
A Pregnant Pause

WERP's response to the Productivity Commission Draft Report re the Paid Maternity, Paternity and Parental Leave inquiry

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INTRODUCTION	3
CHARACTERISTICS OF 76 WERP CLIENTS WHO EXPERIENCED PREGNANCY DISCRIMINATION	9
RECOMMENDATION 1: BRING FORWARD THE IMPLEMENTATION DATE FOR FORWARD WITH FAIRNESS TO ALLOW UNFAIR DISMISSAL CLAIMS BY WORKERS IN SMALL BUSINESSES.	10
RECOMMENDATION 2: WORKCHOICES AMENDMENT PROVISIONS IN REGARD TO THE DEFENCE OF ‘GENUINE OPERATIONAL REASONS’ SHOULD BE REPEALED	13
RECOMMENDATION 3: AN ENFORCEABLE RIGHT FOR WOMEN TO RETURN TO WORK PART TIME MUST BE INTRODUCED.	16
RECOMMENDATION 4: A SET OF ENFORCEABLE STANDARDS IN RELATION TO PREGNANCY.	18
RECOMMENDATION 5: IMPLEMENTATION OF A NATIONAL PAID MATERNITY LEAVE SCHEME	21
RECOMMENDATION 6: COMPULSORY EDUCATION OF EMPLOYERS ON THE CONSEQUENCES OF NOT RECOGNISING PREGNANCY AND MATERNITY RIGHTS	24
RECOMMENDATION 7: EFFECTIVE EDUCATION OF WOMEN REGARDING THEIR RIGHTS IN RELATION TO PREGNANCY AND EMPLOYMENT TO ENABLE THEM TO RETURN TO WORK.	26
RECOMMENDATION 8: A FORMAL ENQUIRY INTO THE PREVALENCE OF PREGNANCY DISCRIMINATION	28

Introduction

1.1 The Inner City Legal Centre

The Inner City Legal Centre (ICLC) is a non-profit community based legal centre located on Darlinghurst Rd, Kings Cross. The Centre provides free legal services to residents and workers in the inner city and surrounding areas. For the last two and a half years the ICLC has run the Women's Employment Rights Project (WERP).

1.2 The Women's Employment Rights Project

WERP is funded by the Office for Women, NSW Department of Premier and Cabinet. It was initially funded in May 2006 in response to WorkChoices¹. WERP provided employment legal advice, information and training to community advocates across NSW through 2006 and 2007. WERP also monitored the effect of WorkChoices on NSW women as detailed in the attached case histories².

In January 2008, WERP implemented a telephone advice line for women facing difficulties in their employment. This was made possible due to continued funding from the NSW Office for Women. The service is offered two mornings a week and has proved to be an important means of assisting women in understanding and enforcing their rights in relation to employment.

1.3 Objective

This submission examines both the nature and extent of pregnancy discrimination encountered by clients of WERP. It demonstrates from qualitative research how amendments to the Workplace Relations Act 1996 (Cth) (WRA) have negatively affected clients in cases of pregnancy discrimination.

The recommendations following this overview are derived from this research and the knowledge base accumulated by WERP in serving the women of NSW.

1.4 Changes to current workplace legislation

An examination of the impact of current workplace legislation on women in NSW is important for two reasons. Firstly, women have traditionally been at a greater

¹ WorkChoices; a series of amendments made to the Workplace Relations Act (WRA) in March, 2006

² See Annexure A

disadvantage in the workforce than their male colleagues. They are disproportionately located in low wage areas of employment and are more reliant than men upon the former award system³. Women are also more at risk of facing discrimination in the workplace. The case studies collected by WERP highlight the fact that women are particularly vulnerable in the areas of unfair and unlawful dismissals, Australian Workplace Agreements and discrimination.

Secondly, the recent changes to employment law represent a major shift for employment conditions in Australia. The changes affect a majority of the population, with estimates suggesting that 85% of the Australian workforce and 75% of workers in NSW are covered by the new amendments.⁴

1.5 Pregnancy discrimination

Whilst maternity leave and anti-discrimination provisions are enshrined in both State and Federal legislation, they are not working as they should. Employers can, and do, easily flout the existing regulations, which are meant to provide rights and protections to women during pregnancy and maternity.

Pregnancy discrimination is a key problem identified in WERP case studies. Of the 224 relevant collected case histories, 63 women experienced discrimination in the workplace. 30 women sought advice specifically on discrimination during pregnancy, including returning to work from maternity leave. From February to June 2008, the ICLC advised clients on 76 cases of pregnancy discrimination.

Pregnancy discrimination has been found to occur at three key stages:

- During pregnancy
- When a woman is on maternity leave
- When women return to work

Complaints range from termination, the refusal of employers to allow women to work part time, changed working conditions after maternity leave and being denied promotions and overlooked in interviews.

Despite the seriousness of the problem, pregnancy discrimination is often overlooked. Cases rarely proceed to court, but are generally settled beforehand. Enforcement of existing rights requires proceedings in the Industrial Commission or the discrimination jurisdictions. This is extremely stressful at a time women are either pregnant or parenting a newborn. As a consequence, the true extent of its occurrence and the forms it takes and the loss of income are widely unknown.

³ Dr Marian Baird, Rae Cooper & Damian Oliver, Down and Out with WorkChoices: The Impact of WorkChoices on the Work and Lives of Women in Low Paid Employment, A Report to the Office of Industrial Relations, Dept. of Commerce, NSW Government, June 2007, p.9.

⁴ Legislative Council of NSW, 2006, pp.xi-xii

1.6 Negotiating Current Legislation

The four main forums in which female employees can seek redress are the Australian Industrial Relations Commission (AIRC), New South Wales Industrial Relations Commission (IRC), Anti-Discrimination Board (ADB) and Australian Human Rights Commission⁵ (AHRC).

Most women who feel that they have unfairly lost their job opt for the cheaper and less complex unfair dismissal proceedings in the Australian or NSW Industrial Relations Commissions. Whilst both the NSW and the Australian Industrial Relations Commissions provide an unfair dismissal jurisdiction, this paper focuses on the AIRC because the WRA regulates the majority of Australian workers.

1.7 Unfair Dismissal and Unlawful Termination under WRA

An Unfair Dismissal application to the AIRC/IRC can result in either the dismissal being overturned or monetary compensation. When considering an unfair dismissal claim the Commission looks at issues such as:

- Whether the employer had a valid reason for terminating the worker's employment
- Whether that reason was communicated to the employee
- Whether the worker had an opportunity to respond to the reason given for their termination

If an unfair dismissal claim is not settled at conciliation the worker can choose to have the claim heard at a formal arbitration hearing by the Commission.

The AIRC also conciliates a jurisdiction called Unlawful Termination, where one of the grounds or prohibited reasons for termination is discrimination. If the application fails at conciliation the matter can be referred to the Federal Magistrates Court.

If the conciliation is successful the compensation paid is often only a few weeks pay, which does not compensate for the loss of income that a pregnant woman would be relying on up to the birth of her child. In most cases, she also loses her statutory right to 12 months maternity leave. The compensation paid depends usually on the length of service with the employer rather than the seriousness of the termination. Therefore, a woman employed for a few years may only receive compensation amounting to a few weeks pay.

Between 1996 and 2005, there were only 147 unlawful termination claims referred, compared with 50,000 unfair dismissal applications during the same period.

⁵ Formerly known as the Human Rights and Equal Opportunity Commission

In an unfair dismissal claim applicants are only required to show that the treatment at the hands of their employers was "harsh, unjust or unreasonable". Ultimately, there is a significant difference in proving what is 'lawful' as opposed to what is 'fair'.

1.8 The Operational Reasons Loophole

According to the AIRC, lodgements for the year 2006-2007 were "well down". This can be partly attributed to the exclusions for workers from seeking a remedy under the WRA. Some 133 (52%) of the 255 applications dismissed on jurisdictional grounds were dismissed because the employer had 100 employees or fewer, 29 (11%) because the employee had not served the qualifying period of employment and 21 (8%) because genuine operational reasons were the reason for the termination of employment.⁶

If an employer claims that dismissal was due to a company's 'operational requirements', a worker is potentially unable to pursue an unfair dismissal claim.

In *Village Cinemas Australia Pty Ltd v Carter* [2007] AIRCFB 35, the first Full Bench decision on the application of 'genuine operational reasons' with respect to unfair dismissal was made. The decision made it clear that as long as a genuine operational reason is "real", "true" or "authentic", the exemption will apply and other matters, such as other steps the employer could have taken to avoid the termination, are irrelevant.

It follows, that to be "genuine", the operational reason does not necessarily need to be sound, defensible, well-founded or fair in the circumstances.

1.9 Conciliation via the ADB and AHRC

The main difficulty with all anti discrimination law is that it is retrospective. In Australia, human rights such as freedom from discrimination are not constitutionally protected. Protections can only be implemented through legislation such as the SDA and ADA, and are pursued after any such incidents occur.

Participants in conciliations convened by the ADB or AHRC experience a much lower rate of success in the conciliation process than in the AIRC. In the 2006-2007 year, there were 5173 cases lodged with the AIRC regarding termination of employment, 73% of which were settled at conciliation. In comparison, for 2006–07, the Complaint Handling Section (CHS) of AHRC achieved a 38% conciliation rate, consistent with its conciliation rate for the previous three reporting years, meaning 62% of cases remained unresolved.

The ADB dealt with 1113 cases for the 2006-2007 year. 284 (25.5%) of cases were settled at or after conciliation, 142 (12.9%) referred to the ADT as conciliation was unsuccessful or not suitable and 168 (15.1%) were abandoned altogether.

⁶ http://www.airc.gov.au/about/annual/ar2007/annual_report_2006-07.pdf

1.10 Room for improvement

Parties are more responsive to resolution when the issues are still immediate, and there is a better opportunity to make changes⁷. The most recent statistics from the ADB state that the current average time to finalise a complaint with the ADB is 5.5 months. In 2006–07, 1779 complaints were received by the Complaint Handling Section (CHS) of AHRC. 38% of finalised complaints were conciliated and the average time from lodgement to finalisation of a complaint was seven months⁸.

Another problem with conciliation conferences is that there is no record of the proceedings or transcript, until after the matter is settled by agreement of the parties and the terms are put in writing. It is also often left to case law to define how individuals will be affected. Decisions arising from individual complaints to the IRC and the AIRC as well as documented cases convened by the ADB and AHRC are almost the only means of expanding human rights and discrimination jurisprudence in Australia.

Moreover, any form of redress is also only applicable to individuals. First, the Australian system relies almost exclusively on victims' willingness to assert their rights, rather than empowering AHRC to investigate and take action against companies in the absence of individual complaints. Second, case law has shown that in practice there is still a great deal of uncertainty about the stringency of the elements of proof required to establish a discrimination case before the court. Reducing uncertainty in this field will increase victims' incentives to lodge complaints, thereby raising the effectiveness of the whole system.⁹

Discrimination can have very real costs for the women affected. The inability to pursue an unfair dismissal claim is frustrating for any worker. Consequences can include unemployment, financial loss, legal battles, medical conditions made worse by stress, current and future career problems. These important issues are exacerbated when the unfair dismissal is a consequence of pregnancy discrimination. In these situations, women are at greater risk financially, physically and emotionally. They are also less likely to pursue an unfair dismissal complaint through the ADB or AHRC because often they have no knowledge of their rights to make such a complaint.

⁷ http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_annual_report_2006_2007#ground

⁸ http://www.AHRC.gov.au/about/publications/annual_reports/2006_2007/pdf/AHRC_ar2006-07.pdf

⁹ (OECD Employment Outlook 2008, <http://www.oecd.org/dataoecd/42/58/40904195.pdf>, viewed on 17 July 2008).

Characteristics of 76 WERP clients who experienced pregnancy discrimination

(a) Length of service with the company

Up to 1 year	2-5 years	5-10 years	10 years and over	Not stated
22	22	14	7	11

(b) Ages of women within the WERP project

Characteristics	18-24	25-29	30-34	35-39	40 or older	Not stated
Age	2	9	10	13	6	36

(c) Type of employment of women under WERP

Type of employment	F/T	P/T	Casual	Not stated
No. of women	32	9	3	32

(d) Table 1.3 Period where discrimination occurred (%)

Time of Discrimination	During pregnancy	While on maternity leave	Upon return to work	N/A
	36	35	2	3

Recommendation 1: Bring forward the implementation date for Forward With Fairness to allow unfair dismissal claims by workers in small businesses.

31% of WERP's clients who had their employment terminated were unable to lodge an unfair dismissal claim under WorkChoices because there were fewer than 100 employees in the workplace.

Case Study 1

Jessica* was seven months pregnant, and worked in a small retail business. She was reliant on her wages until the birth of her baby, but her employer told her that there was “not enough work for her”. She was the only staff member to be dismissed. Rather than receiving 52 weeks unpaid maternity leave, she has been given a redundancy payout and is without a job two months before her baby is due.

Jessica is unable to bring an unfair dismissal claim as the company has less than 100 employees.

Case Study 2

When Laura* was hired through a job agency, her employer said they were ‘lucky to have her’. However, soon after she was employed, she discovered she was pregnant. At work one day she began haemorrhaging and had to be taken to hospital in an ambulance. On the day she returned to work after two days off, her employer terminated her employment, stating it had nothing to do with her work performance.

Laura is unable to bring an unfair dismissal claim as the company has less than 100 employees.

Case Study 3

Caroline* was on sick leave from her job in the medical profession following a miscarriage. Her temporary sickness benefits were suddenly cancelled, and she received a letter saying her employer claimed that she had resigned and did not have a job to return to. When she contacted her employer, their response was to say that they had treated her request for extended leave and return to work letter as a termination. She was also told that it was too risky to employ her permanently if she was going to try and fall pregnant again.

Caroline is unable to bring an unfair dismissal claim as the company has less than 100 employees.

Discussion

Almost one third of clients WERP advised in relation to pregnancy discrimination were unable to bring an unfair dismissal claim because they worked for a company with 100 or fewer employees. Workers in these businesses cannot, by law, pursue a claim for unfair dismissal.¹⁰

With the diminished rights to unfair dismissal claims, affected workers can only bring claims under the:

- *Sex Discrimination Act 1984* (Cth) (SDA)
- *Anti-Discrimination Act* (NSW) (ADA).
- Lodgement of an Unlawful Termination application.

The dispute resolution process under the SDA or the ADA is much more laborious and less immediate than pursuing a claim through the AIRC.

AHRC or the ADB investigate a complaint and then decide whether the matter can be conciliated. If the complaint is not conciliated, it may be pursued in the Federal Court or the Federal Magistrates Court of Australia for determination. Unsuccessful matters in the ADB can be referred to the Administrative Decisions Tribunal.

Discrimination is also a ground for making an unlawful termination application. Unlawful termination as a legal form of redress has further developed with the commencement of the new WRA legislation and the diminished rights to make an application for unfair dismissal

An action of unlawful termination provides workers with a simple, inexpensive and fast process to bring the employer to the conciliation table. Unfortunately, if the employer does not participate in good faith and the issues are not resolved at the one and only conciliation, the client has no alternative but to have the matter referred to the Federal Magistrates' Court or to withdraw the claim. Clients can utilise the panel of solicitors who provide pro bono advice up to the value of \$4,000. Unfortunately, the \$4,000 does not allow for actual representation of a client. Representation in the Federal Magistrates' Court is critical for vulnerable clients.

According to legal advice prepared by plaintiff law firm Maurice Blackburn Cashman for the ACTU, the cost of preparing a statement of claim to initiate proceedings would be \$8500 to \$15,500. Furthermore, if the worker loses the case, there is a danger costs may be awarded against them.

It is WERP's opinion that few women are in the position emotionally or financially to pursue such action.

The *Forward with Fairness* policy adopted by the Rudd government advocates that the exclusion of businesses employing 100 or fewer will be reduced to only these

¹⁰ s643(10) WRA

businesses employing fewer than 15 employees in claims for unfair dismissals and workers in businesses with fewer than 15 employees able to apply for unfair dismissal claims after 12 months employment.

The *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* came into effect on 27 March 2008. However, the substantive component of the legislation is still being drafted and will come into effect in its entirety on 1 January 2010. The delay in its release is to provide adequate time for widespread consultation and to allow for this important legislation to be drafted in a “fair and sensible manner.” WERP commends this approach, however, the delay means vulnerable workers remain at risk for as long the current legislation remains.

Recommendation 2: WorkChoices amendment provisions in regard to the defence of ‘genuine operational reasons’ should be repealed

In 17% of WERP’s pregnancy discrimination cases women’s jobs were either diminished or terminated due to a company ‘restructure’

Case Study 4

When Melanie* was on maternity leave, she was told by her new boss that her position had been restructured and therefore no longer existed. The major accounts she had been responsible for before she went on maternity leave had been given to other people. Melanie was then offered a role answering phones and arranging orders. She was told that she had not been demoted because of her performance, and the change in responsibilities was only a restructure. Moreover, there was no redundancy payable as she was due to return to work a month later. Melanie is unable to bring an unfair dismissal claim as her employer could claim their actions were justifiable under operational requirements.

Melanie cannot bring any claim as her employer could claim their actions were justifiable as ‘genuine operational reasons’.

Case Study 5

Sarah* had been with her employer for 5 years, and trained her locum replacement before going on maternity leave. Before returning to work, she was told that changes had been made to the geographical location staff worked in, but they could apply for the area closest to the one they previously worked in. Sarah did not get the opportunity to apply to the area she used to work in and as it had been given to the locum she had trained. Sarah was forced to resign as the area allocated to her was too far away from her home, especially as she had a newborn baby. She was also made to pay back the amount of her paid maternity leave because she resigned within two years of claiming it.

Sarah is unable to bring an unfair dismissal claim as her employer could claim their actions were justifiable as ‘genuine operational reasons’.

Case Study 6

Donna* contacted her employer while on maternity leave to find out about her return to work dates and what accounts she would be responsible for when she returned. In response, she received an email from her employer stating that due to a significant loss of business revenue, they had to downsize. Consequently, there was no comparable job for Donna, and her redundancy was effective immediately.

Donna is unable to bring an unfair dismissal claim as her employer could claim their actions were justifiable as 'genuine operational reasons'.*

Discussion

One fifth of the pregnancy discrimination cases collected by WERP featured the excuse 'genuine operational reasons.' Of the thirteen women given this rationale for change in their employment status, two were offered a different job after maternity leave and one was given a lesser status job but the same income. Six had their jobs terminated, and four were offered redundancy payouts. Two were forced to resign, and one was asked to reimburse her paid maternity leave as she had been in her job for less than two years. One client was facing the prospect of termination if the company could not find her a job.

The 'genuine operational reasons' provisions under the WorkChoices amendments are so broad that they have created an easy loophole for employers to exploit and effectively discriminate against pregnant women and/or women returning to work after maternity leave. This leaves women without recourse to a fast, inexpensive remedy such as a claim under the unfair dismissal or unlawful termination laws

Recommendation 3: An enforceable right for women to return to work part time must be introduced.

One tenth of WERP cases concern women who are denied the right to return to work part time.
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Case Study 7

Janine* worked for a company with a guaranteed return to work part time policy. While on maternity leave, the policy changed to include only guaranteed full time positions. When she returned to work, she was offered four part time jobs which were all lower level, lower salary and for a fixed term. Moreover, on the waiting list at six childcare centres, Janine is unsure that she can get childcare.

Janine was happy to job share her position and wanted a guaranteed part time permanent position, not a temporary one. Her employer has now told her they tried very hard to accommodate her, and that they are not legally obliged to give her old position to her or any job.

Janine was discriminated against because she wanted to work part time.

Case Study 8

Michelle* wanted to return to work part time, but was told by her company that she had to return to work full time after two months, and she was not allowed to job share. This was not feasible for her with a young child. She was told that the company had allowed an employee to return to work part time in the past and it had “bit them on the bum,” so they refused to agree to allow Michelle to continue working part time after two months.

Michelle was discriminated against because she wanted to work part time.

Case Study 9

Before her pregnancy, Dani* requested that if her company opened an office close to her home she be able to work there. When an office opened near her home, they refused to allow her to transfer there because she was pregnant. During maternity leave Dani requested that she be able to return to work part time. She was told she could return to work part time if she first completed full time training. Dani said that she did not need comprehensive retraining. She went to her office with her new baby to discuss her return to work. No one spoke to her. Dani has since resigned.

Dani was discriminated against because she wanted to work part time.

Discussion

Frequently women find the inability to work part time forces them out of employment. The implementation of an enforceable right for women returning from maternity leave to work part time would assist in maintaining sufficient levels of women in the workplace and allowing 'working families' to truly achieve a 'work life balance'.

Flexible options in working hours allow families to better manage paid work and family responsibilities. While paid work is not the choice of some parents, policies should support the diversity of families and the complexity of caring arrangements.¹¹ Furthermore, 'competing commitments at home and in the workplace are significant factors in increased stress and conflict in families and in marriage and relationship breakdown. It is well known that conflict in families has a detrimental impact on children'.¹²

While work participation rates of Australian women with dependent children have increased significantly, they are not as high as in other OECD countries. Terminology such as, 'on reasonable business grounds' leaves vulnerable workers open to discrimination and this ambiguity enables employers to use these terms to prevent a worker from returning part time. The requirement of twelve months of continuous service also disadvantages at risk employees who may work casually, or employees in the retail and hospitality industries where casual employment is the norm.

Women have the right to request part-time work in the same job held before maternity leave. If the job held before maternity leave no longer exists, the worker is entitled to a job similar in pay and status, or in some cases a redundancy payment.

Of the WERP clients who faced pregnancy discrimination in relation to part time work, only four were given the option of returning to work full time, one was told she would have to undergo re-training full time, and two were offered lower status jobs.

¹¹ (House of Representatives Standing Committee on Family and Human Services , 'Balancing Work and Family' 2006:37).

¹² (Relationships Australia, 2006:127).

Recommendation 4: A set of enforceable standards in relation to pregnancy.

51% of pregnancy discrimination claims resulted in women being terminated or made redundant.

Case Study 10

Anne* had been working in a senior role for six months when she discovered that she was pregnant. Having informed her employer that she was pregnant, she was told to “legally” resign from her job when she went on maternity leave. Anne would then be offered re-employment when she returns to work under new conditions.

Anne’s situation could be resolved through a set of enforceable standards in relation to pregnancy.

Case Study 11

Natalie* informed her employer that she was pregnant a week after she found out. At first her boss said not to worry and that her job was secure. Over the next few weeks, he removed all her duties, claiming it was “for her own good”. Her duties were changed to roles she had not previously been responsible for, and that required a lot of heavy lifting. He also kept asking for the exact date she was going on maternity leave and said she could only come back part time so that she could go home in the afternoons to be with her baby. Natalie wished to return to her full time position. Her employer has already permanently appointed one of his family members to do her hours.

Natalie’s situation could be resolved through a set of enforceable standards in relation to pregnancy.

Case Study 12

Tracy* worked as an accountant for a large company and was pregnant. One day at work she was called into a meeting without any prior notice with her immediate boss, a member of Human Resources, and the divisional finance manager. Tracy was not advised that these people would be present. She was also told that she would not qualify for maternity leave, despite adding her Annual Leave entitlement to reach the 12 month period required to qualify for maternity leave. She was informed that she would be terminated when she left to have a baby, as this was company policy. Tracy was very upset and was told that they would be recruiting a replacement for her to train. She was also advised that this was the company’s standard practice. There have been no reviews of her work performance, however she was told that the company was happy with her work.

Tracy's situation could be resolved through a set of enforceable standards in relation to pregnancy.

Discussion

Women have had the legal right to work and not be disadvantaged due to pregnancy for the last three decades. Under the SDA it is unlawful for an employer to discriminate against an employee on the grounds of the employee's sex, pregnancy or potential pregnancy. However, pregnancy discrimination is still a common feature in the workplace.

There are recognisable methods utilised by employers when discriminating against pregnant workers. Criticism of an employee's work performance is commonly used to terminate an employee's position once they have announced their pregnancy. Pregnancy discrimination disguised as a dismissal for 'genuine operational reasons' also frequently occurs. An enforceable set of standards for pregnancy discrimination would assist in the eradication of such methods.

In the workplace, one of the major difficulties faced by women when considering their options in overcoming pregnancy discrimination is the negative consequences and risks their attempts to enforce their rights may expose them to. The majority of women in the case studies wished to return to their old jobs.

If these women lodge a complaint they may face harsh treatment or derision from their employer. This is particularly the case for women from lower socio-economic backgrounds, who may have less choice or control over their working hours. There also needs to be a cultural change in the assumption that pregnant women can be more irrational, forgetful and emotional than their fellow employees.

A set of enforceable standards for pregnancy would assist in changing the culture of the workplace in Australia with regard to the place of women. The AHRC's¹³ 1999 inquiry into pregnancy discrimination, recommended the publication of enforceable standards in relation to pregnancy and potential pregnancy. The Australian Law Reform Commission also supported this.

¹³ Then known as the Human Rights and Equal Opportunity Commission

Recommendation 5: Implementation of a national paid maternity leave scheme

47% of cases where women experienced pregnancy discrimination occurred before they were due to go on maternity leave

Case Study 13

Christina* was employed under a contract that included maternity leave. In the five years since that contract was signed, several women, including Christina, had approached HR and been told that the policy no longer exists. Four women, including Christina, were employed under the policy that included maternity leave. None of them were ever given notice of, or a reason, for the change in policy. The HR department were evasive regarding the issue and three of the pregnant women emailed queries and were not given a satisfactory answer as to why or when their maternity leave entitlement disappeared. The answer thus far has been, “I wasn’t there at the time”

Under a national paid maternity scheme Christina would have certainty and security.

Case Study 14

Rachel* contacted her company regarding returning to work three months before her maternity leave ran out. She discovered the terms and conditions of her employment had been changed. Rachel was not consulted and did not agree to these changes. The changes required Rachel to fulfil a set of outcomes for development purposes. If she did not fulfil the requirements to the standard specified she would be terminated. Rachel spoke to HR and advised she could return later that month. She was advised a week later that her immediate boss would be away until the following month and to return to work then. One of her colleagues also observed her bosses saying they needed to select a temp that was not newly married or not likely to be pregnant soon while she was away on maternity leave.

Under a national paid maternity scheme Rachel would have certainty and security.

Case Study 15

Jane* is a Manager in a large company. While on maternity leave, she gave written notice of her intent to return to work. She has since been offered two options. The first option is to return to work and take on a temporary role covering a maternity leave position for eight months. She then has to face the possibility of redundancy at the end of that period should no suitable permanent role become available. Her other option is to take redundancy now.

Under a national paid maternity scheme Jane would have certainty and security.

Discussion

Australia is one of only two OECD countries that do not have a universal system of paid maternity leave.

Forward with Fairness proposes a National Employment Standard on parental leave. Under this standard, the entitlement to leave is for both parents to have the right to separate periods of up to 12 months of unpaid leave. Where families prefer one parent to take a longer period of leave, that parent will be entitled to request up to an additional 12 months' unpaid parental leave; the employer may only refuse the request on reasonable business grounds (as per the Family Leave Test Case of 2006). This standard is an entitlement for all employees across all industries and occupations. The National Employment Standards in general will not be able to be removed or replaced.

Internationally, Australia is a signatory to three international instruments: the United Nations' *Convention on the Elimination of All Forms of Discrimination Against Women*, The International Labour Organisation's *Convention (No 156) Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* (ILO 156) and the ILO's *Convention (No 111) Concerning Discrimination in respect of Employment and Occupation*.

Article 11(2) of the *Convention on the Elimination of All Forms of Discrimination Against Women* requires Australia to:

- (a) to prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
- (b) to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances
- (c) to encourage the provision of the necessary supporting social services to enable parents to combine family obligations through work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities.
- (d) to provide special protection to women during pregnancy in types of work proved to be harmful to them.

Gender pay equity is an ongoing problem that is currently worsening. Improving a woman's right to work, and her access to maternity leave and freedom from discrimination, as well as changing work culture will all contribute to improving the wider endemic problem of gender pay inequity. Apart from the obvious implications for employers of claims of discrimination, when Australia is experiencing a labour shortage, it is impractical for employers to jeopardise their prospects of attracting or retaining capable staff by offering lower wages because of gender.

A maternity leave payment should be universal and paid to all women. A clear and defined maternity leave policy would assist in clarifying matters of confusion for both

employers and employees, particularly with regard to their entitlements. Payments available to women should also be accessible to partners if they are acting as the primary carer of the child. A scheme of national paid maternity leave would change the current attitude of many employers to women who are pregnant or want to return to their old job after maternity, especially if they want to return to work part time.

Recommendation 6: Compulsory Education of Employers on the consequences of not recognising pregnancy and maternity rights

Of the 76 women that WERP has assisted, 35% were advised to take up their matter with the ADB, and 22% were encouraged to settle their case through AHRC.

Case Study 16

Susan* is a manager at an indoor racing car centre and was 17 weeks pregnant when she informed her employer of her pregnancy. This was to give them an adequate amount of time to hire a replacement when she takes leave next year. Her employer's response was to threaten to dismiss her as the fumes from the cars would mean that safety-wise she could not properly fulfil her duties. Her employer also indicated that if he did not dismiss her then he might demote her to a lesser job. He told her under the new laws he can do what he likes until she has been there more than 12 months, which was in two weeks time.

Susan's employer would have been more likely to act in a reasonable manner had he understood the regulatory constraints on his treatment of Susan and the consequences of failing to adhere to the law.

Case Study 17

Debbie* found that her hours kept being reduced after she told her boss she was pregnant. She went from working six days a week to being given 20 hours of work a week. Two days before she was due to go on maternity leave her boss announced, "You are retiring today." On her separation certificate, the reason for her termination was listed as pregnancy.

Debbie's employer would have been more likely to act in a reasonable manner had he understood the regulatory constraints on his treatment of Debbie and the consequences of failing to adhere to the law.

Case Study 18

Abby* worked at a childcare centre during her pregnancy with a certificate stating that it was unsafe for her to lift anything over five kilograms. Abby suggested that she be considered for a part time vacancy, where no lifting would be required. The Centre Manager declined this suggestion and gave Abby the option of either working in a full time position requiring lifting or taking maternity leave effective immediately. This was not what Abby wanted as she wanted to be able to spend some time with her child, preferred to work, and was finding it difficult to source a different position.

Abby's employer would have been more likely to act in a reasonable manner had he understood the regulatory constraints on his treatment of Abby and the consequences of failing to adhere to the law.

Discussion

Much of the discrimination faced by female employees could be avoided if their employers had a greater understanding of their responsibilities under the WRA. The case studies from WERP indicate that there is widespread confusion amongst employers as to the rights of workers. For example, in Susan's case her employer told her that under the new workplace laws he could do what he likes, which is simply not the case.

The encouragement by legal centres within WERP for their clients to contact their employers in order to resolve the matter quickly and with minimal fuss reflects the broader objective of most women seeking advice to be able to return to work.

The Business Council of Australia has identified that;

“even within organisations where there is absolute buy-in at the senior management and CEO levels, there is the ongoing need to push that down throughout the management of the organisation to make sure that, day by day, the decisions being taken reflect higher level policy and support for work-family policies”.¹⁴

The promotion of women's right to maternity leave and to not be discriminated against because of their pregnancy will result in a reduction in the attitude of many employers that work-family policies are “women's business”.¹⁵

In a 2002 report, the OECD identified that firms that claim to have significantly altered the work culture of their organisation have focused attention as much on the management as on 'the shop floor'. In the same report, it is clear events such as the 'promotion of a woman even whilst she is pregnant' are still regarded as a 'breakthrough' and not an everyday occurrence.¹⁶

Greater education of employers will have benefits not just for employees, but employers and their businesses as well. Employers need to appreciate that family friendly policies are good for business. The business advantages for employers include: improved staff morale, commitment and productivity, increased staff retention and an increased rate of return from maternity leave, a reduction in absenteeism, recruitment and training costs, as well as stress levels.

¹⁴ (Cilento M, Business Council of Australia, transcript, 10 April 2006, p.12

¹⁵ (Business Council of Australia, Cilento M, transcript, 10 April 2006, p.12).

¹⁶ (OECD, *Babies and bosses: Reconciling work and family life, Volume 1, Australia, Denmark and the Netherlands*, (2002), OECD, p.195-96.

Recommendation 7: Effective education of women regarding their rights in relation to pregnancy and employment to enable them to return to work.

40% of women who faced pregnancy discrimination wanted their job back
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Case Study 19

Emma* worked in accounting in a travel agency for four years. She became pregnant and had her baby. Three days before she was due to return, she received a phone call saying “don’t bother coming back to work”. There was no consultation or offer of other work. Two new staff had been hired as accounts payable officers. Emma was devastated because her husband was in China caring for his two elderly parents, and could not provide her with any income. Her own mother had arrived from China to care for her baby when she returned to work.

Emma was discriminated against with regard to pregnancy and maternity leave. Knowledge of her employment rights would have helped Emma return to work.

Case Study 20

Maria* had been working for eight months as one of six managers in a company that looked after admissions for overseas students for educational organisations around Australia. Maria was five months pregnant and had planned to take paid maternity leave. Soon after she announced her pregnancy, she was made redundant and given two weeks pay. The company said the restructure meant managers would provide services for countries rather than educational organisations. The restructure was undertaken with no consultation, and none of the employees knew about it. Maria was the only one offered redundancy. The person who was employed to replace her has been employed on a temporary contract of three months duration.

Maria was discriminated against with regard to pregnancy and maternity leave. Knowledge of her employment rights would have helped Maria return to work.

Case Study 21

Helen* received workers' compensation for an arm injury. In the following months, Helen went on maternity leave and one year later tried to arrange her return to work. Her manager requested a medical clearance, and her doctor insisted that she be given three weeks of light duties first. Helen was sent to the company doctor, who declared her unfit for duties. She was terminated. She asked for a review of the doctor's decision but her request was refused.

Helen was discriminated against with regard to pregnancy and maternity leave. Knowledge of her employment rights would have helped Helen return to work.

Discussion

Discrimination while pregnant can have a detrimental effect on women's careers, which can be either temporary or permanent, and affect their future earning capacity. Furthermore, the stress of having to find a new job or deal with employment problems can potentially affect the health of their child. Of the women surveyed, 7% were in an extremely distressed emotional state.

WERP frequently advises clients that their first course of action should be to communicate with their employer, and either tell them that they had spoken to a legal advisor or remind them of their statutory entitlements. The most common methods of resolution used where this approach failed are to pursue the matter through the Anti-Discrimination Board or AHRC. Of the 76 cases concerning pregnancy discrimination that WERP has assisted this year, 35% were advised to approach the ADB, and 22% were encouraged to speak to AHRC. Both bodies offer a twelve month period in which to file a claim, potentially more money, and the potential ability to negotiate reinstatement.

As a result of the exclusions currently operational in the WRA, a federal action for unfair dismissal is now an unlikely remedy in the majority of cases. Moreover, the complexity involved in ascertaining whether or not an employer is a constitutional corporation and if so, exactly how many staff are employed, adds to the difficulty of such a remedy for unrepresented women employed in low level jobs, such as cleaning, retail and hospitality.

Resources should be made available to increase public awareness that exclusions do not apply to unlawful termination claims. Whilst there are difficulties for clients whose matters do not settle at conciliation, such a claim does provide an inexpensive and fast process in order to negotiate all outstanding claims, before an industrially experienced convenor.

A greater push to educate women about their rights surrounding maternity leave would reduce the amount of discrimination and resulting stress in Australian workplaces. For example, under new workplace legislation there is a new required commencement of leave provision. An employee may now be required to begin unpaid maternity leave, even if she has already been allowed a transfer to a safe job or is on paid leave, because such a job could not be provided. These requirements need to be promoted to workers, so that they understand their rights under current workplace legislation and can recognise and avoid forms of discrimination where possible.

A campaign targeted at working women could make a significant impact on the incidence of pregnancy and maternity discrimination. For example, WERP published a series of fact sheets that looked generally at the amendments to the WRA and what they meant for working women. Other fact sheets look at specific issues such as unfair dismissal, wages & conditions and where to get legal help. Although the laws are complex and reduce the rights of workers, they allow women to get advice about possible remedies.

Recommendation 8: A formal enquiry into the prevalence of pregnancy discrimination

This year alone the ICLC has advised a client every week on pregnancy discrimination

Case Study 22

Sophie* worked as an assistant to the sales manager of a large company for nearly four years. She discovered she was pregnant and informed her employer. Three weeks later she was made redundant. Not long after a new salesman was put into her position. Sophie has not been able to get another job because of her pregnancy.

A formal enquiry into the prevalence of pregnancy discrimination will establish the extent of inequity and a standard from which to measure progress.

Case Study 23

Marissa* was working for a travel agency in a country town when she informed her boss that she may be pregnant. The response was “just remember if you are pregnant, you are out.” About a month later when she informed her boss that she was pregnant the response was, “I guess it’s too late to have an abortion.” After this the boss only spoke to Marissa when she was snapping out orders. When Marissa tried to speak to her boss about her conduct the response was, “If I am a bitch to work with then resign.” She eventually resigned when she became very ill at work and the boss refused to let her get medical attention.

A formal enquiry into the prevalence of pregnancy discrimination will establish the extent of inequity and a standard from which to measure progress.

Case Study 24

Kate* has three children and was working part time as the HR manager for a charitable organisation. She was pregnant with her fourth child and was planning to return to work after eight months maternity leave. She says it was the perfect job for her. In February, she was called in and informed that her job had been restructured and would be advertised. No consultation or discussion had taken place. Kate was given two weeks notice. Looking at the new and old job description the duties had changed. Only two people applied for the position, Kate and a former employee who had just arrived home from overseas. The former employee was successful and Kate was given five minutes notice to leave the building.

A formal enquiry into the prevalence of pregnancy discrimination will establish the extent of inequity and a standard from which to measure progress.

Discussion

In 1999, the AHRC¹⁷ published *Pregnant and Productive: It's a right not a privilege to work while pregnant*. Information provided to AHRC indicated that discrimination on the basis of pregnancy and the inability to obtain paid maternity leave are significant factors contributing to Australian women and their partners deciding not to have children or to limit the size of their families. That study found that discriminatory practices remove pregnant women from the workplace and sideline their careers.

In 2005 the ABS conducted a survey entitled, *Pregnancy and Employment Transitions, Australia*. Women who worked in a job while pregnant, and who did not own the business in which they worked, were asked whether they had experienced any difficulties in the workplace while they were pregnant. At least one difficulty was reported by 22% of women who were asked, with the most common forms being: 9% receiving inappropriate or negative comments (43% of those who experienced difficulties); 9% missing out on training or development opportunities; and 7% missing out on opportunities for promotion (32% of those experiencing difficulties). The women surveyed were not asked about the reasons for the difficulties, nor whether the difficulties were associated with the pregnancy.

There have been no comprehensive studies conducted on the issue in New South Wales or nationally since then. There has been no major study done on pregnancy discrimination since the amendments to the WRA were introduced in 2006. This will change again with the implementation of the Labor government's new workplace relations legislation and policies.

WERP research contained in this submission indicates that pregnancy discrimination continues to occur and has resulted in half the women surveyed losing their job. A comprehensive study would assist in ascertaining the extent of pregnancy discrimination under current employment legislation. Forms of redress cannot be implemented until the full extent of the problem is understood. Parental leave and balancing work and family is a critical issue for many women, which requires both understanding and governmental commitment.

¹⁷ Then known as the Human Rights and Equal Opportunity Commission.