



QUEENSLAND WORKING WOMEN'S SERVICE

Submission to the Productivity Commission Inquiry into Paid Maternity, Paternity and Parental Leave

The Queensland Working Women's Service (QWWS) was established in 1994 to provide free and confidential advice, information, advocacy and support to women on work-related matters. QWWS is currently funded by the Queensland Government and has previously been funded by the Federal Government. QWWS provides a free-call 1800 telephone advisory service to all Queensland women, hosts a web-site providing information on work-related matters, and provides advocacy and representation to women in the various anti-discrimination and industrial relations jurisdictions. In particular, QWWS aims to provide advice and assistance to women in remote and regional areas, women from culturally and linguistically diverse backgrounds and Aboriginal and Torres Strait Islander women. The women who contact QWWS are often in precarious employment and vulnerable financial situations. They are not union members and generally have minimal negotiating power. For these women, universal, as opposed to negotiated, protections and entitlements are essential.

Since its inception, QWWS has provided information, advice and advocacy to more than 35,300 women. During the period from 1 January 2007 till 31 March 2008, QWWS provided services (including telephone advice and advocacy and representation in Tribunals and Commissions) to more than 4449 women.

Over this period, QWWS has fielded approximately 585 enquiries specifically about pregnancy discrimination, family responsibilities discrimination, parental and maternity leave entitlements and work and family issues. Familiar themes for callers with such enquiries include:

- concern about dismissal both before taking leave and after returning from leave;
- employers making the return to work a difficult process;
- returning to work on a family-friendly basis; and
- the financial difficulties involved in taking long periods of leave for childrearing and childbirth.

QWWS has noticed an increasing number of women contacting our service about discrimination on their return (or attempt to return) to work from maternity leave. In 2007 we presented a paper to the 'Our Work, Our Lives' conference in Adelaide highlighting the stories of some of these women and discussing the need for reform around maternity leave. (We attach a copy of this paper at Appendix 1). We believe that universal paid maternity leave has a role to play in reducing discrimination towards women who choose to have children and return to their jobs after a period of leave.

QWWS is pleased to be able to provide this submission to the Productivity Commission Inquiry. We believe the introduction into Paid Maternity, Paternity and Parental leave is long overdue and welcome the Commission's acknowledgment of the seriousness of this issue. In this submission we have followed the numbering system for questions as set out in the April 2008 Issues Paper.

1. Models of parental leave

(a) Objectives:

QWWS believe that the overriding objectives of any model of paid maternity leave or parental leave should be:

- *to contribute to the elimination of financial inequity for women over the life cycle:*

QWWS believes that these objectives require the creation of a scheme of paid maternity leave that focuses on *working* women. While there exists financial supports for all mothers and families (such as the baby bonus) and social security type financial supports for mothers and families on low incomes, there is no need for a new scheme that has as its *only* focus the provision of financial support for the costs involved in the birth and rearing of a child. What is required is a scheme that recognises that women who take time off work for child bearing and rearing face wage disparity both in the short term and over the life cycle compared to their male counterparts. The elimination of financial insecurity for working mothers must be a central objective of any paid maternity leave scheme.

- *to assist work and career attachment and skill retention for women who wish to remain in the workforce during childbearing and childrearing years:*

A paid maternity or parental leave scheme must also be designed to relate to working women inasmuch as it encourages women to see continuing in the paid workforce as a desirable option but also an affordable one. Many women have invested considerable time and money in the attainment of their skills and qualifications. Reasonable paid time away from work for childbearing and rearing would allow women to take sufficient leave to ensure both physical, financial and other measures of wellbeing, and feel willing and able to return to their jobs and continue their careers. Workforce attachment is fostered not just through employees *wanting* to continue their career but also by employers and governments demonstrating that they value their workers and wish to embrace policies that foster their commitment.

- *to ensure that working women taking maternity leave be under no financial pressure to return to the paid workforce before they or their child are physically or otherwise ready:*

Thirdly, a paid maternity leave scheme must ensure that women are under no financial pressure to return to paid work before they are physically or otherwise ready. The ILO recommendation of at least 14 weeks leave with cash benefits (ILO Maternity Protection Convention 183, Articles 4 and 6) includes a recommendation that “Cash benefits shall be at a level which ensures that the woman can maintain

herself and her child in proper conditions of health and with a suitable standard of living.” Currently, unpaid leave creates a situation where women taking maternity leave may feel compelled to return to work before they are ready.

Case Study:

‘Anne’:

Anne had worked in a food production factory for over 4 years. She became pregnant and took around 7 months off work. Anne was forced to return to work as she and her husband could not ‘pay the bills’ on his income alone. Anne’s young son suffered from pneumonia from an early age and was often sick. Upon her return to work, Anne found she had to take time off every now and then to care for her son who was occasionally unable to attend childcare. Anne felt that her son’s health suffered because

(b) Who should be eligible?

Eligibility for the scheme should not be made any stricter than current requirements in the Workplace Relations Act for unpaid statutory parental leave. The first of these is that an employee need not work for longer than 12 months in the same job to receive job protection benefits. We submit that any increase to the length of required pre-leave service in the scheme’s eligibility rules is a backward step. The recent introduction of paid maternity leave in large retail companies such as Myer and Aldi (traditionally large employers of women), while laudable, have increased the minimum period of engagement to 18 months before an employee becomes eligible for paid maternity leave. (Casual employees are also excluded from some of these newly introduced schemes. It is important to recognise that Australia’s level of casual employment, including long term casual employment, particularly in female-dominated industries, is significant. Since January 2008, around 42% of callers to QWWS who identified as casual employees had been employed for over 12 months.

As such, a universal paid maternity and parental leave scheme should be available to casual employees with the same length of service as permanent employees).

QWWS strongly suggests that a period of paid maternity leave within the entire paid leave period must be quarantined for the exclusive use of new mothers to recognise the physicality of pregnancy, birth, and breastfeeding. This need not be the full period. We suggest that the balance of any paid leave period (after the expiry of the exclusive maternity leave period) not used by the mother must be able to be used by the father or other caregiver.

We also suggest that a separate period of at least 2 weeks paid leave be available for exclusive use by the father or second caregiver to the child.

(c) Duration and amount?

QWWS suggests that a period of paid maternity leave should be no less than 14 weeks and preferably 6-12 months in line with the Australian Breastfeeding Association's recommendation of 6 months exclusive breastfeeding. Given that many women take some leave prior to the birth of children, any minimum leave period must be able to cover sufficient post-natal leave to ensure the health and wellbeing of both mothers and babies. Paid maternity leave should also be able to be taken in a variety of different ways - at full pay, half pay for twice as long, quarter pay etc to allow women and their families to explore flexibility in managing leave periods.

There appears to be little point in developing a system of paid maternity leave where benefits do not reasonably reflect the pre-birth earning capacity of mothers. As such, QWWS recommends that benefits be directly related to earnings, preferably at 100% of normal weekly earnings. Benefits that bear little or no relation to earning capacity before leave do not address pay equity issues (particularly over the life cycle). They also do not represent income replacement in any meaningful way.

Maternity leave and parental leave periods are designed to accommodate a natural occurrence in the life of many women: childbirth and rearing. In the same way, sick leave (paid) is designed to accommodate a natural occurrence: illness. We have

annual leave periods (paid) to accommodate the normal human need for rest and recuperation. Pregnancy, childbirth and child rearing (and therefore maternity and parental leave) need to be recognised as a normal phase in the ongoing working lives of many employees. It should not attract a financial penalty by being unpaid.

The current unpaid maternity/parental leave scheme should ideally be modified so as to allow extensions of unpaid leave for up to 24 months. This is in recognition of the fact that for many families, a 12-month period of primary care giving is not sufficient. This extension would not pose excessive problems for employers. In fact, it would arguably make the leave period more manageable in some circumstances, allowing employers to have the benefit of longer periods between staff changes.

(d) Financing options?

QWWS supports a scheme of paid maternity leave that has no negative impact on the employability of women. Given that significant numbers of women still face discrimination on the basis of gender, family responsibilities and pregnancy, any scheme that discourages employers from employing women (particularly those in prime child-bearing ages) must be rejected. While forward-thinking employers may see the (longer term) value in promoting staff loyalty and retention by offering leave entitlements and benefits beyond minimum requirements, many employers may react to a requirement to pay for an individual woman's maternity leave by electing not to employ women. Given that QWWS supports a scheme whose objectives include promoting pay equity and allowing women to remain meaningfully attached to the paid workforce if they so choose, we support a social-insurance type model that encourages corporate social responsibility along the entire spectrum of employers, from small to large, by requiring sliding-scale social insurance-style employer contributions, **as well as** government contributions to a maternity leave fund. We suggest this would avoid the possible discriminatory backlash against employing women, given that all employers would be required to contribute.

On the other hand, a purely government funded benefit (through existing taxation revenue) would arguably constitute a wider societal recognition of the worth of

bearing and rearing children as well as the worth of paid work. We also acknowledge that a government funded leave system would alleviate the burden that a contributory system would place on smaller businesses. A fully government-funded scheme would still need to match prior earnings. Income replacement must be a central part of any maternity leave scheme.

Employers with existing paid leave schemes should be strongly encouraged to continue to provide these in order to maintain 'employer of choice' status.

(e) Return to work guarantee

QWWS submits that the return to work guarantee in the Workplace Relations Act (Cth) (1996) should be strengthened and broadened to lessen discrimination against employees returning to work after maternity or parental leave.

Currently the Workplace Relations Act requires the employee to provide a significant amount of notice and documentation before she is entitled to take parental leave with a guarantee of return to work. These are:

- the provision of a medical certificate with the expected date of birth;
- the provision of that certificate no later than 10 weeks before the expected date of birth;
- the provision of a written application for maternity leave no more than 4 weeks before the intended date of leave. This application must state the intended first and last days of the period of leave;
- guaranteed right to return to work if the employee gives 4 weeks written notice prior to the intended date of return; and
- statutory declarations about intentions to be the primary caregiver at all times while on maternity leave.

QWWS submits that there should be a higher onus on the employer to indicate a guaranteed entitlement to return to work. This could be as simple as the requirement to provide a pro-forma maternity/parental leave approval document. This may reduce

instances where an employee pleads ignorance of the employee's right to take leave or of their intention to return to work after leave. Such was the case with Melinda who contacted QWWS in 2007:

'Melinda'

Melinda was a real estate property manager. She became pregnant and verbally arranged a period of maternity leave with her boss. Leading up to her leave, Melinda was subjected to various forms of pregnancy discrimination. During her maternity leave, Melinda's employer told her that there had been new workplace relations laws enacted and that, being a small business they were unable to afford

We also suggest that employees be granted the right to request flexible, family friendly or part-time hours on return to work from maternity and parental leave. While we are yet to see the final draft of the National Employment Standards, one of them will touch on the 'right to request' issue. We argue that it is essential that this standard, as in the British model, requires that the employer must not unreasonably refuse a request for flexible work. If a request is refused, employers must provide supporting evidence as to why flexible working arrangements such as part-time work cannot be accommodated for parents returning from maternity or parental leave. We do not believe that this obligation to explain such a refusal would be onerous, even on small businesses.

5. Broader labour market impacts of parental leave

- a. possible beneficial impacts for labour market; and
- b. behavioural change:

QWWS recognises that maternity and parental leave schemes, even when unpaid, make returning to the workplace after the birth of a child less difficult. There does remain, however, significant discriminatory treatment in the re-entry process. In a

2007 paper QWWS catalogued the stories of a number of clients who have faced difficulties in attempting to return to work after a period of maternity leave.¹ Clients were faced with situations such as:

- *being advised their position had been made redundant (or the company had been restructured) while on maternity leave;*
- *simply being told they had been replaced while on leave;*
- *having their position altered to their detriment on return from leave;*
- *being told, upon attempting to return to work, that they never had access to maternity leave in the first place; and*
- *facing difficulty negotiating flexible hours or family-friendly arrangements upon return to work.*

Case Studies:

“Jenna” (QWWS Client)

Jenna worked on a permanent full time basis for over a year in the cultural and recreational industry. Jenna was based on the Sunshine Coast. Jenna became pregnant and she informed her employer. Not long after, Jenna was informed that there was going to be a restructure and that her position was now relocated to Airlie Beach. Jenna maintained that there were many other people that still worked on the Sunshine Coast. Jenna was offered the job in Airlie Beach but her employer did not inform her of her entitlement to a redundancy. Jenna

¹ Chase, T. and Meizner, J. 2007. ‘Would someone please let me back in? How women fare on attempting to return to work after maternity or parental leave’. Presented to: Our Work Our Lives Conference: Adelaide 20-21 September 2007

“Tracey” (QWWS Client)

Tracey worked as a registered nurse for over a year on a permanent full-time basis. When Tracey applied for maternity leave she was offered a contract stating that upon her return to work she would hold a lesser position. She accepted this, as she was unaware of her rights. Upon return to work she also discovered the position required availability for night shifts. Tracy told her employer that this was impossible due to her family responsibilities. She was then made redundant.

We believe that paid maternity and parental leave has the potential to cultivate in employees a greater degree of commitment to their work and a sense of appreciation of being valued (which may translate to greater enthusiasm for ensuring the success of the employment relationship). We submit that some of the discriminatory treatment faced by women who attempt to return to work after a period of (currently unpaid) maternity leave may be alleviated by reinforcing the connection between payment and maternity-related leave. By associating maternity-related financial benefit more clearly with work, it is possible that women on maternity leave will be more aware of their rights *and* more committed to ensuring the success of their relationship with their employer upon return from leave. A reduction in discriminatory treatment can only be a good thing for working women.

Finally, in a labour market facing a significant skills shortage, employers need strategies to retain the skills, knowledge and experience of valued workers. The worth of family-friendly policies, particularly those that are of financial benefit, is not to be ignored by either employers or governments when considering micro and macro-level staff retention strategies. We suggest that a universal paid maternity and parental leave scheme would allow many parents to retain their skills, knowledge and links to the workforce.

QWWS has been running a petition on the issue of Paid Maternity Leave since March 2008. Currently the petition has 796 signatures. The petition has also allowed signatories to leave comments about Paid Maternity Leave. Some of them follow:

“Women should not be punished financially when they decide to have a family. Paid maternity leave would allow for some many females to take a break and be home with their child without having to worry about their financial situation. It will also provide a peace of mind to the women”

“Totally support this petition. Women in the workforce are constantly reminded of the "choice" they will make (that being loss of income for a significant amount of time) when they decide to have children.”

“This is a big issue for me determining on whether I have children in the next 5 years. I am 28 years old, and would dearly love children, but won't have them if I am forced back to work within 3 months because of financial constraints. My company at present offers 2 weeks paid”

“It may be too late for me but for my friends and children I would wish this becomes a right and not a privilege. Motherhood should be respected and cherished while also maintaining a woman's sense of self within the workplace.”

“I am in favour of this and would like to support this as I am due to have a baby in late October and I am only currently entitled to 9 weeks maternity pay, which means I have to take extra time off without pay. Don't know where I'm going to pull the money from to support my family.”

“I can't believe that the top country to live in the world doesn't pay maternity leave. I come from Ireland and have just become a resident in oz and was shocked to hear that maternity pay is still not paid to women. Its like we are living in the 3rd world.”

“I returned to work after 3 month due to financial stress during both pregnancies and expressed breast milk at work. I better system would be appreciated even a repayment or prepayment systems would have benefited. My partner didn't want to earn money to support our family and I have worked ever since”

“I strongly agree and believe there should be better compensations for the working Australian women to help support this nations fast growth in expenses for the average family home. I believe it will also help out in many other ways such as eliminating pre and post natal depression and family separation”

“I think this is a great idea, I'm currently on unpaid maternity leave and living off my husbands income under \$40,000 with a 7 year old and 5 month old. We are struggling to make ends meet, before I had my baby I was earning double to what my husband is making now.”

“Being pregnant with my first my partner and I are very anxious about being reduced to one income. We would like for me to be able to stay home with our child as long as possible but with no paid maternity leave are not confident that this is going to be able to happen.”

“Have just returned to work from maternity leave. The financial stress impacts on all aspects of the family life. Also fosters a feeling of parent and child being undervalued by employer and society as a whole. The 1st years of a child's life should be focused on attachments and love etc.”

“I already receive paid mat leave as I am a government worker. A good friend of mine is finally having her first baby. She will not receive a dime whilst on mat leave. She is very concerned about paying the mortgage. What a terrible thing to have hanging over ones head at such a special, but stressful time”

“I am fortunate to be in a job where I can take 14 weeks paid maternity leave, however I cannot begin to imagine what sort of stress I would be under if this wasn't available. As it is, taking it at half pay means that I have to commit to other part-time work from home to ensure I can pay my bills”.

“As a 29 year old woman who has recently entered permanent full-time employment for the first time, after serial part-time and casual jobs in the arts industry, it is difficult for me to make the choice between the job security I am now experiencing and my desire to plan a family.”

“What a great idea. It would have made time off with my baby more worthwhile, instead of worrying about how to pay the bills while I was off work and I would have gone back to work more enthusiastic about being there.”

“Without women/families being supported in their choice to have children, there will be less future for Australia -in quantitative and qualitative measures-.”

“Working mothers are an untapped resource - let's capitalise on their career experiences by supporting paid maternity leave and job security.”

“Yes! to Paid Maternity Leave! It is about time Australia joined the other developed countries.”

“support people choosing to have a family but also work”

“Supporting working women to also be mothers strengthens our society”

“The current system is draconian - many families are under increasing financial pressures today & to not provide a statutory maternity pay is disgraceful.”

“The issue of maternity leave will really affect my decision whether to have children or not.”

“there was nothing like this 16 years ago - I had to return to work when my daughter was 9 weeks old! She was premie and was in hospital for the first 3 weeks - it is emotionally devastating”

“This could allow me to have another baby, right now I cannot as we rely on both incomes to pay our mortgage.”

“This would be a great asset as I used all of my annual leave after I had my son and still had to return to work when he was 13 weeks old”

“We must have paid maternity leave! how can we not have it! how do you expect women to have children and support themselves and their little ones as well as families while continue working non stop”

“It's nearly unaffordable for couples to have children. THIS IS NOT RIGHT. The government needs to help”

“I’ve been one of the lucky ones to actually have paid maternity leave. i would love for others to have the same opportunity”

“Let us in Australia become women who live in 2008 and not 1960”

“Paid Maternity leave ensures families that they are not left without money throughout the beautiful time of the birth of their children.”

“Paid maternity leave is an investment in the attachment and development of our children. Therefore this should be met by government, employers and a contribution scheme from all Australians. Children are our present as well as our future. They are the responsibility of the entire community.”

“Paid maternity leave is the least we can do for our mothers. Every person has come from the body of a woman and mothers deserve financial support. I think we should provide 12 months maternity leave!!!”

“Paid Maternity Leave will remove some of the stress experienced by new mothers: some financial relief when no money is coming in from her job; security that there will be a job to return to; relieves temptation to return to work too early for both mother & baby”

“Paid maternity leave is not about welfare, but an essential condition to ensure women in the workforce are not disadvantaged by providing the next generation of workers, consumers and taxpayers.”

"I think this should be enforced all over Australia. We are raising the future generation after all. We look after the children who looks after the mothers."

"If the government truly wishes to improve breastfeeding rates in this country, this is a necessary first step."

"It is hard raising a baby and hoping that you have saved enough money so you don't have to go back to work before you are ready, which I had to do twice."

"It makes economic sense to provide paid leave to working women and retain their skills and loyalty to an employer. Its also shameful that Australia does not provide this - why are women workers SO second class in our nation?"

"It's nearly unaffordable for couples to have children. THIS IS NOT RIGHT. The government needs to help"

"I am currently on unpaid maternity leave for my first child who is nearly 3 months old. It is a real struggle to survive on my husband's income alone and paid maternity leave would have been a lifesaver for us."

"I am having a baby in August/September. And i will be taking 12 months unpaid maternity leave. I have a house to pay off and baby on the way. Centrelink wont pay enough to even pay the bills."

"I believe we need at least 6 months full paid maternity leave. I've had 2 horrible pregnancy's which resulted me leaving work at 27 weeks with the first and 22 weeks with the second. I've been told that my pregnancy s wont get better, but worse with each child."

"I can't believe our country supports mothers who are unemployed and will not support working mothers who will pass on a strong work ethic to their children instead of those who grow up relying on Centrelink payments! How does that make sense?"

"I have been working for four years. But because I took a job interstate 11 months before my son was born, i was not entitled to a single day of mat pay as i had not been in that job 12 months. It has been a real struggle on my family"

"Australia needs to move into the 21st century and support the growth of families and women in the work force. Stop wasting time. We are getting impatient"

"Australia wants mother to raise healthy, happy, well-socialised, breastfed babies for our future but do not want to invest or commit financially. Where are our priorities, oh yeah being invested in a 7 billion dollar football stadium in Perth."

"Healthy mother and kid are important for country. Convenient period for mother after deliver is very important for the mother. Kindly consider."

"I am 100% behind this issue Women should not be put at an advantage both financially or within the workforce for deciding to have children. With the means testing connected to the baby bonus this just reinforces the need for paid maternity leave and ongoing support for work life balance"

"And don't forget single mums, we need work that fits around our caring responsibilities if we are to even make it into the workforce."

"As an employer the costs to me of paid maternity leave are a pain but as a mother I know maternity leave is important (I only took 3 weeks leave with my first child!!!!) The government is here for employers and mothers so I support the payment of maternity leave by the government"

"As an ex public servant who had paid maternity leave, I think it imperative all women should be paid while providing future children for our society".

We thank the Commission for the opportunity to make this submission. Please do not hesitate to contact QWWS if you have any questions.

Yours faithfully,

Teresa Chase
Acting Senior Industrial Officer
Queensland Working Women's Service

APPENDIX A

Our Work Our Lives

“Would someone please let me back in? How women fare on attempting to return to work after maternity or parental leave”.

**Teresa Chase, *Acting Senior Industrial Officer* and
Janai Meizner, *Industrial Officer***

Queensland Working Women's Service
Brisbane 4000

Presented to:
OWOL Conference held in Adelaide 20-21 September 2007
Concurrent session 1



Explanatory Note:

This is a 'practitioner paper', not an academic or peer-reviewed paper. As such, it tells the stories of women who have contacted a free, confidential industrial relations information and advocacy service for advice on workplace matters. The issues considered in this paper specifically concern maternity leave and the issues faced by women experiencing difficulties when taking or returning from a period of maternity leave (and, in some instances, requesting to take such leave). We maintain throughout this paper that maternity leave is a right and entitlement, a condition of employment, an industrial issue as well as an attribute/ground of discrimination. Difficulties faced on return from maternity leave is an issue inextricably linked with pregnancy and/or family responsibilities discrimination. In this paper we refer to pregnancy discrimination in relation to less favourable treatment for requesting to take, taking (being on a period of) or returning from a period of maternity leave as prescribed in the relevant legislation. In the case of Thompson and Orica (2002) EOC 93-227;116 IR 186 the Federal Court held that the taking of maternity leave was a characteristic that appertains generally to women who are pregnant. In this paper, our comments, case studies and recommendations are limited to the specific issue of difficulties faced on return from leave and not pregnancy and family responsibilities discrimination issues in general.

We note that some callers have multiple reasons surrounding difficulties in getting their jobs back. Some overlap between the issues we have identified is unavoidable and we note this whenever possible.

This paper examines the situation faced by women who have taken a period of paid or unpaid maternity or parental leave and who attempt to return to their jobs. All State, Territory and Federal governments have enacted legislation protecting the jobs of women who take a period of statutory maternity or parental leave. There is, however, often an unexpected struggle when women announce their readiness to return from leave and take up their positions again. We examine, through a number of case studies drawn from clients of the Queensland Working Women's Service (QWWS) the nature of these difficulties. We consider whether the protections provided by law are sufficient in terms of protecting the jobs of women returning from leave. We also examine difficulties women face in terms of a lack of knowledge of the intricate and often confusing legislative rights and obligations concerning maternity and parental leave. We also present a number of case studies that demonstrate the difficulties faced in negotiating flexibility in returning to work as well as flexibility prior to going on leave. We consider the worth of a legislated right to request part time work for women with family responsibilities, and recommend a universal government funded system of paid maternity leave to help address (amongst other things) the lack of certainty faced by women attempting to return to work from maternity or parental leave.

Background: The Queensland Working Women's Service (QWWS)

Queensland Working Women's Service (QWWS) is a not-for-profit community organisation established in 1994 to provide advice, assistance and advocacy to Queensland women with work-related matters. The Queensland Working Women's Service is funded by the Queensland Government Department of Employment and Industrial Relations.

Some operational figures from QWWS follow:

- QWWS began operations in 1994
- QWWS is funded by the Queensland Government Department of Employment and Industrial Relations
- Calls received since 1 January 2005: 10,520
- Case work clients since 1 January 2005: 343
- Total monetary settlements negotiated since 1 January 2005: \$435,611

- Operational figures relating to the scope of this paper:
 - From 1 January 2005 until the 13 September 2007, 5% of case work clients pursued complaints about pregnancy discrimination, maternity entitlements or family responsibilities discrimination in the Anti-

Discrimination Commission Queensland, the Australian Industrial Relations Commission and the Queensland Industrial Relations Commission;

- In the same period, around 10% of enquiries to the QWWS advisory line were about pregnancy discrimination, maternity entitlements or family responsibilities discrimination;
- Of the of 1,052 enquiries regarding pregnancy discrimination, maternity entitlements and family responsibilities discrimination, approximately 76 were in relation to a position being made 'redundant' upon return from maternity leave.

Working women who take leave from their paid jobs in order to give birth to and be primary caregivers for their children require protection from less favourable treatment both during their pregnancy and leave period and also when they return (or attempt to return) to work from that leave. Protection from unfair or unlawful dismissal, sham redundancies and other less favourable treatment upon return from maternity leave is fundamental to policies and legislation surrounding pregnancy, family responsibilities and work. Maternity and parental leave are essential elements of all modern workplace relations systems. The reasons for this are considered at length in myriad research but perhaps best summarised by the International Labour Organisation (ILO) in its rationale behind the Maternity Protection Convention (2000) (Convention 183):

“Expectant and nursing mothers require special protection to prevent harm to their or their infants' health, and they need adequate time to give birth, to recover, and to nurse their children. At the same time, they also require protection to ensure that they will not lose their job simply because of pregnancy or maternity leave. Such protection not only ensures a woman's equal access to employment, it also ensures the continuation of often-vital income that is necessary for the well being of her entire family. Safeguarding the health of expectant and nursing mothers and protecting them from job discrimination is a precondition for achieving genuine equality of opportunity and treatment for men and women at work and enabling workers to raise families in conditions of security.”

Four main reasons for the provision of universal maternity leave can be drawn from this convention:

- Creating and maintaining work / life balance;
- maintaining security of employment for working mothers;

- to ensure progression of women's career prospects and to ensure the maintenance of income levels over time;
- to ensure skill-retention in the Australian workforce.

Some of these reasons are related to universal paid maternity leave, which Australia sadly lacks.

The literature exploring the benefits of maternity leave (paid and unpaid) to working women (as well as to their employers and the broader economy) is substantial. While current research by Whitehouse (et al) (2007) notes that there is a significant 'statistical gap' on parental leave in Australia (including take-up rates, access to paid leave and patterns of return to work after leave), the lack of universal paid maternity leave and statutory protections for part-time work after return from leave is consistently acknowledged as a detriment to Australian women and society. Academic commentators including Pocock (2004) and Baird (2004), government agencies including the Human Rights and Equal Opportunities Commission, (HREOC) (2007, 2002), international agencies including the ILO, community agencies including QWWS and other national Working Women's Centres, as well as members of the business community (Council of Small Business of Australia, the Australian Hotels Association and the Australian Industry Group) and the Australian population in general (76% according to a recent Newspoll survey) all support some form of universal paid maternity leave. While the issue of the right to take (and benefits of taking) maternity leave have been well discussed in both academic and non-academic circles, the issue of how women fare on returning from such leave has been less well researched. Our paper seeks to give some qualitative insight into how working women experience discrimination *after* their employers have granted them leave for the purposes of childbirth and care-giving and particularly when they attempt to return to the workforce after this period of leave has ended.

Method:

As employees of the Queensland Working Women's Service, we have accessed the QWWS database of callers from January 2005 through to September 2007. We look at the experiences of callers who have identified issues of pregnancy discrimination, family responsibilities or maternity entitlements. We present the stories of both clients who have called for advice, as well as those we have assisted as casework. Through analysis of our database, we have identified six main difficulties faced by women attempting to return to the workplace after a period of maternity or parental leave. These are - being made redundant, being replaced, unfavourable alterations to positions, denial of rightful access to maternity leave and difficulty negotiating flexible working arrangements upon return. A related issue is where the

employee is dismissed upon requesting to take maternity or parental leave. Before considering these in more depth and presenting case studies of real women and their experiences, we briefly consider existing legislative provisions regarding women wishing to take maternity or parental leave and return to work after such leave. New legislative provisions under *The Workplace Relations Act 1996* (Cth) (the Act) are specifically noted and we conclude with some brief recommendations on ways to redress the difficulties faced by women re-entering the workforce after maternity leave.

The Legislative Provisions and protections:

Definition of Maternity Leave

The Act defines maternity leave as “a single, unbroken period of unpaid leave (*ordinary maternity leave*) taken in respect of the birth, or the expected birth, of a child of an employee)....”. *Section 266 (3)* states that the maximum total amount of maternity leave an employee is entitled is to 52 weeks paid or unpaid, less any other related authorised leave taken (including leave taken by spouse). We note that this includes annual leave as per an employees’ contract of employment. (s263).

Entitlement to Maternity Leave

Section 265 of the Act discusses the necessary requirements in order to be entitled to maternity leave. They are:

1. *Section 265 (a)* that a woman must comply with the documentation requirements as per s 270 and 271 of the Act. These include:
 - the provision of a medical certificate with the expected date of birth;
 - the provision of that certificate no later than 10 weeks before the expected date of birth;
 - the provision of a written application for maternity leave no more than 4 weeks before the intended date of leave. This application must state the intended first and last days of the period of leave.
2. *Section 265(b)* That immediately before the expected date of birth the employee would have completed at least 12 months continuous service with her employer; or *s 265(c)* the employee is an eligible casual employee (an

employee who has been engaged on a regular and systematic basis for at least 12 months);

3. If the employee wishes to change the intended date of return from leave, she must comply with requirements under s 278 that she give notice of the desire to extend her leave 14 days prior to the previous end date. (Under the Act, an employee may only make one request to extend her period of leave.)

Return to work guarantee-maternity leave “The Guarantee”

- A woman has a guaranteed right to return to work if she gives 4 weeks written notice prior to the intended date of return (*s280(1)(a)*)
- In accordance with *s280 (3)* the employee is entitled to return to the position she held immediately before the start of the maternity leave. Pursuant to *s 280 (5)*, if the former position no longer exists, and the employee is qualified and able to work in another position, the employee is entitled to return to that position or another position nearest in status and remuneration.

Other legislative provisions touching on this issue include:

- *Sex Discrimination Act (Cth) 1984*: S 7 identifies pregnancy and ‘potential pregnancy’ as grounds for discrimination. Case law has identified certain situations where unfair treatment upon return to work from maternity leave can be considered discriminatory. These include: where an inability to work full time after return from maternity leave led to not having a contract renewed as a law firm partner (*Hickie v Hunt & Hunt [1998] HREOCA 8 (9 March 1998)*).
- *Anti-Discrimination Act (Qld) 1991*: Section 7 (c) specifically identifies pregnancy as a ground for discrimination.

As noted above, we identified six main areas in which women face difficulties on attempting to return from maternity leave. These are:

- 1. The employee is advised her position has been made redundant (or the company has restructured) while she has been on leave.*
- 2. The employee is simply told that she has been replaced whilst on leave.*
- 3. The employee's position is altered to her detriment on return from leave.*
- 4. The employee is told, upon attempting to return to work, that she never had access to maternity leave in the first place.*
- 5. The employee faces difficulty negotiating flexible hours or family-friendly arrangements upon return to work.*
- 6. The employee is dismissed upon requesting to take maternity/parental leave.*

Issue 1: The employee is advised her position has been made redundant (or the company has restructured) while she has been on maternity leave.

Of the women QWWS have assisted specifically in relation to discrimination on the grounds of pregnancy and family responsibilities 76 advised they had lost their jobs due to “redundancy”, “restructure” or “operational requirements” when attempting to return from maternity leave. This section will discuss some of their stories. Redundancy occurs when an employer decides that the job an employee has been doing is no longer needed. In this paper our understanding of “redundancy” is based on the Queensland Industrial Relations Commission (QIRC) Statement of Policy on Termination, Change and Redundancy (TCR). This policy was initially espoused in a decision of the Full Bench of the Queensland Industrial Relations Commission dated 16 June 1987 and encapsulated in the Statement of Policy in 2003 (*QGIG Vol. 174, No.11, 908 – 912*).

Recent ‘WorkChoices’ amendments to the Act mean an employee can be terminated due to ‘operational reasons’ (which include structural, technological or economic reasons) and have no avenue for redress. It is often simple to cite ‘operational reasons’ as the reason for termination. Of particular concern is the fact that unlawful dismissal applications (on the grounds of dismissal on the basis of pregnancy or parental status discrimination) to the AIRC can be avoided by an employer who cites ‘operational reasons’ for the dismissal of a worker. The Workplace Relations Act (1996) provides that an employer may insist on a full hearing

on the operational reasons issue before the matter is conciliated. This has the capacity to deter women with financial constraints from proceeding with complaints. We consider this a problematic change that should be monitored.

In some cases the operational reasons ‘defence’ in the dismissal of an employee need not require a payment of severance monies to an employee. This is because redundancy is not a ‘protected award condition’ under the Act. This may also mean that there is no obligation on behalf of the employer to comply with fair notification and consultation procedures as per TCR provisions and included in many pre-reform awards. This may further prejudice women on maternity leave, as they are not physically present in the workplace. As such, the likelihood of falling through the gaps increases. Severance pay due to redundancy *is* a preserved award entitlement under the Act. However such entitlement only survives for 12 months after the life of an agreement. As such, within approximately 5 years the right to severance pay may no longer exist for many employees. This significantly disadvantages vulnerable employees, namely women, especially if they are award reliant.

We identify three sub-issues emerging from the stories of clients who face redundancy, restructure or dismissal due to ‘operational requirements’ on return from maternity leave:

- i) Made redundant due to a fabricated restructure
- ii) Made redundant due to a genuine restructure
- iii) Transfer of Business

i) Made redundant due to a fabricated restructure:

The following case demonstrates redundancy after returning from a period of maternity leave under highly suspicious circumstances.

“Tracey”

Tracey worked as a registered nurse for over a year on a permanent full-time basis. When Tracey applied for maternity leave she was offered a contract stating that upon her return to work she would hold a lesser position. She accepted this, as she was unaware of her rights. Upon return to work she also discovered the position required availability for night shifts. Tracy told her employer that this was impossible due to her family responsibilities. She was then made redundant. Tracey did not believe the redundancy was legitimate.

In the above case study, Tracey was discriminated against after requesting maternity leave as she was offered to return to work at a lesser position. She was also made 'redundant' without any consultation or option of redeployment. This shows non-compliance with the TCR provisions.

The following case study is an example of the experience of a woman who was treated less favourable due to a 'restructure'.

"Jenna"

Jenna worked on a permanent full time basis for over a year in the cultural and recreational industry. Jenna was based on the Sunshine Coast. Jenna became pregnant and she informed her employer. Not long after, Jenna was informed that there was going to be a restructure and that her position was now relocated to Airlie Beach. Jenna maintained that there were many other people that still worked on the Sunshine Coast. Jenna was offered the job in Airlie Beach but her employer did not inform her of her entitlement to a redundancy. Jenna maintained that she could not move and that the commute was unreasonable. She had no option but to resign.

In Jenna's case there were many elements of less favourable treatment regardless of the restructure being 'genuine' or not. It was not a reasonable management action to relocate a position without consultation with Jenna. We also note that there was no reasonable option of redeployment.

ii) Made redundant due to a genuine restructure

In some cases the employer has genuinely undergone a bona fide restructure whilst an employee is on maternity leave. The problems caused by this situation, however, are often disproportionately unfair on the employee on maternity leave. For example, an employee on leave may not be notified of the restructure and hence not afforded the opportunity to apply for redeployment. This may be a result of the employer simply forgetting about the employee because they are not physically present at the workplace. Of course, knowingly excluding the employee on leave from communication about the restructure is discriminatory.

a) Position dissolved

A further complex situation often arises when a 'replacement employee' is not hired to replace the employee on leave and her job is simply divided up among existing staff. When the employee on leave attempts to return to the position held prior to going on leave, she may learn that her position no longer exists as other people have adopted various aspects of her job. From the perspective of the employer this may be a genuine restructure of the organization and thus they believe the employee on leave is genuinely redundant:

"Lucy"

Lucy worked in the retail industry on a permanent full-time basis for approximately 6 years. While Lucy was on maternity leave her employer had hired a replacement employee for her position. The replacement employee left and the employer did not refill the position. Lucy attempted to return from maternity leave and she was informed that her full-time position no longer existed. Lucy had not been informed of a restructure or redundancy and she was simply informed that the decision was based on operational reasons.

b) Position offered on less pay

In the case of Megan, when she attempted to return from maternity leave she found that the company had restructured and her position had been made redundant. Megan was offered redeployment to a "similar position on less pay". Unfortunately the following situation is not unlawful under the Act:

"Megan"

Megan worked for a company in the wholesale industry on a permanent full-time basis. In early 2007 she commenced maternity leave and took approximately 4 months leave. She wanted to return to work after taking maternity leave. While on leave there was also a change of business ownership. The new owners had their own sales team and were making many workers redundant. While Megan was on maternity leave the new employer did not hire a replacement employee for her. Instead, a co-worker took on her duties. When Megan returned she was informed that the company had decided to restructure and merge 2 positions together to create a new position on less pay. Megan was given the option to apply for the new job. She did not accept this because of the decrease in pay. Megan decided to take the redundancy. She was also disadvantaged because her co-worker was also given the option to apply for the job and Megan felt that she would not get the position over her co-

worker as her co-worker had been performing in the position for the new employer for 4 months while Megan was on maternity leave.

c) Maternity leave a factor in the decision to make a worker redundant

A common scenario reported to QWWS is where a redundancy genuinely needs to occur somewhere in the business and the position held by the woman on maternity leave is the position chosen to be made redundant:

“Kate”

Kate worked on a casual basis in Real estate. She had been working there for over 12 months on a regular and systematic basis. Kate informed her employer that she was pregnant and she would be taking maternity leave for 6 months. When Kate informed her employer of this he shrugged it off. Kate’s employer had hired a worker to replace her (‘Kelly’) after he became aware of Kate’s pregnancy and intention to take maternity leave. Kate was training Kelly before she went on leave. Kelly was employed as a permanent part-time employee. Approximately 4 months after notifying her employer of her intentions to take maternity leave Kate was terminated. The reason given for termination was that the business was not doing so well financially and that someone had to be let go. Kate had more qualifications than Kelly, and more had experience in the position. She felt that the only reason she was chosen for redundancy was because of her impending leave.

iii) Transfer of Business

A complicated situation often arises when there has been a transfer or transmission of business while the employee is on maternity leave. Often the employee on leave is not notified of the transmission and is not considered to be a transferred employee. This may be because she has not had the opportunity to re-apply for a job with the new company or it may be because the company has decided not to employ her because she is on maternity leave. In some cases the woman has tried to return to work and the new employer has been unaware they were even employed. Women on maternity leave often simply fall through the gaps. This may be as a result of the employer placing the employee in the ‘too hard basket’, forgetting about the employee and the status of their leave because they are absent from the workplace, or it may be a wilful act of discrimination. In the following case study a young

woman lost her job as a result of the combination of being on maternity leave and a transfer of business.

“Cassie”

Cassie was 21 years of age. She was employed in the Business Services industry on a permanent basis as a receptionist. She became pregnant in her first year of employment and took maternity leave approximately 14 Months after she commenced employment. When she took maternity leave her employer hired a replacement employee in her position. Approximately 2 months after she commenced maternity leave she was contacted by her employer and told that the business had been sold and a transfer of business had taken place. This conversation was the first Cassie had heard of the transmission of business. She did not receive any notification or consultation in accordance with TCR provisions. Cassie assumed that the transfer would not affect her, as she was not given any information. Two days after the initial contact her employer informed her that she would be dismissed. Cassie was told that the new employer did not want her because she was on maternity leave and that all other employees had become transferred employees (including her replacement employee). Cassie contacted the Queensland Working Women’s Service and we assisted her with her situation. We became aware that the new employer had never heard of Cassie before!

Issue 2: The employee is told that she has been replaced whilst on leave.

QWWS frequently hears of situations where an employee is replaced while on maternity leave, and on undertaking the return to work discover that the employer favours the new arrangement and does not wish to allow the employee to return. Sometimes this boils down to the employer wilfully ignoring maternity leave legislation or being unaware of the relevant legislation and the rights it confers on employees. QWWS has also encountered cases of clients who have been told, despite clear indications to the contrary, that it was understood that they had resigned when they left to have their child.

i) The employee is simply told she has been permanently replaced:

“Sue”

Sue was an administration employee of 7.5 years service with an employer in the retail sector. She returned from clearly-sanctioned statutory maternity leave to have her employer

tell her that her job had been given to someone else. Sue was also told she could apply for her position back when the (male) employee performing it decided to resign.

This is an issue not just of wilful employer denial of statutory maternity leave entitlements, but ignorance of the requirements regarding informing replacement employees of their temporary status (s 281 of the Act).

ii) The employee is considered to have resigned when they left to take maternity leave.

Whether guilty of wilfully misunderstanding maternity protection legislation or otherwise, employers sometimes interpret a woman's declaration that she wishes to take a period of maternity or parental leave to mean she is resigning her position. At times this is linked to a perception that a woman who leaves work to have a child has no intention of returning to the workforce. (Chester and Kleiner (2001). QWWS has received calls from women who attempt to return to work to find her employer surprised at her intentions. The following case studies exemplify this issue:

'Kym':

Kym worked as a full time administration officer at a real estate firm for three years and discovered she was pregnant in mid 2004. Kym took some annual leave toward the end of the year (and had some extra annual leave paid out) because of complications related to her pregnancy. She returned to work from this leave and requested to reduce her hours to part time at the beginning of her third trimester, which was accommodated. Kym gave written notice of taking 52 weeks statutory maternity leave in March 2005. On emailing her employer with notice of her impending return to work, Kym was advised that when she took annual leave at the end of 2004, she had actually resigned, and when she returned part-time in March 2005 she was re-employed on a casual basis and as such was not entitled to maternity leave because of the length of her employment (considered to be three months casual). Kym had never indicated she was resigning and had always referred to her leave as 'maternity leave'. Kym's employer quite deceptively made her casual after she returned from annual leave, and interpreted her departure from the company as the resignation of a casual employee with less than 12 months service. During conversations with QWWS, Kym's employer also made it clear that, as a small business, they could not accommodate women who leave to have children. It was clear that their actions had nothing to do with misunderstanding Kym's maternity leave as resignation.

Issue 3: The employee's position is altered to her detriment on return from leave.

QWWS often hears from clients returning from maternity leave to discover their employment status has been changes from permanent to casual, or their position has been significantly and negatively altered. This is of course is at odds with the Act's 'Guarantee' to return from maternity leave to one's former position or a position of comparable worth. We identify this as a separate issue from that of genuine or fabricated redundancies. From our data, we identify two types of arguably discriminatory treatment by employers within this issue:

- (i) Alterations to the employee's status on return from maternity leave
- (ii) Moved to 'undesirable/non-comparable' role or location:

(i) Alterations to the employee's status on return from maternity leave:

Callers to QWWS sometimes report instances of being unilaterally terminated from a permanent status and appointed to a casual status after having a child and returning to work. Some callers report that their employer has advised them that this is in order to offer them 'flexibility'. What it often means, however, is that the employer is able to reduce, increase or alter the employee's hours at short notice. It is often done on the employer's assumption that the employee will no longer be reliable after childbirth and childrearing.

'Francine'

Francine had been employed by a company in the retail industry since 1998. In May 2006 Francine commenced maternity leave. She was told that she had to resign and take a casual position when she came back from her leave. After returning from her leave in January the following year and working as a casual employee for a short amount of time, Francine was dismissed and advised that her resignation had broken her continuity of service. As a double whammy, Francine, missed out on accessing her accrued long service leave as she was seen to have resigned before the entitlement was secured as a payable entitlement of 10 years service.

'Chantel'

Chantel had worked in a clerical position in an agricultural production company for 2.5 years. Chantel took 7 weeks maternity leave after the birth of her child. On return from her leave, she was unilaterally terminated from her former position of permanent status and appointed to a lower classification at casual status.

'Melissa'

Melissa was employed as a permanent full time employee for over 4 years in administration. She went on maternity leave and did not specify her intended date of return. 4 weeks after she gave birth she requested to return to her position. Melissa's employer informed her that there were not enough hours for her to return to her job. Available work for her was one day a week as a casual. She requested to return to the position she held prior to taking maternity leave and was told by her employer that it "was unlikely".

(ii) Employee is moved to 'undesirable/non-comparable' role or location:

The statutory guarantee to return to the position held prior to going on maternity leave (or a position of 'comparable worth') is often given mere lip service by employers. Some callers to QWWS have advised that, while they experience no problems in being allowed to return to work, their working conditions or roles have been subtly (and sometimes not so subtly) altered to their detriment:

'Jane':

Jane had worked as a full time casual employee in the education sector for 5 years. Jane informed her employer she was pregnant and took a period of maternity leave. Three months after commencing her leave, Jane's employer called her and requested she return to work. Jane advised this was not possible as she was suffering from post-natal depression and advised her employer that she needed the full amount of statutory maternity leave. Jane returned to work 8 months later to discover that her workstation had been moved to the basement of the building (an area known as 'the Dungeon'), an area without heating and situated next to sewerage pipes. Jane was also dismissed 4 days later. The reason provided for dismissal was 'performance issues'.

'Sally':

Sally worked in a clerical position and took a period of maternity leave. On return from leave, Sally was initially told her job was redundant. (It had in fact been filled by another employee). Sally's employer then appeared to have a change of mind and advised her that she was still employed but that she was to be relocated to a different office – 1.5 hours drive and many road tolls away.

'Karen'

Karen had worked for a childcare company for 9 years when she took a period of maternity leave. Upon her return from leave, she was told she had a job, but that it was in a different location, at a lower status and included different duties.

Issue 4: The employee is told, upon attempting to return to work, that she never had access to maternity leave in the first place.

Another recurring theme QWWS has noticed is that women who attempt to return from a period of maternity leave are told they were never entitled to said leave. Entitlement to leave is an issue that often honestly confuses some employers (and employees). However, QWWS has encountered cases where the employer acts deceptively by assuring an employee she need not (for example) provide particular written notice, then advises, upon the employee's attempt to return from leave, that she had not complied with legislative requirements and hence has no position with the firm. This was the case with Alice:

'Alice':

Alice was employed in a clerical position with an agricultural company. Alice discovered she was pregnant around 6 months into her employment. She advised her employer that she would need to take a period of maternity leave after she had completed 12 months of service with the company. The employer made frequent and harassing enquiries into when she was intending to leave. Eventually, the employer advised Alice in writing that she could go on leave when she had completed 11 months of service. While on leave, the company was sold and all employees were transferred to the new owners. Upon attempting to return to work, however, Alice was told by the employer that she was not considered to be an employee of the company as her leave was not taken in accordance with the legislation (having not completed 12 months service).

It would be interesting to see some case law develop around whether employer approved unpaid maternity leave (regardless of whether or not the employee is entitled to leave under legislation) could be upheld as a contractual arrangement.

Provisions in the Act relating to the giving of proper notice before taking leave have also been unreasonably used by employers to deny a return to work after maternity leave. The simplest elements of the notice provisions in the Act are (1) the need for the employee to give 4 weeks written notice of the date of return to work (s 280 (1) (b) of the Act) and (2) the need for the employee to give 4 weeks written notice of intent to take maternity leave and the intended date of starting and ending such period of leave (accompanied by a medical certificate) (s 271 (1) & (2) of the Act). However, as noted earlier, there are a raft of other requirements, including the need for statutory declarations about other dates of authorised leave intended to be taken because of the pregnancy, statutory declarations about intentions to be the primary care-giver at all times while on maternity leave (s 271 (5) (a), (b) and (c) of the Act) and written notice of changes of dates to maternity leave periods while on leave.

In 'Kym's case, above, the employer also refused a return to work on the grounds that Kym did not give any written notice about her intention to take maternity leave. Kym was, in fact, told many times by her employer that she did not need to provide written notice, as they considered their workplace to be a friendly and informal place that thrived on trust. Kym's employers, however, ultimately used the absence of written notice as another reason to deny her the right to return to work after maternity leave.

'Sarah'

'Sarah' was another QWWS client denied the right to return from maternity leave because she was told she had not complied with proper notice provisions. Sarah was a permanent part time manager of a fast food franchise for 15 months before she became pregnant and requested maternity leave. HR and other managers were completely aware of the nature of Sarah's leave but never advised her she needed to provide written notice as per the statutory requirements. While on leave, Sarah bumped into another manager who told her she wasn't entitled to maternity leave because she had not followed the 'proper procedures'. Sarah was told that she was considered to have quit, but that she could come back to work as a casual employee if she wanted to.

A particularly unfair case was that of 'Lyn' :

Lyn had worked as a permanent front-office employee in a hotel for three years. Lyn informed her employers she was pregnant and asked her employer if she could work part-time up until the start of her leave, as the full time workload was contributing to medical difficulties towards the end of her pregnancy. She supported this request with a letter from her doctor. Her employer agreed that Lyn could reduce her hours to part-time (but also perform different tasks) before going on maternity leave, but made those hours casual. Lyn was happy with her reduced hours and went on her maternity leave as agreed with her employer. On her attempt to return to her former full time administration position, however, Lyn's employer advised her she was only able to return to perform the casual position she began doing prior to her maternity leave. Lyn should have had the protection of s 280 (3) (c) of the Act :

...the employee is entitled to return:

(a) unless paragraph (b) or (c) applies--to the position she held immediately before the start of the maternity •related leave period; or

(b) if she was promoted or voluntarily transferred to a new position (other than to a safe job under paragraph 268(2)(a) during the maternity •related leave period--to the new position; or

(c) if paragraph (b) does not apply, and she began working part •time because of her pregnancy--to the position she held immediately before starting to work part •time.

Given that Lyn began working part-time hours because of her pregnancy, Lyn should have been able to return to her substantive, full time position upon return from leave. Nevertheless, since Lyn's employer had unilaterally decided her part-time hours were to be casual part-time hours, she did not have the protection of the Act. Lyn's employer did not advise her that making her position casual prior to going on leave would have the effect of nullifying the 'guarantee' provided in the Act.

A final example of where an employee is simply told she never had access to maternity leave in the first place can be found in those cases where an employer has used what might be called the 'WorkChoices Defence'. QWWS has identified a number of cases where employers misinterpreted changes to the unfair dismissal laws and considered that they had

free reign to dismiss any employee for any reason. Some employers have advised workers upon their attempt to return from maternity leave (or in the course of communications while on leave) that the WorkChoices amendments to the Act now means that they do not have to give a reason to terminate, and that the employee was considered to have been terminated upon the taking of maternity leave:

'Melinda'

Melinda was a real estate property manager who became pregnant and verbally arranged a period of maternity leave with her boss. Leading up to her leave, Melinda was subjected to various forms of pregnancy discrimination. During her maternity leave, Melinda's employer told her that there had been new workplace relations laws enacted and that, being a small business they were unable to afford to let her return from maternity leave and that the new unfair dismissal laws allowed them to terminate her employment.

This is a prime example of a little bit of knowledge being a dangerous thing.

The intricacies of the law surrounding the right to access maternity and parental leave, including legislative notice provisions, make it difficult for women to be sure their jobs are safe while they take their leave. In addition, new unfair dismissal laws in the Act are being exploited by some employers in order to evade their continuing obligations under the same and other legislation.

Issue 5: The employee faces difficulty negotiating flexible hours or family-friendly arrangements upon return to work.

Those employees who return to their pre-maternity leave positions unhindered may face a different set of challenges. Juggling caring responsibilities with paid work is generally challenging. When an employer will not at least make reasonable attempts at flexibility and accommodation of an employee's caring responsibilities, the juggling becomes even more difficult. There are several legislative (and, to a limited extent, industrial) instruments that are designed to foster family-friendly arrangements at work. Briefly, these are:

- Sex Discrimination Act (Cth) 1984 (and associated state legislation, including the Qld Anti-Discrimination Act 1991 – prohibiting direct or indirect discrimination on the grounds of family responsibilities. Case law (eg: *Hickie v Hunt & Hunt (1998)*)

HREOCA 8 (9 March 1998)) has interpreted this section to include prohibiting less favourable treatment of a worker who returns from maternity leave and requires part time work that can reasonably be accommodated.

- The federal *Family Leave Award* (whose coverage has been severely limited by WorkChoices) gives employees with caring responsibilities the right to request part time work. An employee's right to request (and employer's obligation to consider) part-time or flexible working conditions is pivotal in allowing women returning from maternity leave to balance their work and family commitments. The United Kingdom has recently successfully implemented legislation around this issue.
- *Workplace Relations Act 1996 (Cth): s 3(1)* ('Principal Objects): notes that one of the principal objects of the Act is "assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers".
- Unreasonable refusal of a request to work part time hours on return from maternity leave has been held to be discriminatory in a number of cases including *Reddy v International Cargo Express* [2004] NSW ADT 218 and *Mayer v A.N.S.T.O* [2003] FMCA 209.

The following callers to QWWS have experienced difficulties negotiating flexible working arrangements after returning from maternity leave:

'Kate':

Kate had worked for a large medical research company and had taken a period of unpaid maternity leave. Kate could not find childcare that would accommodate her child for 5 days. Two months prior to returning from her maternity leave, Kate emailed her HR manager requesting a meeting to talk about the possibility of performing her position part time or in some other manner. Five days after emailing her request Kate received a firm rejection of her request. Kate was advised her position was 'full time or not at all'. It was clear that the company had not made a reasonable attempt to investigate alternative options to full time work for Kate. Kate's situation was also one where a (male) replacement employee had been hired. Kate was advised that this new employee suited the role and would continue on in the full time position if she would not return full time.

Kate's case demonstrates that even very large companies with considerable resources to devote to staff training and retention will put requests for family-friendly and flexible working arrangements (particularly on the tail of a period of maternity leave) in the 'too-hard basket'.

Nicola:

Nicola was a permanent employee of 12 years with an office supplies retail store. Some years before contacting QWWS Nicola had taken a period of maternity leave for the birth of her first child, returning to work two, and then four days per week. Nicola was about to go on a new period of statutory maternity leave for the birth of her second child when her employer advised her she was to resign, but would be re-employed following her leave only if she committed to working full time, 5 days per week.

Issue 6: The employee is dismissed or treated less favourably upon requesting to take maternity/parental leave.

This final section examines discrimination in the earlier stages of pregnancy, where clients have reported less favourable treatment (or dismissal) for requesting to take maternity leave. While this is not strictly within the scope of our paper we believe it is important to note given that it often precedes difficulties in returning to work after the leave is taken.

In the following case, an employee contacted our service after informing her employer of her intention to take leave. As a result of this her duties were progressively changed and reduced:

"Lee"

Lee was employed as a sales representative in the retail industry on a permanent full-time basis for over 3 years. She was paid on a commission basis. Lee informed her employer that she was pregnant. She also informed them of the date her baby was due and the date she would be returning from maternity leave. Not long after, her employer began to allocate the clients in her area to another sales representative. As Lee's income was reliant on commissions, she experienced a significant reduction in pay after the opportunities to make sales was removed.

“Daisy”

Daisy worked on a permanent part time basis for 16 months in the retail industry. As part of her role she had particular targets to meet. Daisy notified her employer of her pregnancy and put in an application to take leave. Not long after, Daisy was called in for disciplinary action for not meeting her targets. Daisy maintained that other workers had not met their targets and they were not being disciplined.

Conclusions and Recommendations

In this paper we have examined the experiences of women who have contacted QWWS in relation to difficulties experienced as a result of taking maternity leave. We identified 6 themes:

- 1. The employee is advised her position has been made redundant (or the company has restructured) while she has been on leave.*
- 2. The employee is simply told that she has been replaced whilst on leave.*
- 3. The employee's position is altered to her detriment on return from leave.*
- 4. The employee is told, upon attempting to return to work, that she never had access to maternity leave in the first place.*
- 5. The employee faces difficulty negotiating flexible hours or family-friendly arrangements upon return to work.*
- 6. The employee is dismissed upon requesting to take maternity/parental leave.*

We note that in Australia we have a long way to go in terms of favourable and equitable legislation around the issue of maternity leave. Discrimination on the basis of pregnancy and family responsibilities remains a significant barrier to women who work and require time off for childbirth and childrearing. To go some way to removing this barrier, we suggest that legislation be amended or established to provide for:

- *A right to return to part-time work after maternity leave (and an 'obligation to consider' such request on the part of the employer) (similar to the system adopted by the United Kingdom);*
- *Paid universal and government-funded maternity/parental leave of a minimum of 14 weeks but preferably 6 months. Paid maternity leave has been shown to encourage workforce attachment in those women who wish to return to work after childbirth. We suggest that a statutory minimum of paid leave may (among myriad other benefits) encourage not just workforce attachment but greater recognition of the rights which attach to their employment;*
- *A right to request to take leave for a maximum of 24 months;*
- *Penalties to apply to employers who breach the legislation.*

We also believe that education for both employees and employers around this issue is lacking. In many cases this results in unintentional discrimination against pregnant women and women on or returning from maternity leave.

This paper reflects the real life experiences of Queensland women. We encourage more research in this area and urge politicians on both sides of politics to acknowledge the need for immediate legislative change. There is no room in a modern Australia for policies or laws that impede women's progress in their working lives *or* cause financial or other hardship to women who require time off work for childbirth and childrearing.

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