

Submission to the Productivity Commission

Australian Breastfeeding Association

18 September 2015

Australian Breastfeeding Association

The Australian Breastfeeding Association (“ABA”) is a national organisation dedicated to the support of breastfeeding mothers and babies. ABA provides practical support for mothers wanting to breastfeed their babies and aims to have breastfeeding recognised as culturally important by all Australians and is culturally normal. As Australia’s leading authority on breastfeeding, we support, educate and advocate for a breastfeeding inclusive society.

The ABA provides information and support, predominantly by a volunteer workforce of community members, to mothers, their supporters and health professionals.

The ABA’s purposes of helping mothers to establish and maintain the breastfeeding of their babies and to educate the community, including health professionals and employers, to recognise the importance of breastfeeding, compliments federal and state government health goals to produce a healthier population by increasing rates of breastfeeding beyond initiation.

The Breastfeeding Friendly Workplace Program is an initiative of the Australian Breastfeeding Association. We have been working with organisations to support women in combining breastfeeding and work for many years. During this time we have worked with hundreds of organisations bringing together our expertise with practical experience in helping organisations facilitate their breastfeeding employees’ return to work.

Some of the Benefits of Breastfeeding

It is well established that a number of leading health problems in Australia have been identified as being prevented by, or there being a reduced risk due to, breastfeeding. Among these are gastrointestinal illnesses, respiratory illnesses, asthma, SIDS and some cancers. The health burden of chronic diseases such as diabetes, heart disease and obesity and the potential health gain-cost savings at a population level cannot be ignored.¹ Other

¹ Queensland Health Submission to the Australian Parliament: House of Representatives Standing Committee on Health and Ageing, *The Best Start Report: Inquiry into the Health Benefits of Breastfeeding*, Commonwealth of Australia, Canberra 2007, 17 April 2007, p6.

health benefits of breastfeeding include protection against ear infections, necrotising enterocolitis and sepsis in premature babies and lower IQ.²

Where there is early weaning or no initiation of breastfeeding, the illnesses listed above effect the short and long term health and care, including hospital readmissions and other health services, of these babies who will be more likely to need continued health care throughout their lives.³ Studies show that the longer a mother and baby breastfeed, the better the health outcomes for both the mother and baby. Premature weaning (cessation of breastfeeding) due to factors such as return to work, may prevent such women and babies from better health outcomes throughout their lives.⁴

The health costs associated with illnesses linked to premature weaning are substantial. The National Health and Medical Research Council noted the high costs of hospital care associated with early weaning. Based on Australian research, the attributable hospital costs of premature weaning would be at least \$60 -120 million per year nationally for just 5 illnesses.⁵

Why Returning to work and breastfeeding is an important workplace, health and safety and social issue

Since the 1970s, employers and government agencies have become increasingly aware of the value of women's labour force participation, and also of industrial obstacles that women face. In the last 20 years attention has been given to the the barriers that effect women breastfeeding their babies on their return to work.⁶ In *The Best Start: Report of the Inquiry*

² Australian Breastfeeding Association website: www.breastfeeding.asn.au. See also the World Health Organisation publications and the National Health and Research Medical Council Infant Feeding Guidelines (2003 and 2012).

³ See, for example, House of Representatives Standing Committee on Health and Ageing, *The Best Start Report: Inquiry into the Health Benefits of Breastfeeding*, Commonwealth of Australia, Canberra 2007.

⁴ Ibid.

⁵ Ibid, Chapter 3 on economic benefits of breastfeeding, at 3.60 citing Smith J et al, 'Hospital system costs of artificial infant feeding: estimates for the Australian Capital Territory', *Australian and New Zealand Journal of Public Health* (2002), vol 26, no 6, pp 543–551: see http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=haa/breastfeeding/chapter3.htm. See also Smith,J and Harvey, 'Chronic Disease and Infant Nutrition: Is it Significant to Public Health?'(2011) 14(02) Public Health Nutrition 279–289, see also Smith,JP, McIntyre,E, Craig,L, Javanparast,S, Strazdins,L, Mortensen,K, 'Workplace Support, Breastfeeding and health',(2013) *Family Matters*,No.93,58–73,p58–59; Riordan,J, 'The Cost of Not Breastfeeding: A Commentary' (1997) 13(2) *Journal of Human Lactation*, 93–97.

⁶ eg the ILO Convention 183 (2000), Amendments to anti-discrimination legislation throughout Australia; Department of Health and Aged Care, South Australian Employers' Chamber of Commerce, University of

into the *Health Benefits of Breastfeeding*, the Department of Health and Ageing received evidence, submissions and made recommendations on matters including women returning to work and breastfeeding.⁷ In 2014, the Australian Human Rights Commission's *Supporting Working Parents: Pregnancy and Return to Work, National Review – Report*,⁸ provides evidence for the prevalence of discrimination against women on return to work, including women employees who breastfeed. The Commission also makes recommendations to the reform of Australian laws including the *Fair Work Act 2009* (Cth) with respect to breastfeeding employees. In this regard, a key recommendation is that the law clearly guarantee women employees access to breastfeeding or lactation breaks and facilities to breastfeed their baby at work and or to express their breastmilk.⁹ The Commission report states that 'the National Review recommends that the *Fair Work Act* be clarified to allow employee breaks from work for the purposes of breastfeeding or expressing'.¹⁰ The National Review also identifies breastfeeding and expressing breastmilk at work as a health and safety issue.¹¹

Internationally, the World Health Organisation¹² and nationally, the National Health and Research Medical Council¹³ recommend that babies be exclusively breastfed for six months with continued breastfeeding for up to two years and beyond.¹⁴ However, maternity leave typically expires before the end of the breastfeeding period and in 2011, the Australian Bureau of Statistics reported that 22,200 women did not take leave when their baby was born.¹⁵ In 1996, the significance of breastfeeding to the nation was recognised in the National Breastfeeding Strategy with the most recent such Strategy committed to by all States, Territories and the Federal Government, for the period 2010 to 2015.¹⁶ Australia

Adelaide, (2000), *Balancing Work and Breastfeeding: Important Information for Workplaces*, Adelaide, 1-33; Department of Health and Aged Care, (2000) *Balancing Work and Breastfeeding* (pamphlet for employees/women. Human Rights and Equal Opportunity Commission, *Pregnant and Productive: It's a Right not a Privilege to work: Report of the National Pregnancy and Work Inquiry*, Commonwealth of Australia, 1999.

⁷ House of Representatives Standing Committee on Health and Ageing, *The Best Start Report: Inquiry into the Health Benefits of Breastfeeding*, Commonwealth of Australia, Canberra 2007, chapter on work, pp75-82.

⁸ Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work, National Review – Report*, Sydney 2014.

⁹ Ibid, see, eg, p124.

¹⁰ Ibid.

¹¹ See, for example, p125.

¹² World Health Organisation, UNICEF, (2014), *Global Nutrition Targets 2025: Breastfeeding Policy Brief*, [online] http://www.who.int/nutrition/publications/globaltargets2025_policybrief_breastfeeding/en/ [cited 21 June 2015].

¹³ National Health & Research Medical Council, *Infant Feeding Guidelines*, 2003, 2012.

¹⁴ Note that it is up to one year and beyond for the NHRMC Guidelines.

¹⁵ Australian Bureau of Statistics, *Pregnancy and Employment Transitions Australia*, Nov 2011, 916/11/2012), Canberra, downloaded on 11 December 2014 at [http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/5BAE2DE90539240DCA257AB700100F6A/\\$File/49130_nov%202011.pdf,p5](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/5BAE2DE90539240DCA257AB700100F6A/$File/49130_nov%202011.pdf,p5).

¹⁶ The Strategy is a five year strategy agreed upon by the Prime Minister and all Ministers of the States and Territories.

introduced paid maternity leave in 2010 with the introduction of the Paid Parental Leave scheme providing for 18 weeks paid leave.¹⁷

However, the 2010 Australian National Infant Feeding Survey found that only 39% of babies were exclusively breastfed (essentially, breastmilk only) at 4 months and only 15% at less than 6 months.¹⁸ Studies have found that mothers returning to work before their babies are six months old are less likely to be breastfeeding at six months than mothers who are not employed.¹⁹

The Breastfeeding Friendly Workplace Program, an initiative of the Australian Breastfeeding Association, provides guidance on creating a breastfeeding-friendly workplace including that the provision of a private space or area, preferably with a lockable door, that is not a shower or a toilet, with access to: power, clean running water, refrigeration to store expressed breastmilk, and lactation breaks for the woman to breastfeed her baby or to express her breastmilk.²⁰

In the year 2000, the 'Balancing Breastfeeding at Work' initiative provided information to employers and female employees about options for work arrangements that may be conducive to women continuing to breastfeed after maternity leave ended including: work from home, delay returning to work, work flexible hours, work less hours, bring baby to work, express breastmilk at work, use child care onsite or near work.²¹ However, there is clearly a need for legislated guaranteed breaks for breastfeeding and expressing of breastmilk for women. The anti-discrimination legislation in Australia, both federally and at the state level, does not provide clear guarantees for women and employers to have certainty and, in terms of the federal *Sex Discrimination Act 1984*, this is a criticism that has been raised by legal academics Laura Grenfell and Anne Hewitt.²²

¹⁷ *Paid Parental Leave Act 2010* (Cth). A proposal of a Bill to amend the *Fair Work Act 2009* to enable 26 weeks of paid parental leave in recognition of the WHO recommendation of 6 months exclusive breastfeeding and of *ILO Maternity Protection Convention No.183*, and Article 11.2(b) of the Convention on the Elimination of All Forms of Discrimination against Women, 1979, but was not passed: *Fair Work Amendment (Paid Parental Leave) Bill 2009 No. [sic]2009 1*: downloaded on 10 February 2015, at <http://www.austlii.edu.au/au/legis/cth/bill/fwapl2009349/>.

¹⁸ Baxter, Cooklin et al, 2008.

¹⁹ Ibid. See Baxter, J's review of the *Growing Up in Australia: The Longitudinal Study of Australian Children*, and her statement that policy makers need to be aware of the lack of universal maternity leave entitlement coupled with the lack of breastfeeding friendly work environments and of how the two are related and impact on breastfeeding duration and outcomes: Baxter, J, 'Breastfeeding, employment and leave: an analysis of mothers in Growing Up in Australia, (2008) *Family Matters*, No.80, p17.

²⁰ See <https://www.breastfeeding.asn.au/workplace?q=workplace>; see also Baxter (2008), p24.

²¹ [http://www.health.gov.au/internet/main/publishing.nsf/Content/1658C8EADC83F382CA257BF000209DD8/\\$File/english.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/1658C8EADC83F382CA257BF000209DD8/$File/english.pdf); Baxter (2008) and Smith et al (2013) have also conducted research that supports the flexible work arrangements approach as being more supportive of breastfeeding.

²² Grenfell and Hewitt are critical of the opacity in section 7AA of the Sex Discrimination Act, and the minimal incentives and legislative protections for breastfeeding in Australia, in Grenfell, L & Hewitt, A, 'Supporting breastfeeding mothers in the workplace' [online]. *Bulletin (Law Society of South Australia)*, Vol. 36, No. 7, Aug 2014: 24-25.

It is also to be noted that the ability of the father to access parental leave and flexible work arrangements is important to the success of continued breastfeeding and the sharing of care-work in raising children in Australia.²³

The National Health and Medical Research Council reports on women and breastfeeding and the impact of paid work as follows:

The workplace and parental leave environment has an important impact on breastfeeding rates. The relationship between returning to work and breastfeeding for mothers in Australia is complex, with other interplaying factors, such as maternal and family characteristics, having an impact on the decision to breastfeed.(873) There is probable evidence that intention to work or return to paid employment is negatively associated with both the initiation and duration of breastfeeding.(921,922) Women who are not employed full-time,(922) are self-employed or have flexible working hours are more likely to breastfeed for 6 months. Using only parental childcare has a positive association with continuation of breastfeeding.(921) Where mothers are separated from their infants, they may continue breastfeeding whenever they are together. Continuation of any breastfeeding is of benefit to mother and infant.²⁴

²³ Heron,A, and Charlesworth,S, Working Time and Managing Care under Labor: Whose Flexibility?(2012) ABL 38 (3),214-233, p215-16 – in terms of sharing the care-work load; Baxter(2008), supra, – re breastfeeding duration,p19.

²⁴ Australian Government, Department of Health and Ageing, The National Health and Medical Research Council, *Australian Dietary Guidelines*, Commonwealth Government of Australia, Canberra 2013, p93: downloaded on 16 September 2015 at http://www.nhmrc.gov.au/files_nhmrc/publications/attachments/n55_australian_dietary_guidelines_130530.pdf.

1. Summary of ABA Recommendations

Recommendation 1: That there be legislative reform to provide for working mothers with adequate paid breastfeeding or lactation breaks and access to appropriate facilities for breastfeeding or expressing, including, where viable, a lockable, private room (not a toilet), with access to power, clean running water and refrigeration.

Recommendation 2: That the legislation be reformed to impose on employers a duty to consider all viable options that a woman employee may be accommodated to breastfeed, including express breastmilk, at work and if it is not possible to accomplish this in a workplace that lacks space or facilities, to consider options for the woman to leave the workplace to access nearby facilities to enable breastfeeding and or expressing. That the breastfeeding employee be given a right of appeal by way of Dispute Provisions to the Fair Work Commission against an employer's refusal to accommodate the breastfeeding employee who needs to breastfeed and or express breastmilk. That such appeal be considered on an urgent basis as adverse decisions preventing women from breastfeeding and or expressing during work may impact the mother employee and her baby within hours to days of the decision and beyond.

Recommendation 3: That the *Fair Work Act 2009* and ancillary or related legislation be reviewed to include specific reference to include considerations relating to breastfeeding, including expressing breastmilk, in provisions such as: section 351 'Discrimination', section 62(3) 'Maximum weekly hours', section 65(1A) 'Requests for flexible working arrangements, sections 81-82A 'transfer to a safe job' and 'no safe job leave', section 67 requirement for continuous service and in section 65(2), relevant objects and definition sections, section 352 'Temporary absence – illness or injury', section 772 'Employment may not be terminated on certain grounds, and related provisions, also sections 81 – 82A 'transfer to safe job' and 'no safe job leave', the definition of 'breastfeeding'.

Recommendation 4: That there be a positive requirement for employers to provide an employee returning from parental leave with a template information sheet of her rights and responsibilities under the *Fair Work Act*, occupational health and safety and anti-discrimination laws, as well as any relevant award, enterprise agreement, individual contract or workplace policy and procedures. Such information to specifically include information about rights concerning breastfeeding at work, including expressing breastmilk. This information is to be given prior to return to work with adequate time for the employee to organise breastfeeding accommodations including breaks and facilities with the employer.

Recommendation 5: That that there be legislative reform to develop mechanisms for protection from redundancy, dismissal and non-renewal of contracts for employees who are pregnant, on parental leave or have family and caring responsibilities including breastfeeding. This is in line with the International Labor Organisation's *Maternity Protection Convention No 183* recommendations.

Recommendation 6: That workplace bullying laws incorporate specific reference to women who breastfeed and or express breastmilk, so that these employees are not bullied and are protected

within the prevention of workplace bullying scheme and are clearly covered by the specialist jurisdiction that deals with workplace bullying.

2. Response to questions posed by the Productivity Commission

The ABA has concentrated this submission on particular aspects of the workplace relations system. These are the discrete areas where we see the need for adjustment to ensure enhanced equity and provision for women workers who breastfeed or express breastmilk, or who potentially will do so in future, at work.

In general, with the exceptions of these discrete areas where ABA recommends adjustment, our position is that any protections in place that protect women workers who breastfeed or express breastmilk, including protection against dismissal and general protections as provided in the *Fair Work Act 2009* (Cth), remain unchanged.

The areas that the ABA considers in its recommendations cover the Productivity Commission's call for submissions, including the fair and equitable pay and conditions for employees; productivity, competitiveness and business investment; the ability for employers to flexibly manage and engage with their employees; the ability of business and the labour market to respond appropriately to patterns of engagement in the labour market; barriers to bargaining; and any other issue the submitter views as relevant.

3.1 Entitlements to paid breastfeeding or lactation breaks and access to facilities

In 1919, the third Convention of the International Labor Organisation was the Maternity Protection Convention. One of the recommendations was that women have access to breaks at work to breastfeed. In 2015, the 1919 Convention is almost 100 years ago and yet Australian women still do not have legislated guaranteed breastfeeding or lactation breaks and guaranteed access to facilities to provide a space or private area for breastfeeding or expressing in the workplace and to refrigeration and other necessary facilities. The Maternity Protection Convention was revised in 1952 and then in 2000, with this latter current Convention being referred to as Recommendation No. 183 wherein Article 10 provides as follows:

1. A woman shall be provided with the right to one or more daily breaks or a daily reduction of hours of work to breastfeed her child.
2. The period during which nursing breaks or the reduction of daily hours of work are allowed, their number, the duration of nursing breaks and the procedures for the reduction of daily hours of work shall be determined by national law and practice. These breaks or the reduction of daily hours of work shall be counted as working time and remunerated accordingly.

On a global comparative scale, Australia lags behind many countries in the provision of guaranteed lactation breaks and facilities. In 'Breastfeeding policy: a globally comparative analysis', Heymann, Raub and Earle observed that of the 182 nations that had data for 2012 on the existence of a

national policy for breastfeeding breaks in the workplace, a policy guaranteeing paid breastfeeding breaks is in place in 130 countries and seven countries have policies guaranteeing unpaid breaks.²⁵ There were 45 countries (25%) that had no policy in place and from the map of countries provided in the study, Australia is represented as having no policy in place.²⁶ The study recognised that:

A woman's ability to breastfeed is markedly reduced when she returns to work if breastfeeding breaks are not available, if quality infant care near her workplace is inaccessible or unaffordable, and if no facilities are available for pumping or storing milk.²⁷

Writing in 2007, Boswell-Penc and Boyer stated that:

Over three-quarters of the counties in the world have adopted the International Labor Organization's current standards which include, in addition to maternity leave policies, breastfeeding breaks totalling at least one hour per day. In Mozambique, mothers can have two paid half-hour breaks per day (in addition to normal breaks)...; in Egypt women are granted two half-hour breaks which are paid for 18 months; and in Japan women are granted two half-hour breaks which are paid....In France, mothers are allowed two one-hour breaks and nursing/pumping rooms must be provided by employers; and in Norway...women are allowed two hours daily. In Sweden, which had breastfeeding breaks comparable to the US until the government launched a pro-breastfeeding campaign, a woman can take breaks for pumping or nursing when she wishes. It is noteworthy that Scandinavian success rates have been related to work policies and that, there, few women express milk, as extended maternity leave and on-site childcare are much more available than in the US (Greiner, noted in Hausman,2003,p183). The lack of a supportive legislative framework constitutes a formidable structural barrier to women in the US seeking to combine breastfeeding and wage labor.²⁸

The need to create a clear, supportive legislative framework also finds justification and support in the *Innocenti Declaration* of 1990 where governments have been encouraged to enact 'imaginative legislation protecting the breastfeeding rights of working women and established means for its enforcement'.²⁹ This is a global goal set by the World Health Organisation and UNICEF.

Since 2007, the United States federal government³⁰ and New Zealand³¹ have both legislated for guaranteed lactation or breastfeeding breaks at work. Since 2008, the *Employment Act 2000* of New Zealand provides breastfeeding breaks and these are additional to breaks an employee is entitled

²⁵ Heymann,J, Raub, A, and Earle,A, 'Breastfeeding Policy: a Globally Comparative Analysis', *Bull World Health Organ* 2013; 91: 398-406, at p400, doi: <http://dx.doi.org/10.2471/BLT.12.109363>.

²⁶ Ibid, p402.

²⁷ Heymann et al, supra, p398.

²⁸ Penc-Boswell, M, and Boyer, K, 'Expressing Anxiety? Breast pump usage in American wage workplaces', (2007) 14 *Gender, Place and Culture: A Journal of Feminist Geography* 5, 551-567,pp555-556. Downloaded on 17 July 2015, DOI: 10, 1080/09663690701562248.

²⁹ <http://www.unicef.org/programme/breastfeeding/innocenti.htm>.

³⁰ In 2010, the United States Congress passed a comprehensive health care reform law: the *Patient Protection and Affordable Care Act*, (Pub.L.No.111-148, 124 Stat. 119(2010)) of which section 4207 amended the *Fair Labor Standards Act*. For more critical review of this legislative amendment see, Karin,M, and Runge,R, 'Breastfeeding and a New Type of Employment Law', [2014] 63 *Catholic University Law Review*, 329-370.

³¹ In New Zealand the *Employment Act 2000* (NZ) was amended in 2008 by the *Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act 2008*.

to³² and they are paid breaks (section 69Z). The employer's must ensure that appropriate facilities and breaks are provided to employees who wish to breastfeed, where it is reasonable and practicable (s69Y). A Code of employment relating to employer's obligations is established under section 69ZA. A penalty for an employer who does not comply with section 69Y is imposed by the Authority (section 69ZB). The 'Breastfeeding in the Workplace: A guide for employers'³³ provides information that is far more advanced and readily accessible in New Zealand, and other countries such as the United States, Ireland, and Britain, than in Australia.

Where an employer is dismissive about an employee's breastfeeding in Australia, where the employer does not understand the situation (such as that breastfeeding could be the one thing that is going right for the breastfeeding employee and keeping her together – or where, for example the mother cannot express breastmilk despite trying and despite the fact that she may have an adequate supply and or the baby is refusing to take a bottle – such situations that may cause both the mother and baby distress as well as a threat to the nutrition, hydration and safety of the baby which may be the catalyst for some women to quit work), the arbitrary decision of an employer can end or threaten the breastfeeding relationship within a short amount of time. Paula McDonald's study revealed such a situation where:

Client being pressured by employer about her situation with breastfeeding her baby...Currently working 8am to 4pm, which fits in with baby's feeds. Boss pressuring her to work 9am to 5pm. Client explained she would be happy to do these hours in the future and could they review the situation in a month's time. He told her that her milk should have dried up by now and that her baby should not be refusing a bottle.³⁴

The indication by the mother that the situation could be different within a month or so, illustrates how important time is to the success of continued breastfeeding, how conflicts need to be resolved quickly before there is a breakdown of the workplace relationship and also the temporary nature of breastfeeding, that it is not a permanent situation and it may change as the baby grows.³⁵

The necessity to achieve a speedy resolution of a workplace problem where discrimination is alleged was raised during the Senate Inquiry into the effectiveness of the SDA in 2008.³⁶ As time is of the essence with breastfeeding, due to the physical health detriments to women who are prevented from breastfeeding or expressing including a threat to their ongoing milk supply that feeds their

³² under Part 6D of the Act, though, by agreement the employee may use established breaks instead of additional breaks.

³³ See: employment.govt.nz, the Ministry of Business, Innovation & Employment.

³⁴ McDonald, P, (2006), 'Family Responsibilities Discrimination in Queensland Workplaces: Where Business and Caring Collide', 50(1) *Journal of Industrial Relations* 45-67,p55.

³⁵ Depending on such factors as the introduction of solids and other fluids such as water, the baby dropping a feed or more, etc. See the Australian Breastfeeding Association website, www.breastfeeding.asn.au.

³⁶ Catherine Bowtell of the ACTU explained that it is imperative to keep people in a job when there is a workplace dispute and so the resolution needs to be quick and the workplace relations recover quickly also and work can resume. Likewise, employers may benefit from speedy, non-litigious resolutions, particularly if they have not been aware of the law and are reassured by sections like s7D and s31 of the SDA 1984: *Senate, (December 2008) Standing Committee on Constitutional and Legal Affairs, Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, Canberra, Commonwealth of Australia, December 2008.

babies who are dependent upon what their mother produces, as well as mastitis which may necessitate medical treatment and bed rest for a matter of days, it is imperative that an enforcement or implementation mechanism be encouraged or facilitated and for any dispute to be resolved quickly. In many cases, if disputes are not resolved within a matter of hours or days for the breastfeeding employee who is already back in the workplace³⁷ may quickly experience health problems (such as engorgement and pain³⁸), and or may be expressing in an unhygienic toilet stall either with the knowledge of the workplace or in hiding³⁹ and may be prematurely weaning her baby which was not her intention and or looking for another job. As breastfeeding employees typically do not make formal complaints alleging discrimination,⁴⁰ and as they may fear the loss of their job over something which other managers, staff or even friends, may have made them feel is trivial, there needs to be, perhaps, a workplace inspector and or advisory and enforcement body who can assist the employee and employer to resolve the matter in a short time frame as a priority. In some cases employers may need time to consider or prepare facilities that have been requested or arrange access for the employee but they need to be made aware that in some situations the mother will need immediate accommodation and where there are no 'reasonable' grounds for withholding her use of breaks and facilities, this may be discrimination according to the federal Department of Employment, that has launched a 'Supporting Working Parents' website in July 2015:

Breastfeeding is a protected ground of discrimination. Failure to provide adequate facilities may constitute discrimination and a breach of work health and safety laws. Also, failure to allow an employee to have breaks to facilitate breastfeeding or expressing milk may constitute discrimination.⁴¹

However, as Grenfell and Hewitt have pointed out, the *Sex Discrimination Act 1984* is not sufficiently clear as to what specifically it means in terms of the requirement for not treating women who breastfeed 'less favourably' and whether lactation breaks are covered by the relevant provisions.

³⁷ As opposed to a dispute where the worker is on leave and will not return for some time, though a dispute may affect a worker to consider weaning when but for this negative situation the consideration of premature weaning would not have been contemplated.

³⁸ See, eg Karin and Runge, *supra*, p336. See also Australian Breastfeeding Association website on 'engorgement' and 'mastitis': www.breastfeeding.asn.au.

³⁹ Gatrell documents the exclusion of breastfeeding workers by employers, managers, co-workers and unsupportive workplace cultures in her research including how women go into hiding to continue to breastfeed their babies or express their breastmilk: Gatrell, CJ, 'Secrets and Lies: Breastfeeding and professional paid work', (2007) 65 *Social Science & Medicine*, 393-404. See Karin and Runge for legal cases in the United States where breastfeeding workers have been harassed in the workplace for breastfeeding or expressing, *supra*, p337-338 and corresponding footnoted case citations.

⁴⁰ See the low rates of complaint, or nil complaints, in the AHRC *Annual Reports 2009-2013*, and the State *Annual Reports* and other collected statistics are similar – see as summarised in the AHRC *National Review*, Appendix E, pp238-248, and note the difference in number of enquiries to the number of complaints in the tables E1 and E2, p239, eg 27 enquiries and 0 complaints (2008), 14 to 2 (2009), 28 to 2 (2010), 27 to 0 (2011), 14 to 2 (2012), and 28 to 2 (2013). Note, there is no apparent rise in enquiries or complaints after the 2011 breastfeeding SDA Amendment commenced mid-year.

⁴¹ Department of Employment, *Supporting Working Parents*, Quick Guide for Small Businesses. See section on 'Returning to work': 'How can I support employees who are breastfeeding?': <http://www.supportingworkingparents.gov.au/employers/employees-returning-work-leave#how-can-i-support-employees-who-are-breastfeeding>. Note, the advice to employers is that breastfeeding at work is also a work health and safety issue.

The ABA is aware of only one breastfeeding and work related complaint, in terms of a claim of unlawful discrimination, that has been reported in the public arena. According to reports in articles of *The Courier-Mail* in Brisbane, Senior-Constable Tammy O'Connell filed an application in the Queensland Civil and Administrative Tribunal in 2011, claiming unlawful discrimination by the Queensland Police Service and the Crimes Misconduct Commission. According to *The Courier-Mail*, O'Connell claimed that she was forced to wean her baby to return to work in that her request for a flexible work arrangement to enable her to continue to breastfeed was refused and there existed a QPS policy that breastfeeding and pregnant workers were excluded from performing the half-day weapons training to requalify to perform operational duties. The *Courier-Mail* reported that a Deed of Agreement was lodged and that the QPS and the CMC were to pay Ms O'Connell \$10,000 in compensation, were to issue an apology and were to reinstate Ms O'Connell.⁴² However, there are no decided cases on anti-discrimination law in Australia in the context of breastfeeding and work that may provide guidance on the application of the laws and guaranteed breastfeeding breaks are a necessity for mothers and women of childbearing years to have confidence to plan for breastfeeding.

In the 2014 launch of the National Review, Elizabeth Broderick, the federal Sex Discrimination Commissioner stated that:

...In some of the most distressing cases I heard...women...had difficulties continuing breastfeeding... I have heard of talented and successful women suffering from a lack of self-esteem and self-confidence, which for some, developed into severe anxiety disorders and depression....⁴³

Such discrimination is not necessary where procedures for accommodating breastfeeding employees are clearly spelt out in the legislation. The advantage of coverage by the *Fair Work Act 2009* is the lesser reliance on individual complainants who are typically less resourced to make complaints and take legal action than employer respondents, who may have less energy to pursue a complaint as they are mothers of babies or small children, and who would benefit from assistance by the Fair Work Ombudsman, the Fair Work Commission and inspectors, and by unions. Individual women should not be required to use personal resources, which may be reduced due to the time out of the workforce to have their baby, in order to change systemic discrimination and to try to negotiate breastfeeding breaks and facilities where the legislation is not clear as to the terms of its coverage.⁴⁴

⁴² Eg 'Breastfeeding Cop wins Discrimination Case', September 29, 2011: printed on 26 August 2015 at <http://www.news.com.au/national/a-queensland-cop-has-won-compensation-after-she-was-forced-to-stop-breastfeeding-and-return-to-work/story-e6frfkvr-1226151009523>.

⁴³ Broderick, 'Supporting Working Parents: Pregnancy and Return to Work National Review Launch', Speech delivered on 30 July 2014, at <https://www.humanrights.gov.au/news/speeches/supporting-working-parents-pregnancy-and-return-work-national-review-launch>

⁴⁴ The ABA notes that access to justice issues have been canvassed in another inquiry and refers to such reports as The Senate Inquiry into the effectiveness of the Sex Discrimination Act 1984, 2008, in relations to the chapters on 'Complaints' and 'Enforcement' and also to the body of work by legal academics such as Margaret Thornton, Beth Gaze, Rosemary Hunter, Belinda Smith, Anna Chapman, Paula McDonald and Rosemary Owens. Note that specific references can be provided on request by the Productivity Commission.

Recommendation 1: That there be legislative reform to provide for working mothers with adequate paid breastfeeding or lactation breaks and access to appropriate facilities for breastfeeding or expressing, including, where viable, a lockable, private room (not a toilet), with access to power and refrigeration.

3.2 Duty of employer to consider all viable options to accommodate breastfeeding employee and Right of appeal of decision

Due to the constraints of some workplaces in terms of size or facilities, and due to the possibility of an employer failing to see how an employee who breastfeeds or expresses can be accommodated in a workplace, there needs to be a protection for the employee so that options are explored to enable the employee to access lactation breaks and facilities. Some workplaces are small, for example a takeaway shop front in a food court in a shopping centre. However, this shopping centre may have a parents' room with facilities for breastfeeding and or expressing that staff are able to use or the employee may choose to breastfeed in public in the shopping centre, as this is permitted by laws, including anti-discrimination laws in Australia, federally and in the states and territories. Another scenario may be where the office space is limited but there may be facilities for a breastfeeding mother on another level of the building that are either open to the public or staff of the building or which the employer could lease or join with other businesses in the building to co-lease so that many employees could benefit from various businesses pooling resources or sharing resource costs. The experience of a small business workshop as recounted in the Australian Human Rights Commission *National Review* at p165 is enlightening as to how a breastfeeding employee chose to breastfeed her baby at work while she continued to operate the workshop floor. This example also provides a leading practice on how the workplace was transformed in a short timeframe to be a supportive workplace for breastfeeding as staff came together to learn about breastfeeding and acceptable behaviours around breastfeeding employees.

Alternatively, that 'no safe job' leave be considered as an option for a breastfeeding employee where the workplace cannot or refuses to accommodate the breastfeeding employee. Alternatively, that the employee be given flexible work arrangement options in terms of the time that her work commences in terms of a shorter work period to enable breastfeeding or expressing in lieu of the lack of accommodation of her breastfeeding. This option is outlined by the ILO Maternity Protection Convention No. 183, Article 10(2), as described above in the section providing reasons for Recommendation 1 (see above).

The right to appeal a decision concerning whether a breastfeeding employee will be accommodated in the workplace is vital as this is also a health and safety issue for the mother in terms of avoiding engorgement and accompanying pain, mastitis, and loss of lactation or milk supply (loss of bodily function). The reasons why breastfeeding employees need a quick resolution to their problem are outlined above in the section providing reasons for Recommendation 1 (see above).

Recommendation 2: That there be a duty of the employer to consider the options to accommodate the breastfeeding employee with lactation breaks and facilities. That there be other safeguards such as ‘no safe job leave’ or a reduction in hours of work in accordance with Article 10(2) of the ILO Convention 183. That the breastfeeding employee be able to appeal a decision of the employer in the accommodation of breastfeeding or expressing at work.

3.3 Review and revision of the *Fair Work Act 2009* (Cth) and related legislation to specifically refer to ‘breastfeeding’ including ‘expressing breastmilk’ and to specific circumstances of breastfeeding employees

In order to provide lactation breaks and facilities for breastfeeding employees and to protect these employees against discrimination and to be covered by general protective provisions, the ABA considers that it is necessary for the *Fair Work Act 2009* (Cth) and ancillary and related legislation be reviewed and revised to identify where ‘breastfeeding’, including ‘expressing breastmilk’ needs to be specifically referred to throughout the legislation and where the personal circumstances of breastfeeding employees should be specifically taken into account and mentioned in the legislation including:

1. Section 62 – Maximum weekly hours

To include the personal circumstances of an employee who is breastfeeding or pregnant.

This needs to be spelt out and may be perceived by employers and or courts to not include breastfeeding, eg subsection 62(3) because of potential risk to employee – and her baby/child who is breastfeeding and or unborn – health and safety from working the additional hours – 62(3)(a); and (b) the employee’s personal circumstances, including family responsibilities and breastfeeding.

Or a separate subparagraph to subsection 62(3) eg ‘section 62(3)(bb) the employee’s breastfeeding;’ or ‘the employee’s breastfeeding, including expressing, of or for her child’.

2. Section 65 – Requests for flexible working arrangements

Section 65(1A) to be amended:

(1A) The following are the circumstances:

Suggested amendment:

‘s65(1A)(g) the employee is breastfeeding and or expressing.’

3. Section 67 – General rule – employee must have completed at least 12 months of service

This is a rule that employers can avoid by dismissing employees/casual employees prior to the 12 months or date when the employee becomes entitled to leave under this Division. Women cannot necessarily qualify through no fault of their own if an employee dismisses them or only makes contracts for periods eg less than 12 months, that avoid this entitlement. Such women and their

families miss out on entitlements that others receive, for their mother to mother them in the optimum way due to this requirement. This may mean that a mother is not entitled to leave that other women and families receive for not just one baby but potentially for all the babies that mother has and she may never become entitled – through no fault of her own – and it may even be as a result of discrimination or other unfair employment terms of conduct toward her such that she is forced to leave or is dismissed or constructively dismissed.

4. Section 351 Discrimination

The *Fair Work Act 2009* fails to particularise ‘breastfeeding’ as a ground or attribute and or fails to include or list ‘breastfeeding’ in subsection 351(1). This makes the legislation unclear as to whether breastfeeding (including expressing breast milk) is included in the protections afforded to people under section 351 and under the Act generally. The *Sex Discrimination Act 1984* (‘the SDA’) was amended in 2011 (by the *Sex and Age Discrimination Legislation Amendment Act 2011*) to provide breastfeeding, including expressing breast milk, as a separate ground of discrimination. The relevant section is section 7AA of the SDA and various other sections of the SDA operate to protect breastfeeding including section 7D (Special measures), section 31 (employer free from claim of discrimination by men where providing for breastfeeding employees), section 27 (request for information), section 4 Definition section, the objects of the Act and etc. In the work context, section 7AA operates with section 14 to protect women in the work context who breastfeed, including expressing breast milk.

All of the states and territories also have anti-discrimination legislation that provides for breastfeeding as a separate ground of discrimination and in the work context, except for South Australia that provides for this only in the provision of goods and services and education contexts.⁴⁵ In South Australia a woman employee who is breastfeeding at work would need to argue that protection is provided under the general ‘sex’ ground and or the ‘family and carer responsibilities’ provisions which would be an uncertain exercise as to what a decisionmaker would decide.

Currently, this is the situation that the FWA offers to breastfeeding employees or those mothers considering whether to enter or re-enter the workforce because ‘breastfeeding’ has been omitted from inclusion in section 351 and section 772. That is, there is no specific mention of breastfeeding as being protected and so it is not clear that ‘sex’ or ‘family or carer responsibilities’ or ‘pregnancy’ would cover breastfeeding. In other countries there have been problems with the courts defining whether ‘breastfeeding’ comes within the definition of ‘sex’ discrimination or provisions that relate to ‘pregnancy’ (eg in the US ‘pregnancy and related medical conditions’ has been fraught with litigation where many judges cannot see a link between the onset of lactation and breastfeeding

⁴⁵ See the *Anti-Discrimination Act 1991* (QLD) s7(e); *Anti-Discrimination Act 1992* (NT), s19(1)(h); *Anti-Discrimination Act 1998* (TAS), s16(h); *Equal Opportunity Act 2010* (VIC), s6(b); *Discrimination Act 1991* (ACT), s7(1)(g); *Equal Opportunity Act 1984* (WA), s10A; *Anti-Discrimination Act 1977* (NSW), s24(1C) was inserted by amendment in 2007 with breastfeeding as a characteristic generally appertaining to women; South Australia’s *Equal Opportunity Act 1984* only provides specific reference to ‘breastfeeding’ in the context of the provision of goods and services (s 85T and s85ZG) or in relation to students of an educational authority (s85U). Breastfeeding at work still may be covered by use of ‘sex’ or ‘carer and family responsibility’, by virtue of the operation of section 85T ‘caring responsibilities’ and 85V ‘discrimination against applicants and employees’. See discussion in Rees, N, Rice, S, and Allen, D, *Australian Anti-Discrimination Law, 2nd Edition*, (2014) Leichardt (The Federation Press), p437 at [6.6.14.2].

once pregnancy ends with the birth of a child and lactation is triggered by the birth).⁴⁶ Also, in some prominent US cases such as *Allan v Totes/Isotoner* (2009), most of the judges declined to consider the issue at all and this is not an isolated problem where breastfeeding discrimination claims are sidelined or avoided by the bench.⁴⁷

There are no Australian cases under the family or carer's responsibilities provisions (that we are aware of) that deal with whether breastfeeding is covered by this or not and it may be a tenuous and resource exacting exercise for a mother to try to have a case determined on this where the uncertainty should not exist in the first place.

The Commonwealth government has supported breastfeeding and breastfeeding at work initiatives and programs and has had the National Breastfeeding Strategy since 1996 and has published information in kits and pamphlets for both employers to help accommodate breastfeeding employees at work and for employees to become more aware of how they can breastfeed at work (see introduction), so it is incongruous that this reference to 'breastfeeding', including expressing, is left out of the FWA. It should have been included in the 2011 SDA amending Act as that Act amended other Acts at the time. This needs to be corrected. The ABA considers it burdensome to expect breastfeeding employees who already have perhaps lost income due to time off for parental leave, who are most likely involved in night time parenting around the clock and who are feeling the effects of this, to also then have to prove that they are covered by the FWA and or be deterred from asserting their rights under the FWA to protect themselves and their baby's welfare and well-being because of this omission.

This should not need to be an uncertainty for employees and their partners, for employers who need to be aware of the effects of poor and discriminatory treatment on women workers, for lawyers, Anti-discrimination commission staff, Fair Work Ombudsman staff, Fair Work Commission staff and other advisory services to women workers eg the National Working Women's Centres, Women's legal services, unions and etc.

Suggested amendment:

Insert 'breastfeeding' into section 351(1), including a definition of breastfeeding as per the definition in the *Sex Discrimination Act 1984* (Cth) to include expressing, single acts of breastfeeding and long term breastfeeding. Alternatively, the definition of breastfeeding to be inserted into a definition section in the FWA.

Example:

Section 351

- (1) 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 orientation, age, physical or mental disability, marital status, family or carer's

⁴⁶ See Byrne, S, (2011), 'Weaning Ohio Employers off Lactation Discrimination: the need for a clear interpretation of Ohio's Pregnancy Discrimination Act Following *Allen v Totes/Isotoner Corp*', (2011), 59 *Cleveland State Law Review*, 265.

⁴⁷ *Allen v Totes/Isotoner Corp.*, 915 NE 2d622 (Ohio 2009) (Supreme Court).

responsibilities, pregnancy, **breastfeeding**, religion, political opinion, national extraction or social origin.

With respect to subsection 351(2)(c), it is submitted that breastfeeding a baby or child for their sustenance and hydration is a matter that should be of a higher importance than someone's susceptibilities may be injured. The injury to mother and baby are physical as well as mental. There should be an inquiry into the health, safety and well-being of the mother and baby having a priority and not to be dismissed by a broad brush exception in each case. For example, if the Pope makes an international statement that women should breastfeed in church if their baby needs to be fed then should Catholic employers be enabled to dismiss without due consideration the rights and claims of the mother and baby to health and safety and to parent in the way that they want and need to, to exercise reproductive rights and be a mother because it might 'injure' somebody's susceptibilities? Should this exception apply without question in all work contexts where people are employed by religions who usually state that they are promoting love and community spirit and may help mothers and babies in their charitable purposes and other areas of services to members and communities? There is a need for greater scrutiny of a broad exception where it is not needed in many areas and is greatly detrimental to the health and safety of mothers and babies and can force premature weaning which can impact on the short and long term health of babies and mothers.

5. Section 343 Coercion

This type of provision – (1) a person must not take any action or threaten to take or organise any action against a person with intent to coerce the other person, or a third person, to exercise or not exercise a workplace right (a); or exercise or not exercise a workplace right in a particular way (b). This needs to apply specifically to women who are discouraged from taking parental/maternity leave entitlements – either paid or unpaid leave or minimising this to their detriment - and in relation to their breastfeeding and or expressing at work. There needs to be some specific, express, provision to protect women in this area. Some Australian studies have shown that breastfeeding employees returned to work earlier than they had planned as their workplace called them while they were on leave and requested the employee to return. This may put a strain on the mother and baby relationship, the mother's ability to provide breastmilk for the baby if she has not had proper opportunity or notice to prepare for return to work, loss of opportunity to gradually introduce the baby to a carer or childcare centre, loss of opportunity to spend more time with the baby and direct breastfeeding which is important to the establishment and maintenance of breastfeeding. This may also be discriminatory conduct if other employees on leave would not be requested to return early from leave, for instance, from a European holiday.

6. Sections 65 and 67 – Right to Request flexible work and access to leave

The Australian Human Rights Commission recommended in its National Review of work and parenting 2014, that the 12 months continuous service requirement be removed from the FWA in regard to the right to request flexible work arrangements under section 65(2) (at p122).

Periods of parental leave impact on a woman's ability to establish and continue to breastfeed her baby. The requirement that a woman employee be required to complete continuous service in order to qualify for certain types of leave (such as in section 67 of the FWA) needs to be reviewed in order to consider whether every Australian baby and mother has the opportunity to have sufficient

leave entitlements in order to recover from birth and to establish breastfeeding, which may take some months, and to bond. Women workers who are missing out on this entitlement may do so through no fault of their own if their work is terminated or if their contract ends prior to a certain period that qualifies them for entitlements to leave and paid leave.

7. Section 81-82A – transfer to safe job and no safe job leave

That the National Employment Standards ('NES') of the FWA be amended to ensure that the transfer to a safe job and no safe job leave apply to breastfeeding employees as well as to pregnant employees, where relevant. Currently, the NES specifically refers to pregnant women only and omits reference to breastfeeding employees who may be impacted (see, for example, sections 81-82A of the FWA).

8. Section 352 and 772 – temporary illness or injury and termination

Provisions such as section 352 'temporary illness' and section 772 'Employment not to be terminated on certain grounds' need to refer to 'breastfeeding' and or the circumstances of breastfeeding employees. Section 352 refers to conditions as prescribed in the regulations and these should include breastfeeding complications or conditions arising from breastfeeding such as engorgement, mastitis, threat to the loss of milk supply/lactation, breast refusal or bottle refusal of the baby and other such conditions.

9. Definition of 'breastfeeding'

That a definition of 'breastfeeding' in the FWA, and related legislation, be modelled on the *Sex Discrimination Act 1984* (Cth) definitions of section 4 and section 7AA(3) and (4) of that Act. That is, that 'breastfeeding' includes the act of expressing milk (s7AA(3)) and that it includes an act of breastfeeding and breastfeeding over a period of time (s7AA(4)).

Recommendation 3: That the *Fair Work Act 2009* and ancillary or related legislation be reviewed to include specific reference to include considerations relating to breastfeeding, including expressing breastmilk, in provisions such as: section 351 'Discrimination', section 62(3) 'Maximum weekly hours', section 65(1A) 'Requests for flexible working arrangements, sections 81-82A 'transfer to a safe job' and 'no safe job leave', section 67 requirement for continuous service and in section 65(2), relevant objects and definition sections, section 352 'Temporary absence – illness or injury', section 772 'Employment may not be terminated on certain grounds, and related provisions, also sections 81 – 82A 'transfer to safe job' and 'no safe job leave', the definition of 'breastfeeding'.

3.4 Positive requirement for employers to provide information about breastfeeding entitlements and rights

ABA considers that information and awareness about the existence of entitlements and rights concerning breastfeeding employees is vital. This is particularly reflected in the Australian Human Rights Commission in its National Review where it was revealed that 'a significant proportion of mothers are not aware that the actions and behaviours...that they experienced, could constitute discrimination on the grounds of sex, pregnancy, breastfeeding and family responsibilities under the

SDA.⁴⁸ The Fair Work Ombudsman also distributed 100,000 kits in an effort to increase awareness of pregnant employee's rights in 2010.

Recently Belinda Smith, legal academic, has raised awareness about the bolstering of rights awareness through information provision about anti-discrimination and other workplace legislation.⁴⁹ The Australian Human Rights Commission has also recommended that provision of information be given to employees at the point of contact required by the Paid Parental Leave Scheme.⁵⁰ This would ensure that employers and employees give early consideration to whether breastfeeding accommodation and breaks may be a factor in the return to work arrangements of employees. Such arrangements require preparation and discussion prior to return to work, such that giving employees notice of rights and information when they return to work may be too late for breastfeeding employees who need immediate accommodation of their breastfeeding and or expressing.

Recommendation 4: That there be a positive requirement for employers to provide an employee returning from parental leave with a template information sheet of her rights and responsibilities under the *Fair Work Act*, occupational health and safety and anti-discrimination laws, as well as any relevant award, enterprise agreement, individual contract or workplace policy and procedures. Such information to specifically include information about rights concerning breastfeeding at work, including expressing breastmilk. This information is to be given prior to return to work with adequate time for the employee to organise breastfeeding accommodations including breaks and facilities with the employer.

3.5 Protection from redundancy, dismissal and non-renewal of contracts

ABA recommends that there be legislative reform to develop mechanisms for protection from redundancy, dismissal and non-renewal of contracts for employees who are breastfeeding. This is in line with the International Labor Organisation's *Maternity Protection Convention No 183* recommendations.

This is also a recommendation from the Australian Human Rights Commission in its National Review (2014).⁵¹ Women returning to work have had their jobs changed to lesser duties and or lesser pay, told they have been restructured out of a job, been made redundant or their job was given to their temporary replacement or their contract has not been renewed due to, for example, 'poor performance', even where an employee has worked long term for the employer and has a record of consistent performance at superior levels, such as in the case of *Ilian v ABC*.⁵² The National Review also documented cases where women returning to work were constructively dismissed by having their working hours lengthened and or been given unrealistic higher targets that they could not

⁴⁸ AHRC, *Supporting Working Parents, National Review, Community Guide*, Commonwealth of Australia, Sydney 2014, p44.

⁴⁹ Smith, B, "How might information bolster anti-discrimination laws to promote more friendly work practices?" (2014) 56(4) *Journal of Industrial Relations* 547,p556.

⁵⁰ See the National Review, *supra*.

⁵¹ *Ibid*,p123.

⁵² *Ilian v ABC* (2006) 236 ALR 168.

meet. The Australian cases that consider such issues are summarised in the National Review at appendix F, being FWC cases and SDA cases. Such women lose their job security and or permanence and or any entitlements and good working conditions that went with the job. They may then become casual workers and find it harder to have 12 months continuous service to qualify for parental leave entitlements and other work entitlements in future and particularly when they are next pregnant and having another baby.

One in 5 mothers (18%) indicated, to the AHR Commission, that they were made redundant/restructured/dismissed or that their contract was not renewed, either during their pregnancy, when they requested or took parental leave, or when they returned to work.[p27] This is not good enough for our mothers and their children! There are much greater protections in many other countries including in Europe, for example, in Switzerland the women are protected from such termination of their work status and any such action is void and invalid, for 16 weeks post-birth.⁵³

Recommendation 5: That there be legislative reform to develop mechanisms for protection from redundancy, dismissal and non-renewal of contracts for employees who are breastfeeding. This is in line with the International Labor Organisation's *Maternity Protection Convention No 183* recommendations.

3.6 Workplace bullying laws to include or incorporate specific reference to women who breastfeed

Part 6-4B of the FWA specifies provisions that relate to 'Workers bullied at work'. Section 789FA provides that this Part allows a worker who has been bullied at work to apply to the FWC for an order to stop the bullying. The FWC is give power under 789FF FWC to may make orders to stop bullying but not to award monetary compensation or penalties. Section 789FD provides the circumstances of when a worker is 'bullied at work' by an individual or group of individuals where the individual or group repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and that behaviour creates a risk to health and safety. However, the provision is limited to constitutional corporations and the Commonwealth (and limited other bodies or organisations under the section). An individual may make an application to the FWC to stop the bullying (s789FC). The FWC must begin to be deal with the application within 14 days. The FWC may make such orders as it thinks fit excepting monetary orders.

The FWC reports on its website that despite expecting a rush of applications, the FWC only received over a hundred or so applications after the Part was introduced. This may be because of the lack of power in the FWC to award monetary compensation to the applicant or penalty orders to the individual or group who is bullying the applicant, if such claim is established. Some applicants may be fearful to commence this type of inquiry and or proceedings where the power relations between the applicant and the alleged bullying group or individual are already skewed against the applicant and where the applicant may fear for their job security or concern over the perceptions of others as

⁵³ AHRC, *National Review*, supra, p122. See also Germany and other countries briefly summarised on p122.

to whether they are good workers who fit into their place in the workplace and who do not complain.

Although the anti-bullying provisions in the FWA are worded broadly and would cover many types of situations, if there is no reference in the FWA to 'breastfeeding' as a protected workplace activity or worker activity, then there may be confusion over whether breastfeeding workers are covered by the anti-bullying provisions. There needs to be some reference in the FWA, perhaps in a definition section that includes a definition of breastfeeding at work or where there is provision for guaranteed lactation breaks and facilities, that Part 6-4B applies to cover women who breastfeed or express at work.

As the National Review reported that:

Given the adverse impact that discrimination has on the mental health of most workers who experience it, workplaces that conduct or permit pregnancy/return to work discrimination are also potentially in breach of their work health and safety obligations pertaining to eliminating and minimising safety risks of psychological injury.[p125]

The anti-discrimination law may not always capture or quickly deal with the circumstances of breastfeeding employees who experience breastfeeding discrimination, but where there is such conduct that is also dealt with by anti-bullying mechanisms in the FWA, then breastfeeding employees need clear and specific guidelines as to how they are covered by the provisions so that they may use them. Negative behaviour toward breastfeeding employees in the workplace, or a lack of supportive workplaces, are known to cause negative effects of women's decisions to continue breastfeeding or to wean prematurely.⁵⁴

Should there be a positive duty on the employer to protect such employees against bullying and vicarious liability (such as in provisions ss105 and 106 of the SDA) where bullying and discrimination in the FWA is not prevented or actively discouraged by employers and management?

Recommendation 6: That workplace bullying laws of Part 6-4B of the FWA incorporate specific reference to women who breastfeed and or express breastmilk, so that these employees are not bullied and are protected within the prevention of workplace bullying scheme and are clearly covered by the specialist jurisdiction that deals with workplace bullying.

Positive and supportive workplaces are known to influence breastfeeding employees to continue to breastfeed and they are often more productive.⁵⁵ Some workplaces have breastfeeding policies and corporate lactation programs that educate women employees about breastfeeding prior to their parental leave and follow up with the employee after the birth of the child and assist such employees to return to work in a positive way. Studies of such corporate lactation programs showed higher rates of breastfeeding amongst employees with longer duration of breastfeeding also.

⁵⁴ See, work by Gatrell,CJ, 'Secrets and lies: Breastfeeding and professional paid work', supra; see also Karin and Runge, supra; Byrne, S, supra. See also *The Best Start Report*, supra, at 5.8,p78.

⁵⁵ Stewart-Glenn, J, 'Knowledge, Perceptions, and Attitudes of Managers, Coworkers, and Employed Breastfeeding Mothers', (2008) 56 *AAOHN Journal* 10, 423-429; Garvin, CC, Sriraman,NK, Paulson,A, Wallace,E, Martin,C, and Marshall,L, 'The Business Case for Breastfeeding: A Successful Regional Implementation, Evaluation and Follow-Up' (2013) 8 *Breastfeeding Medicine* 4,413-417.

Additional Information:

The National Review 2014 (AHRC) also found that:

‘In the United Kingdom the government provides employers with comprehensive information on employer obligations with regard to the ensuring the work health and safety of expectant mothers and employees who are breastfeeding/expressing milk. This includes detailed guidance on the work health and safety risks associated with pregnancy and breastfeeding, and checklists for carrying out risk assessments.[see fn33 of Report] By comparison, there is currently very little information available in Australian jurisdictions to assist employers and employees with addressing health and safety issues in relation to pregnancy at work.’p66 And there is little also in respect to breastfeeding at work, eg, see the Dept of Employment and the AHRC since June/July 2015 but even these do not provide a lot of guidance or specifics on how to accommodate or not discriminate against breastfeeding employees. See p109 also.

Refer to pages 73-74 of the AHRC National Review 2014 that some mothers returning to work while breastfeeding or expressing told of not being provided with lactation breaks and adequate facilities at work...heard that women were using their lunch breaks to express in toilets, car parks and offices with glass walls or without locks because their workplace did not provide suitable rooms and storage for breastfeeding and expressing. See pp73-4 for testimonies of the humiliating, frustrating, disappointing treatment and stories of Australian mothers at work. The toilet is an unhygienic area for breastfeeding and or expressing and storing breastmilk which is essentially the production, preparation and storage of a meal for a baby. The US recognises a toilet stall as not an acceptable venue for breastfeeding workers to breastfeed or express, see *PPACA* 2011(Affordable Care Act) which amended the *Fair Labor Standards Act 1938 (US)*. Refer to page 74, re Testimonies as to negative, discriminatory comments of co-workers that cause detriment to breastfeeding workers and may influence them to wean prematurely through embarrassment and humiliation of harassment. This is workplace bullying. If co-workers are embarrassed they need to work that out for themselves and this is why the workplace culture needs to be accepting of breastfeeding and expressing as normal, and not for a woman to be shamed because she is doing the best for her baby and family unit and is effectively working two jobs. The importance of positive and non-discriminatory workplaces refer p110.

p165: In 2010, the Industrial Relations Commission approved the application by the NSW Director of Public Employment to vary the Crown Employees (Public Service Conditions of Employment) Award 2009 which stipulated paid breastfeeding breaks for full time and part time employees and flexible work arrangements as agreed between staff members and supervisors.

However, there needs to be national certainty in national laws for mothers and employers over this provision of breastfeeding breaks and facilities as recognised by the NZ amendments of 2008 and the United States government in 2011 and the over 130 other countries worldwide who provide lactation breaks and facilities for women workers.

Also, noting that complaints to commissions such as the AHRC, and state and territory anti-discrimination commissions, [eg see Appendix E re complaints data,pp238-248] do not necessarily reflect the reality of the experiences of women and workplaces that do not accommodate breastfeeding employees. Of the National Review findings, more than a third (35%) of women

reported experiencing discrimination when returning to work after parental leave (with 8 per cent related to breastfeeding or expressing milk). One in two women reported experiencing discrimination in the workplace during pregnancy, parental leave or on return to work.[p26] A quarter experienced this during pregnancy and almost a third when they requested or took parental leave.

Adverse comments to breastfeeding employees include:

Being told to 'express more breastmilk' instead of breastfeeding. See *Sydney Morning Herald*, 16 September 2015, 'Liberal MP and new mum Kelly O'Dwyer told to express more breastmilk to avoid missing votes in the chamber'. In this case, the MP was able to make a vote by proxy and the advice from the office of the government's Chief Whip Scott Buchholz, was incorrect and was not informed of the proper entitlement for this mother before this detrimental advice was given. If the government cannot get it right, what confidence can mothers have? See:

<http://www.smh.com.au/federal-politics/political-news/liberal-mp-and-new-mum-kelly-odwyer-told-to-express-more-breast-milk-to-avoid-missing-votes-in-the-chamber-20150916-gjnwwh.html>.

Noting also that women should not be forced or compelled to express breastmilk where they intend to breastfeed and or where there are problems for the mother in expressing milk and or the baby accepting expressed milk where it will only accept direct breastfeeding.

