Bill was subsequently referred to the Committee for inquiry. The Law Council made a submission to the Committee and gave evidence to it. The Law Council indicated to the Committee that it strongly supported the Draft Bill and in particular the enhanced protections it offered against discrimination, including on the grounds of sexual orientation, gender identity and intersex status. The Law Council also identified some areas in need of improvement, including the definition of ‘direct discrimination’ as unfavourable treatment, which includes conduct that ‘offends, insults or intimidates’ a person. Another area in need of improvement was identified as the general exception provision regarding justifiable conduct by a respondent.

[47] A copy of the Senate Committee’s report is available from: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/anti_discrimination_2012/report/index.htm.

[48] The Committee also recommended making changes to the definition of gender identity and the inclusion of “intersex status”’ as a protected attribute. Dissenting reports were provided by the Opposition and the Greens Senators. The Opposition Senators acknowledged that the existing anti-discrimination laws needed improvement to include protections against discrimination on the grounds of sexual orientation and gender identity, but expressed strong opposition to the Draft Bill. A copy of the Senate Committee’s report is available from: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/anti_discrimination_2012/report/index.htm.

minority report was issued by Coalition Senators strongly opposing the Draft Bill, but supporting limited amendments to the SDA to provide protection against discrimination on the grounds of sexual orientation, gender identity and intersex status.

129. On 20 March 2013, the then Attorney-General, Mark Dreyfus QC MP, announced the Government's decision not to proceed with the consolidation of Commonwealth anti-discrimination laws at this time, and advised that there were significant policy, definitional and technical points that required deeper consideration. The newly elected Coalition Government has indicated that it does not intend to pursue this reform.

130. The Law Council supports reforms to the current Commonwealth anti-discrimination regime that make it easier to access and understand, improve its capacity to address all forms of discrimination, promote substantive equality, and that implement Australia's international obligations in this area.

Q6.2.3 How could the laws and their implementation be strengthened?

131. With assistance from the WLASA the LIV, and the LSNSW, the Law Council has identified the following examples of how the implementation of the existing legislative framework could be strengthened. Many of these suggestions align with the comments of the Law Society of Western Australia during its attendance at the Perth community consultations.

Ensuring access to flexible work

132. Feedback fom LSNSW members during the Advancement of Women in the Legal Profession Project indicates that the availability of flexible working arrangements is a key area in which impediments to the advancement of women continue to exist. While most employers have policies for flexible working, difficulties were experienced translating those policies into appropriate workplace arrangements. Practitioners who reported positive experiences suggested that discussion between individuals, supervisors and colleagues, including clients where necessary, can be effective in devising an arrangement which meets the needs of the individual, the work team, the practice and the client.

133. The LSNSW has published a "Flexible working resource" to help solicitors and their employers capitalise on the benefits of flexible working. The resource draws on the experiences of practitioners and brings together practical tools which may assit them and the practices in which they work. Information is provided on a number of aspects of flexible working including:

(a) types of flexible working arrangements, such as job-share, compressed work week and remote working;

(b) the value of flexible working in attracting and retaining talent and improving productivity; and

(c) ways to develop effective flexible working arrangements, with supervisor tips for success and tips for employees.

134. The resource also includes a sample flexible work proposal or business case and individual flexible work plan, reproduced with the permission of Victorian Women Lawyers.

Improving implementation of return to work provisions

135. The return to work guarantee contained in section 84 of the FW Act provides:

> *On ending unpaid parental leave, an employee is entitled to return to (a) the employee's pre-parental leave position; or (b) if that position no longer exists—an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position.*'

136. While the Law Council welcomes this provision, it is concerned that it may not be implemented effectively.

137. For example, WLASA suggests it is the experience of many female lawyers that the quality of work assigned to them upon returning from maternity leave is substantially diminished from that which was allocated to them prior to going on leave. In particular, WLASA has observed that:

- Upon returning from leave female lawyers may be returned to their previous formal position of Associate or Senior Associate, etc., however, many experience discrimination in relation to the types of files they are allocated. They also often feel excluded from their team and from making decisions due to their returning part time or as a result of the leave they have taken.
- This type of discrimination can also occur prior to women taking leave in the form of being allocated less valuable work or experiencing a reduction in responsibilities as the leave becomes imminent. It can also be that women who are not even pregnant, but recently married, or simply of child bearing age experience this type of discrimination in allocation of work in anticipation that they will take time out to have children.

138. The LIV has also observed that many employees who return to work after maternity leave feel disengaged within the workplace. The disengagement can be the result of the work they are allocated when they return and/or a lack of process regarding re-integration into the workforce which makes the return to work challenging or can even result in employees choosing not to return to work. The LIV suggest that employers should have a range of policies dealing with the various issues faced by employees returning to work.

139. Returning to work after an absence, particularly maternity leave, was also identified as an area where the existance of a policy may not translate to a successful transition back to practice during the LSNSW Advancement of Women in the Legal Profession Project. One strategy identified by the LSNSW for improving the experience of women was to maintain a connection with the profession during the absence. It was also suggested that women may benefit from continuing professional development (CPD) activities which are targetted at those who have been absent from practice.

140. The LSNSW has developed targeted return to work seminars which are designed to provide practical strategies and guidance about the steps practitioners can take to ensure that their return to work after parental leave is successful. The seminars are delivered throughout the year as part of the LSNSW's CPD program. The LSNSW has also established an online "Returning to work" resource which brings together

information to assist practitioners during an absence from the profession and when preparing to return to work.[49]

Expansion of 'Keeping In Touch Days' Provisions

141. Feedback received by the Law Council suggests that returning to work after parental leave often presents particular challenges for both employers and employees.

142. To help address these challenges, both the WLASA and the LIV have suggested that consideration be given to expanding the "*keeping in touch* " provisions of the FW Act and the Paid Parental Leave Act.[50] These provisions currently allow a person to undertake a maximum of ten days employment while on parental leave and are designed to enable employees on parental leave to remain connected with their workplace and assist in the transition back to work after the period of leave has ceased.

143. The WLASA suggests that while many people may not wish to work while on parental leave (and should not be required to), the ten day "keeping in touch" allowance may be ineffective in some instances. For example where a lawyer is working on a very lengthy dispute spaning a few years, it may be that in order to be able to re-join the team upon return, her or she will need to be kept up to date and provide assistance more often.

144. The LIV suggests that the provisions could be strengthened to require a higher level of consultation between employee and employer regarding return to work. LIV members suggest that statutory mandated consultation could alleviate systemic problems for employers and employees regarding returning to work. The LIV further suggests that the *Paid Parental Leave Act* could be amended to provide a notice requirement on both the employer and employee if the return to work date is going to be altered. It is suggested that the inclusion of a timeframe in which an employee must notify an employer of any changes in the intended date of return to work would enable employers to better manage and facilitate return to work for the employee.

Other mechanisms to strengthen the current legislative framework

145. In addition to the above comments, other mechanisms that may assist in strengthening the implementation of the current laws relating to discrimination on the grounds of pregnancy or return to work include:

- An increase in education for employers and employees regarding each party's legislative rights and obligations. In particular, an increased awareness that parental leave is an entitlement that either parent or a combination of parents may take to allow families to discuss shared parenting and potentially encourage more fathers to access these entitlements so that their partners may return to work.
    - For example, the LIV suggests that employees should be educated about their rights when they apply for or access parental leave, for example though the provision of an information pack on their workplace rights. The LIV also suggests that educating employers on the business case for enabling flexible work practices including increased productivity and efficiency could also assist in addressing what apperas to be a

[49] This resource is available at https://www.lawsociety.com.au/ForSolictors/advocacy/thoughtleadership/Advancementofwomen/Onlineresource/index.htm.
[50] See s 79A *Fair Work Act*, and ss 49-50 under the *Paid Parental Leave Act 2010* (Cth).

reluctance by some employers to accept flexible work or carer arrangements. For example, the LIV notes that the VEOHRC Report found that while most of those respondents who made a request for flexible work arrangements under the EO Act (Vic) had their request approved in full, many respondents making such requests also experienced hostility, a lack of support from their employer, felt pressure to work more hours and felt devalued.[51]

- Improved timeframes for making and dealing with complaints in relation to pregnancy discrimination protections. In particular consideration of the following:

  - The likely fact that the person being discriminated against may often have other major health concerns and may be less able to deal with the stress of contesting a decision by an employer. Due to these health reasons they may not file their discrimination or general protections application (eg with AHRC or Fair Work Commission) within the correct timeframe. This is particularly the case for the limited 21 day time period for general protection applications relating to dismissal under the FW Act.

  - Matters relating to pregnancy discrimination being given priority over other discrimination matters when listing a conciliation conference. The timeframes for dealing with pregnancy discrimination mean that once a complaint is made it can take months before a conciliation is listed, by which time the woman is likely to have already had their child. If the matter cannot be conciliated, it proceeds to the Federal Court, which is again a lengthy and expensive process, and many women "drop out" of the process if the conciliation fails, leaving them with no remedy and often no job.

Q.6.3.1 What difficulties are there for employers and employees in understanding relevant work health and safety standards in relation to pregnant employees in the workplace?

146. The LIV has recognised that there are various occupational and safety considerations to take into account when employers allow for flexible work practices. In April 2011, the LIV provided a submission to SafeWork Australia regarding occupational health and safety obligations relating to flexible work practices,[52] in which discussed issues included:

- the scope of employer's legislated safety obligations and responsibilities when allowing an employee to work from home or offsite;
- liability in case of injury;
- the parameters of "working flexibly", and whether liability extends to travelling to, and working in a work space outside the designated home office (eg library); and
- whether risk assessment will be required for those working from home.

[51] VEOHRC Report pp. 23-25.
[52] A copy of this submission, made in June 2013, is available at http://www.liv.asn.au/getattachment/710315f7-a000-473a-aaf2-68b75b598a6e/Draft-Model-Preventing-and-Responding-to-Workplace.aspx.

147. In its SafeWork submission, the LIV expressed the view that these concerns are exacerbated when an employee is pregnant and it may therefore be difficult for employers to provide the safe working environment that they are required to provide by law.

148. The LIV suggested that in order for employees and employers to properly understand the relevant work health and safety standards in relation to pregnant employees in the workplace, SafeWork Australia should be encouraged to draft guidelines on best practice. The LIV suggest that employers would be greatly assisted with the inclusion in the guidelines of information regarding reasonable adjustments that could be made for pregnant employees.

Conclusion

149. The Law Council considers that discrimination against pregnant employees and against men and women returning to work after parental leave is unacceptable. It is grateful for the efforts of the AHRC in ensuring that this issue is carefully reviewed and addressed..

150. The Law Council is confident that the AHRC National Review will provide invaluable quantitative and qualitative data in order to assess the prevalence of such discrimination, and useful insights into the type of action that should be taken to remove discrimination on these grounds.

151. The Law Council is grateful for the contributions of its Constituent Bodies in the preparation of this submission, and for providing relevant feedback to the AHRC in other forms, including through separate online submissions and through community forums. It looks forward to continuing to work with the AHRC to help identify leading practices and strategies for employers supporting pregnant employees and men and women returning from parental leave; and to provide recommendations for future actions to address the forms of discrimination identified through the review process.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.