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Mr Mick Gentleman, MLA (Chair)  
Select Committee on Working Families in the ACT  
ACT Legislative Assembly  
Civic Square  
Canberra ACT 2601

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	A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE
SUBMISSION NUMBER	5
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Dear Mr Gentleman

We appreciate the opportunity to make this submission on issues of work and family and the impact of the federal Government's new workplace relations laws on people in the ACT.

The ACT Human Rights Office is an independent statutory agency with a range of responsibilities under the *Discrimination Act 1991* and the *Human Rights Act 2004*. Central to our mission is the promotion of equality and human rights. The *Human Rights Commission Act 2005* comes into effect on March 1 2006 and one of its main objects is "to promote the human rights and welfare of people living in the ACT" (section 6(a)). A legal and policy framework that enables people to combine paid work and caring responsibilities is essential to gender equity, to child and family wellbeing and to workplace fairness.

We recently prepared a submission, on behalf of a number of State and Territory human rights agencies, to the Inquiry being conducted by the federal Sex Discrimination Commissioner. I attach for your Committee's consideration a copy of our response to the Discussion Paper '*Striking the Balance: Women, Men, Work and Family*' (October 2005), where we emphasise the importance of a human rights approach to these issues. We make a number of recommendations in the Submission, some of which could be progressed at an ACT level. For example, the *Discrimination Act 1991* could be strengthened in relation to employers' obligations to accommodate employees' family responsibilities. A project to develop and promote quality part-time work opportunities could also be developed in the ACT, which might also address the under-representation of women at senior levels in the ACT public service. Consideration could be given to establishing a specialist 'work and family' information and advisory service to ensure that workers with family responsibilities are aware of and able to access their entitlements. If necessary this service could also help people lodge discrimination complaints. To be effective, it would need to be established in collaboration with existing community information and legal services and trade unions.

In relation to the federal Government's Workchoices Bill 2005, we are concerned that these changes will have a detrimental impact on most women, particularly women who are disadvantaged in workplace bargaining by cultural or language barriers from non-English speaking

background, Indigenous women, women with disabilities and women with caring responsibilities. The dismantling of the Award system and the reduction in minimum pay and conditions will have a disproportionate and adverse effect on women. I draw your attention to the detailed analysis of the legislation submitted by the Human Rights and Equal Opportunities to the Senate Inquiry into the Workchoices Bill, which highlights concerns about changes to minimum-wage setting, gender pay equity, the removal of the no-disadvantage test for agreements, the failure to adopt the AIRC Family Provisions Testcase decision, and the removal of unfair dismissal protection for most workers. The submission considers these issues in relation to Australia's international human rights obligations and I endorse the concerns expressed there. The submission is available at [http://www.aph.gov.au/Senate/committee/eet\\_ctte/wr\\_workchoices05/submissions/sub164.pdf](http://www.aph.gov.au/Senate/committee/eet_ctte/wr_workchoices05/submissions/sub164.pdf) As noted there, the changes may well result in an increase in unlawful discrimination claims, which has implications for the resourcing of our Office.

It will be very important for the Government to work with community, union and business organisations to monitor the impact of these changes on workers and their families in the ACT, and to take any possible measures to reduce adverse impacts.

We would be happy to make further submissions to your Committee on particular issues of concern if it continues its deliberations into 2006. Jenny Earle is the contact officer and she will be on leave from 12 December 2005 to 20 January 2006.

Thank you again for this opportunity to contribute to your deliberations and I hope you find that attached material helpful.

Yours sincerely

Dr Helen Watchirs  
ACT Human Rights and Discrimination Commissioner  
1 December 2005

# **Paid Work & Family Responsibilities**

**A Territory and State  
human rights agencies  
response to HREOC  
Discussion Paper  
'Striking the Balance:  
Women, Men, Work and  
Family '  
October 2005**



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17 October 2005

Dear Commissioner

**Re Paid work and family responsibilities submission**

Please find attached a joint submission in response to your excellent Discussion Paper *Striking the Balance: Women, men, work and family*. We regard the issues that are the focus of this inquiry as of central importance to the achievement of substantive equality between women and men. We would be happy to discuss the issues further, and strategies for progressing them, as you develop the findings and recommendations for your final report. If you need further information about work and family arrangements in our State and Territory jurisdictions please do not hesitate to contact Ms Jenny Earle at this Office:

Yours sincerely

Dr Helen Watchirs  
ACT Human Rights and Discrimination Commissioner

on behalf of

Tony Fitzgerald  
Northern Territory Anti-Discrimination  
Commissioner

Susan Booth  
Queensland Anti-Discrimination Commissioner

Yvonne Henderson  
Western Australia Equal Opportunity  
Commissioner

Linda Matthews  
South Australia Commissioner for Equal  
Opportunity

Cc Katy Gallagher MLA, ACT Minister for  
Women

## Summary of Recommendations:

1. That HREOC should continue to promote awareness of the human rights underpinnings to the work and family debate.
2. That HREOC should press the federal government to give full effect to its international human rights obligations in relation to work and family, and take all necessary steps to ensure that paid work, parenting and unpaid household work can be equitably shared between women and men.
3. That full account be taken of the requirements of ILO 156 in any changes to the powers and duties of the Australian Industrial Relations Commission and other aspects of federal workplace relations regulation.
4. That discrimination on the ground of family responsibilities should be unlawful in relation to all aspects of work and employment and should apply to both direct and indirect discrimination.
5. That the Sex Discrimination Commissioner and/or the Minister should be given powers under the SD Act to formulate standards and guidelines for family-friendly work arrangements that promote gender equity.
6. That consideration be given to replacing the comparator test in the SD Act with a detriment test.
7. That HREOC urge the federal Government to introduce an Equality Act to provide a more effective guarantee of substantive equality for women and men.
8. That HREOC seek funding to conduct a high-profile media and community education program encouraging men as well as women to see themselves as carers as well as workers.
9. That the exemption in the SD Act for acts done under statutory authority be reviewed and either repealed or narrowed so as not to undermine the objects of the Act.
10. That frameworks and initiatives to develop workplace flexibilities be co-ordinated across the areas of disability, age and sex discrimination, to encourage the mainstreaming of the needs of all affected groups.
11. That a national inquiry be conducted into the conditions of part-time work and the implications for gender equity.
12. That HREOC advocate a comprehensive national legislative scheme of work and family entitlements for women and men that is based on principles of gender equity, to be accompanied by information, education and small business assistance programs.
13. That accessible and effective remedies for unfair and unlawful dismissal continue to be available to workers with family responsibilities.
14. That HREOC co-ordinate a review of the impact on all anti-discrimination agencies of the forthcoming changes to the federal workplace relations system.
15. That HREOC advocate for a high-profile media campaign on the rights of workers with family responsibilities, and the obligations of employers.
16. That HREOC advocate the urgent resumption of regular and comprehensive national workplace surveys to measure the availability and take-up of family-friendly working conditions, covering the perspective of employers and employees.

## **Background**

This submission has been prepared by the ACT Human Rights Office on behalf of a number of the State and Territory anti-discrimination and human rights agencies, namely the Northern Territory Anti-Discrimination Commission, South Australia Equal Opportunity Commission, Western Australia Equal Opportunity Commission, and Queensland Anti-Discrimination Commission, in response to the Federal Sex Discrimination Commissioner's Discussion paper '*Striking the Balance*' (June 2005). We note that it follows on from the Commission's earlier work on pregnancy discrimination, *Pregnant and Productive: It's a right not a privilege to work while pregnant* (1999), and the Commission's report '*A Time to Value: Proposal for a national paid maternity leave*' (2002). The latter recommended a national government-funded scheme of paid maternity leave, which has yet to be implemented.<sup>1</sup> Both reports noted strong community demand for broader measures that would enable men and women to share and balance work and family responsibilities more equally. *Striking the Balance* is taking forward this project.

The HREOC project is lent further significance and urgency by proposed changes to the federal industrial relations system, which many fear will lead to increased inequality and discrimination at work. The recent Australian Industrial Relations Commission Family Provisions test-case decision could be a short-lived advance for those combining work and family, unless the Federal Government acts to implement the new entitlements.

The proposal from the March 2005 meeting of the Australian Council of Human Rights Agencies (ACHRA) to prepare a combined submission to avoid duplication of effort was discussed at a meeting in August 2005 of legal and conciliation officers. The submission starts by setting out its purpose and focus, and then addresses particular questions posed in the Discussion paper. The recommendations are summarized at the end.

### **The purpose of this submission is to:**

- highlight the human rights underpinnings of the 'work and family' policy arena, and emphasise gender equality as the primary goal of change;
- contribute the perspective of State and Territory anti-discrimination agencies on the extent and nature of the problems experienced, as reflected in their casework and other activities;
- reflect on the strengths and weaknesses of particular anti-discrimination legislative provisions; and
- comment on and propose a more effective legislative framework for enabling men and women to combine paid work with caring responsibilities and promote gender equality.

The submission will not address all the questions posed in the Discussion Paper, but will focus on Questions 23-26 (Ch 7, p88), which are about anti-discrimination law, and

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<sup>1</sup> Australia is still not in compliance with CEDAW Art 11(2)(b) requiring paid maternity leave, one of the most basic entitlements to support women combine work and family.

Questions 27–31 (Ch 8, p.100), which are about the workplace relations system. It also considers Questions 42-44 (Ch 11, p.132), which are about the goals of any reform.

### **Need for a rights based approach**

The HREOC Discussion Paper (DP) provides considerable evidence to show the inequity in Australia's current system for managing work and family. It demonstrates the adverse consequences of the current work and care regime for gender equality, especially women's opportunities and independence. Described as the 'downward spiral of women's lives' (DP pp 68-69), these include barriers to work, unequal pay, poverty in old age and limited scope for participation in public life. The constraints on men's opportunities for balanced lives and involvement in the care and nurture of children and other dependents are also well-documented. Although women and men themselves will often talk about their work and family arrangements in terms of 'choice', this should not be allowed to obscure the 'force field of gender and discrimination' that patterns those choices<sup>2</sup>. It is important to challenge the language of 'choice' that permeates public debates on work and family, and assert a more 'rights-based' approach to policy and program development and evaluation. Taking a human rights approach means comprehensively integrating human rights norms, standards and principles into design, implementation and evaluation of policies, service provision and programs. Twenty years after the passage of the *Sex Discrimination Act 1984 (Cth)*, we need to press for a more positive duty to prevent discrimination and promote gender equality at home and at work.<sup>3</sup>

### **Human rights as they apply to work and family**

Australia is bound by a number of relevant international human rights instruments to provide a more effective legal and policy framework for enabling women and men to combine paid work and family life. Five of these instruments are considered in detail below. The need for renewed effort by governments to achieve gender equity was acknowledged at the 49<sup>th</sup> Session of the UN Commission on the Status of Women in March 2005.<sup>4</sup>

*Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*  
Despite adopting a framework of 'choice', the HREOC paper is firmly rooted in the key provisions of the Convention on the Elimination of All Forms of Discrimination Against Women, to which Australia is a party and underpins the *Sex Discrimination Act* (see DP pages 1-2). CEDAW recognizes that "the upbringing of children requires a sharing of responsibility between men and women, and society as a whole".<sup>5</sup> Many of the Articles of CEDAW demand action by Government – including measures to modify social and

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<sup>2</sup> For an account of the relationship between the ideology of domesticity and sex discrimination in employment see Williams J, *Unbending Gender: Why Family and Work Conflict and What to do About it*, Oxford University Press (2000).

<sup>3</sup> *Time for Equality at Work*, Global report under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work, ILO, Geneva, 2003 – notes 'a shift from laws that prohibit discrimination to laws that provide for a positive duty to prevent discrimination', p.xii

<sup>4</sup> Declaration adopted by the UN Commission on the Status of Women, 3 March 2005, E/CN.6/2005/L.1.

<sup>5</sup> CEDAW Preamble

cultural patterns that are based on sex role stereotypes (art. 5); measures to ensure that women can work on the same basis as men, because the right to work is an inalienable right of all human beings (art. 11(1)(a)); the right to equal remuneration and equal treatment (art. 11(1)(d)); and the right to participate in public life (art. 7). Other provisions emphasise the need for measures to ensure the practical realization of equality (eg art. 2(a), art. 3). The UN Committee on the Elimination of Discrimination Against Women, which monitors implementation of CEDAW, has stressed that given men's failure to share household tasks and childcare, governments have a positive duty to act in order to relieve women of some of these burdens and reduce their economic dependence on men.<sup>6</sup>

#### *Convention on the Rights of the Child (CRC)*

It is not only CEDAW that requires more vigorous State action to ensure that childrearing is shared, and that parents can access child-friendly work arrangements. The UN Convention on the Rights of the Child, to which Australia is a Party, is also quite clear about this. The focus of article 18 is on the balance of responsibilities between the child's parents and the government, and obliges the government to support parents in their child-rearing responsibilities. It specifically recognizes the needs of children of working parents in Art 18(3)<sup>7</sup>.

The Committee on the Rights of the Child has made frequent comments about the importance of ensuring that both parents take equal responsibility for the day-to-day care and upbringing of their children, as well as sharing legal and financial responsibility. The CRC is one of the first treaties to see this as a human right of children, reflecting the provision in CEDAW which requires governments to recognize "the common responsibility of men and women in the upbringing and development of their children..." (art 5). In countries such as Sweden, parent education programs focus on the equal responsibilities of parents, which the Committee on the Rights of the Child has endorsed in its Concluding Observations.

The CRC Committee has been concerned that social inequalities between women and men may undermine the family as a source of support for children's rights. It has said that government should adopt employment, tax and welfare measures to encourage both parents' active involvement in childrearing, and promote the viability of joint parenting – during marriage, as well as after separation /divorce. In particular the Committee has suggested that "appropriate measures be taken to counter the inequalities between men and women with regard to remuneration since it may be detrimental to the child, particularly in homes headed by a single woman."<sup>8</sup>

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<sup>6</sup> CEDAW Committee General Rec No 23, 16<sup>th</sup> Session, 1997 paras 10, 11 – on Art 7 discrimination in political and public life.

<sup>7</sup> And see Human Rights Committee *General Comment* 17, 1989, HRI/GEN/1/Rev.5, p.133: "since it is quite common for the father and mother to be gainfully employed outside the home, reports by States Parties should indicate how society, social institutions and the State are discharging their responsibility to assist the family in ensuring the protection of the child".

<sup>8</sup> Iceland Concluding Observations, Add.50, para 25.

Generous maternity and paternity leave with pay, and family sensitive working conditions clearly meet the needs of both children and working parents.<sup>9</sup> The CRC Committee has expressed its concern that in Australia “women working in the private sector are not systematically entitled to maternity leave, which could result in different treatment between children of State employees and those working in other sectors... The Committee encourages the State Party (the Australian Government) to review its legislation and make paid maternity leave mandatory in all sectors, in light of the principle of the best interests of the child”.<sup>10</sup> The same point can be made about access to flexible work arrangements.

The extent to which governments in Australia are currently failing our children is documented and discussed in the recent book *Children of the Lucky Country?* which notes that ‘the workplace is a most important aspect of the environment for parents and children: it can either acknowledge and support parenting or ignore it and make it difficult for parents to work and be fathers or mothers.’<sup>11</sup> The authors make a number of recommendations for improved workplace entitlements to support parenting.

#### *International Covenant on Civil and Political Rights*

As a party to the ICCPR, Australia must guarantee women and men the equal enjoyment of human rights without discrimination, and with equality before the law (articles 2 and 26). The term discrimination in the Covenant refers to “any distinction, exclusion, restriction or preference which is based on **any** ground or ... status and which has the effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”<sup>12</sup> This obligation could provide a constitutional basis under the external affairs power for equality laws that explicitly apply to men as well as women in relation to family responsibilities, and status as parent or carer (see below). It can also justify preferential or affirmative action measures for people, including men, with caring responsibilities where that is necessary to ‘diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant’.<sup>13</sup>

#### *International Labour Organisation Convention 156 Workers with Family Responsibilities*

This Convention requires States Parties, including Australia, to take measures that ensure non-discrimination and equal opportunities for workers with family responsibilities. It has been given limited effect in the federal *Sex Discrimination Act 1984* where it underpins the prohibition on dismissal on ground of family responsibilities,<sup>14</sup> and in the *Workplace Relations Act 1996* which also makes family responsibilities a prohibited ground of dismissal.<sup>15</sup> The Australian Industrial Relations Commission is obliged to take account of this Convention in determining applications before it – see s. 93A *Workplace Relations*

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<sup>9</sup> *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF, Geneva, 2002, p.253.

<sup>10</sup> Australia IRCO, Add 79 paras 17 and 31.

<sup>11</sup> Stanley F, Richardson S, Prior M, *Children of the Lucky Country? How Australia has turned its back on children and why children matter*, Macmillan, 2005, Sydney, p176.

<sup>12</sup> ICCPR General Comment 18 (37<sup>th</sup> session, 1989), para 7.

<sup>13</sup> ICCPR General Comment 18 (37<sup>th</sup> session, 1989), para 10.

<sup>14</sup> section 7A and 14(3) SDA.

<sup>15</sup> WRA s 170CK; see for example *Thomson v Kertam Pty Ltd* (1995) EOC 92-738.

*Act*<sup>16</sup>. This Convention recognizes that women's 'excessive burden' of caring and domestic responsibilities is 'one of the most important reasons for their continuing inequality in employment and occupation' and requires that steps be taken to alleviate the burden<sup>17</sup>.

*ILO Convention 111 Concerning Discrimination in respect of Employment and Occupation and ILO Convention 110 Equal Remuneration*

The other important ILO Conventions in the field of gender equality require Australia to take all appropriate measures to promote equality of opportunity and treatment, and eliminate discrimination including on the basis of sex, family responsibilities and pregnancy. They specifically require Australia to seek the co-operation of employers and workers organizations and other appropriate bodies in pursuit of this objective, and to enact necessary legislation. Given the sound evidence that women's family responsibilities and family status account for around half of the continuing gender pay gap, as well as inequality of employment opportunity, these Conventions remain vital obligations that require full implementation.

**Recommendations:**

- 1. That HREOC should continue to promote awareness of the human rights underpinnings to the work and family debate.**
- 2. That HREOC should advocate that the federal government give full effect to its international human rights obligations in relation to work and family, and take all necessary steps to ensure that paid work, parenting and unpaid household work can be equitably shared between women and men.**
- 3. That full account be taken of the requirements of ILO 156 in any changes to the powers and duties of the Australian Industrial Relations Commission and other aspects of federal workplace relations regulation**

**Anti-discrimination legislation and family responsibilities (Chapter 7, Questions 23 – 26, page 88)**

*Question 23: Can anti-discrimination systems assist men and women better balance their paid work and family responsibilities? Why or why not?*

The anti-discrimination agencies involved in preparing this submission consider that anti-discrimination laws are one important tool that can assist men and women better balance their paid work and family responsibilities. Most State and territory jurisdictions have provisions that make discrimination on grounds of family responsibilities unlawful, although the way these are framed is not uniform. A table summarizing these provisions is provided in Table 1, Appendix A.

<sup>16</sup> See for example AIRC decision on an application by Esso to change shift arrangements in a way that would impact adversely on children and families (Australian Industrial Relations Commission PR951725, 7/9/2004)

<sup>17</sup> ILO, *General Survey. Workers with Family Responsibilities*, International Labour Conference, 80<sup>th</sup> Session, 1993 Geneva, report III, Part 4B (25)

Further details about the relevant provisions currently operating in different State and Territory jurisdictions, together with information about their take-up and application and the extent to which they have been used, are provided in **Appendix A**.

While the lack of uniformity means that individuals may not have the same level of protection against discrimination linked to family responsibilities across Australia, there are valuable features in the State and Territory regimes that warrant further consideration, including:

- a test for unlawful discrimination that does not require a comparator, but instead focuses on unfavourable treatment linked to the protected attribute - such as that in section 8 of the Discrimination Act 1991 (ACT).
- the role of a statutory bill of rights in strengthening protection against discrimination and guaranteeing substantive equality as in the Human Rights Act 2004 (ACT); and
- a provision making unlawful an employer's failure or refusal to accommodate needs associated with family responsibilities, subject to a reasonableness test – as applies in section 24 of the Anti-Discrimination Act 1992 (NT).

It is also worth noting that Western Australia became the first Australian State to attempt to meet the obligations of ILO 156 when in 1992 it enacted new section 35A of the *Equal Opportunity Act 1984* to prohibit discrimination on the ground of family responsibility or family status. The amending legislation came into effect in January 1993. Summaries of reported cases on this ground are in Appendix A. Queensland followed shortly after with an amendment to its *Anti-Discrimination Act 1991* adding family responsibilities as an attribute with effect from March 2003. In South Australia, the Minister for Families and Communities announced in Parliament on 12 September 2005 his intention to introduce a *Carers' Recognition Bill*. This Bill could introduce the ground of caring responsibility into the *Equal Opportunity Act 1984* (SA), which does not yet include provisions relating to family or carer responsibilities.

A common concern for participants in this submission is the continuing high rates of pregnancy discrimination, which is a disturbing indicator of the attitudes and barriers that confront workers with young families. As one Commissioner noted “it is disheartening that some employers fail to recognize the fundamental rights of pregnant workers which have been enshrined in law for so many years....This kind of discrimination remains one of the ongoing obstacles to the equal participation of women in the workforce”.

Information on the number of complaints received on the different grounds is in Appendix A. The investigation and conciliation of complaints can provide remedies to individuals, and can result in improved practice by employers. In addition, all the anti-discrimination agencies provide information, community education and training for employers and employees on the purpose and requirements of the anti-discrimination laws, with the aim of encouraging compliance and the promotion of equal opportunities. We provide a range of guides and publications, most available through our websites as well as in hard copy. Information and advice provided to individuals about their rights

under anti-discrimination law is often used to assist in negotiating flexible work arrangements. This important aspect of the work of anti-discrimination agencies should not be overlooked.

However, the number of inquiries and complaints being received by agencies on the ground of carer/parental status indicates that there is some way to go before employers fully understand their obligations to accommodate family responsibilities at work. It may also suggest that people are becoming more assertive of their need to have their family responsibilities reasonably accommodated at work, even though their rights in this regard remain inadequately protected.

Shortcomings in the anti-discrimination system and the need for reform are discussed below in relation to the *Sex Discrimination Act (Cth) 1984* (the SDA), as this HREOC inquiry primarily concerns federal laws, policies and programs. Some of the key problems have been canvassed recently, in a Special Issue of the UNSW Law Journal marking the twentieth anniversary of the Act,<sup>18</sup> and in a special issue of the Journal of Labour and Industry that is one outcome of an Expert Workshop on Quality Part-time Work held at RMIT University.<sup>19</sup> This inquiry provides the ideal forum for addressing the problems that have been identified, and seeking to improve the effectiveness of the legal framework.

#### *Limited scope of discrimination on ground of family responsibilities*

Unlike the other grounds of discrimination in the SDA, family responsibilities discrimination only applies to dismissal of an employee, not to other aspects of employment or in other areas of public life, and it is limited to direct discrimination. Although courts and tribunals have interpreted the provision (s.14(3A)) to include constructive dismissal, which has extended its ambit, the effect is still to require a total breakdown in the employment relationship, or job loss, before the ground can be invoked. It cannot be applied to issues of recruitment or promotion for example, or other aspects of the terms and conditions of employment, such as a refusal to reduce or adjust working hours. Furthermore, establishing constructive dismissal can be difficult from an evidential viewpoint, as the case of *Qantas v Howe* demonstrates – here the court found there had been no dismissal, so the larger part of the complainant's claim was lost.<sup>20</sup> It appears that originally the Federal Government intended the families responsibilities ground to have wider application, but this has not happened. This ground of discrimination needs comprehensive application in order give effect to ILO Convention 156.

#### *Problems with comparator test*

Section 7A(a) of the SD Act requires a comparison between the way a complainant was treated, and the way a person without the relevant ground or attribute (family responsibilities) was or would have been treated 'in circumstances that are the same or not materially different', to assess whether there has been 'less favourable treatment' amounting to discrimination. This requirement for an actual or hypothetical comparator

<sup>18</sup> See Special Issue of the UNSW Law Journal Volume 27(3).

<sup>19</sup> Labour and Industry, Special Issue, Quality Part-time Work Vol 15, No 3, April 2005.

<sup>20</sup> [2004] FMCA.

has caused both practical and philosophical problems for people making discrimination claims.<sup>21</sup>

The ACT is the only jurisdiction in Australia that does not have a comparator test for direct discrimination. The *Discrimination Act s.8(1)(a)* defines discrimination as when a person treats or proposes to treat the other person unfavourably because the other person has a (protected) attribute. This test was considered in *Prezzi and Discrimination Commissioner* where it was stated that:

“The Discrimination Act is about unfavourable treatment of persons and subjecting persons to disadvantage because of the attributes they possess... It is thus unnecessary to inquire whether a complainant with a particular attribute has been dealt with less favourably because of that attribute than persons without that attribute. All that is required is whether the consequences of the dealing with the complainant are favourable to the complainant’s interests or are adverse to the complainant’s interests, and whether the dealing has occurred because of a relevant attribute of the complainant.”<sup>22</sup>

The point has been made that determining what is unfavourable or detrimental or adverse to the complainant may well involve an element of comparative assessment, but there is no requirement to construct a comparator and this arguably avoids many of the problems with that process identified in the case law and relevant commentaries.

In its review of the *Anti-Discrimination Act 1997 (NSW)*, the NSW Law Reform Commission recommended a ‘detriment test’ to replace the comparator test which it said caused conceptual difficulties, complexity and problems associated with proof for complainants.<sup>23</sup> This recommendation has not yet been implemented.

The Federal Productivity Commission considered these issues in its inquiry into the *Disability Discrimination Act* and concluded that it was “not convinced that these alternative approaches are significantly different in practice from the comparator approach in the DDA. Any notion of unfavourable, less favourable, or detrimental treatment almost inevitably requires a notional or theoretical comparison... ” The Productivity Commission concludes that “a direct point of comparison provides an essential practical benchmark against which the action of the discriminator can be measured.” It recommends retention of the comparator test for direct disability discrimination.<sup>24</sup> However, prompted by concern arising from the High Court’s decision in the *Purvis* case<sup>25</sup> it suggests supplementing the definition with examples to clarify the circumstances that are the same or not materially different.<sup>26</sup>

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<sup>21</sup> Von Doussa J and Lenehan C, ‘Barbequed or Burned: Flexibility in Work Arrangements and the Sex Discrimination Act’, (2004) *UNSW Law Journal* Vol 27(3) pp 892-904.

<sup>22</sup> 1996 ACT AAT 132 para 22- 24.

<sup>23</sup> NSW LRC 1999 paras 3.51-3.53

<sup>24</sup> Finding 11.2, p.307.

<sup>25</sup> *Purvis v New South Wales (Department of Education & Training)* (2003) 202 ALR 133.

<sup>26</sup> Finding 11.3 p.311.

### *Need for transparent, enforceable standards*

The comparator test can be particularly problematic in relation to the attributes of family responsibilities, or pregnancy, breastfeeding or other aspects of maternity, which are the markers of women's difference. In its *Handbook for Practitioners on International Discrimination Law*, Interights considers all the problems with the comparator test and advances the alternative of appealing to substantive standards or principles. It notes that 'appealing to substantive standards has several advantages over other methods of establishing a case. It eliminates the need to find a similarly situated individual or group for individual or statistical comparison. This approach also helps raise human rights standards by focusing on higher standards rather than relative standards of comparison.'<sup>27</sup>

These arguments support the proposal, made in the Australian Law Reform Commission Report *Equality Before the Law*, that there should be a power for the Sex Discrimination Commissioner and/or the Minister to formulate standards to further the objectives of the Sex Discrimination Act<sup>28</sup>. This proposal for enforceable standards, which could apply for example to the development of family friendly work standards, is modeled on the provisions in the *Disability Discrimination 1992*. Standards, to be developed in consultation with all stakeholders, would clarify the policies and practices that facilitate work and family balance while promoting gender equity. The standards can draw on and codify the extensive work already done by State and federal agencies, and internationally, on family friendly work arrangements and can incorporate the standards and principles established by caselaw. A major advantage of this approach is the improved transparency and practical guidance it could offer to employers about their legal obligations.

### *Indirect discrimination*

For many years now women have been making use of the indirect sex discrimination provisions in the SDA and in State and Territory law, to assert a right to work part-time and/or flexibly to help accommodate childcare and other family responsibilities, particularly on return from maternity leave and while their children are young. The effect has been to establish sufficient successful precedent to ensure that informed employers will be inclined to consider any requests carefully. However, there are many challenges involved in successfully establishing discrimination, and the state of current law falls far short of a right to part-time work, or even a right to request it, for example at key points in the cycle of caring for the young and old.

The difficulties of establishing an indirect discrimination claim include demonstrating that a requirement or condition has been imposed (*Kelly v TPG Internet*).<sup>29</sup> In fact in a number of recent cases it has been argued with some success on behalf of respondent employers that, far from the requirement to work full-time being a condition or requirement (under SDA section 5(2)), a request for part-time work constitutes "a form of request for positive discrimination and is therefore not within the compass of the SDA as presently drafted"(discussed in *Qantas v Howe*, para 122 – Driver FM disagreeing with

<sup>27</sup> Published by Interights, the International Centre for the Legal protection of Human Rights, London, 2005, para 2.2, p.118

<sup>28</sup> see ALRC Report No 69 *Equality before the Law*, 1994, Sydney, para 3.41 – 3.45; Recommendation 3.4

<sup>29</sup> (2003) 176 FLR 214.

Raphael FM). There is no doubt that employers are showing themselves to be as creative in avoiding liability under the Act as women have been in using the Act to assert their right to combine work and family over the last decade.

The application of the reasonableness test has also limited the effectiveness of indirect discrimination, and certainly stopped it short of establishing a general right to work flexibly or part-time. However, a number of successful cases have demonstrated the need for employers to beware refusing a request. Case-law has been variable – as the examples of *Schou*, *Kelly* and *Howe* illustrate, and do not provide the firm guarantees of employment protection and equity that those combining work with family responsibilities need. A significant example of the protection this test can afford employers is the case of *Commonwealth Bank of Australia v HREOC & Anor* where the bank was found not to have indirectly discriminated against 100 women when it retrenched them on parental leave.<sup>30</sup> The weakness of the reasonableness test (ie how easy it can be for employers to meet the test) and discrepancies between its application in federal and state jurisdictions has been usefully analysed in the light of recent case-law.<sup>31</sup>

Despite its defects, the indirect discrimination test in the SD Act has been described as ‘the most favourable to complainants of all Australian anti-discrimination laws’.<sup>32</sup> The fact that it does not apply to the ground of family responsibilities should be remedied by amendment as soon as possible.

**Recommendations:**

- 4. That discrimination on the ground of family responsibilities should be unlawful in relation to all aspects of work and employment, and should apply to both direct and indirect discrimination.**
- 5. That the Sex Discrimination Commissioner and/or the Minister should be given powers under the SD Act to formulate standards and guidelines for family-friendly work arrangements that promote gender equity.**
- 6. That consideration be given to replacing the comparator test in the SD Act with a detriment test.**

*Question 24: Why do men with family responsibilities not make more use of the family responsibilities provisions of the Sex Discrimination Act?*

Men are not using the SDA because they are not being discriminated against on this ground to the same extent as women. That is, it is not surprising that men are under-represented among complainants given that they are much less likely than women to have adopted the role of primary carer or to seek to modify their work arrangements, or take emergency or other leave for example, to accommodate caring. Men are less likely to be denied access to family-friendly work arrangements (or be sacked for asking for it), including part-time work, because they are less likely to seek it. In State and Territory

<sup>30</sup> [1997] 1311 FCA (28 November 1997)

<sup>31</sup> Gaze B ‘Quality part-time work: can law provide a framework?’ in *Labour and Industry*, Vol 15, No 3 April 2005 pp 89.

<sup>32</sup> Gaze in *Labour and Industry* p.93.

jurisdictions, men are also not major users of these anti-discrimination provisions although their numbers are increasing, quite rapidly in some jurisdictions (see information in Appendix A). For most discrimination complainants (women and men) use of legal remedies is very much a last resort, and it may also be that men are more likely to negotiate a satisfactory solution to their problem because they tend to have more bargaining power at work. It may also be that they are not aware of the SD Act's potential application to them, especially given the limited circumstances in which it does.

The fact that, as the Discussion Paper notes, men cannot use the sex discrimination provisions to ground an indirect discrimination claim relating to family responsibilities is more a reflection of the continuing gender inequality at home, than of a defect in the legislation. The submissions of the Sex Discrimination Commissioner in the case of *Howe v Qantas* on this point were correct (see DP fn 26, p.86). On the other hand, it means the SD Act has limited leverage as a tool for change, and there is no justification for limiting the family responsibilities ground to direct discrimination (DP pp 83).

This points to the need for a more comprehensive and positive guarantee of equality, along the lines of an Equality Act as proposed by the Australian Law Reform Commission, to apply to men and women. The DP refers to constitutional issues and the effect of relying on CEDAW being to focus the SD Act on discrimination against women (DP p 86 fn 25). An Equality Act would be a legitimate means of giving effect to the equality provisions of ICCPR as well as those of the other international human rights instruments referred to here.<sup>33</sup> Alternatively, the SDA could be amended to introduce a duty on public authorities to promote gender equality.<sup>34</sup> This would benefit men, particularly by encouraging recognition of the caring role of fathers and their need to combine work and care, as well as women. The need for an improved national system of employment and workplace relations, with entitlements and incentives that facilitate at a workplace level the more equal sharing of family and domestic responsibilities is considered below.

The work that the Sex Discrimination Commissioner is doing in the course of this project to engage with men's groups and organizations will hopefully encourage men to use the SD Act where possible and appropriate, and to advocate for law reform that will better protect men as carers. The recommendation above for extension of the family responsibilities grounds is directly relevant to this issue.

**Recommendations:**

- 7. That HREOC urge the federal Government to introduce an Equality Act to provide a more effective guarantee of substantive equality for women and men.**
- 8. That HREOC seek funding to conduct a high-profile media and community education program encouraging men, and women, to see themselves as carers as well as workers.**

<sup>33</sup> There is an extensive discussion of the need for an Equality Act to provide a more positive guarantee of equality between women and men in the Australian Law Reform Commission Report No 69 Part II Chs 4-6. Recommendation 4.6 (p.68) is that the Act should apply for the benefit of both women and men.

<sup>34</sup> In the UK, the Equality Bill will introduce a 'gender equality duty' from April 2007, requiring all public authorities to eliminate sex discrimination and promote gender equality. See [www.eoc.org.uk](http://www.eoc.org.uk)

*Question 25: Should the Sex Discrimination Act be amended to give greater assistance to men and women to address any workplace disadvantage they may face on the basis of their family responsibilities? If so, what particular amendments are necessary? If not why not?*

As discussed in the preceding material, specific proposals made here include to:

- review the comparator test for discrimination;
- review the reasonableness test for indirect discrimination;
- broaden the definition of family responsibilities discrimination to include indirect discrimination and to apply to employment matters not related to dismissal;
- impose a positive duty on employers to accommodate family responsibilities (modelled on the NT provision);
- introduce a power to make and enforce ‘equality standards’ for family-friendly workplaces; and
- introduce an Equality Act and/or a duty on public authorities to promote gender equality.

In addition, the exemption in section 40 of the SD Act for ‘acts done under statutory authority’ should be reviewed in light of the finding in *Qantas v Howe* that refusal of part-time work to a senior flight attendant was not indirect discrimination, because the total number of part-time positions available was limited by the applicable enterprise agreement.

**Recommendation:**

**9. That the exemption in the SD Act for acts done under statutory authority be reviewed and either repealed or narrowed, so as not to undermine the objects of the Act.**

*Question 26: Can an individual complaint mechanism adequately deal with discrimination on the basis of family responsibilities? If not, what other changes may be necessary?*

The complaint process contained in the anti-discrimination legislation allows for individuals who believe they have been discriminated against on the basis of their family responsibilities in the workplace, to make a complaint to the relevant agency and, where there is substance in the complaint, to attend a conciliation conference in an attempt to resolve the problem with the respondent/employer. There are numerous ways in which complaints may be resolved, including negotiating different working hours, more flexible work conditions, permission to take unexpected leave breaks in some circumstances to meet family needs, to name a few. Negotiations, where successful, can lead to a better work life balance for the individuals involved in the complaint. However, the terms remain confidential and cannot serve as binding precedent, although de-identified information can be used for general educational purposes. Most agencies include such material as case-studies in their annual reports and on their websites. In small jurisdictions high profile complaints subject to media attention cannot be effectively de-

identified, ironically meaning that their potential high impact is lost because of routine confidentiality clauses in conciliation agreements.

Not all complaints can be successfully conciliated, and some may ultimately proceed to a public hearing before a Tribunal. The decisions can indirectly affect more workplaces and individuals than just those individuals and employers involved in that specific complaint. The broader public benefit of Tribunal or court decisions is that they can build up a body of case law that can illustrate the circumstances and parameters of unlawful discriminatory conduct in relation to the ground of family responsibilities. Unfortunately, developing a body of case law can be very slow, and does not assist in a timely way the development of larger systemic changes that may be necessary across workplaces to assist people to better manage their work and family responsibilities. Also, jurisprudence from other jurisdictions may not be persuasive because of differing terminology and coverage of the legislation.

The complaints mechanism is therefore a valuable mechanism to deal with discrimination on the basis of family responsibilities, but it cannot be relied upon as the sole or even primary means of ensuring that workplaces adequately accommodate the various needs of workers with family responsibilities.

The burden placed upon individuals to make and follow through their complaint is significant. Not only is there a considerable amount of time and energy required to pursue a complaint, there is also the emotional consequence for workers being in direct and clearly identifiable conflict with their employers, and the stress and uncertainty that this conflict entails. Complainants often feel obliged to engage a lawyer which can involve significant expense, and if they proceed to public hearing, complainants in some jurisdictions also risk a costs order being made against them if they fail to prove their complaint. Trade unions are often able to provide assistance but rates of unionization are low, especially among women.

Gathering sufficient evidence to prove on the balance of probabilities that a worker's family responsibilities was a substantial reason for an unfavourable decision by an employer (in direct discrimination cases), or gathering evidence to show a term or condition of work being imposed by an employer is not reasonable (in a case of alleged indirect discrimination), can often be a very difficult task.

Changes to the workplace may be significant for some complainants who successfully conciliate a discrimination complaint. Resolution of cases occurs most frequently where conciliation occurs very early on in the complaint process, when a potentially discriminatory issue has been identified in the workplace. However, in many cases complainants are arguing their case after losing their employment, or the consequence of running the complaint totally destroys the important trust relationship between an employee and an employer, and the employment relationship does not survive the complaint process.

These are very heavy burdens for individual complainants to bear in order to be able to obtain recognition and accommodation in the workplace of their family responsibilities.

A complaints-based mechanism thus has limited effectiveness for enabling women and men generally to 'strike the balance' in an equitable way. This was acknowledged by the State and Territory Governments in their Closing Contentions in the Family Provisions Test Case,<sup>35</sup> where they noted that anti-discrimination law is largely reactive, remedial, complaint-based, and adversarial. In addition, the limited remedies, generally low level of damages awards, and lack of provision for punitive damages reduces the deterrent effect.<sup>36</sup> The application of the law is limited by the need for a comparator in most jurisdictions. The proportionality and reasonableness tests can be hard to satisfy. The anti-discrimination framework at present is mostly remedial – what is needed is a positive duty to promote equality, including by accommodating family responsibilities. Success in individual cases is no guarantee of systemic change. Furthermore, a recent analysis of higher court reviews of discrimination decisions by the specialist tribunals found disturbing evidence of a tendency to adopt a formal rather than substantive approach to equality, and this narrow protection offered by the discrimination legislation, particularly in the employment area.<sup>37</sup>

The answer to the question what other changes may be necessary has been partially provided above in terms of amendments to the SD Act to make it more effective as a tool for systemic change. In addition the recent review of the *Disability Discrimination Act* has considered ways to strengthen anti-discrimination law that might assist in relation to family responsibilities as well as disability.<sup>38</sup> Both involve the development of flexible working conditions to accommodate individual needs. The Interim Report of the National Inquiry into Employment and Disability, 'recommends the development of guidelines for creating a flexible workplace for employees with disability. It may be useful to co-ordinate such efforts with people designing family-friendly workplaces.'<sup>39</sup> There is also demand for workplace flexibilities associated with retaining older workers in the context of an ageing population and skills shortages.

**Recommendation:**

**10. That frameworks and initiatives to develop workplace flexibilities be co-ordinated across the areas of disability, age and sex discrimination, to encourage the mainstreaming of the needs of all affected groups.**

<sup>35</sup> 19 November 2004; see airc website <http://www.e-airc.gov.au/familyprovisions/>

<sup>36</sup> For examples of damages awarded to successful complainants under the SD Act involving family responsibilities see HREOC, *Federal Discrimination Law (2005)* pp 278 –284. Some of these awards seem particularly insensitive to the impact of family responsibilities on a woman's capacity to 'mitigate her loss'.

<sup>37</sup> Bailey P, Callinan R and Dziedzic A, *Interpretive Approaches of the Tribunals and Courts in Discrimination Law*, in *Interpreting Statutes*, Corcoran S & Bottomley S, (eds) Federation Press, Sydney (2005).

<sup>38</sup> Productivity Commission Inquiry Report, *Review of the Disability Discrimination Act 1992*, No 30, April 2004

<sup>39</sup> HREOC, *Workability – People with Disability in the Open Workplace*, August 2005 Interim recommendation 19.

Beyond that what is needed is a more effective national legislative framework for employment and workplace relations, considered below. The available evidence indicates that access to flexible, family-friendly work arrangements is patchy, least often provided to those who most need it, and where it is available comes in the form of a restricted 'mummy track' for women of casual, low-skilled, low-paid work.<sup>40</sup> The Discussion Paper mentions the suggestion of an inquiry such as the UK Women and Work Commission. It would be preferable if the political will could be found to enact those measures that we already know can make a substantive difference. However, there could be merit in establishing an inquiry into the conditions of part-time work in Australia, given the significance of this for gender equity in employment. The recent report of the UK Equal Opportunities Commission investigation into flexible and part-time work, *Britain's Hidden Brain Drain*, highlights the under-utilization of women's skills, and the many penalties experienced by part-time workers, most of whom are women. Such an inquiry could draw on the research into Quality Part-time Work currently being conducted by Dr Sara Charlesworth and her colleagues at RMIT University. It could be conducted by the Federal Productivity Commission, with input from HREOC.

**Recommendation:**

**11. That a national inquiry be conducted into the conditions of part-time work and the implications for gender equity.**

**Workplace relations, policies and practices and the business case for change  
(Chapter 8 – Questions 27 – 31, page 100)**

*Question 27: Are amendments to the workplace relations system needed to give greater assistance to men and women to address any workplace disadvantage they may face on the basis of their family responsibilities? If so, what particular amendments are necessary? If not why not?*

The agencies involved in this submission believe that core work and family entitlements should be incorporated into the federal Workplace Relations Act (WR Act) as national minimum entitlements. This is necessary to ensure that across all workplaces, workers with family responsibilities have clear rights that are understood by employees and employers, and that enable workers with family responsibilities to adequately manage those responsibilities.

The need for changes to workplace conditions to assist employees, women and men, to manage their work and family obligations has just been extensively canvassed in the Family Provisions Testcase heard by the Australian Industrial Relations Commission (PR082005). The Commission considered a wealth of evidence from employers and business organizations, employees, unions, women's organizations, the Human Rights and Equal Opportunities Commission, the Commonwealth government and State and Territory Governments, and academic experts and researchers. The decision of the Full

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<sup>40</sup> The last comprehensive national survey of workplace entitlements was carried out a decade ago. The Australian Workplace Industrial Relations Survey was intended to be conducted at five yearly intervals but the last one was in 1995, before major changes to the workplace relations regime commenced.

Bench (103 pages long) was handed down on 8 August 2005, and reflects the key proposals supported by the State and Territory Governments, which the Commission regarded as “an intermediate position” (para 390).

The Commission was satisfied that it “should take a positive step by way of award provision to assist employees to reconcile work and family responsibilities” (para 393). It described the new provisions as “a measured response to the evidence and submissions, bearing in mind our obligation under s 93A of the WR Act to take account of the principles embodied in the Family Responsibilities Convention 1981, in particular those relating to helping workers reconcile their employment and family responsibilities.”(para 398).

The Full Bench decision will provide an employee entitled to parental leave with the right to request:

- simultaneous unpaid parental leave of up to 8 weeks;
- an extension of unpaid parental leave from one year to two;
- to return to work on a part-time basis until the child reaches school age; and
- the request may be refused by an employer on reasonable grounds.

In addition the Commission approved a new provision for improved communication between employer and employee during parental leave, and new provisions for ‘personal leave’ which allow up to ten days paid leave a year to provide care and support for immediate family or household members.

The decision represents a modest advance, but even this may be short-lived as the Federal Government has announced it will be further reducing award conditions, and has not guaranteed to include these entitlements in the new scheme.

As discussed at the outset of this submission, combining work with family responsibilities involves fundamental human rights. At present these are inadequately protected in Australia. Including core family friendly provisions in national industrial legislation is the most effective way to ensure comprehensive coverage across the workforce. Such entitlements should not be piecemeal and dependent upon insertion in a variety of awards or enterprise bargaining agreements. Nor should such provisions be dependent upon an employer’s goodwill or a supportive workplace culture. Best practice employers may respond, but many working parents, fathers as well as mothers, will not be able to negotiate such practices where employers are less responsive. Basic entitlements should apply to all workers, be gender neutral, and (apart from obvious exceptions associated with birth and breastfeeding) capable of being utilized by any worker, male or female.

It is suggested that the following should be considered “core” or essential family friendly provisions to which all workers with family responsibilities are entitled:

- reasonable personal/carer’s leave provisions – paid time off to care for and support an immediate family/household member who is sick;

- the right to request reduced or more flexible hours, without loss of status, pay or opportunities;
- caps on hours worked;
- paid maternity leave for working mothers for a reasonable period before and after childbirth (the ILO standard of 14 weeks to be the minimum);
- paid paternity leave to enable working fathers to be at home around the time of the birth both to support the mother, and bond with the baby;
- a further entitlement to a period of unpaid maternity and paternity leave following the birth of a child for permanent full-time, part-time and long-term casual employees;
- the right to refuse unreasonable overtime; and
- breastfeeding rights for nursing mothers who are workers for the first 12 months after birth.

So workers and employers are clear about their rights and responsibilities in relation to workers with family responsibilities, these entitlements should be clearly set out in a single statute. The UK has adopted this approach in relation to parental leave and the statutory right to request flexible work arrangements.<sup>41</sup> There are many legislative models operating across the European Union (EU) and in Scandinavia from which Australia could draw that require employers to accommodate parents' caregiving responsibilities<sup>42</sup>. This is not only more effective, it is also more transparent than implicitly imposing that requirement through remedial anti-discrimination laws as is currently the case here. The 'right to request' legislation in the UK, and the new AIRC Testcase standard, recognize that a worker's family needs may not always be accommodated and provides a framework for considering business impacts.<sup>43</sup>

Legislative measures ought to be complemented by State and Federal Government programs that provide both employers and employees with information and education about their obligations and rights, and promotion of strategies including incentives to assist employers and employees in achieving workplaces that are family friendly. Companies that achieve best practice in this area should receive public recognition for their achievements. Small business should be provided with extra support and assistance where necessary. Measures that should be encouraged in workplaces include:

- time off in lieu arrangements;
- flexible working hours/flexible rostering;
- part-time work;
- job sharing;
- career break schemes;

<sup>41</sup> See ss 80F and 80G in the *Employment Rights Act 1996* (UK).

<sup>42</sup> For useful cross-national perspectives see Gornick J.C and Meyers M.K. *Families That Work: Policies for Reconciling Parenthood and Employment*, Russell Sage Foundation, New York, (2003). Also see the OECD Report Series '*Babies and Bosses: Reconciling Work and Family Life*, Vols 1-3.

<sup>43</sup> Business grounds for refusal in the UK law may include burden of additional costs, detrimental impact on customer service, inability to recruit additional staff, inability to reorganize work, detrimental impact on performance.

- working at home/telecommuting;
- subsidized childcare facilities at work;
- counselling and support services;
- breastfeeding and expressing breaks and facilities;
- pooling of leave entitlements;
- pre-natal leave; and
- family leave in minimum awards/legislative standards.

Programs to promote these working arrangements should take into account the risk that gender inequalities can be entrenched if they are not explicitly challenged – for example part-time work initiatives can lead to more women getting caught in the ‘mummy-track’.

**Recommendation:**

**12. That HREOC advocate a comprehensive national legislative scheme of work and family entitlements for women and men that is based on principles of gender equity, to be accompanied by information, education and small business assistance programs.**

*Protection from dismissal*

Workers should encounter no disincentives to utilizing these work and family provisions. This means they must be protected from adverse consequences of seeking to access such entitlements – including protection from unfair and unlawful dismissal. The Federal Government is proposing to abolish unfair dismissal protection for the majority of employees. Whilst the provisions in the WR Act for unlawful termination, which include grounds of discrimination,<sup>44</sup> will be retained, remedies will only be available through the Federal Court. This is a major concern for anti-discrimination agencies, which could see a significant increase in discrimination complaints if access to the AIRC is restricted for dismissals involving discrimination. This matter was commented on in the 2 June 2005 issue of *Discrimination Alert* by Professor Ron McCallum, Dean of Law at Sydney University. Professor McCallum believes many sacked workers will turn to equal opportunity agencies to help them remedy discriminatory dismissals.

**Recommendation:**

**13. That accessible and effective remedies for unfair and unlawful dismissal continue to be available to workers with family responsibilities.**

**14. That HREOC co-ordinate a review of the impact on all anti-discrimination agencies of the forthcoming changes to the federal workplace relations system.**

**15. That HREOC advocate for a high-profile media campaign on the rights of workers with family responsibilities, and the obligations of employers.**

<sup>44</sup> see section 170CK WR Act – includes sex, pregnancy, family responsibilities

*Question 28: Do men make adequate use of the workplace relations system to assist them to balance their paid work with their family responsibilities?*

The evidence is that men do not use their existing work and family entitlements (eg parental leave and carer's leave) to nearly the same extent as women. There is some evidence as to the reasons for this – including lack of awareness and concerns about the impact on their job security and career prospects – the latter being something women are more acculturated to accept, where men generally are not.

On 6 April 2005, a report by the Select Committee on the Status of Fathers was tabled in the South Australian Parliament. A number of recommendations were made, including that:

*The barriers to fathers' uptake in parenting and carer's leave be investigated and addressed, as part of a broader State Government strategy targeting work/family balance issues across the public and private sector.*<sup>45</sup>

In her submission to this inquiry, the South Australia Commissioner for Equal Opportunity commented on the impact stereotypes about fathers as parents have on men's ability to access flexible work policies.

Many fathers can and do encounter discriminatory views when they seek to have their parenting responsibilities taken seriously into account; such as where they ask for extended leave to care for a child. As an example, one family arranged for the mother to take 12 months unpaid maternity leave after the birth of their first child. The father, an electrician, planned to take a year off work to stay at home and raise their child when his wife returned to work after her maternity leave. Unfortunately, the father faced strong criticism and ridicule from his work colleagues, who did not view this as 'the thing for a man to do'. Old fashioned ideas about the role of fathers as providers, not caregivers, are still around. Men are more likely to be seen as not being committed to their job and future career if they take time off to be with their children. Increasingly though, a trend has been noted at the SA Equal Opportunity Commission for young male partners of pregnant women who are being discriminated against at work, to call seeking assistance. This suggests that the struggle for young families to balance work and child rearing responsibilities is starting to be viewed in the community as a concern for all parents – it is no longer seen exclusively as a 'women's issue'. Men have traditionally derived greater status for their achievements at work than in the home. To improve the status of men as carers requires us to foster a social environment that allows and encourages men to take a more active role in parenting and promotes their domestic contributions as of equal value.<sup>46</sup>

Clearly then, to promote the status of fathers as carers, changing community attitudes towards the role of men as parents need to be supported and encouraged. This is an

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<sup>45</sup> for the report see [http://www.parliament.sa.gov.au/committees/lcdocuments/Fathers\\_50\\_4/public\\_d](http://www.parliament.sa.gov.au/committees/lcdocuments/Fathers_50_4/public_d)

<sup>46</sup> See also Submission of Commissioner for Equal Opportunity to the Select Committee on the Status of Fathers in South Australia, May 2004.

important function for anti-discrimination agencies – to challenge gender stereotypes as they apply in both domestic and workplace spheres.

There is also evidence that men are much less likely than women to take unpaid leave. So unless and until there is more cultural acceptance of and universal entitlement to paid paternity and parental leave, take-up rates by men are likely to remain low. There is also evidence that stronger measures or incentives may be needed to encourage or require men to take advantage of leave and other forms of family provision. If this is done at periods of key transition (eg after birth of baby) it can have lasting consequences in terms of a more equal sharing of care and paid work.<sup>47</sup>

It is also important to note that the persistence of the sex-based pay gap serves to reinforce the gendered allocation of paid work and caring, and the effect is then self-perpetuating – he earns more than she does, so it makes sense for her to stop work or work less, especially with significant childcare costs.

*Question 29: Do informal workplace policies work well to assist employees balance work and family?*

As stated above, these are important but they are no substitute for adequate guaranteed minimum entitlements if the objective is equity and fairness. Informal workplace policies have a significant role to play however in building family-friendly and equitable workplace cultures.

*Question 30: Have EEO policies and business case arguments produced a greater acceptance of the need for workplaces to be family friendly?*

There is no doubt that these have been very helpful, but they tend to have more traction in larger organizations. They are still often associated with women's employment, rather than being seen as central to men's employment across the life-cycle too.

*Question 31: How can Australian workplaces be made more family friendly?*

The answer is largely provided above. Encouraging men's take-up of family-friendly work arrangements will certainly help share the load, as well as strike the balance.

## **Chapter 11 – Striking a balance Questions 42 – 45 (page 132)**

*Question 42: What do you think should be the key goals of paid and unpaid work arrangements in Australia?*

From the perspective of the agencies involved in this submission, the key goals of law reform and policy initiatives in relation to work and family should be to promote and facilitate gender equity at home and at work, in accordance with the human rights instruments to which Australia is a signatory, and consistent with our own national values of equal opportunity and fairness. The goal must be substantive not merely formal equality, and this requires positive measures to address past discrimination and enduring

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<sup>47</sup> Brandth B and Kvande E, Reflexive Fathers: Negotiating Parental leave and Working Life, Gender Work and Organisation, Vol 9, Number 2, April 2002

stereotypes. Crucially, there should be an expectation that caring for children, the aged and infirm, for friends and relatives in times of need, is the responsibility of men and women equally. As long as this responsibility falls primarily to women they are vulnerable to being discriminated against at work, and constrained in their employment choices and opportunities.

*Question 43: What do you think should be the role for each of government, employers and families for promoting appropriate divisions of paid and unpaid work by Australian families?*

All have a role to play in achieving the cultural change that is demanded by changing demographic and social trends. However, governments have a particular responsibility to show leadership and provide the appropriate regulatory environment and support mechanisms to achieve national goals. They also are more able to take a long-term view, and have the capacity to develop multi-faceted strategic responses to social issues. All Governments, particularly the Commonwealth Government, which has the primary obligation in international law, are responsible for taking necessary measures to ensure compliance with the international treaties to which we are a party. Governments have to bear the social and economic consequences of failing to address women's disproportionate domestic burden and inequalities in the home, in terms of some mothers' under-participation in paid work, the undervaluing of women's work, and women's vulnerability to welfare dependency.

*Question 44: What options are needed for promoting appropriate change to the divisions of paid and unpaid work in Australian families?*

In addition to the legal reforms to anti-discrimination and workplace relations frameworks proposed above, it would be helpful if government and employer associations were to provide more practical assistance support to employers. Such support is necessary to ensure they understand their obligations, as well as the business benefits of family-friendly work arrangements and are able to implement them. The State and Territory anti-discrimination agencies can play a role in this. They provide active programs of community education, which address employers and employees, but have very limited resources for this work. Guidelines such as the Pregnancy at Work Guidelines, the Sexual Harassment Code of Practice and information resources such as the Good Practice, Good Business kit, provided by HREOC are also extremely useful. A comprehensive guide to the law on work and family should be developed by HREOC with input from each jurisdiction to make it nationally applicable.

Encouragement should be given to all stakeholders to include family friendly measures in all awards, enterprise agreements and individual workplace agreements. These need to be supported by individual company policies that endorse the provisions and ensure workers are aware of their rights and will not be disadvantaged if they utilize them. Such provisions should not be confined to female dominated industries, awards or agreements.

Public education campaigns on the importance of women and men sharing domestic work and caring, and challenging the assumption that this is women's work, are also important. In the UK, information campaigns to raise awareness of new entitlements such as paid

paternity leave and the right to request flexible working conditions have been specifically targeted at men. In Spain, the new marriage contract will require prospective husbands to promise to share household work and childcare equally with their wives<sup>48</sup>.

Another option, that has proved both popular and effective in some Scandinavian countries, is to provide a scheme of paid parental leave that requires a proportion of the leave to be taken by the father. This is the case in Norway, and there is currently debate both in the UK and in Sweden about ensuring that fathers and mothers are able to share parental leave equally.<sup>49</sup>

*Question 45: What evidence is lacking on the issues covered in this paper? What else does HREOC need to know in its consideration of these issues?*

The paper is comprehensive in its coverage of the issues and the evidence surveyed. Because these issues are so central to a whole range of continuing inequalities between women and men, it is hard to narrow the focus. The main evidence that is lacking, as indicated earlier, is sound up-to-date evidence of the availability and take-up of family-friendly workplace arrangements. This is due to the Federal Government's failure to run Australian Workplace Industrial Relations Survey 2000 or 2005, which means relying on a patchwork of other data sources, some of it more reliable than others. It also means we will lack an accurate base-line from which to measure any progress, should there be any.

#### **Recommendation**

**16. That HREOC advocate the urgent resumption of regular and comprehensive national workplace surveys to measure the availability and take-up of family-friendly working conditions, covering the perspective of employers and employees.**

More evidence may be needed in the final report of the impact on women of the proposed industrial relations changes, and the importance for women of providing national minimum entitlements rather than relying on individual contracts or agreements. The WR Act obliges the Government to report periodically on the effect of agreement-making on women and reference could be made to that material, although the reporting has been of limited value.<sup>50</sup>

It would also be useful to have more information about and more discussion of the implications of some of the options for reform for different kinds of business, in particular small business, and whether or not additional support is needed from governments – eg to assist with providing parental leave cover, or with implementing a range of flexible working patterns. Reports from the consultations with business representatives, employers and unions will no doubt be instructive.

<sup>48</sup> Reported in *The Guardian* newspaper 8 April 2005.

<sup>49</sup> For information see the Swedish Equal Opportunities Ombudsman website see <http://www.jamombud.se/en>

<sup>50</sup> section 358A WR Act 1996 (Cth). See *Agreement making in Australia under the Workplace Relations Act 2002 and 2003*, A report prepared by the Department of Employment and Workplace Relations and the Office of the Employment Advocate.

## Appendix A

### Information on State and Territory anti-discrimination legislation relevant to family responsibilities

#### **Australian Capital Territory *Discrimination Act 1991, Human Rights Act 2004***<sup>51</sup>

The *Discrimination Act 1991* makes discrimination unlawful on a range of grounds relevant to this inquiry, including sex, pregnancy, breastfeeding and status as a parent or carer (section 7). The test for discrimination is 'unfavourable treatment' linked to the ground or protected attribute, and is not based on a comparator (section 8).

*Complaints made on the Grounds of Pregnancy, Breastfeeding and Status as a Parent or Carer in the Area of Employment for the Period 01/07/2000 until 30/06/05*

Year	Pregnancy	Breastfeeding	Status as a Parent or Carer
2000-2001	4	N/A	1
2001-2002	5	0	2
2002-2003	12	0	6
2003-2004	7	1	5
2004-2005	4	0	0
<b>Total</b>	<b>31</b>	<b>1</b>	<b>14</b>

This table does not tell the whole story. Firstly, the Human Rights Office receives regular requests for advice and information from or on behalf of women about their rights on returning to work from maternity leave, both in the private and public sector. Comprehensive data on these inquiries is not collected, but it is understood that the information provided is often used to assist in negotiating flexible work arrangements. The ACT Chief Minister's Department publication *Expectant and New Mothers: Guidelines for Employers and Employees in ACT Workplaces* (2004), provides useful guidance on family-friendly work arrangements and entitlements in the ACT.

Since its commencement on 1 July 2004, the *Human Rights Act 2004* has given further statutory protection to the principle of equality and non-discrimination.<sup>52</sup> While it does not provide a new or independent right of action, all decisions made and policy developed under ACT laws must be human rights compliant.<sup>53</sup> Also, the Act explicitly invites the application of international human rights law and jurisprudence,<sup>54</sup> and this is potentially very significant for the full implementation of the ACT's anti-discrimination measures. For example, the human rights treaty bodies have interpreted the obligations of non-discrimination and equality as requiring the attainment of substantive, rather than merely formal, equality in the enjoyment of human rights. This is made clear by: specific wording in the treaties, which refers to the 'enjoyment' and the 'practical realisation' of

<sup>51</sup> For details of legislation see [www.hro.act.gov.au](http://www.hro.act.gov.au)

<sup>52</sup> Section 8 HR Act 2004.

<sup>53</sup> For further information and a Plain English Guide to the HR Act see <http://www.jcs.act.gov.au/humanrightsact/indexbor.html>

<sup>54</sup> Section 31 HR Act 2004.

equality,<sup>55</sup> by the definition of non-discrimination and affirmative action in CEDAW;<sup>56</sup> and authoritative interpretations by the treaty committees.<sup>57</sup>

### **Northern Territory – Anti-Discrimination Act 1992<sup>58</sup>**

The Anti-Discrimination Act includes sex, pregnancy, parenthood and breastfeeding as protected attributes (section 19), all of which may be relevant to discrimination related to family responsibilities. Interestingly, the Act provides that failure or refusal to accommodate special needs associated with a protected attribute (including pregnancy, breastfeeding, or parenthood) may give rise to a complaint of unlawful discrimination (section 24). This provision is similar to disability discrimination provisions and is subject to a defence of ‘unjustifiable hardship’, analogous to the exception that is generally applied in relation to adjustments for disability. The provision, which applies to all the attributes protected by the Act, is reproduced below.

#### *Section 24 Failure to accommodate special need<sup>59</sup>*

- (1) A person shall not fail or refuse to accommodate a special need that another person has because of an attribute.
- (2) For the purposes of subsection (1) –
  - (a) a failure or refusal to accommodate a special need of another person includes making inadequate or inappropriate provision to accommodate the special need; and
  - (b) a failure to accommodate a special need takes place when a person acts in a way which unreasonably fails to provide for the special need of another person if that other person has the special need because of an attribute.
- (3) Whether a person has unreasonably failed to provide for the special need of another person depends on all the relevant circumstances of the case including, but not limited to
  - (a) the nature of the special need;
  - (b) the cost of accommodating the special need and the number of people who would benefit or be disadvantaged;
  - (c) the financial circumstances of the person;
  - (d) the disruption that accommodating the special need may cause; and
  - (e) the nature of any benefit or detriment to all persons concerned.

There have been no cases decided by the Commissioner or courts (the NT does not have a Tribunal) applying this provision or in relation to the relevant protected attributes, but it would appear to go further in requiring accommodation of the needs of parenthood than other anti-discrimination laws. The provision has been in the Act from the outset, and in practice is applied in relation to a range of attributes. Mr Shane Stone, then Minister for Public Employment said in the second reading speech on the Bill on 1 October 1992:

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<sup>55</sup> For example CEDAW art 2(a), ICCPR art 3

<sup>56</sup> CEDAW arts 1 and 4

<sup>57</sup> For example see Human Rights Committee General Comment 18

<sup>58</sup> For details of the legislation see [www.adc.nt.gov.au](http://www.adc.nt.gov.au)

<sup>59</sup> Information on this provision is featured in *Fair Go: Newsletter of the Northern Territory Anti-Discrimination Commission*, Edition 6, June 2005.

"Clause 24 requires that people 'reasonably' provide for special needs of another person in relation to a specific attribute. This means, for example, the reorganisation of a workplace in relation to a person's impairment, provision of appropriate work breaks for a nursing mother, the provision of facilities in public buildings, such as baby changing areas for use by parents, or the provision, in some circumstances, of interpreters for people from non-english speaking backgrounds. 'Reasonableness' will be determined by the nature of the special need, the cost of accommodating the special need and the number of people who may benefit or be disadvantaged, the financial circumstances of the person, the disruption that accommodating the special need may cause and the nature of any benefit or detriment to all persons concerned."

Information on complaints received in relation to the protected grounds is reproduced below.

### Complaints received on the ground of parenthood in the area of work

		99-00	00-01	01-02	02-03	03-04
<b>COMPLAINANT</b>	<b>Male</b>	5	8			3
	<b>Female</b>	5	1	3	3	3
<b>OUTCOME</b>	<b>Rejected</b>	8	6			5
	<b>Lapsed</b>	1	1			
	<b>Withdrawn</b>	1	1			
	<b>Discontinued s.102</b>		1			
	<b>Settled</b>			3	3	1

While the number of complaints is too small a sample size to allow reliable and detailed analysis, it is of interest that the numbers of men and women making complaints on the ground of parenthood is almost equal.

### Complaints received on the ground of pregnancy in the area of work

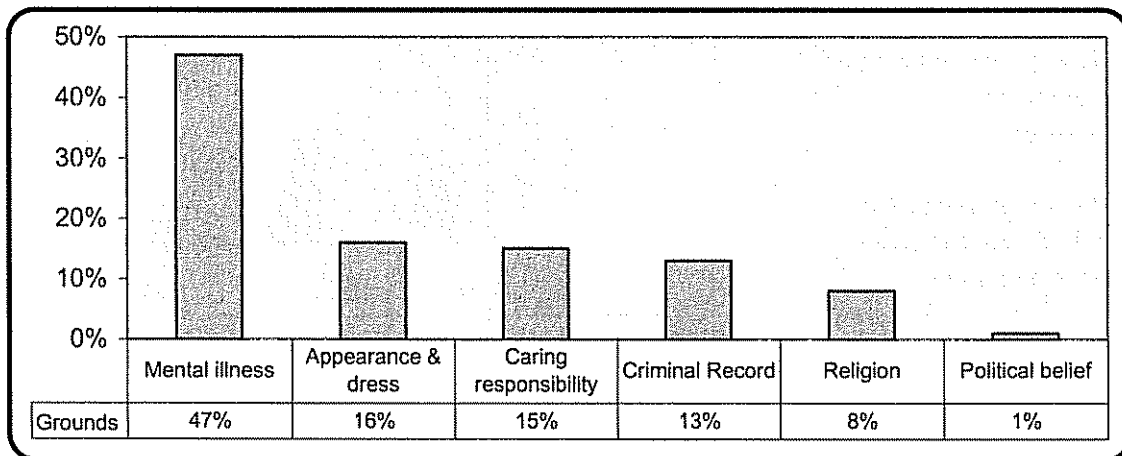
		99-00	00-01	01-02	02-03	03-04
<b>COMPLAINTS</b>		3	4	1	3	1
<b>OUTCOME</b>	<b>Rejected</b>	1	2			
	<b>Dismissed no PF Found</b>	2				
	<b>Withdrawn</b>		1	1	2	
	<b>Settled</b>		1		1	1

### South Australia - Equal Opportunity Act 1984

The SA Equal Opportunity Act is deficient in a number of areas. Among other things, it does not protect people against discrimination based on their caring responsibilities, religion, mental illness, or criminal records.

In 2004-05, a number of matters were raised with the SA Equal Opportunity Commission that fell outside its jurisdiction. Of these, 15% were about discrimination faced by people with caring responsibilities (see Figure below).

### Issues outside SA equal opportunity jurisdiction



While South Australian equal opportunity laws do not cover caring responsibility, certain complaints can be taken up as indirect sex discrimination. This can be done where the person making a complaint can establish that a particular requirement is being imposed which places a substantially higher burden on them because of their gender. Usually, this is argued by women in the workplace who are also responsible for looking after young children.

However, this is a limited approach. Many other carers lack the protection of discrimination laws in SA. For example: male parents; people caring for a spouse, child or parent with special needs; or people voluntarily looking after others they are not related to (including those in receipt of a carer's allowance or payment under the federal *Social Security Act 1991*).

South Australians will be disadvantaged in comparison to workers interstate once mooted changes to federal industrial relations laws are in place, as the anti-discrimination legislation does not provide specific protection for caring responsibilities.

### Pregnancy discrimination

The discrimination faced by women during their pregnancy is an indicator of the attitudes and barriers that confront workers with young families.

South Australian data for the 2004-05 year shows that working women are at a much higher risk of being dismissed or having their hours cut during their pregnancy (see figure

2). It is disheartening that some employers fail to recognise the fundamental rights of pregnant women which have been enshrined in laws for so many years.

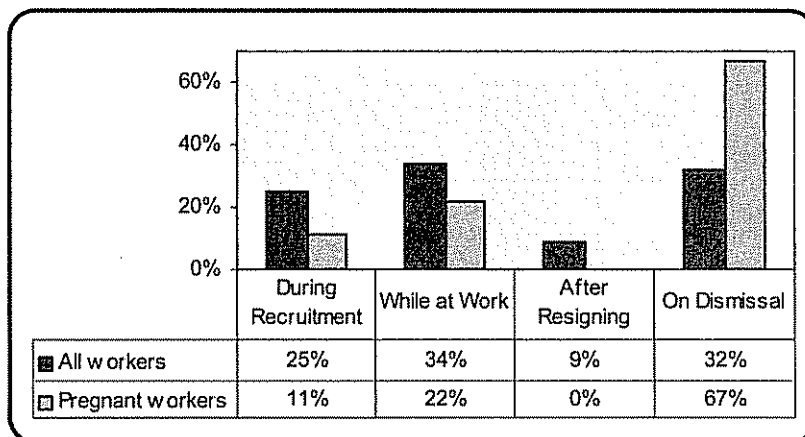
Pregnant workers experience discrimination very differently from other employees. Most report being dismissed because of their pregnancy, even if they have the all-clear from their doctor.

This can be distressing for women who may be relying on the savings from the income for their time off work, or counting on a job to come back to once they are ready.

When a pregnant women is sacked, her chances of securing another job during the pregnancy are remote. This kind of discrimination remains a significant

obstacle to the equal participation of women in the workforce. It is also a likely contributor to the fact that working women today are choosing to have fewer, if any, children.

**Workers report discrimination at different phases**



\* Figures add to 100% across rows

### Western Australia – Equal Opportunity Act 1984

Western Australia became the first Australian State to attempt to meet the obligations of ILO 156 when it enacted new section 35A in 1992 to prohibit discrimination on the ground of family responsibility or family status. The amending legislation came into effect on 8 January 1993. Such discrimination is prohibited in the areas of work, including partnerships and professional or trade organisations, and education. The Act also makes pregnancy and marital status grounds of unlawful discrimination (ss 10 & 9).

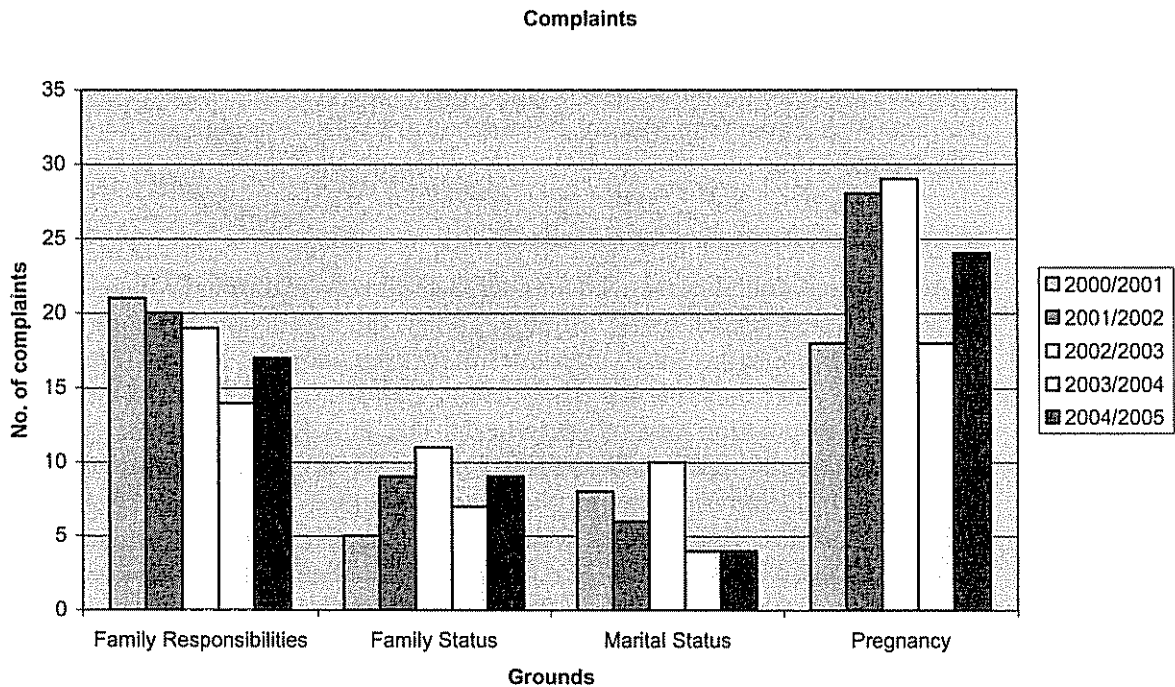
#### Section 35A Family responsibility or family status

Definition: in relation to a person, means—

- (a) having responsibility for the care of another person, whether or not that person is a dependant, other than in the course of paid employment;
- (b) the status of being a particular relative; or
- (c) the status of being a relative of a particular person;

#### Complaints

Complaints on the ground of family responsibilities, marital status, family status and pregnancy together make up about 20% of employment related complaints, and 10.4% of all complaints to the Equal Opportunity Commission, WA. The chart below shows that pregnancy discrimination complaints are the largest group.



For details of the legislation see [www.slp.wa.gov.au](http://www.slp.wa.gov.au)

### Relevant reported cases

The following cases decided by the WA Equal Opportunity Tribunal illustrate the range of outcomes in relation to claims centering on carer responsibilities in WA. For details see the full case reports in *CCH Equal Opportunity Law and Practice*.

### Family responsibilities

#### *Parsons v South Metropolitan Health Service (2005)*

A woman was required by her employer ('the Health Service') to comply with a condition that she start work at 7:30am each day. She had family responsibilities and wished to start work at a later time, such as 9am. The Health Service claimed that a 7:30am start was necessary because the job required the employee to ensure that staff levels for the day were adequate in each section of the Health Service, and to arrange replacement staff if necessary. It claimed that this task could only be done efficiently if the employee was on-site at 7:30am. The WA Equal Opportunity Tribunal found that a 7:30am start was a reasonable requirement in the circumstances and dismissed the complaint.

#### *Miller v Minister for Education (2001)*

The complainant, a woman teacher whose applications for promotion were rejected in favour of other applicants seeking transfer, complained against the promotion policy of the WA Education Department. The policy, which

emphasised mobility and transfer, was found to indirectly discriminate against female teachers, who were less likely than their male colleagues to be mobile (from city to country and vice versa). It was not reasonable of the Department to continue to apply the contentious requirement in the circumstances of the case. The W A Equal Opportunity Tribunal awarded the complainant \$4,000 compensation.

*Bogle v Metropolitan Health Service Board (2000)*

A registered dental nurse who adopted a child was held to have been discriminated against by her employer when she was denied her former position as a Charge Nurse after her return from adoption leave. Her employer had offered her only a lower position on a part-time basis, or her former supervisory position on a full-time basis. The W A Equal Opportunity Tribunal found that she had suffered a detriment in that the requirement that she work full-time as a Charge Nurse was incompatible with her family responsibilities. The Tribunal ordered her reinstatement to her former position on a job-share basis, as well as damages for economic loss and stress, humiliation, frustration and emotional upset.

**Pregnancy**

*Turland v Captains Girl MV Pty Ltd (2001)*

The complainant worked in the kitchen and as a hostess on the respondent's cruise boat. She became pregnant and almost immediately her employment was terminated. The W A Equal Opportunity Tribunal found that the complainant had been discriminated against on the ground of pregnancy and awarded her compensation and damages in the amount of \$16,485.

**Family status**

*Hautlieu Pty Ltd t/a Russell Pathology v McIntosh (2000)*

This was a case of alleged discrimination in the workplace brought on grounds of family responsibility or family status, and victimization. It went to appeal on a number of questions, including the meaning of detriment and whether family relationship is confined to a relationship of care or responsibility. The evidence revealed facts that supported an inference of discrimination leading the WA Supreme Court to uphold the Equal Opportunity Tribunal's finding of discrimination. The Court rejected the appellant's argument that the prohibition against discrimination on the ground of family responsibility or family status was not restricted to people with care or responsibility for a relative.

*A v Bowling club (2000)*

The only event of any consequence preceding the dismissal of a reliable and popular worker was that she had been absent from work at short notice to attend

to family responsibilities. Accordingly, the WA Equal Opportunity Tribunal found that the complaint of discrimination on the ground of family responsibility was made out.

## Queensland - Anti Discrimination Act 1991

The attribute 'family responsibilities' was inserted into the Queensland *Anti-Discrimination Act 1991* (the 'ADA'), by way of an amendment that came into effect in March 2003 (section 7(o) ADA).

In 2003-2004, 19 complaints were accepted by the Anti-Discrimination Commission Queensland where a ground of discrimination is alleged to be 'family responsibilities' in the area of work. Of those complaints, 9 were made by female complainants and 10 were made by male complainants.

In 2004-2005, 46 complaints were accepted on the ground of family responsibilities in the area of work. Of these, 36 were made by female complainants, and 10 were made by male complainants.

To date, only one complaint alleging family responsibilities discrimination has proceeded to a public hearing before the Anti Discrimination Tribunal Queensland (the 'ADTQ'). That case involved a complainant who was a teacher and a single parent. She successfully obtained an interim order to prevent her employer (Education Queensland) requiring her to move to a new school, a move that she alleged failed to take into account her family responsibilities.<sup>60</sup> This case later settled, so there have been no final determinations in the Queensland jurisdiction on 'family responsibilities.'

The ADA also prohibits discrimination on the basis of pregnancy, parental status, and breastfeeding (section 7 (c), (d), (e) ADA respectively). These attributes have been in the ADA since enactment in 1991, although the ground of breastfeeding was limited to the goods and services area, and did not include breastfeeding in the workplace until March 2003. These grounds have also been the basis for complaints about issues of alleged discrimination in the workplace, and provide a mechanism to negotiate for workplace conditions that accommodate these responsibilities. From 1997 - 2005 the ADCQ has had 16 complaints by males and 77 complaints by females on the basis of their parental status in the work area. In the same period, 345 complaints have been made by women alleging pregnancy discrimination in the workplace. A number of these complaints have proceeded to public hearing in the ADTQ.<sup>61</sup>

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<sup>60</sup> *Hastie v Ryan and others* (2003) QADT 29 (12 December 2003).

<sup>61</sup> Parental status discrimination cases include *Porter v Matson and Locomotive International Pty Ltd* [1977] QADT 2 (28 January 1997); *Everett v Copperart Pty Ltd* [1997] QADT 14 (30 May 1997); *Dickie v Newman* [1998] QADT 11 (10 June 1998); *Dennis v Martin and CM Pty Ltd t/a Gray Eisdell Martin* [2001] QADT 18 (18 September 2001); *Du Bois-Hammond v Ariel, Cole and Raging Thunder Pty Ltd* [2004] QADT 27 (26 August 2004). Pregnancy discrimination cases include *Speight v Brown and Australian Money Exchange Pty Ltd* [2003] QADT 7 (18 June 2003); *Hoffman v Jones t/a Classic Images Hair and Beauty Salon* [2002] QADT 11 (3 May 2002); *H v H and HS* [2001] QADT 5 (3 May 2001) [51%]; *Johnson v Gloria Marshall Figure Salons of Australia* [1999] QADT 6 (24 June 1999); *Parker v*

## Victoria - Equal Opportunity Act 1995

The Equal Opportunity Commission Victoria is making a separate submission to this inquiry, but has also provided some material for inclusion in this submission Appendix. The status of being a parent or carer is among 16 protected attributes covered by the *Equal Opportunity Act 1995* (section 6), which also covers discrimination on the ground of breastfeeding, marital status, or sex. Their data show a marked rise both in the number of complaints on the grounds of parental and carer status, and in the number and proportion of complaints by men on these grounds.

### Complaints of discrimination on the basis of carer status and parental status in employment lodged under the *Equal Opportunity Act 1995*(Vic) at the EOCV between 1996 and 2004<sup>62</sup> disaggregated by sex of complainant (f/m):

Year	Parental Status			Carer Status		
1996-1997	25	22f	3m	0		
1997-1998	46	35f	11m	39	27f	12m
1998-1999	51	41f	10m	23	18f	5m
1999-2000	101	84f	17m	31	22f	9m
2000-2001	95	71f	24m	38	18f	20m
2001-2002	97	90f	7m	29	29f	
2002-2003	157	141f	16m	55	42f	13m
2003-2004	129	110f	19m	50	31f	19m

The increase in the number of complaints being received on the ground of carer/parental status indicates that there is some way to go before employers fully understand their obligations to accommodate family responsibilities at work. It may also suggest that people are becoming more aware of their right to redress if their parental/carer status is not reasonably accommodated.

**Note:** Information is not provided here on News South Wales or Tasmania but is included in the summary table attached.

*North Queensland Animal Refuge Inc* [1998] QADT 4 (16 March 1998); *Boyd v SCI Operations Pty Ltd* [1996] QADT 9 (17 May 1996); *Skellern v Colonial Gardens Resort Townsville and Attlee* [1996] QADT 4 (22 January 1996); *Haddock v Moore and Musostock Pty Ltd* [1995] QADT 2 (30 March 1995).

<sup>62</sup> Information from the Equal Opportunity Commission of Victoria Annual Reports 1996-1997 to 2003 -2004.

### Family responsibilities in anti-discrimination laws in Australia

PROTECTED ATTRIBUTE	CTH	ACT <sup>1</sup>	NT	QLD	SA	WA	VIC	NSW	TAS
Sex	SDA 1984, s. 5	DA 1991, s.7	ADA 1992, s.19	ADA 1991, s.7	EOA 1984, s.29(2)	EOA 1984, s.8	EOA 1995, s.6	ADA 1977, s.24	ADA 1998, s.16
Pregnancy	SDA 1984, s.7	DA 1991, s.7	ADA 1992, s.19	ADA 1991, s.7	EOA 1984, s.29(6)	EOA 1984, s.10	EOA 1995, s.6	ADA 1977, s.24(1B) <sup>2</sup>	ADA 1998, s.16
Breastfeeding	SDA 1984, s.5, s.5(1A)	DA 1991, s.7	ADA 1992, s.19	ADA 1991, s.7	-	-	EOA 1995, s.6	ADA 1977, s.24(1A) <sup>3</sup>	ADA 1998, s.16
Parenthood/ Parental status		DA 1991, s.7	ADA 1992, s.19 <sup>4</sup>	ADA 1991, s.7	-	-	EOA 1995, s.6	-	ADA 1998, s.16
Family/caring Responsibilities	SDA 1984, s.7(a), s.4(A), s.14(3A) <sup>5</sup>	DA 1991, s.7	-	ADA 1991, s.7	-	EOA 1984, s.35A, s.4	EOA 1995, s.6	ADA 1977, s.49(s)	ADA 1998, s.16
Relationship/ Marital status	SDA 1984, s.7A	DA 1991, s.7	ADA 1992, s.19	ADA 1991, s.7	EOA 1984, s.29(1)(c) & 29(5)	EOA 1984, s.9	EOA1995, s.6	ADA 1977, s.39	ADA 1998, s.16

<sup>1</sup> The ACT Human Rights Act 2004 further strengthens anti-discriminatory provisions, see especially section 8 and section 31 of the Act.

<sup>2</sup> The section provides that "For the purposes of this section, but without limiting the generality of this section, the fact that a woman is or may become pregnant is a characteristic that appertains generally to women."

<sup>3</sup> see below

<sup>3</sup> see below

<sup>3</sup> Covered as an attribute of sex under the Act: In the case of NSW ADA - "For the purposes of subsection (1) (a), something is done on the ground of a person's sex if it is done on the ground of the person's sex, a characteristic that appertains generally to persons of that sex or a characteristic that is generally imputed to persons of that sex."

<sup>4</sup> See also section .24 ADA 1992 which requires accommodation of special needs associated with an attribute, including parenthood.

<sup>5</sup> Section 14(3A) provides limited protection against discrimination on ground of family responsibilities: "It is unlawful for an employer to discriminate against an employee on the ground of the employee's family responsibilities by dismissing the employee".

