

Redfern Legal Centre



The Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

Attention: The Executive Director

Please find attached Redfern Legal Centre's policy submission in response to the Australian Human Rights Commission's enquiry into *Pregnancy and Return to Work*.

We would welcome the opportunity to discuss this submission with you further.

Yours faithfully,
Redfern Legal Centre

A handwritten signature in black ink, appearing to read 'Jacqui Swinburne', followed by a period.

Jacqui Swinburne
Acting Chief Executive Officer

31 January 2014

Redfern Legal Centre



SUBMISSION:

**Australian Human Rights Commission Inquiry – Supporting Working Parents: Pregnancy
and Return to Work**

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DATE:

31 January 2014



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1. Introduction: Redfern Legal Centre

Redfern Legal Centre (RLC) is an independent, non-profit, community-based legal organisation with a prominent profile in the Redfern area.

RLC has a particular focus on human rights and social justice. Our specialist areas of work are domestic violence; tenancy; credit and debt; employment; discrimination and complaints about police and other governmental agencies. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

2. RLC's Work in the Area of Pregnancy Discrimination

RLC has specialist practice areas in discrimination law and employment law. RLC offers free legal advice and representation in employment related matters arising under the *Fair Work Act 2009* (Cth), and discrimination matters, including complaints of sex discrimination, under the *Sex Discrimination Act 1984* (Cth) and Part 3 of the *Anti-Discrimination Act 1977* (NSW). This submission is based on RLC's experience in providing legal advice and representation to people who have experienced pregnancy discrimination at work, and who have sought redress under either the *Fair Work Act* or the *Sex Discrimination Act*.

Through these experiences, RLC has seen the devastation caused by pregnancy discrimination at work, especially when the discrimination results in loss of employment. It causes enormous distress, anger and grief to those who have experienced it. It can result in a long-term loss of confidence at work. It causes an unexpected reduction or loss of income at a time when people are least able to afford it. It greatly increases the financial and personal pressures associated with beginning a new family. Because of the loss of income caused by the discrimination, it can be extremely difficult or impossible for people to pay for the legal assistance that they need. RLC is committed to providing the best assistance possible to people who have experienced this form of discrimination, and to supporting systemic change aimed at eliminating pregnancy discrimination at work.

3. RLC's View in Summary

RLC welcomes the opportunity to comment on pregnancy discrimination. It is RLC's experience that women, in particular, experience discrimination in their employment when they inform their employers of their pregnancy and when they seek to return to work after taking maternity leave. This form of discrimination is affecting women's equal participation in the workforce.

Some of the trends which RLC has noted in its work with people who have experienced pregnancy discrimination relate to difficulties with the discrimination complaints-handling process, such as discharging the burden of proof in a complaint under federal anti-discrimination law. As RLC understands that these issues may be the focus of other submissions, we have focused this submission on the difficulties related to pregnancy discrimination which our clients have experienced in their employment, and recommended preventative measures to address those issues.

RLC has structured this submission in order to respond to the Australian Human Rights Commission's Guiding Questions, set out in its document entitled *Supporting Working Parents: Pregnancy and Return to Work National Review – Community Organisations*. The submission begins with an overview of the trends in work-related pregnancy discrimination which RLC has noted through its work with people who have experienced pregnancy discrimination in their employment. Based on those trends, we then make some observations of the limitations of the existing laws and policies aimed at addressing pregnancy discrimination at work. Following this, we review the best international practices in this area. We conclude with our recommendations for reform, based on our own experience and international best practice.

4. RLC's Recommendations

1. RLC's key recommendation is that pregnancy discrimination at work should be addressed by the introduction of a generous, publicly funded paid parental leave scheme, which includes periods of leave that are non-transferrable between male and female parents and which provides universal coverage combined with modest eligibility restrictions.
2. RLC recommends the amendment of the existing National Employment Standards in the *Fair Work Act 2009* (Cth) relating to flexible working arrangements, to enable employees whose request for a flexible working arrangement is refused on reasonable business grounds to seek an independent review of that decision by the Fair Work Commission.
3. RLC recommends the maintenance of a well-resourced and robust complaints-handling body for the investigation and conciliation of pregnancy discrimination complaints.
4. RLC recommends the funding of legal advice and assistance services for the community in the area of employment and discrimination law.

5. Responses to Specific Issues

5.1 Women's Participation in the Workforce

RLC has noted a number of specific trends amongst people who have come to us for assistance with pregnancy discrimination at work.

The first is that women are vulnerable to pregnancy discrimination in the workplace at both the time of informing their employer of their pregnancy, and at the time that they seek to return to the workplace after maternity leave. RLC has also had experience working with people who have experienced discrimination at the time of informing their employer of their impending marriage. Discrimination which RLC clients have reported upon informing their employer of their pregnancy includes a sudden reduction in shifts, a reduction in responsibilities and increased performance management. Discrimination which RLC clients have reported on attempting to return to work from maternity leave also includes reduced hours and reduced responsibilities, and termination of employment (with redundancy usually being the reason provided by the employer).

Case study: Employer's reaction to employee disclosing pregnancy

"Sarah" was employed full-time as a senior designer. After telling her employer that she was pregnant, she noticed a change in his behaviour. He was no longer available to her, ignoring her phone calls and emails. His attitude towards her changed, and he began to question her ability, called her "an idiot" and said to her "It's clear that you are incapable of doing your job". Sarah resigned, feeling that she had no alternative.

Case study: Problems returning to work after maternity leave

"Abigail" worked in a part-time, job share position as a bookkeeper. After she had been working in this role for nearly two years, she took one year of maternity leave. About ten months into her maternity leave, she discovered that her job-sharer had started working full-time hours. One month later, her job-sharer resigned and a new person was employed on a full-time basis. Just before she was due to return from maternity leave, Abigail received a letter from her employer terminating her employment on the basis that her role was redundant.

The second trend which RLC has noted in its work with people who have experienced pregnancy discrimination in their employment is that they frequently have difficulty in negotiating the existing legal remedies for this type of discrimination. People in this situation have a number of different avenues for legal recourse open to them, including a complaint of sex discrimination under either the federal or the state anti-discrimination laws; a general protections claim under s 351 of the *Fair Work Act*; or an unfair dismissal claim under s 394 of the *Fair Work Act*. General protections claims involving termination of employment and an unfair dismissal claims have strict limitation periods of twenty-one days from the date on which the termination of employment takes effect for lodgment of a claim with the Fair Work Commission. It can be very difficult for people effectively identify their most appropriate claim, especially without legal advice and assistance.

Accessing legal advice and assistance is extremely difficult for people who have experienced the personal and financial stress of recent job loss, and who are facing the additional commitments of caring for a newborn child, given that people in this situation are usually unable to afford the assistance of a private law firm and there are limited publicly funded legal services available. The discrimination itself causes financial disadvantage which prevents the person discriminated against from obtaining remedies.

RLC has also noted that, once the most appropriate claim is identified and lodged with the relevant body, people often experience difficulty in navigating the complaints process and frustration at its limitations. Difficulties which have been reported by RLC clients include that the complaints process under federal anti-discrimination law can be lengthy and that it can be difficult to discharge the burden placed on the individual to prove the discrimination, particularly against an employer who has greater resources (including access to legal assistance) than the employee. Once again, this is particularly true for clients who are unable for financial or other reasons to access legal advice and assistance.

It points to the need for people to be able to access free legal advice and assistance services in this area. While free specialist employment law advice services exist in Western Australia and Victoria, no such services exist in the other States and many community legal centres do not have funding for a specialist employment and discrimination legal advice and assistance service.

It has also been noted that the outcomes from conciliation do not achieve systemic change or prevent repeated instances of discrimination, given their confidential nature.

Case Study: Difficulties Navigating the System and Lack of Systemic Outcomes

“Kate” had been working as a personal assistant for eighteen months before taking maternity leave. Near the end of her maternity leave, she contacted her employer to arrange her return to work. She was told that another person had been employed in her role while she was gone, and it was suggested to her that she wait a while before returning as there wasn’t much work for her to do. About a month later, her employer terminated her employment, saying that there was no work for her to do and she was redundant.

Kate made a general protections claim to the Fair Work Commission, with the assistance of RLC. In preparing this submission, RLC interviewed Kate about her experience with this process. She said, “I had to do a lot of research to find out what legal avenues I had. I talked initially to Industrial Relations and then had to go to Fair Work who pointed out a few things, and I knew from them that I had a case...(I was then) put onto RLC who were happy to assist. From this, it can be noted that it was a complicated process and very time-consuming to make this complaint and therefore put together a case. I highly doubt someone without a legal background would be able to do all this”.

Kate’s claim settled after a conciliation conference. In relation to the settlement of her claim, she said, “I had to sign to say I was not allowed to talk about it with anyone which made looking for future jobs difficult as I didn’t have a proper reference and I didn’t trust what my previous employer would say about me, especially as they were so angry with me for even starting the case. They also probably felt they could get away with it again in the future”.

5.2 Limitations of the Existing Legislative / Policy Framework Relating to Pregnancy Discrimination at Work

RLC believes that the trends in pregnancy discrimination identified above – including the prevalence in pregnancy discrimination at work and the difficulties in dealing with pregnancy discrimination once it has occurred – arise from the reactive nature of the existing anti-discrimination laws. The right to a discrimination-free workplace implicit in the federal and state anti-discrimination legislation is effectively only a right to complain about discrimination once it has occurred. More proactive anti-discrimination laws and policies could contribute significantly to preventing pregnancy discrimination at work from occurring. Proactive anti-discrimination laws and policies have a role to play in educating employers about their non-discrimination responsibilities, changing attitudes towards pregnant employees, and eliminating the root cause of the discrimination.

In considering what form such proactive anti-discrimination laws and policies may take, it is important to recall that pregnancy discrimination affects fathers as well as mothers.

Case Study: Pregnancy Discrimination and Fathers

“Adrian” worked full-time as a warehouse assistant for just over four years when he took three months unpaid paternity leave. Before going on leave, he felt that he had a good relationship with his employer. After he returned from leave, his employer made him participate in a “performance-counseling plan”, gave him a long list of issues about his work performance and ultimately terminated his employment.

Adrian made an unfair dismissal claim to the Fair Work Commission and, at the same time, lodged a sex discrimination complaint with the Australian Human Rights Commission. His unfair dismissal claim settled after a conciliation conference. Part of the settlement was that he withdraw his complaint with the Australian Human Rights Commission.

Pregnancy discrimination is not limited to discrimination based on the biological phenomenon of pregnancy. Rather, it extends to discrimination against employees who take time off from work before and after the birth of a child in order to care for that child. To an extent, such time off will always be gendered as pregnancy is a biological phenomenon exclusively experienced by women. The time taken off after the birth of a child in order to care for that child does not have to be gendered in the same way.

It is possible to develop and implement policies that allow both mothers and fathers to take time off work and care for a child. This restructuring or redistributing of care responsibilities opens up the possibility that the burden of care is shared across both genders. If shared across both male and female employees there is enormous potential to shift the way employers think about their employees and perhaps even in encouraging employers themselves to consider the way they care for their children.

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) has noted that gender inequality needs to be “addressed proactively at a systemic and organisational level, rather than solely being left to women making individual complaints”¹ Specifically, the VEOHRC has noted that to achieve gender equality “men also need to assume greater responsibility for caring”.²

5.3 Leading Practices and Strategies for Addressing Pregnancy Discrimination at Work

The care burden can be redistributed more equally across both male and female employees and address pregnancy discrimination at work by implementing parental leave policies that encourage more male employees to utilise leave after the birth of a child.

5.3.1 *Best Practice – Europe*

¹ Victorian Equal Opportunity and Human Rights Commission *Changing the Rules: The experiences of female lawyers in Victoria* p. 5

² Victorian Equal Opportunity and Human Rights Commission *Changing the Rules: The experiences of female lawyers in Victoria* p. 42

In a review of the parental leave policies of twenty-one high-income countries Ray, Gornick and Schmitt identified a number of elements necessary for a parental leave policy to be effective in distributing care across both genders.³ These are: generous paid leave, non-transferable quotas of leave for each parent, universal coverage combined with modest eligibility restrictions, financing structures that pool risk among many employers and scheduling flexibility.

Paid leave, and specifically generous paid leave is noted by Ray, Gornick and Schmitt to be the most significant of these features for two reasons. First, it gives lower wage parents financial security to encourage them to take up the leave. Second, it encourages and allows the higher wage parent in a couple to take parental leave without forfeiting the family unit's earning capacity. As the father is typically the higher wage earner a generous paid leave policy encourages the father of the child to take leave and redistribute the care burden. In Portugal for example, in the last year that parental leave was unpaid, less than 150 men took parental leave. After legislative change that granted Portuguese fathers two weeks of paid family leave, 27,000 men took leave.⁴ Interestingly, Finland deploys a system of sliding scale benefits: low wage workers are paid approximately two-thirds of their earnings and higher wage workers are paid at progressively lower percentages. In Australia, the parental leave policy currently in place provides 18 weeks pay at the rate of the National Minimum Wage.⁵ Sweden has the world's most generous paid parental leave scheme. Parents have been given 480 days of paid parental leave since 2002. Parents have 60 days of non-transferrable leave each, and the remaining days can be divided between them as they wish.⁶

While this is in some ways meeting the best practice identified, the low rate of pay detracts from the incentive it may otherwise provide to the higher-wage parent, typically the father, to take leave.

Non-transferrable leave is the second best practice policy feature identified by Ray, Gornick and Schmitt. That is, a parental leave system in which substantial portions of leave are not able to be transferred between parents. As the authors note, this feature "helps to counteract social and economic pressures that otherwise encourage fathers to transfer benefits to mothers, thereby reducing fathers' role in caregiving and mothers' attachment to paid work".⁷ In Finland, not only do fathers have an entitlement to two weeks leave, they receive an extra two weeks leave at a higher wage-replacement rate if they take the first two week period in full. In Spain, fathers are entitled to the same paid schedule reductions granted to breastfeeding mothers, independently of whether the mothers themselves take those reductions. In Germany reform which granted extra leave to fathers if they took an initial period of leave saw the uptake jump from 8.8% of eligible fathers to over 17%. Women were taking the majority of the transferrable leave in Sweden (90%) but by 2012 men were taking 24% of the leave.⁸ Countries differ in whether single parents are

³ Rebecca Ray, Janet C. Gornick and John Scmhitt, *Parental Leave Policies in 21 Countries: Assessing Generosity and Gender Equality*, Center for Economic and Policy Research September 2008

⁴ Rebecca Ray, Janet C. Gornick and John Scmhitt, *Parental Leave Policies in 21 Countries: Assessing Generosity and Gender Equality*, Center for Economic and Policy Research September 2008 p. 13

⁵ Department of Social Services, *Paid Parental Leave Scheme*, <http://www.dss.gov.au/our-responsibilities/families-and-children/programs-services/paid-parental-leave-scheme> 9 August 2013, accessed 11 December 2013

⁶ Klaus Schwab et al, *The Global Gender Gap Report 2013*, World Economic Forum 2013, p.85.

⁷ Rebecca Ray, Janet C. Gornick and John Scmhitt, *Parental Leave Policies in 21 Countries: Assessing Generosity and Gender Equality*, Center for Economic and Policy Research September 2008 p.18

⁸ Sweden, *Gender Equality in Sweden* <<http://sweden.se/society/gender-equality-in-sweden/#start>>.

able to take up the leave reserved for the second parent of a child. Norway and Sweden allow single parents to take the entire period of parental leave while Finland does not. In Australia, “Dad and Partner Pay” provides up to two weeks pay at the National Minimum Wage to the father or partner of a parent who has taken the 18 weeks provided for the primary carer.⁹ While this is meeting best practice as it is not transferable, the significant variation between two weeks and eighteen weeks for the primary carer is not ideal. In addition, the low rate of pay again detracts from the encouragement it may otherwise provide to fathers.

Creating a system of non-transferable paid parental leave has the potential to change the culture of workplaces and in particular the attitudes of employers towards working women who are pregnant or who have children. Writing about the cultural impact of non-transferable paid parental leave in Sweden, author Katrina Alcorn noted, *“In 1995, in what turned out to be a bureaucratic stroke of genius, the Swedish government created financial incentives for men to take paternity leave.....Soon it became the norm for dads to take off a month, two months, even longer. Men got a taste of what it is like to be the primary parent.....As everyone got used to the idea that dads would take time off, the culture at work began to change, with flexitime becoming more common. The pay gap between men and women started to close.....This simple little change – giving dads incentives to take parental leave – had a profound effect on employees, employers, women, men and families”.*¹⁰

The third best practice element is in essentially universal coverage of parental leave policies. While most policies will still require recent employment history to qualify for wage-related benefits, they also offer flat-rate benefits to new parents who do not meet the employment history thresholds. Norway requires that in order to receive wage-related payments, parents have worked at least six of the ten months before their leave and have met a minimum earning requirement in that period. If they do not meet the thresholds however, parents are still entitled to a less generous form of paid leave.¹¹ Ensuring widespread coverage is significant in beginning the long but important process of redistributing the care burden across the workforce as a whole and not only in isolated industries or professions. It also ensures that those working in more tenuous forms of employment are not at risk of greater discrimination than those in secure positions.

In Australia to be eligible for paid parental leave, the employee must have worked for a least ten of the thirteen months before the birth of the child, have worked at least 330 hours in that ten month period and have had no more than an eight week gap between two consecutive working days.¹² This is a relatively stringent requirement in terms of the amount of work that must have been completed prior to the taking of leave however it is universal in the sense that it applies to full-time, part-time and casual employees. If ineligible for the paid parental leave, parents may be eligible for a \$5000 ‘baby bonus’ for

⁹ Department of Social Services, *Paid Parental Leave Scheme*, <http://www.dss.gov.au/our-responsibilities/families-and-children/programs-services/paid-parental-leave-scheme> 9 August 2013, accessed 11 December 2013

¹⁰ Alcorn, Katrina “Here’s What the Swedes Get Right about Parenting that Americans Don’t”, *Business Insider*, 12 November 2013, www.businessinsider.com/heres-what-the-swedes-get-right-about-parenting-that-americans-don-t-2013-11?IR=T

¹¹ Rebecca Ray, Janet C. Gornick and John Schmiltz, *Parental Leave Policies in 21 Countries: Assessing Generosity and Gender Equality*, Center for Economic and Policy Research September 2008 p.19

¹² Department of Human Services, *Work Test for Parental Leave Pay*, <http://www.humanservices.gov.au/customer/enablers/centrelink/parental-leave-pay/work-test-for-parental-leave-pay> 18 November 2013, accessed 11 December 2013

the first child and then \$3000 for any subsequent children. It does not however have the same catch-all seen in the Norwegian system for those who do not meet the work requirement. In addition, any person who has received an individual adjusted taxable income of over \$150,000 is ineligible.¹³

Ray, Gornick and Schmitt identify the financing structure underpinning a parental leave policy as central in terms of reducing incentives to discriminate against female employees. Parental leave payments must be funded through social insurance schemes e.g. payroll taxes, and not by individual employers. Financing through this structure “minimizes the burden on individual employers and, in turn, reduces incentives for employers to discriminate against potential leave-takers”.¹⁴ This is the structure used in Australia at the moment and it is clearly important that it remain so.

Finally, scheduling flexibility is the fifth element of a best practice parental leave policy. Typically this involves allowing parents to take up available paid leave on a part-time basis and so retain a connection with their workplace. This practice clearly addresses some of the many difficulties parents, particularly mothers, face when taking extended periods of parental leave. In taking parental leave on a part time basis parents are able to stay in touch with any changes in personnel or practice at their workplace and take leave with their child without a total sacrifice of loss of connection with their employer. In Finland, parents can take paid parental leave until their child’s third birthday and parents who work part-time are able to take paid leave up until the child turns seven. In Spain, parents can request part-time schedules until their child turns 8 and in Norway, both parents can take leave at the same time if each take it on a part-time basis.¹⁵

Australia does not compare well in this regard. While the National Employment Standards guaranteed by the *Fair Work Act* provide the right to request flexible working hours, an employer can refuse the request on “reasonable business grounds”. Broomhill and Sharp note that “parents who need, or desire, to reduce their hours of work or to re-organise their hours of work to meet their caring responsibilities, often face strong resistance from employers.”¹⁶ There is also no right to appeal a refusal from an employer on the basis of “reasonable business grounds”. In addition, while there may be a right to request flexible working arrangements, parental leave as such is limited in Australia to a period of leave soon after the birth of a child and does not extend to leave beyond that time. Indeed on the whole, Broomhill and Sharp conclude that “the Australian scheme falls short of the standards provided the best of the European schemes”.¹⁷

¹³ Department of Human Services, *Eligibility for Parental Leave Pay*, <http://www.humanservices.gov.au/customer/enablers/centrelink/parental-leave-pay/eligibility-for-parental-leave-pay> 18 November 2013, accessed 11 December 2013

¹⁴ Rebecca Ray, Janet C. Gornick and John Scmhitt, *Parental Leave Policies in 21 Countries: Assessing Generosity and Gender Equality*, Center for Economic and Policy Research September 2008 p.23

¹⁵ Rebecca Ray, Janet C. Gornick and John Scmhitt, *Parental Leave Policies in 21 Countries: Assessing Generosity and Gender Equality*, Center for Economic and Policy Research September 2008 p.20

¹⁶ Ray Broomhill & Rhonda Sharp, *Australia’s parental leave policy and gender equality: an international comparison* Australian Workplace Innovation and Social Research Centre August 2012, page 9.

¹⁷ Ray Broomhill & Rhonda Sharp, *Australia’s parental leave policy and gender equality: an international comparison* Australian Workplace Innovation and Social Research Centre August 2012, page 1.

5.3.2 Comparison of Government Paid Parental Leave Schemes

Country	Duration of paid leave	Payment	Period reserved for father/partner
Australia	18 weeks per family and must be taken in one period either from up to 6 weeks before birth or at date of birth	National Minimum Wage: Approximately 53% of national average weekly earnings	2 additional weeks for father/partner only
Denmark	32 weeks per family and can be taken until child is 47 weeks	100% of personal earnings (capped at a moderate level)	3 weeks for father only if an industrial worker 6 weeks for father only if a public sector worker
Finland	26 weeks per family	Approximately 75% of normal earnings (capped at a high level)	24 additional days for father if father takes the last two weeks of the family leave
Germany	12 months per family	67% of earnings (capped)	2 additional months for father/partner
Italy	6 months each for mother and father, available until child is 8 years old	30% of earnings if taken while child is under 3. Unpaid if child is 3-8	Additional 1 month if father takes at least 3 months
Sweden	480 days (~ 16 months)	80% of personal income (capped at a moderate level) Minimum payments of SEK 225 for 390 days (~ 13 months) and the SEK 180 for 90 days (~ 3 months).	60 days must be taken by each parent (~ 2 months). If parents share the leave equally they are entitled to a daily bonus of SEK 50 for 270 days (~ 9 months).

5.3.3 Best practice – OECD Recommendations

The significance of promoting female participation in the workplace by combatting discrimination has also been recognised by the OECD. In 2011 the OECD launched its Gender Initiative to combat “persistent gender inequalities” in education, employment and entrepreneurship.¹⁸ With a persistent and potentially increasing wage gap and ongoing lack of representation of women at high levels of the commercial sector, Australia as an OECD member nation should take note of the recommendations of the OECD’s Gender Initiative.

¹⁸ Organisation for Economic Co-Operation and Development, *OECD Gender Initiative: Gender Equality in Education – Employment – Entrepreneurship*, 2011, p. 4

The Gender Initiative produced a particular set of recommendations for APEC member nations, of which Australia is one. The three recommendations provided to OECD nations also a part of APEC were: provide strong financial incentives to both parents – and especially mothers – to participate in paid work; expand the exclusive use of fathers’ parental leave entitlements, and; take active measures to combat discrimination. All three recommendations are significant in addressing pregnancy discrimination in employment whether in directly addressing such discrimination or taking proactive action to address gender stereotypes that underpin such discrimination.

In order to provide financial incentives to encourage both parents and mothers in particular to participate in paid work, the OECD recommends “a continuum of supports throughout the early years of child-related leave, childcare and out-of-school hours care.”¹⁹ In addition, the recommendation to expand access of fathers to parental leave is explained as necessary to “facilitate women to strengthen their labour market attachment, *improve perceptions amongst employers on labour market commitment of women*, and contribute to a more equal distribution of earning and caring” (emphasis added).²⁰ These recommendations demonstrate the growing understanding that addressing discrimination or unequal representation of women in the workforce requires more than reactive complaint handling bodies. Instead, it requires a commitment to addressing the factors that underpin discrimination in the first place and implement policies to proactively address the gender stereotypes and structural barriers that create an environment in which such discrimination persists.

The final recommendation recognises that while proactive policies are necessary, there is still a need for a robust complaint handling body to address discrimination. Significantly, the recommendations in this area are still focused on a proactive complaint body. The OECD recommends that member nations, in order to make legal rules more effective, “empower well-resourced specialised bodies to investigate complaints and organisations” and “empower specialised bodies to take legal action against employers who engage in discriminatory practices, even in the absence of individual complaints”.²¹

These recommendations were reiterated in May 2013 when the OECD Council on Gender Equality in Education, Employment and Entrepreneurship (the Council) adopted a series of more detailed recommendations to encourage the work of the OECD Gender Initiative and address significant “gender disparities and biases”.²² These recommendations included a focus on the promotion of policies that enable parents to balance working hours with family responsibilities and “facilitate women to participate more in private and public sector employment.”²³ The recommendations specifically encourage member states to encourage fathers to take parental leave by designating part of parental leave entitlements

¹⁹ Organisation for Economic Co-Operation and Development, *OECD Gender Initiative: Gender Equality in Education – Employment – Entrepreneurship*, 2011, p26

²⁰ Organisation for Economic Co-Operation and Development, *OECD Gender Initiative: Gender Equality in Education – Employment – Entrepreneurship*, 2011, p26

²¹ Organisation for Economic Co-Operation and Development, *OECD Gender Initiative: Gender Equality in Education – Employment – Entrepreneurship*, 2011, p26

²² Organisation of for Economic Co-Operation and Development, *Recommendation of the Council on Gender Equality in Education, Employment and Entrepreneurship*, 29 May 2013, p. 2

²³ Organisation of for Economic Co-Operation and Development, *Recommendation of the Council on Gender Equality in Education, Employment and Entrepreneurship*, 29 May 2013, p.3

as non-transferable leave for exclusive use by fathers and provide incentives for fathers to take up flexible work entitlements.²⁴

6. RLC Recommendations

Based on its experience of the limitations of existing laws and policies to address pregnancy discrimination and the international best practices outlined above, RLC recommends:

1. The introduction of a government paid parental leave scheme involving:
 - a. non-transferable quotas of leave for male and female parents;
 - b. universal coverage combined with modest eligibility restrictions, along the lines of the Norwegian model requiring that a parent accessing paid parental leave have worked six of the ten months prior to their leave, and allowing parents who do not meet this threshold to access a less generous paid parental leave scheme.
2. The amendment of the National Employment Standards relating to requests for flexible working arrangements (s 65 of the *Fair Work Act*) to enable an employee whose request for flexible working arrangements has been refused on “reasonable business grounds” to seek an independent review of that decision by the Fair Work Commission.
3. The maintenance of a robust, well-resourced and proactive discrimination complaints-handling body, empowered to investigate individual complaints and organisations, and to take legal action against organisations revealed in those investigations to engage in discriminatory practices, in the absence of an individual complaint.
4. The funding of free legal advice and assistance services in the area of employment and discrimination law in each State.

7. Conclusion

Thank you for considering the recommendations made by RLC in this submission. RLC is hopeful that those recommendations, and the information contained in this submission, will be helpful in future law and policy development in the area of pregnancy discrimination and work.

RLC wishes to take this opportunity to thank the pro bono section of Gilbert + Tobin, particularly Tamara Simms and Clancy King, for their invaluable assistance in preparing this submission.

RLC also wishes to acknowledge and thank our clients who agreed to be interviewed in relation to their experience of pregnancy discrimination at work for this submission.

Please contact us if any further information in relation to this submission is required.

²⁴ Organisation of for Economic Co-Operation and Development, *Recommendation of the Council on Gender Equality in Education, Employment and Entrepreneurship*, 29 May 2013, p.4